Notes

EXECUTIVE ORDERS 12,291 AND 12,498: USURPATION OF LEGISLATIVE POWER OR BLUEPRINT FOR LEGISLATIVE REFORM?*

In 1981, President Reagan arrived at the White House carrying an electoral mandate to get government off the backs of the American people and restore the nation's economic health.[1] From the beginning of his term, the President sought to build economic recovery, in part upon a cornerstone of regulatory reform.[2] Although the economy has recovered during the past five years, true regulatory reform remains elusive.[3] In its stead, the administration has empowered the Office of Management and Budget (OMB) to run a secretive and authoritarian regulatory program founded upon Executive Order 12,291 (E.O. 12,291).[4]

This Note examines the history and workings of E.O. 12,291 and

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* This Note was developed by W. Andrew Jack.

1. *See* Remarks of the President to the Texas State Bar Association, 20 WEEKLY COMP. PRES. DOC. 986, 987 (July 6, 1984).

2. *See Regulatory Reform Act: Hearings on S. 1080 Before the Subcomm. on Regulatory Reform of the Senate Comm. on the Judiciary,* 97th Cong., 1st Sess. 136 (1981) (statement of James C. Miller III, then Administrator for Information and Regulatory Affairs, Office of Management and Budget (OMB) and Executive Director, Presidential Task Force on Regulatory Relief, now Director of OMB) (citing four cornerstones of the President's program for economic recovery: tax reduction, stringent budgetary policy, regulatory relief, and stable monetary policy) [hereinafter cited as *Hearings on S. 1080*].

3. Regulatory reform presumably connotes an improvement rather than a mere change. *See* Olson, *The Reagan Record: Where's the Reform?,* REGULATION, Mar.-Apr. 1984, at 30, 30.

4. 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 app. at 431-34 (1982). *See generally* Presidential Task Force on Regulatory Relief, Reagan Administration Regulatory Achievements (Aug. 11, 1983) (detailing other building blocks of President Reagan's regulatory reform program) [hereinafter cited as Task Force Report] (report on file at the *George Washington Law Review*).

exposes cracks in the Reagan administration's regulatory program. It argues that, although the administration's cost-benefit approach to governmental regulation is laudable, Congress should adopt legislation that uniformly applies the cost-benefit approach to all agencies and that provides a public forum for analyzing the economic and political ramifications of proposed regulations.[5] Part I of this Note highlights E.O. 12,291's development, from its precursors in the Ford and Carter administrations through its progeny during the second year of President Reagan's final term. Part II describes how OMB, through its Office for Information and Regulatory Affairs (OIRA), controls the E.O. 12,291 process. Part III focuses on four major deficiencies in the E.O. 12,291 process that prevent true regulatory reform. Finally, Part IV provides a novel legislative proposal that offers a firm foundation upon which to base a regulatory reform program.

I. History and Development of E.O. 12,291

A. Precursors of Executive Order 12,291

Executive Order 12,291 is in part the product of an evolving debate concerning the level of control a President should wield over the regulatory machinery.[6] Through the 1970s to the present, this debate has increasingly favored more presidential intervention. As the detrimental impact of inefficient regulatory policy became more evident, the federal government naturally sought more economically rational standards for decision making. President Ford

5. *See infra* notes 171-82 and accompanying text.

6. Arguments abound for many levels of presidential intervention in the regulatory process. *See, e.g.*, ABA COMM'N ON LAW AND THE ECONOMY, FEDERAL REGULATION: ROADS TO REFORM 73-88 (1979) (arguing for limited presidential review of major rules); Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 461-62, 486-88 (1979) (favoring presidential intervention in the rulemaking process, but identifying constitutional limits); Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1407-08, 1410-17 (1975) (contending that political reality results in unfocused congressional policy decisions that are inadequate to guide regulators, and arguing that the President should exert political control over the bureaucracy). The opposing viewpoint favoring congressional control was most cogently stated by Judge Henry Friendly. *See* H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS 163-75 (1962) (proposing that Congress periodically review, redefine, and clarify existing major legislation); *see also* Morrison, *Presidential Intervention in Informal Rulemaking: Striking the Proper Balance*, 56 TUL. L. REV. 879, 880-81, 897-902 (1982) (Congress should exercise its power to limit presidential intervention in rulemaking); Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 MICH. L. REV. 193, 221-34 (1981) (E.O. 12,291 circumvents congressional intent to deny the President control over administrative policymaking). *See generally* Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1, 3-4 n.2 (1984) (collecting additional viewpoints in the debate over presidential control over regulation).

took the initial step to rein in the bureaucracy by requiring each agency to consider the inflationary impact of its major regulatory proposals.[7] Even though President Ford's order appointed OMB as the nominal overseer,[8] it granted OMB no enforcement authority to ensure agencies' compliance.[9] President Carter expanded on the Ford order by requiring executive agencies to analyze the expected economic impact of significant proposed rules, and to demonstrate why available alternatives would be less economically sound.[10] However, the Carter order contained two fatal flaws. First, it gave individual agencies responsibility both for determining which proposed rules to review and for developing procedures for reviewing those rules.[11] Moreover, like the Ford order, President Carter's proposal gave the nominal overseers no enforcement authority.[12] Thus, even though the Carter and Ford orders were unsuccessful at tethering America's ballooning bureaucracy,[13] they set precedents for wide-ranging presidential intervention into rulemaking through the use of economic analyses.

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7. Exec. Order No. 11,821, 3A C.F.R. 203 (1974). The order directed OMB to establish criteria and procedures for evaluating the inflationary impact of regulations, *id.* § 2(a), and required each agency making a major proposal to certify that it had conducted an inflationary impact evaluation that accorded with OMB's criteria, *id.* § 1. The order had limited success in establishing economically sound rulemaking. Note, *The Inflation Impact Statement Program: An Assessment of the First Two Years,* 26 AM. U.L. REV. 1138, 1160-62 (1977). Executive Order No. 11,949, 3 C.F.R. 161 (1977) extended E.O. 11,821 until December 31, 1977, when the order finally lapsed.

8. Exec. Order No. 11,821, *supra* note 7, § 2(a). The order gave OMB power to delegate responsibility for reviewing agencies' inflationary impact statements to the Council on Wage and Price Stability (CWPS). *Id.* § 2(b). *See generally* Note, *supra* note 7 (assessing OMB's and CWPS's oversight of the inflationary impact statement program). Congress created CWPS to monitor the economy and make reports to the President and Congress. One of CWPS's enumerated functions was to make economic appraisals of regulatory programs. Council on Wage and Price Stability Act, Pub. L. No. 93-387, § 3(a)(7), 88 Stat. 750, 751 (1974), *repealed by* Pub. L. No. 97-35, § 383, 95 Stat. 357, 432 (1981).

9. Rosenberg, *Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues that May be Raised By Executive Order 12,291,* 23 ARIZ. L. REV. 1199, 1200 n.8 (1980).

10. Exec. Order No. 12,044, 3 C.F.R. 152 (1979), *revoked by* Exec. Order No. 12,291, *supra* note 4, § 10 [hereinafter cited as E.O. 12,044]. The order also required subject agencies to prepare six-month regulatory agendas. *Id.* § 2(a). The order formally placed oversight of agencies' economic impact analyses in OMB. *Id.* § 5(c). However, in practice the CWPS, the Regulatory Analysis Review Group (staffed by CWPS), and the Regulatory Council oversaw the agencies' performance. *See* Rosenberg, *supra* note 9, at 1200 n.8.

11. Exec. Order No. 12,044, *supra* note 10, § 4; De Muth, *Constraining Regulatory Costs—Part I: The White House Review Programs,* 4 REGULATION, Jan.-Feb. 1980, at 16-23. President Carter, a farmer, should have realized his mistake in letting the fox guard the hen house. *Cf. id.* (criticizing the lack of executive oversight in the Carter administration's review program).

12. Exec. Order No. 12,044, *supra* note 10, § 5(c); Rosenberg, *supra* note 9, at 1,200 n.8. Executive Order 12,044 § 5 empowered OMB to approve each agency's review procedure. However, the order granted no power to ensure compliance with the procedure. OMB was simply to report on agencies' compliance to the President. Exec. Order No. 12,044, *supra* note 10, § 5(c).

13. Between 1970 and 1979 the size of the annual *Federal Register* increased threefold, and the *Code of Federal Regulations* grew by two-thirds. *See* Comment, *Capitalizing on a Congressional Void: E.O. 12,291,* 31 AM. U.L. REV. 613, 614 n.6 (1982) (citing Office of the Press Secretary, The White House, Materials on President Reagan's Program of Regulatory Relief (July 13, 1981)); *see also* Task Force Report, *supra* note 4,

B. Executive Order 12,291

President Reagan clearly intended E.O. 12,291 to expand the scope and remedy the shortcomings of its predecessors. The order contemplates a three-part process to achieve five avowed purposes.[14] First, agencies must classify regulatory proposals as either "major rules" or not major.[15] If an agency classifies a rule as "major," it must then analyze the potential economic impact of the proposed rule by preparing a Regulatory Impact Analysis (RIA) that weighs the potential costs of a regulation against its potential benefits.[16] To pass scrutiny under the RIA, not only must the societal benefits of a proposed regulation exceed the costs, but the regulation must maximize net benefits and minimize net costs.[17] Finally, as the key step in the process, OMB reviews agencies' proposals and RIAs.[18] Executive Order 12,291 grants OMB sufficiently unbridled authority to, in effect, quash any regulatory proposals even prior to publication of a notice of proposed rulemaking (NPR) in the *Federal Register*.[19] Thus, E.O. 12,291

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at 65-66 (comparing the *Federal Register's* growth during the Carter administration with its decline during the Reagan years).

14. Exec. Order No. 12,291, *supra* note 4, preamble. The Order seeks "to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations." *Id.*

15. *Id.* § 3(b). A major rule is:

> any regulation that is likely to result in:
> (1) An annual effect on the economy of $100 million or more;
> (2) A major increase in costs or prices for consumers, individual industries, federal, state or local governmental agencies, or geographic regions; or
> (3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Id. § 1(b). The order authorizes the Director of OMB to establish criteria for identifying major rules, *id.* § 3(a), and to redesignate any proposed rule as major, *id.* § 6(a)(1). Thus, for all practical purposes, OMB has plenary power to control the classification of proposed rules.

16. *Id.* § 3. Minor rules must also comply with E.O. 12,291's cost-benefit criteria, *id.* § 2, however, preparation of an RIA is unnecessary. *Id.* § 3.

17. *Id.* § 2(b)-(d).

18. *Id.* § 3(e)(1).

19. Several sections of E.O. 12,291 combine to give OMB substantial authority over agency regulations. *See id.* § 3(c)(2) (an agency shall submit for approval a preliminary RIA to OMB at least 60 days prior to publication of the notice of proposed rulemaking). Executive Order 12,291 empowers OMB to promulgate uniform standards for RIAs. *Id.* § 6(a)(2); *see* Office of Management and Budget, Interim Guidance to Federal Agencies on Preparing Cost-Benefit Analysis of Regulations (June 13, 1981), *reprinted in* 12 ENV'T REP. (BNA) 258-59 (June 19, 1981). Final standards still have not been promulgated, but the Presidential Task Force on Regulatory Relief (Task Force) established 10 policy guidelines that apply generally to all proposed regulations. Task Force Report, *supra* note 4, at 19. OMB can prevent publication of the NPR until OMB's review of the RIA is complete and the agency has satisfactorily

places within the Executive Office of the President a mechanism for centralizing control over all federal regulatory activity, with the exception of activities of independent agencies, which are not subject to the order.[20] This mechanism ensures that all regulations are either economically sound or at least politically justified by the President.[21]

C. *Developments Subsequent to the Issuance of E.O. 12,291*

Although Congress has failed to codify the cost-benefit approach of E.O. 12,291, several legislative proposals have been considered. Shortly after issuance of E.O. 12,291, Senator Paul Laxalt introduced, with the blessings of the Reagan administration,[22] the Regulatory Reform Act.[23] This bill would have amended the Administrative Procedure Act (APA)[24] to require an agency to include in its NPR a description of the costs and benefits of proposed major rules,[25] an explanation of how the benefits would be likely to justify the costs,[26] and a description of why the agency's proposal would be more cost-effective than alternative proposals.[27] The bill permitted sixty days for oral and written

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incorporated OMB's response into its rulemaking file. Exec. Order 12,291, *supra* note 4, § 3(f). No time limit is imposed on OMB's review. *Id.*

Since E.O. 12,291 was issued, OMB has garnered even more power over the regulatory agencies. The order subjected OMB's authority to the direction of the Presidential Task Force. *Id.* §§ 3(e), (i), 5(b), 6(a)-(b), 7(c), (g), 8(b). However, the Task Force disbanded on August 11, 1983, leaving OMB with no formal overseer. Wash. Post, Aug. 12, 1983, at A15, col. 4. For a discussion of other powers vested in OMB that influence the administrative process, see Olson, *supra* note 6, at 7-8.

20. Exec. Order No. 12,291, *supra* note 4, § 1(d) (excluding agencies specified as independent in 44 U.S.C. § 3502(10) (1982)). Many of the independent agencies, such as the Interstate Commerce Commission (ICC), the Federal Trade Commission (FTC), and the Federal Communications Commission (FCC), are pervasive regulators. The statute lists 14 other agencies and also excludes any other agency later designated by Congress to be independent. 44 U.S.C. § 3502(10) (1982).

Vice President Bush, as head of the Task Force, requested the independent agencies to comply voluntarily with E.O. 12,291. *See* Letter from Vice President Bush to Independent Agencies (Mar. 25, 1981), *reprinted in Role of OMB in Regulation: Hearings before the Subcomm. on Oversight and Investigations of the House Comm. on Energy & Commerce,* 97th Cong., 1st Sess. 177-78 (1981). Only the Civil Aeronautics Board (CAB) abided by the Vice President's request, and since the demise of the CAB, no independent agency is in compliance. *See infra* notes 105-10 and accompanying text.

21. OMB is authorized to waive the RIA and other requirements imposed upon the agencies. Exec. Order No. 12,291, *supra* note 4, § 6(a)(4). The RIA process economically justifies regulatory proposals; thus waiver of the process is necessarily premised on political grounds.

22. Task Force Report, *supra* note 4, at 118.

23. S. 1080, 97th Cong., 1st Sess., 127 CONG. REC. 7938-41 (1981); *see* 127 CONG. REC. 7935 (1981) (Senator Laxalt introduced the bill along with 74 cosponsors).

24. 5 U.S.C. §§ 551-706 (1982).

25. S. 1080, *supra* note 23, sec. 3, § 553(c)(2)(A), 127 CONG. REC. 7938 (1981). The bill defined "major rule" slightly differently from section 1(b) of E.O. 12,291, by limiting the measurement of economic effect — for purposes of the $100 million major rule threshold — to enforcement and compliance costs. *Id.* sec. 2, § 551(16), 127 CONG. REC. at 7938. It also would have excluded informal rate-making and licensing proceedings from the definition of major rules. *Id.*

26. *Id.* sec. 3, § 553(c)(2), 127 CONG. REC. 7938.

27. *Id.*

public comment,[28] and promulgation of a final rule would have required a statement of basis and purpose that incorporated the agency's cost-benefit analysis.[29] Thus the bill, if passed, would have created a public record of the agency's economic assessment that paralleled OMB's review of proposed regulations. However, because the bill would not have preempted E.O. 12,291,[30] OMB would have retained threshold control over rulemaking.[31] Conceivably because the bill failed to check OMB's power, after passing the Senate,[32] it died in the House at the expiration of the ninety-seventh Congress.

Noting the failure of previous legislative proposals to check OMB's power over regulatory agencies, Representative Sam Hall introduced a different regulatory-reform measure in the ninety-eighth Congress.[33] Representative Hall's bill would have codified the cost-benefit analysis of regulations, and would have authorized OMB to review these analyses.[34] However, the bill would have limited OMB's power by requiring the director of OMB to docket all written communications with administrative agencies.[35] The bill would also have specifically prohibited OMB from deciding what, if any, regulatory action an agency should undertake.[36] Although Representative Hall's purpose seemed beneficent, he could not muster enough support to move the bill out of committee.

In the ninety-ninth Congress three regulatory reform bills requiring cost-benefit analysis of rulemaking have been introduced.[37] While these bills have seen no legislative action, their study is warranted because they present a continuum of adherence to a pure cost-benefit model.

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28. *Id.* sec. 3, § 553(d), 127 CONG. REC. 7939. Extensions would have been available to interested parties unless the delay contravened the public interest. *Id.*

29. *Id.* sec. 3, § 553(e)(2), 127 CONG. REC. 7939.

30. The bill was amended to empower the president to establish procedures for agencies' compliance. *See id.* sec. 4, § 624, 128 CONG. REC. 5297, 5300 (1982). The Reagan administration urged Congress to amend the bill to permanently place the RIA process within the executive branch to force future administrations to comply with the cost-benefit requirements. *Hearings on S. 1080, supra* note 2, at 189.

31. However, Congress amended S. 1080 to provide for congressional review over rulemaking via a report-and-wait legislative veto. S. 1080, *supra* note 23, sec. 13, §§ 801-803, 128 CONG. REC. 5304 (1982).

32. 128 CONG. REC. 5297 (1982).

33. H.R. 2327, 98th Cong., 1st Sess., 129 CONG. REC. H1807 (daily ed. Mar. 24, 1983).

34. *Id.* sec. 101, §§ 622, 624.

35. *Id.* § 624(c). Docketing would subject OMB's formerly secret actions to public scrutiny, and would preserve a record for judicial review.

36. *Id.* § 624(a). By contrast, E.O. 12,291 empowers OMB to determine what regulatory actions an agency will undertake. *See supra* note 19 and accompanying text.

37. H.R. 19, 99th Cong., 1st Sess., 131 CONG. REC. H66 (daily ed. Jan. 3, 1985); H.R. 1339, 99th Cong., 1st Sess., 131 CONG. REC. H944 (daily ed. Feb. 28, 1985); H.R. 1351, 99th Cong., 1st Sess., 131 CONG. REC. H944 (daily ed. Feb. 28, 1985).

H.R. 1339,[38] introduced by Representative Trent Lott along with forty-seven cosponsors, exemplifies strict adherence to the cost-benefit model. If enacted, H.R. 1339 would require each agency to include in its regulatory proposal for major rules[39] an analysis of the benefits and costs of the proposed rule, as well as a description of all reasonable alternatives for accomplishing its purposes and a comparison of the costs of the alternatives.[40] No rule could be promulgated unless the benefits of the rule "justify" the costs, and the rule achieves the rulemaking objectives in a more cost-effective manner than the listed alternatives.[41] H.R. 1339 would bar judicial review of agency compliance,[42] but would provide congressional oversight in the form of a report-and-wait legislative veto.[43]

H.R. 19, introduced by Representative Hamilton Fish, would ease the cost-effectiveness requirement by requiring agencies to prepare an analysis of the "benefits and adverse economic effects and other adverse effects" of the proposed rule.[44] However, a rule whose benefits do not justify its adverse effects could be promulgated if the agency prepared a detailed statement justifying how the regulatory aims of the relevant statute require enforcement of the rule as promulgated. H.R. 19 also would bar judicial review of agency compliance,[45] and contemplates no congressional oversight. Nevertheless, the bill would establish an Office of Regulatory Policy and Coordination within the Executive Office of the President to monitor and review agency compliance with the bill's requirements.[46]

H.R. 1351, introduced by Representative Ben Erdreich, would ease further the cost-effectiveness requirement. The bill would require agencies to include in the rulemaking record a regulatory analysis making a "reasonable determination . . . that the benefits of the rule justify the costs."[47] The bill would not prohibit pro-

38. H.R. 1339, 99th Cong., 1st Sess. (1985).

39. "Major rule" means "a rule or group of closely related rules that (A) imposes economic costs which are likely to result in an annual impact on the economy of $100,000,000 or more; or (B) otherwise is designated a major rule by the agency proposing the rule or by the President." H.R. 1339, *supra* note 37, sec. 101, § 621(a)(6).

40. *Id.* § 622. H.R. 1339 defines "benefit" as "any direct or indirect beneficial economic, health, safety, environmental, or other effect" and defines "cost" as "any direct or indirect adverse economic, health, safety, environmental, or other effect." *Id.* § 621(a)(2)-(3). Thus the analysis is not limited to weighing quantifiable costs and benefits.

41. *Id.* § 622(c)(7). The bill would exempt regulations from this requirement if the cost-benefit analysis was inconsistent with statutory provisions under which the agency was promulgating the rule. *Id.*

42. *Id.* § 623.

43. *Id.* sec. 201(a), § 802.

44. H.R. 19, *supra* note 37, sec. 101, § 553(h). The bill does not define "benefit" or "adverse economic effect."

45. *Id.* § 553(h)(8).

46. *Id.* sec. 101, § 553(h)(9); *id.* secs. 201-205.

47. H.R. 1351, *supra* note 37, sec. 4, § 622(d)(2). "Benefit" means "the reasonably identifiable significant benefits and beneficial effects, including social and economic benefits and effects, that are expected to result directly or indirectly from implementation of a rule." *Id.* § 621(5). "Cost" means "the reasonably identifiable significant costs and adverse effects, including social and economic costs and effects, that are

mulgation of rules whose benefits do not justify costs; it merely would require that the agency comply "to the maximum extent feasible prior to the promulgation of the final rule."[48] However, the bill would provide extensive congressional review through a report-and-wait legislative veto.[49]

In light of the deficiencies of E.O. 12,291,[50] it is difficult to explain the lack of enthusiasm for legislative solutions to regulatory reform. Perhaps it is a result of congressional complacency and reluctance to take responsibility for controlling agency action.[51] Alternatively, the recent dearth of legislative solutions may be attributed to a consensus reached in the debate over the limits of presidential intervention into rulemaking.[52] More likely, congressional approval of, or inability to effectively counter, E.O. 12,291 precipitated this drought.[53]

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expected to result directly or indirectly from implementation of a rule." *Id.* § 621(b). The cost-benefit requirement only applies to "major rules." *Id.* § 622(d).

48. *Id.* sec. 3, § 553(b)(2)(C).

49. *Id.* sec. 13, § 802(b).

50. *See infra* notes 99-159 and accompanying text.

51. Congress's inaction raises the spectre of the nondelegation doctrine. Because the Constitution vests all legislative power in Congress, U.S. CONST. art. I, § 1, the nondelegation doctrine provides that the executive branch cannot exercise legislative power without a specific delegation from Congress. *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3 (2d ed. 1978) (discussing the Supreme Court's treatment of the nondelegation doctrine). To render executive action amenable to judicial review, each delegation must provide sufficiently narrow guidelines for the executive's exercise of legislative power. *Id.*

Courts have not used this doctrine to restrain executive action since 1936. *See* Federal Power Comm'n v. New England Power Co., 415 U.S. 345, 354 n.2 (1973) (Marshall, J., concurring). However, many commentators have urged a renaissance of this principle to force Congress to impose more controls on administrative discretion. *See, e.g.,* Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring); Fort Worth & D. Ry. v. Lewis, 693 F.2d 432, 435 (5th Cir. 1982); Note, *The Fourth Branch: Reviving the Nondelegation Doctrine,* 1984 B.Y.U. L. REV. 619, 640-41 (proposing an analytical framework for courts to use to determine the constitutionality of congressional delegations of power) [hereinafter cited as Note, *The Fourth Branch*]; Note, *Rethinking the Nondelegation Doctrine,* 62 B.U.L. REV. 257, 257 n.3 (1982) (citing authorities) [hereinafter cited as Note, *Rethinking the Nondelegation Doctrine*].

52. *See supra* note 6 and accompanying text; Task Force Report, *supra* note 4, at 4.

53. Task Force Report, *supra* note 4, at 4 (stating that E.O. 12,291 has decreased the need for legislation to accomplish regulatory reform). Despite the dearth of legislative solutions, a few members of Congress, by threatening to eliminate appropriations for the Office of Information and Regulatory Affairs (OIRA), have recently pressured OMB to agree to greater disclosure of the regulatory review process. *See* Wash. Post, June 17, 1986, at A21, col. 3. In the House of Representatives, Congressman John Dingell spearheaded the drive to cut-off appropriated funds to OIRA and gained the public support of Appropriations Committee Chairman Jamie Whitten. *See* Letter from Congressman Whitter to Congressman Dingell, Mar. 18, 1986 (on file at the *George Washington Law Review*). However, OMB's promised changes are directly attributable to pressure from Senators David Durenburger and Carl Levin. *See*

D. *Executive Order 12,498*

The most recent, and potentially most far-reaching, development in the Reagan administration's regulatory-reform program has been the issuance of Executive Order 12,498 (E.O. 12,498).[54] This order requires all agencies subject to E.O. 12,291 to submit for OMB's review an annual agenda of all anticipated "significant regulatory actions."[55] OMB is charged to "ensure that all regulatory actions are consistent with the goals of the agency and the Administration."[56] After approving each agency's regulatory agenda, OMB must compile the administration's Regulatory Program.[57]

Letter from OMB Director James C. Miller to Senator Durenburger, June 13, 1986 (copy on file at the *George Washington Law Review*).

The new disclosure rules provide that, upon written notice, OIRA will make available all drafts of NPR's and final rules, as well as all written correspondence concerning the drafts. *See* Memorandum for the Heads of Departments and Agencies Subject to Executive Order Nos. 12,291 and 12,498 from Wendy L. Gramm, Administrator, OIRA, June 13, 1986 (copy on file at the *George Washington Law Review*). In addition, with respect to EPA rules, OIRA will advise EPA of all oral communication between OIRA officials and persons outside of the federal government. *Id.* at 3. Finally, OIRA will place in its public reading room copies of all written communications concerning agencies' rules as well as a docket of all meetings and oral communications with persons outside the federal government. *Id.* at 4.

It remains to be seen what effect these disclosure rules will have on OMB's rulemaking power. However, their effect is likely to be minimal because the new rules are adopted "as a matter of administrative discretion" and are "not intended to create any right or benefit, substantive or procedural, enforceable at law or in equity." *Id.* at 1, 4. Thus, nothing more than public condemnation and the ability of these few members to muster defunding support is available to hold OIRA to its promises.

54. 50 Fed. Reg. 1036 (1985). The White House issued the order on January 4, 1985.

55. *Id.* § 2. OMB interprets "significant regulatory action" very broadly, to include both "prerulemaking action," such as action taken to consider initiating a rulemaking proceeding or publication of any notice or document that could lead to a rulemaking, and "rulemaking action." Office of Management and Budget, Bulletin No. 85-9, at 2-3 (Jan. 10, 1985). Rulemaking action includes publication of an NPR, rule, or other statement of general applicability that would be a step to or would be

1) a major rule;
2) a priority of the agency head;
3) subject to a statutory or judicial deadline;
4) of unusual interest to other federal agencies;
5) of unusual public interest;
6) likely to establish an important new policy or legal precedent; or
7) designated by OMB to warrant review as a significant regulatory action.

Id. at 3. OMB has devised a form on which all agencies are to submit their draft regulatory programs. *Id.* attachment 1.

56. Exec. Order No. 12,498, *supra* note 54, § 1(b). OMB's standard for reviewing regulations is thus no longer the quasi-objective cost-benefit analysis. Instead proposed regulatory action will now live or die according to the political whims of the Reagan administration. OMB Watch, OMB Control of Rulemaking: The End of Public Access 14 (Aug. 1985).

57. Exec. Order No. 12,498, *supra* note 54, § 3. On August 8, 1985, OMB presented the administration's first regulatory program. OFFICE OF MANAGEMENT AND BUDGET, REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT APRIL 1, 1985 - MARCH 31, 1986 (1985) [hereinafter cited as REGULATORY PROGRAM]. The program compiles and prioritizes significant regulatory actions of seventeen federal agencies. *Id.* at xi. It identifies three principal functions of regulations: (1) protection of public health and safety and the environment, (2) direct control of commerce and trade, and (3) proper management and control of federal funds and property. *Id.* at xiv. The program proclaims itself analogous to the federal budgeting process, *id.* at xii, however, it neglects to point out that unlike the budget, the regulatory program is not approved by Congress.

The compilation process enables OMB to sort out conflicting or duplicative regulations and to guarantee that all proposals comport with the administration's policy goals.[58] Absent unusual circumstances, OMB may return for reconsideration any rule submitted for review under E.O. 12,291 that is not included in the Final Regulatory Program.[59] Thus, E.O. 12,498 grants OMB virtually unbridled power to supervise or veto almost any agency's activity without public scrutiny. It remains to be seen whether this grant of power will be judiciously used or brazenly abused. However, E.O. 12,498 demonstrates at least that into his second term President Reagan still seeks greater executive control over the regulatory process.

II. Inside OMB: Executive Orders 12,291 and 12,498 in Operation

A. The Structure of OMB and OIRA

OMB implements the Reagan administration's regulatory agenda via the Office of Information and Regulatory Affairs (OIRA), where a group of approximately forty bureaucrats and their support staff are responsible for daily oversight of the administrative process.[60] Within OIRA, a politically appointed administrator presides over a nonappointed deputy administrator and three civil-servant branch chiefs, who in turn supervise approximately thirty-five desk officers.[61] These unelected desk officers have tremendous legislative power; they are responsible for reviewing regulatory impact analyses and descriptions of significant regulatory actions to determine whether an agency may take a proposed regulatory action.[62]

Each desk officer is assigned to review the regulatory proposals of a particular department or agency[63] and functions as a sieve, theoretically allowing only economically sound regulations to

58. REGULATORY PROGRAM, *supra* note 57, at xii.

59. Exec. Order No. 12,498, *supra* note 54, § 3(d). The order indicates that "new statutory or judicial requirements or unanticipated emergency situations" would present unusual circumstances prohibiting OMB from blocking regulatory proposals. *Id.*

60. OMB Watch, *supra* note 56, at 31.

61. 44 U.S.C. § 3503 (1982); OMB Watch, *supra* note 56, at 31. The Administrator of OIRA reports to the Director of OMB. The current director, James C. Miller, III, was the OIRA Administrator who first implemented E.O. 12,291. *Id.*

62. OMB Watch, *supra* note 56, at 31. Jim Tozzi, former Deputy Administrator of OIRA, has been quoted as saying: "[Although desk officers] are just G.S. twelves or fourteens, if [they] get on your [agency's] case, you're in a lot of trouble." Olson, *supra* note 6, at 12 n.35. Many times, "Assistant Secretaries have come crying" to these desk officers "pleading" for mercy. *Id.*

63. OMB Watch, *supra* note 56, at 32 (listing desk officers and their assigned agency or regulatory topic).

pass.[64] Although most desk officers have backgrounds in economics or public administration,[65] the technical complexity of regulatory policy probably forecloses desk officers from being the best forum to make what are in effect unilateral decisions on legislative policy.[66] The unilateral legislative policy decisions are especially disturbing given that they are often based on secret debate of non-public information.[67]

B. Federal Rulemaking Under E.O. 12,291 and E.O. 12,498: The Reagan Administration's Viewpoint

The Reagan administration boasts of its first-term deregulatory effort.[68] Since President Reagan took office, the number of pages in the *Federal Register* has declined annually to its present level, which is over forty percent shorter than it was during the final year of the Carter administration.[69] Correspondingly, agencies now promulgate almost thirty-five percent fewer federal rules.[70] At the same time as the number of rules has declined, the number of deregulatory measures has increased.[71] Although OIRA indicates that under the new executive orders, OMB's regulatory management is becoming more effective at curtailing the growth

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64. *See* Task Force Report, *supra* note 4, at 17-19. The Task Force imposed 10 economic-efficiency guidelines for regulatory policy: (1) regulations and regulatory objectives should produce a net economic benefit to society, (2) regulation of prices and production in competitive markets should be avoided, (3) regulations should not prescribe uniform quality standards for goods or services unless they are needlessly unsafe or voluntary private standards have failed to correct the problem, (4) regulation of health and safety risks should be based on scientific risk-assessment procedures addressing only real and significant, not hypothetical or remote risks, (5) health, safety and environmental regulations should address ends rather than means, (6) licensing and permitting decisions should be made swiftly, (7) licenses should be available to all minimally qualified applicants on either a lottery or auction basis, (8) where regulations create private rights such rights should be freely transferable, (9) regulations should not preempt state laws or regulations, except to protect rights of national citizenship or avoid significant burdens on interstate commerce, and (10) terms and conditions of federal grants should be limited to those necessary to achieve the purposes for which the funds were appropriated. *Id.*

65. Olson, *supra* note 6, at 12 n.35.

66. Comment, *supra* note 13, at 646; Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1066 (1986). *But see* DeMuth & Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1083-85 (1986) (responding that desk officers may not be expert in the subject-matter of each agency, but they are expert in the field of regulation itself).

67. Olson, *supra* note 6, at 62-63 (arguing that in secret meetings with agency officials, OMB acts as a conduit for the regulatory views of special-interest groups).

68. *See generally* Task Force Report, *supra* note 4 (describing the Reagan administration's regulatory achievements); Memorandum from President Reagan to the Heads of Executive Departments and Agencies (Jan. 4, 1984) (boasting that "this Administration has substantially reduced the burden and intrusiveness of Federal regulatory programs."), *reprinted in* REGULATORY PROGRAM, *supra* note 57, at 563; Office of Management and Budget, Executive Order 12,291, Annual Report for 1984 (outlining components of the administration's deregulatory effort) [hereinafter cited as OMB Report], *reprinted in* REGULATORY PROGRAM, *supra* note 57, at 569.

69. OMB Report, *supra* note 68, *reprinted in* REGULATORY PROGRAM, *supra* note 57, at 581.

70. *Id.*

71. *See* Task Force Report, *supra* note 4, at 77-124 (discussing substantial deregulatory measures during the Reagan administration).

of the federal bureaucracy,[72] the cited statistics may be misleading. Granted, in 1984 OMB reviewed fifteen percent fewer regulations than in 1983, and twenty-five percent fewer than in 1981.[73] Nevertheless, the percentage of agency rules that OMB revised or quashed during the review process has increased from thirteen percent in 1981 to twenty-two percent in 1984.[74] Thus it may be argued that the OMB's claimed efficiency in reviewing fewer regulatory proposals stems from agencies' reluctance to make proposals due to the chilling effect of OMB's more stringent review.

C. *Federal Rulemaking Under 12,291 and 12,498: The Critics' Viewpoint*

The secrecy attendant to OMB's proceedings makes it difficult to measure the harmful effects of President Reagan's orders. Although the content of communications between desk officers and agency and industry representatives has not been logged, it is clear that desk officers have been deluged with such communications and that they have based regulatory decisions upon them.[75] Because OMB has not published this information, investigation of the abuses of the Reagan administration's regulatory process must focus on revelations to the media by disgruntled agency personnel.[76]

A prime example of OMB's obstruction of an agency's rulemaking is the recent controversy over the regulation of asbestos.[77] In

72. OMB Report, *supra* note 68, *reprinted in* REGULATORY PROGRAM, *supra* note 57, at 571.

73. *Id.*

74. *Id.*

75. Olson, *supra* note 6, at 55-73; STAFF OF SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 99TH CONG., 1ST SESS., EPA'S ASBESTOS REGULATIONS: REPORT ON A CASE STUDY ON OMB INTERFERENCE IN AGENCY RULEMAKING 103 (Comm. Print 1985) [hereinafter cited as ASBESTOS REPORT]. *But see* DeMuth & Ginsburg, *supra* note 66, at 1086-87 (suggesting that outside communications are infrequent but, to the extent they occur, are beneficial).

76. *See, e.g.,* Wash. Post, Oct. 4, 1985, at A21, col. 1 (discussing congressional finding that OMB illegally blocked asbestos rule); Wash. Post, Aug. 7, 1985, at A1, col. 1 (reporting Federal Aviation Administration chief's complaint that OMB's economic review delayed implementation of doppler radar and may be responsible for recent airline crashes); Wash. Post, July 11, 1985, at A19, col. 3 (reporting OMB's delay of an OSHA safety rule for oil and gas drilling); Wash. Post, Apr. 28, 1985, at A16, col. 1 (reporting Small Business Administration chief's complaint that OMB's senior staff are "fanatics [who] have no real-life experience" and who act "like zombies on some issues—mechanical prostitutes"); Wash. Post, Apr. 23, 1985, at A13, col. 1 (reporting OMB's disapproval of an Interior Department recommendation to establish a government-owned corporation to run the strategic stockpile); Wash. Post, Apr. 16, 1985, at A17, col. 4 (reporting OMB's "sabotage" of asbestos rules).

77. *See* ASBESTOS REPORT, *supra* note 75, at 4 (calling the asbestos controversy the "quintessential illustration" of OMB's usurpation of rulemaking power); *see also* OMB Watch, *supra* note 56, at 10-11 (summarizing the chronology of the asbestos controversy); Wash. Post, Oct. 4, 1985, at A21, col. 1 (same).

May and August of 1984 the Environmental Protection Agency (EPA) submitted proposed regulations for controlling asbestos to OMB. However on February 1, 1985, EPA announced it had withdrawn the rules from OMB because responsibility for regulating asbestos had shifted to the Occupational Safety and Health Administration (OSHA) and the Consumer Products Safety Commission (CPSC).[78] On January 29, 1986, EPA republished its proposed asbestos regulation in substantially the same form as originally proposed.[79]

The House Energy and Commerce Committee's Subcommittee on Oversight and Investigations inquired into these events. The Subcommittee discovered that during 1984 the regulations became mired in OMB because OIRA was dissatisfied with EPA's cost-benefit analysis.[80] Additionally, the Subcommittee uncovered numerous contacts between OMB officials and asbestos industry personnel that had been kept secret from EPA.[81] Thus, EPA falsely believed that it was making progress with OMB when, in fact, OMB was succumbing to pressure from the asbestos industry.[82]

Another controversy arose over OMB's substantive review of EPA's regulation establishing standards for granting permits to construct hazardous-waste underground storage tanks. Congress amended the Resource Conservation and Recovery Act[83] in 1984 to establish a mandatory March 1, 1985 deadline for promulgating the regulation.[84] Congress imposed the deadline as a response to OMB's previous dilatory actions, which had delayed issuance of

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78. Statement of A. James Barnes, EPA Acting Deputy Administrator (Feb. 1, 1985), *reprinted in EPA's Asbestos Regulations: Hearings Before the Subcomm. on Oversight and Investigation of the House Comm. on Energy and Commerce,* 99th Cong., 1st Sess. 209 (1985); *see* ASBESTOS REPORT, *supra* note 75, at 3, 30-31. According to the Acting Deputy Administrator of EPA, OMB convinced EPA of a novel interpretation of the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1982 & Supp. II 1984), that required EPA to refer the matter to OSHA and CPSC. ASBESTOS REPORT, *supra* note 75, at 30. OMB reasoned that section 9 of the Act, 15 U.S.C. § 2608 (1982), "requires EPA to refer the regulation of chemical risks to another Federal agency if the other agency has remedial authority over *some* facet of the risk during the chemical's life cycle." ASBESTOS REPORT, *supra* note 78, at 50. However, the House Subcommittee investigating this incident disagreed, arguing that Congress intended for the Act to provide EPA with broad remedial power to regulate any unreasonable risk to health or environment. It did not contemplate referral to OSHA or CPSC. *Id.* at 50-51.

79. 51 Fed. Reg. 3738 (1986) (to be codified at 40 C.F.R. pt. 763) (proposed Jan. 29, 1986).

80. ASBESTOS REPORT, *supra* note 75, at 24-25.

81. *Id.* at 102-03. The Subcommittee uncovered over 20 previously secret communications between industry representatives and OMB concerning the proposed rules. In addition, the subcommittee revealed over 30 secret contacts between OMB and EPA that permitted OMB to implement industry's goals of delaying asbestos regulation without interference from public-interest lobbies. *Id.* at 103.

82. *Id.* at 22, 102-03. EPA had been negotiating extensively with OMB concerning OMB's objections to the proposal. It was not until shortly before OMB revealed its novel interpretation of the Toxic Substances Control Act that the negotiations reached an impasse. *Id.* at 22, 26.

83. 42 U.S.C. §§ 6901-6986 (1982).

84. Pub. L. No. 98-616, § 207(w), 98 Stat. 3221, 3239-40 (1984).

the regulations.[85] Despite the March 1 deadline, OMB officially began reviewing the proposed standards on March 4, 1985. EPA anticipated approval within ten days, but OMB refused to approve the proposed rule and on March 25 OMB announced that it would extend its review. OMB disputed EPA's regulatory goal of preventing all leaks of hazardous wastes, arguing instead that the regulation should only prohibit leaks that create a demonstrable risk to human health.[86] Finally, the Environmental Defense Fund (EDF) brought suit to enjoin OMB from interfering with the regulation.[87] The district court found for EDF and issued an injunction preventing OMB from continuing to review any regulatory proposals beyond the expiration of a statutory deadline.[88]

The asbestos episode demonstrates how unrecorded ex parte contacts combined with a secretive cost-benefit review process enable OMB to subvert congressional intent and displace agencies' rulemaking authority.[89] Because OMB delayed promulgation of the asbestos rules through secret haggling over the RIA and convinced EPA of a questionable interpretation of statutory authority, OMB proved to be the ultimate policymaker, rather than EPA, which wielded a congressional mandate. The underground tank controversy further exemplifies OMB's unauthorized policymaking role. Even though the court eventually restrained OMB's conduct, OMB still mustered sufficient power, under the aegis of E.O. 12,291, to delay implementation of congressionally mandated regulations. Thus, if usurpation of rulemaking power is the Reagan administration's goal, then its boasting is justified. However, if a well-reasoned, democratically acceptable rulemaking policy is the goal, then the present formula creates no right to brag.

More recently, OMB has quashed other regulatory action under E.O. 12,498. Under this order, the weighing of *economic* costs and benefits does not appear to be a legitimate concern. Rather, application of the rule rests upon the comparative weight of *political* costs and benefits.[90]

In May of 1985, OMB, using E.O. 12,498, disapproved a Public Health Service study on the relation between cuts in federal funding and infant mortality rates.[91] Prior to the issuance of E.O.

85. H.R. REP. NO. 198, 98th Cong., 2d Sess. 34 (1984), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 5576, 5593.

86. *See* Environmental Defense Fund v. Thomas, 627 F. Supp. 566, 567 (D.D.C. 1986) (summarizing the factual background of the suit).

87. *Id.*

88. *Id.*, slip op. at 13.

89. *See infra* notes 123-48 and accompanying text (discussing the problems of ex parte contacts and preclusion from judicial review).

90. *See supra* note 56 and accompanying text.

91. OMB Watch, *supra* note 56, at 14.

12,498, OMB would have had no recourse against this study, which would not have been regulatory action.[92] The study would have been announced in the *Federal Register,*[93] and solicitations for research contracts would have been published in *Commerce Business Daily.*[94] However, because this study could be considered "prerulemaking action" possibly leading to a "significant rulemaking," OMB, using E.O. 12,498, managed to prevent public notice of the proposed study.[95]

It is clear that Congress intended the Public Health Service to carry out this sort of study.[96] Furthermore, it would not have been very costly to complete.[97] It seems therefore that OMB quashed the study simply to avoid possible embarrassment for the White House if the Public Health Service concluded that federal budget cuts could be linked to higher mortality rates.

Thus, E.O. 12,498 enables OMB to claim even greater power over rulemaking policy than does E.O. 12,291. Since OMB may secretly prevent what it believes to be unfavorable prerulemaking action, the evidence of abusive and unreasonable executive actions may be harder to uncover.[98] The secretive process makes judicial review impossible and congressional oversight more difficult. Although the goal of providing a process for a coordinated regulatory policy is sound, the unchecked E.O. 12,498 process leaves too much room for abuse.

III. Four Deficiencies in E.O. 12,291 Preventing True Regulatory Reform

This section questions the effectiveness and legality of E.O. 12,291 in the context of four specific problems.[99] First, E.O. 12,291

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92. Exec. Order No. 12,498, *supra* note 54, § 1(a). This order extends OMB's power to review "significant regulatory action," which includes any prerulemaking action likely to lead to a significant regulatory action. *Id.* § 2.

93. 44 U.S.C. § 3507(a)(2)(B) (1982).

94. OMB Watch, *supra* note 56, at 25.

95. *Id.* at 35-36.

96. 42 U.S.C. § 241 (1982) (charging the Public Health Service to "encourage, cooperate with, and render assistance to other appropriate public authorities, scientific institutions, and scientists in the conduct of . . . research, investigations, experiments, demonstrations, and studies relating to the causes, diagnosis, treatment, control, and prevention of physical and mental diseases and impairments of man").

97. Telephone Interview with Dr. Vincent Hutchins of the Public Health Service (Mar. 14, 1986) (estimating that the study would have cost between $125,000 and $150,000 per year and would have taken one to three years to complete).

98. Presumably if OMB quashes a regulatory proposal after it becomes public, some interested party may become suspicious and investigate the proposal's fate. However, if the proposal had never been published, no suspicion would be likely to arise.

99. Despite the substantive legal problems with E.O. 12,291, no court has accepted plaintiffs' various arguments seeking to invalidate the order. *See, e.g.,* Professional Drivers Council v. Bureau of Motor Carrier Safety, 706 F.2d 1216, 1222 (D.C. Cir. 1982) (upholding the Secretary of Transportation's cost-benefit analysis, as required by E.O. 12,291 and its predecessor, that led the Secretary to forego amendments to truck-driver safety regulations). The Association of Ethylene Oxide Users recently attempted to challenge the legality of E.O. 12,291, but the case was remanded and that question was not reached. Public Citizen Health Research Group v. Tyson, 796 F.2d

fails to achieve its avowed goals for regulatory reform[100] because it specifically exempts a great deal of regulatory activity from its ambit.[101] Further, the order permits OMB to secretly modify or quash regulatory proposals after receiving ex parte comments, but without receiving the benefits of public comments. Both of these aspects of E.O. 12,291 violate the firmly entrenched wisdom and statutory mandate of the Administrative Procedure Act.[102] Additionally, private litigants cannot challenge OMB's actions under E.O. 12,291, even though such actions adversely affect potential litigants' interests.[103] Finally, the order arguably contravenes Article I of the Constitution and federal agencies' organic statutes by usurping the agencies' congressionally delegated regulatory authority.[104] After outlining these problems, Part IV of this Note presents a proposal for a legislative solution.

A. E.O. 12,291 Neglects Much Regulatory Activity

Three major categories of federal regulatory activity are sheltered from the effects of E.O. 12,291. First, and most profound, is the exemption for independent agencies.[105] The Reagan administration was forced to exclude these agencies because, without statutory authority, the Constitution severely restricts the President's ability to control agencies deemed by Congress to be independent.[106] Thus, the administration could make only an unenforce-

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1479, 1481 (D.C. Cir. 1986). In Environmental Defense Fund v. Thomas, 627 F. Supp. 566 (D.D.C. 1986), the court declined to address the constitutionality of E.O. 12,291, but ruled that OMB's purposeful delay in reviewing regulations creating permitting standards for hazardous-waste storage tanks beyond the expiration of a statutory deadline for promulgating the standards exceeded the President's Article II power. The court then enjoined OMB from continuing to review the proposed regulation. *Id.* at 571. Courts have also held that suspension of promulgated, but unimplemented, regulations under E.O. 12,291 is illegal. *See* Environmental Defense Fund v. Gorsuch, 713 F.2d 802, 816 (D.C. Cir. 1983); National Resources Defense Council v. EPA, 703 F.2d 700, 703 (3d Cir. 1983).

100. *See supra* note 14.

101. *See infra* notes 105-22 and accompanying text.

102. *See* 5 U.S.C. § 557(d) (1982) (prohibiting ex parte contacts between members of agencies and interested persons outside agencies in formal proceedings); 5 U.S.C. § 553(b), (c) (1982) (requiring notice to the public of proposed rulemaking and an opportunity for interested persons to submit comments on proposed rules); *see also infra* notes 123-37 and accompanying text (discussing the benefits of public participation in rulemaking and the ban on ex parte contacts).

103. *See* Exec. Order No. 12,291, *supra* note 4, § 9; *see also infra* notes 138-48 and accompanying text (discussing the unavailability of judicial review of OMB's decisions under E.O. 12,291).

104. *See infra* notes 149-59 and accompanying text.

105. Exec. Order No. 12,291, *supra* note 4, § 1(d); *see supra* note 20.

106. *See, e.g.*, Wiener v. United States, 357 U.S. 349, 356 (1958) (holding that the President could not remove a member of an adjudicative administrative agency merely to put his own appointees in office); Humphrey's Ex'r v. United States, 295 U.S. 602, 623-24 (1935) (holding that the President could not remove a Federal Trade Commissioner for personal or political reasons because the FTC was an independent

able plea for voluntary compliance by exempted agencies.[107]

The definition of independent agencies contained in the Paperwork Reduction Act of 1980[108] further attenuates the President's control over these agencies' regulatory actions. The statute not only lists independent agencies, but it also contemplates independent status for any similar agency designated by Congress to be independent.[109] Consequently, Congress could obviate E.O. 12,291 by designating many of the currently nonindependent agencies as independent.[110]

Along with the exemption for independent agencies, the Supreme Court further frustrated the President's desire to impose cost-benefit standards upon independent agencies' rulemaking by requiring clear congressional intent to impose a cost-benefit analysis upon independent agencies. In *American Textile Manufacturers Institute v. Donovan,*[111] the Court barred the use of cost-benefit analysis of the Occupational Safety and Health Administration's (OSHA) cotton-dust standards, which established very low limits for exposure to ambient cotton dust.[112] OSHA's statutory delegation to regulate toxic substances directed the agency to establish standards that most adequately assure, "*to the extent feasible,* . . . that no employee will suffer material impairment of health."[113] The textile industry argued that "to the extent feasible" meant to the extent *economically* feasible. However, the Court held that the clear meaning of Congress's directive required OSHA to set standards that protected employees to the extent *technologically* feasible.[114] Furthermore, the Court reasoned that reading a cost-benefit analysis into the statute would be improper because, by enacting the statute, Congress had already weighed the costs against the benefits and had found the cost of the lowest technologically feasible standards to be justified by the benefits to workers' safety.[115] Thus, even where Congress has provided language amenable to an interpretation requiring cost-benefit analysis, the President cannot impose this requirement on independent agencies without clear congressional intent.[116]

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agency created by Congress, and its organic statute specified only limited grounds for removal).

107. *See supra* note 20.

108. Pub. L. No. 96-511, 94 Stat. 2812 (codified in scattered sections of 5, 20, 30, 42 & 44 U.S.C.).

109. 44 U.S.C. § 3502(10) (1982), *as amended by* Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, § 9(h), 98 Stat. 1703, 1708.

110. *See* Olson, *supra* note 6, at 18-19 & n.78 (discussing Congress's inclination, prior to creation of EPA, toward designating EPA as an independent agency).

111. 452 U.S. 490 (1981).

112. 43 Fed. Reg. 27,361 (1978). Inhalation of cotton dust is the primary cause of brown lung disease.

113. 29 U.S.C. § 655(b)(5) (1982) (emphasis added).

114. 452 U.S. at 511-12.

115. *Id.* at 514-22.

116. *Cf.* Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1347(b) (1982) (requiring offshore drilling operations to use the safest technology economically feasible). Of course, the decision in *American Textiles* may later be overruled. The case was decided by a five-to-three vote, with Justice Lewis Powell

A second category of regulatory activity sheltered from E.O. 12,291 is closely related to the independent-agency exemption. This category encompasses a class of statutes in which the statutory delegation prohibits cost-benefit analysis of regulations.[117] Executive Order 12,291 recognizes this dilemma by requiring compliance only to "the extent permitted by law."[118] However, if the concern embodied in these statutes is that many of the attendant costs and benefits of health regulations are not quantifiable, it would still be beneficial to introduce cost-benefit thinking into the regulatory process.[119]

Finally, E.O. 12,291 applies only to informal rulemaking.[120] Thus, all regulations promulgated by formal adjudication or made "on the record after opportunity for a hearing" are exempt from cost-benefit analysis.[121] Summing this category with the previous two, a large portion of all federal regulatory activity clearly falls outside the ambit of E.O. 12,291.[122] Thus, the order does not, by

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taking no part in the decision. However, in a prior decision, Justice Powell, in dicta, interpreted the "feasible" language to impose a cost-benefit analysis. Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 667 (1980). Furthermore, the attorney who argued the case for the textile industry, Robert H. Bork, has subsequently been appointed to the Court of Appeals for the D.C. Circuit, and is an oft-mentioned candidate for elevation to the Supreme Court.

117. *See, e.g.*, 21 U.S.C. § 348(c)(3) (1982) (Food, Drug & Cosmetic Act) ("[N]o [approval] shall issue if the data fails to establish that the use of a food additive will be safe."); 42 U.S.C. § 7409(b)(1) (1982) (Clean Air Act) ("Air quality standards shall . . . allow an adequate margin of safety, requisite to protect public health."). Despite the clear statutory command of the Clean Air Act, OMB has imposed cost-benefit review on national ambient air quality standards. Olson, *supra* note 6, at 33.

118. Exec. Order No. 12,291, *supra* note 4, § 3(a), (f)(3).

119. *See* Miller & Yandle, *Benefit/Cost Analysis: New Thermostat for the Regulatory Caldron*, BUSINESS, Mar.-Apr. 1980, at 15, 16. The authors submit a simple analogy for understanding the value of cost-benefit analysis even when some of the relevant factors are not quantifiable. They envision two large sandpiles, one representing costs and the other representing benefits. Because both piles are very large it is difficult to determine their relative sizes, but if certain factors are quantified and corresponding buckets of sand are removed from each pile, their absolute sizes diminish and their relative sizes become more apparent.

120. Exec. Order No. 12,291, *supra* note 4, § 1(a)(1) (excluding from coverage administrative action governed by 5 U.S.C. §§ 556-557 (1982)).

121. *See* 5 U.S.C. § 553(c) (1982) (5 U.S.C. §§ 556-557 apply to rulemaking proceedings conducted "on the record"); *id.* § 554(a) (5 U.S.C. §§ 556-557 apply to adjudications conducted on the record). However, given the broad definition of "significant regulatory action," *see supra* note 55, E.O. 12,498 may exert some control over formal rulemaking proceedings. For example, if an agency that ordinarily regulates through formal rulemaking decided to conduct a study of industry conditions as a basis for future rulemaking, E.O. 12,498 purportedly empowers OMB to prohibit the study if the future rulemaking might be "significant." *Id.*

122. Exec. Order No. 12,498, *supra* note 54, reaches the regulatory actions of even fewer agencies. Section 1 imposes the order's requirements on all agencies subject to E.O. 12,291. However, section 1(a) permits the Director of OMB to exempt such agencies as it deems appropriate. At this writing the Departments of Defense and State are exempt from E.O. 12,498. *See* Office of Management and Budget, Bulletin No. 85-9, at 2 (Jan. 10, 1985).

itself, constitute comprehensive regulatory reform.

B. Ex Parte Contacts and Preemption of Public Comments

One of the explicit purposes of E.O. 12,291 is to provide for presidential intervention in the regulatory process.[123] In accomplishing this purpose, however, the order allows rulemaking to proceed totally on the basis of secret presentations made to OMB.[124] Thus, the order allows OMB to circumvent two related tenets of the APA: the requirement for giving interested parties the opportunity to submit materials into the rulemaking record,[125] and the ban on ex parte communications.[126]

Both of these principles benefit the administrative process. The notice-and-comment provision encourages the free flow of information to decisionmakers and facilitates more reasoned rulemaking.[127] The opportunity for public comment also ensures broader acceptance of a promulgated regulation because all interested parties have had the opportunity to obtain favorable concessions.[128] The ban on ex parte communications reinforces these benefits by ensuring that interested parties are apprised of all relevant data necessary for addressing their comments to all sides of the issues being considered.[129] The ban also assures interested parties that the agency will conduct rulemaking fairly, without giving any party an undue advantage.[130] Consequently, it is ironic that in the name of regulatory reform E.O. 12,291 seriously threatens to obfuscate two of the most beneficial provisions of the APA.

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123. Exec. Order No. 12,291, *supra* note 4, preamble.

124. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6:40 (Supp. 1982).

125. 5 U.S.C. § 553(c) (1982).

126. 5 U.S.C. §§ 554(d), 557(d)(1) (1982). The APA defines an ex parte communication as "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." 5 U.S.C. § 551(14) (1982). Even though the APA does not specifically prohibit ex parte communications in informal rulemaking, courts have imposed such constraints. *See* Home Box Office v. FCC, 567 F.2d 9, 53 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977). *But see* Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977) (limiting the holding in *Home Box Office* to rulemakings in which there are few parties with competing claims to a valuable privilege and noting that Congress did not intend to forbid ex parte contacts in every informal rulemaking). *See also* Rosenberg, *supra* note 9, at 1227-32 (discussing the problem of ex parte contacts arising from E.O. 12,291).

127. U.S. DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 26, 28 (1947).

128. *See* Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 528-30 (1972) (arguing that broader public participation will ensure that agencies will implement regulatory policies that are more responsive to public needs); Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 361 (1972) (similar argument).

129. *See* Home Box Office v. FCC, 567 F.2d 9, 51-59 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977); *see also* Rosenberg, *supra* note 9, at 1228 (citing three benefits of the ban on ex parte contacts: (1) all parties are ensured fair access to the decision maker, (2) a record for reasoned decision making is produced, and (3) prospects for future judicial review are enhanced).

130. Home Box Office v. FCC, 567 F.2d 9, 51-59 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977); *see also* Note, *Due Process and Ex Parte Contacts in Informal Rulemaking*, 89 YALE L.J. 194, 198 (1979) (permitting ex parte contacts enables "secret political intervention [that] may interfere with the agency's ability to make a reasoned decision based on the statutory criteria").

The order has, in fact, compromised the goals of the APA. A recent article thoroughly details ex parte contacts and other nonrecorded information upon which three EPA rules were based.[131] It also exposes as a sham OMB's efforts to quell criticism about the secrecy problem,[132] and reveals that the regulatory process established by E.O. 12,291 encourages nonrecorded contacts to the extent that it would be incompetent for an attorney representing a client on regulatory matters not to use every means at his disposal to influence OMB officials.[133]

Of course all ex parte contacts are not reprehensible.[134] In fact, E.O. 12,291 and E.O. 12,498 formally establish an avenue whereby the executive branch may contribute salutary ex parte comments.[135] However, this avenue must not be open to industry officials seeking to obtain regulatory concessions; rather it should permit only comments that enhance the ability of the President and his policy chiefs to interpose a coordinated voice into the process.[136] Still the problem of extra-governmental ex parte contacts clearly requires a remedy. Docketing such comments, while frequently proposed, would be ineffective.[137]

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131. *See* Olson, *supra* note 6, at 64-73; *see also supra* notes 75-82 and accompanying text (discussing ex parte communications during the asbestos regulation controversy).

132. Olson, *supra* note 6, at 62-64. OMB has taken three actions to stem the criticism directed against ex parte contacts. In a memorandum, OMB Director David Stockman noted that the primary forum for submitting factual communications was the agency promulgating the rule, and, therefore, any information received by OMB would be passed on to the agency. Office of Management and Budget, Memorandum M-81-9 (June 11, 1981), *reprinted in Regulatory Reform Act: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary,* 98th Cong., 1st Sess. 2811 (1983). Also, in a separate internal memorandum to OMB Desk Officers, OMB states that only top officials are to have contacts with industry representatives. Memorandum from Jim J. Tozzi, Deputy Administrator of OIRA, to Desk Officers, *reprinted in Role of OMB in Regulation: Hearing Before the Subcomm. on the Oversight and Investigations of the House Comm. on Energy and Commerce,* 97th Cong., 1st Sess. 195 (1981). Finally, OIRA recently adopted broader disclosure rules that require the docketing of ex parte contacts. Adherence to the rules, however, is strictly voluntary on the part of OIRA. *See supra* note 53.

133. Olson, *supra* note 6, at 55-56.

134. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6:18 (1978) (private communications are beneficial in a notice-and-comment rulemaking, so long as the comments are logged to permit adequate judicial review).

135. The preambles of both executive orders propose to enhance presidential oversight. Exec. Order No. 12,291, *supra* note 4, preamble; Exec. Order No. 12,498, *supra* note 54, preamble. In addition, the preamble to E.O. 12,498 states that the order creates a process to enhance public and congressional understanding of the administration's regulatory objectives. Exec. Order No. 12,498, *supra* note 54, preamble.

136. *See* Exec. Order No. 12,498, *supra* note 54, preamble. The Constitution authorizes the President to order written opinions from executive officials on any subject relating to the duties of their offices. U.S. CONST. art. II, § 2. Implicit in this provision is presidential authority to comment on these written opinions. *See* Sierra Club v. Costle, 657 F.2d 298, 405 (D.C. Cir. 1981).

137. In theory, all comments of central relevance to the rulemaking should be re-

C. *The E.O. 12,291 Process Is Precluded from Judicial Review*

A true commitment to a regulatory process tempered by cost-benefit analysis would encourage enforcement by allowing interested parties to obtain judicial review.[138] Courts, as expert analysts of decisionmaking procedures, could ensure both that the required procedure was followed and that the administrative decision bore some reasonable relationship to the record upon which the decision was based.[139] Judicial review is essential to effective citizen participation in the regulatory process.[140] Allowing affected parties a chance not only to comment, but also to litigate the outcome of an administrative decision, increases both the incentives and forums for submitting accurate, balanced information.[141] More important than actual review, however, is the threat of judicial oversight, which prompts heightened analytic efforts by agency officials.[142] Unfortunately, E.O. 12,291 precludes these benefits by specifically denying judicial review of OMB's cost-benefit analyses.[143] Although judicial gloss bolsters this preclusion,[144] at least one commentator has argued that the preclusion is not insurmountable.[145]

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corded. However, the Court of Appeals for the District of Columbia Circuit has recognized the need for private communications between agencies and White House officials in order to monitor the consistency of proposed regulations with the administration's policy. *See* Sierra Club v. Costle, 657 F.2d 298, 402-09 (D.C. Cir. 1981) (discussing the merits and demerits of suggested docketing requirements for various types of ex parte communications). Despite the risk that these communications could serve as conduits for undocketed industry views, the court refused to impose docketing without a specific statutory command to do so. *Id.* at 406-07. Congress has indicated that the best approach to the problem of ex parte contacts is to allow each agency to experiment with its own procedures concerning both intra- and extragovernmental contacts. S. REP. NO. 1018, 96th Cong., 2d Sess. 54-55 (1980); *see also* DeMuth & Ginsburg, *supra* note 66, at 1086 (suggesting that all outcome determinative ex parte contacts will, by necessity, appear in the rulemaking record, otherwise the record will not reflect the rule's rational basis. Thus, it would be inefficient to mandate docketing all ex parte contacts.).

138. McGowan, *Regulatory Analysis and Judicial Review,* 42 OHIO ST. L.J. 627, 634 (1981).

139. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320-27 (1965) (stating that the judiciary is the guarantor of the legitimacy and validity of administrative action, as well as an important forum for policy review).

140. STAFF OF SENATE COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., 1ST SESS., STUDY ON FEDERAL REGULATION 25, 40-41 (1977).

141. *Id.* at vii.

142. Raven-Hansen, *Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12,291,* 1983 DUKE L.J. 285, 329-34.

143. Exec. Order No. 12,291, *supra* note 4, § 9.

144. Independent Meat Packers Ass'n v. Butz, 526 F.2d 228, 236 (8th Cir. 1975), *cert. denied,* 424 U.S. 966 (1976). In *Meat Packers,* the district court set aside the Department of Agriculture's meat grading regulations for failure to comply with President Ford's Executive Order No. 11,821, which required an inflationary impact statement. *See supra* note 7 and accompanying text. The circuit court reversed, holding that the issue of compliance with the order was not subject to judicial review. 526 F.2d at 236. *See also In re* Surface Mining Regulation Litig., 627 F.2d 1346, 1357 (D.C. Cir. 1980) (rejecting a challenge based on the Secretary of Interior's failure to prepare an inflationary impact statement); *cf.* Thompson v. Clark, 741 F.2d 401, 404-05 (D.C. Cir. 1984) (upholding provision of Regulatory Flexibility Act, 5 U.S.C. § 611 (1982), precluding judicial review of regulatory flexibility analyses except as part of the rulemaking record on review).

145. *See* Raven-Hansen, *supra* note 142, at 329-34. Professor Raven-Hansen argues

OMB's secret hold over the rulemaking process must be exposed to the public and subjected to judicial scrutiny. Part IV of this Note suggests creating a cause of action specifically designed to review an agency's cost-benefit analysis. Such an approach would not impinge on an agency's generally unreviewable discretion to refuse enforcement.[146] Most often the process of reviewing regulatory actions under E.O. 12,291 does not result in an agency's decision to refuse enforcement. Rather, the cost-benefit approach merely affects the type of enforcement to be used.[147] Furthermore, since the proposed statutory solution, and for that matter even E.O. 12,291, establishes substantive guidelines for agencies' exercise of enforcement discretion, the presumption against reviewability can be rebutted.[148]

D. E.O. 12,291 Permits OMB to Usurp Legislatively Delegated Regulatory Authority

Notwithstanding that an executive order emanates from the most powerful office in the nation, it is axiomatic to a system of limited government that without constitutional or statutory authority an executive order is void of legal effect.[149] Commentators

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that despite the express preclusion of judicial review, some ambiguity exists because E.O. 12,291 requires that an RIA be included as part of the "whole record of agency action in connection with the rule." E.O. 12,291, *supra* note 4, § 9. Therefore, this language arguably triggers the strong presumption of reviewability announced by the Supreme Court in Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967). In addition, Professor Raven-Hansen questions the President's power to unilaterally insulate executive actions from judicial scrutiny. Raven-Hansen, *supra* note 142, at 332.

146. Heckler v. Chaney, 105 S. Ct. 1649, 1656-57 (1985) (recognizing a presumption that agencies' discretion to enforce is not subject to judicial review, but allowing rebuttal of that presumption when the statute delegating enforcement power to the agency sets guidelines for the exercise of its discretion).

147. The percentage of proposed rules that are quashed by OMB is minimal. For example, in 1984 OMB reviewed 2,104 rules. Of that number, 78 percent were approved without modification, 15.2% were approved after minor changes, and only 5.2% were either vetoed or "voluntarily" withdrawn by the promulgating agency. OMB Report, *supra* note 68, *reprinted in* REGULATORY PROGRAM, *supra* note 57, at 575. However, these data do not reflect the unknown number of regulations that are chilled from reaching the status of a formal proposal by the threat of OMB's review. *See supra* notes 72-74 and accompanying text.

148. Heckler v. Chaney, 105 S. Ct. 1649, 1656-57 (1985).

149. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585-89 (1952) (enjoining the President from seizing the nation's steel mills for war production during a steel workers' strike because the action lacked constitutional or statutory support).

The President can cite at least four constitutional grants of power that may validate E.O. 12,291. *See* U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* § 2, cl. 1 ("[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."); *id.* § 2, cl. 2 ("[The President] shall appoint . . . public Ministers . . . and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in

have extensively debated the legal underpinnings of E.O. 12,291.[150] Rather than recapitulating this debate over the facial validity of E.O. 12,291, it is more important to examine the order's practical effect.[151]

A pervasive rationale for congressional delegation of rulemaking activity to administrative agencies is that the agencies are a repository for expertise.[152] Although Congress created the APA to enhance development and implementation of agencies' expertise,[153] the practical effect of E.O. 12,291 is to engraft additional procedures onto the APA's requirements,[154] and more important, to permit nonexperts at OMB to determine conclusively what regulations will be promulgated.[155] Thus by effectively nullifying agencies' expertise, OMB may circumvent one of Congress's main purposes for enacting the APA.

This result obtains notwithstanding qualifying language in sections 2 and 3 of E.O. 12,291, which facially relegates many directives to mere suggestions.[156] Not only does the President, in most cases, wield sufficient political clout to cause agency officials to heed OMB's "suggestions," but he also wields the removal power and can keep executive officials in line.[157] Despite the clear dic-

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the courts of Law, or in the Heads of Departments."); *id.* § 3 ("[The President] shall take care that the laws be faithfully executed."). Even so, where Congress has delegated legislative authority to be exercised according to certain guidelines, the President cannot usurp that authority or alter the guidelines by relying on these dormant constitutional grants of power. *See Youngstown Sheet & Tube Co.*, 343 U.S. at 585-89.

150. *See, e.g.*, Rosenberg, *supra* note 6, at 196-220 (concluding that the order rests on weak constitutional foundations); Shane, *Presidential Regulatory Oversight and the Separation of Powers: The Constitutionality of Executive Order 12,291*, 23 ARIZ. L. REV. 1235, 1243-55 (1981) (arguing that the order stands on stronger constitutional footing).

151. The language of the order itself indicates presidential recognition of the order's questionable constitutionality. Section 2 requires agencies to adhere to the order's requirements "to the extent permitted by law." Exec. Order No. 12,291, *supra* note 4, § 2. And section 3(f)(3) states: "Nothing in this subsection shall be construed as displacing the agencies' responsibilities as delegated by law." *Id.* § 3(f)(3). However, given the beneficial principles of administrative law that this order seeks to eviscerate, it would be unfortunate to permit clever draftsmen to successfully usurp power in practice when in theory such usurpation is unconstitutional.

152. *See* U.S. DEPARTMENT OF JUSTICE, FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 19 (1941).

153. *Id.*

154. Notice and comment rulemaking, as contemplated in the APA, does not provide for rules to pass through a central cost-benefit arbiter, such as OMB, prior to becoming effective. Thus, this added procedural hurdle is ultra vires. *See* Vermont Yankee v. Natural Resources Defense Council, 435 U.S. 519, 525 (1978) (courts cannot impose procedures on agencies beyond those prescribed by Congress).

155. OIRA, which has primary responsibility for enforcing E.O. 12,291, has a total staff of about 40. The desk officers are mid-level bureaucrats (G.S. 12-14) mostly with backgrounds in economics or public administration. It seems incomprehensible to suggest that these 40 individuals could rival the aggregate analytical ability of all the federal agencies' personnel. *See* OMB Watch, *supra* note 56, at 31-32; Comment, *supra* note 13, at 646 & n.94.

156. In recent litigation the Justice Department has argued that agency heads are "legally free to ignore" E.O. 12,291 and "promulgate a regulation without subjecting it to OMB review." Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment in Environmental Defense Fund v. Thomas, Civ. No. 85-1747 (D.D.C. filed May 30, 1985), *cited in* ASBESTOS REPORT, *supra* note 75, at 115.

157. *See* Myers v. United States, 272 U.S. 52 (1926) (President's dismissal of execu-

tate that the President's constitutionally derived removal power does not extend so far as to preclude the exercise of vested discretion by an agency official,[158] the Damoclean effect of the removal power is ostensibly the same.[159] Thus, even though statutes prohibit some agency action seemingly mandatory under E.O. 12,291, the President's regulatory will can still be realized.

This conclusion begs a final question. Is it necessarily improper for the President's regulatory will to be realized, or should some other entities set the nation's regulatory agenda? Prior to E.O. 12,291 individual agencies haphazardly arranged this agenda. E.O. 12,291 and its progeny go a long way toward remedying the inefficient and often conflicting regulatory activity of the past;[160] however, the present system is fraught with executive abuses.[161] Consequently this Note suggests that Congress should establish the nation's regulatory agenda.

IV. Congressional Responsibility and the Regulatory Process—A Legislative Proposal

A. The Nondelegation Doctrine and E.O. 12,291

In his second treatise of civil government John Locke wrote:

> The power of the *Legislative* being derived from the People by a positive voluntary Grant and Institution, can be no other, than what that positive Grant conveyed, which being only to make *Laws,* and not to make *Legislators,* the *Legislative* can have no power to transfer their Authority of making Laws, and place it in other hands.[162]

The Constitution restates this principle of nondelegation of legislative authority.[163] Yet despite the framers' admonition, the post-

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tive official was within his constitutional powers); *see also* Synar v. United States, 626 F. Supp. 1374, 1394-1403 (D.D.C. 1986) (reviewing the removal decisions and concluding that the Comptroller General may not exercise executive powers because he is removable by Congress rather than the President), *aff'd,* 106 S. Ct. 3181, 3192 (1986). K. DAVIS, *supra* note 124, § 6:40 (analyzing the removal cases). *But see* Humphrey's Ex'r v. United States, 295 U.S. 602, 623-24 (1935) (officials of independent agencies cannot be removed for causes other than those specified by Congress); Wiener v. United States, 357 U.S. 349, 356 (1958) (same).

158. Myers v. United States, 272 U.S. 52, 135 (1926).

159. Although the Nixon-ordered termination of Special Watergate Prosecutor Archibald Cox in the aftermath of the Saturday Night Massacre was illegal, *see* Nader v. Bork, 366 F. Supp. 104, 110 (D.D.C. 1973), the damage was done.

160. *Cf.* ABA COMM'N ON LAW AND THE ECONOMY, FEDERAL REGULATION: ROADS TO REFORM 70-72 (1979) (as of 1979, 16 federal agencies were responsible for regulating the price and supply in the nation's energy markets).

161. *See supra* notes 75-98 and accompanying text.

162. J. LOCKE, TWO TREATISES OF GOVERNMENT, Book II, ch. 141 (2d P. Laslett ed. 1967) (1st ed. London 1690).

163. "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S.

World War II Congresses increasingly conferred unrestrained legislative powers upon administrative agencies.[164] Underlying the nondelegation doctrine and Congress's seemingly contradictory action are two sets of competing policies. The nondelegation doctrine is founded in the ideal that lawmakers should be politically accountable to the citizenry, and that agencies' action should be governed by sufficiently specific guidelines to provide standards for judicial review.[165]

The judiciary has not used the nondelegation doctrine to strike down legislative action for fifty years.[166] Nevertheless, its underlying policies are still vital.[167] This vitality in part prompted the issuance of E.O. 12,291 and E.O. 12,498. Part of the justification for the order is that by allowing the President to establish a regulatory agenda and enforce compliance with that agenda, administrative action will be subject to political oversight.[168] Further, by imposing the cost-benefit requirement, the White House establishes standards to guide and limit agencies' action. However,

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CONST. art. I, § 1. *But see id.* art. I, § 8, cl. 18 (the necessary and proper clause, upon which Congress can rely to legitimate its broad delegations of legislative power); Kapourelos v. United States, 306 F. Supp. 1034, 1040-41 (E.D. Pa. 1969), *aff'd,* 446 F.2d 1181 (3d Cir. 1971) (relying on the necessary and proper clause to uphold statutory delegation to Veterans Administration to set "reasonable and practicable" terms and conditions for veterans' insurance); U.S. CONST. art. I, § 8, cl. 3 (commerce clause); INS v. Chadha, 462 U.S. 919, 953-54 n.16 (1983) (upholding Congress's delegation of the power to regulate immigration based on the commerce clause).

164. 1 K. DAVIS, *supra* note 134, § 3.3 (citing several broad delegations, including the National Environmental Policy Act, 42 U.S.C. §§ 4321, 4331-4347 (1982), and the Civil Aeronautics Act, 49 U.S.C. §§ 1301-1542 (1982)); *see also* Note, *The Fourth Branch, supra* note 51, at 624-30 (discussing delegations without standards).

165. Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 744-48 (D.D.C. 1971); *see* Synar v. United States, 626 F. Supp. 1374, 1386 (D.D.C. 1986) (as the scope of the delegation increases Congress must enunciate more precise standards to govern its exercise), *aff'd,* 106 S. Ct. 3181 (1986). To justify its broad delegations, Congress proffers agency expertise, the need for administrative flexibility, and occasionally legislative incompetence. J. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 93-94 (1978) (approving broad delegations when Congress lacks the institutional competence and experience to make wise policy decisions).

166. *See* Panama Ref. Co. v. Ryan, 293 U.S. 388, 394 (1935) (striking down provisions of the National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933)); Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (same).

167. *See generally* Note, *Rethinking the Nondelegation Doctrine, supra* note 51. The author cites many commentators' proposals for judicial revitalization of the nondelegation doctrine. *See id.* at 257 n.3. *See also* Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607, 671-88 (1980) (Rehnquist, J., concurring) (suggesting Congress's delegation of authority to OSHA to set standards for toxic substances was impermissible). *But see* Scalia, *A Note on the Benzene Case,* REGULATION, July-Aug. 1980, at 25-28 (arguing that revitalizing the nondelegation doctrine would lead to further judicial activism given the inherent vagueness of the doctrine).

The argument for revitalizing the nondelegation doctrine is even stronger now that Congress's loss of the legislative veto has further attenuated its control over the agencies. *See* INS v. Chadha, 462 U.S. 919, 958-59 (1983); *see also* Consumer Energy Council of Am. v. FERC, 673 F.2d 425, 477-79 (D.C. Cir. 1982) (holding the legislative veto unconstitutional), *aff'd,* 463 U.S. 1216 (1983). In arguing for the revitalization of the nondelegation doctrine, the District of Columbia Circuit stated: "If Congress has given away too much power, it may by statute take it back, or may in the future enact more specific delegations." 673 F.2d at 476.

168. Task Force Report, *supra* note 4, at 2-3.

neither of these rationales is completely consistent with nondelegation principles.

The key concern of Article I is to ensure popular control over the lawmaking process. But if this were the only concern it might be more appropriate to vest the legislative power in the presidency since that is the only nationally elected office. Thus, the framers intended more than political accountability to result from the Article I process; they sought to secure the benefits of diverse viewpoints and the honing of issues that occurs in public debate.[169] Congress incorporated these principles into the APA, but, E.O. 12,291 effectively abrogates these salutary provisions.[170] In addition, the nondelegation doctrine requires more than naked guidelines for agency action; it requires enforceable standards. E.O. 12,291 facially precludes judicial enforcement of the cost-benefit standards intended to guide agency action. With no independent power ensuring adherence, OMB likely will enforce the standards only when it is politically convenient to do so. Thus, the standards do not fulfill the judicial-enforcement prong of the nondelegation doctrine.

Because a unilateral attempt by the executive to rein in the bureaucracy rests on a questionable constitutional foundation, the need for a legislative solution becomes apparent.

B. Legislative Proposal

Cost-benefit considerations can impose a uniform rationality to administrative action. Yet it is equally obvious that not all social policies can be justified solely on economic grounds.[171] The advantage of economic factors is their quantifiability. Conversely, the disadvantage of noneconomic factors is their subjectivity. However, the political process provides a method for aggregating subjective viewpoints so that the resultant decision satisfies the greatest number of people. Therefore, the optimal decisionmaking system for social policy would allow objective economic factors to be determined by experts in the field, while allowing a

169. *See* INS v. Chadha, 462 U.S. 919, 944-51 (1983) (striking down the legislative veto because it offends the presentment and bicameralism provisions of the Constitution). According to Chief Justice Warren Burger, the framers inserted these Article I requirements to maximize the diversity of viewpoints available in public policy debate. *Id.* at 951.

170. *See supra* notes 123-37 and accompanying text.

171. A debate over the utility of economics in policymaking has been raging over the past decade. *Compare* R. POSNER, ECONOMIC ANALYSIS OF LAW (1973) (favoring use of economic factors in almost all social decision making) *with* Baram, *Cost-Benefit Analysis: An Inadequate Basis for Health, Safety and Environmental Regulatory Decisionmaking*, 8 ECOLOGY L.Q. 473, 523-26 (1980) *and* Sagoff, *At the Shrine of Our Lady of Fatima or Why Political Questions Are Not All Economic*, 23 ARIZ. L. REV. 1283, 1290-96 (1981) (arguing that most social decisions are not economic).

decision making body that represents the subjective views of society as a whole to weigh subjective factors. This Note proposes a statutory scheme that would establish such a framework.

Essentially borrowing sections 2 and 3 of E.O. 12,291, Congress should amend the APA to require agencies to perform a cost-benefit analysis for all proposed substantive regulations.[172] Congress should further require agencies to incorporate all cost-benefit analyses into the rulemaking record, although the detail of the agency's cost-benefit analysis may vary depending on the scope of the regulatory program. If the agency could demonstrate that a proposed regulation would be economically justified, promulgation of the regulation should not be politically hampered. However, if a desired regulation could not pass muster under a cost-benefit analysis, then its ultimate passage should require political justification. And because Congress, rather than bureaucratic agencies, is constitutionally mandated to make political judgments, all proposed regulations failing a cost-benefit analysis must undergo the Article I legislative process.

In addition, the statute should contain an adapted version of E.O. 12,498's Regulatory Program that retains the benefits of a coordinated regulatory policy, but avoids the possible excesses that are inherent in the current scheme.[173] The statute should continue E.O. 12,498's requirement for agencies to submit and for OMB to review a draft regulatory program.[174] Once OMB completes the draft program, it should be presented to Congress where it may receive the same legislative scrutiny presently given to the annual budget proposal.[175] This will allow disgruntled agencies as well as public-interest lobbyists to plead their cases publicly to a higher authority if OMB decides that a proposed regulatory action is not warranted on economic grounds. Thus, by obtaining the congressional imprimatur, the regulatory process will be cleansed of the abuses that are presently possible under OMB's secretive review procedure.

This process would not unduly burden either the agencies or Congress. All agencies but the independent commissions must already comply with such a program under the current versions of

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172. "Substantive regulations" would mean those requiring notice and comment under section 553 of the APA, 5 U.S.C. § 553 (1982). Congress, unlike the President, is authorized to impose this requirement on the independent agencies. *See supra* notes 111-16 and accompanying text; *see also* Synar v. United States, 626 F. Supp. 1374, 1398 (D.D.C. 1986) ("It is not as obvious today as it seemed in the 1930s that there can be such things as genuinely 'independent' regulatory agencies, bodies of impartial experts whose independence from the President does not entail correspondingly greater dependence upon the committees of Congress to which they are then immediately accountable; or, indeed, that the decisions of such agencies so clearly involve scientific judgment rather than political choice that it is even theoretically desirable to insulate them from the democratic process."), *aff'd*, 106 S. Ct. 3181 (1986).

173. *See supra* notes 75-98 and accompanying text.

174. By imposing a coordinated review by OMB, Congress can avoid costly and duplicative regulations. *See* Exec. Order No. 12,498, *supra* note 54, preamble.

175. OMB Watch, *supra* note 56, at 22; *see* 31 U.S.C. §§ 1104-1105 (1982).

E.O. 12,291 and E.O. 12,498.[176] Further, because the cost-benefit review process would narrowly focus the agencies' inquiry, their analyses could be more efficiently performed. Congress already requires many agencies to submit proposed regulations to oversight committees.[177] The added congressional burden could be significantly lessened by streamlining certain House and Senate rules.[178] To this end the statutory scheme should provide for a joint standing committee that would have exclusive jurisdiction to review proposed regulations that fail the cost-benefit analysis.[179] This regulatory oversight committee should consist of subcommittees organized around broad regulatory areas (e.g., transportation, labor, environment). Subcommittee staff could be expanded to provide the necessary expertise to both review the agencies' efforts and to consider political justifications for economically unsound regulations. Unlike the present system under E.O. 12,291, the veil of secrecy under which lobbying is conducted at OMB would be lifted; lobbying would shift to the more public arena of Congress, and a bipartisan congressional decisionmaking process would be receptive to more viewpoints.

To test the veracity of an agency's conclusion that a proposed

176. *See supra* notes 14-21 & 54-59 and accompanying text.

177. *See, e.g.,* Environmental Pesticide Control Act, 7 U.S.C. § 136w-4 (1982) (requiring reports to Congress on EPA's proposed regulations on pesticide use); Federal Land Policy and Management Act, 43 U.S.C. § 1714(c)(1) (1982) (requiring Secretary of Interior to notify both houses of Congress of withdrawals of public land from their present use).

178. For example, each house should maintain a Regulatory Review Calendar where bills would be referred upon report or discharge from committee. Items on the Calendar would be considered on the first legislative day of each month. Floor debate on each item could be limited to one hour and roll call votes granted only upon prior petition to the reporting committee by one-fourth of the members of each house. Any floor motions to amend or recommit would not be in order. These changes will enhance the power of the reporting committee: to guarantee that its opinion approximates that of the full Congress, a two-thirds vote of the committee should be required to report the bill. In addition, to limit the committee's power, a motion to discharge may be supported in writing by one-fifth of the members of each house. In this way quick consensus votes on the floor should be the norm; however, the procedure will satisfy Article I.

179. A joint standing committee is not entirely novel. With the automatic deficit-reduction provisions having been ruled unconstitutional, Synar v. United States, 106 S. Ct. 3181, 3194 (1986), the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (to be codified in scattered sections of 2 & 15 U.S.C.) (popularly known as the Gramm-Rudman-Hollings Act) provides for establishment of a Temporary Joint Deficit Reduction Committee. *Id.* § 274(f), 99 Stat. at 1100. The Joint Committee is empowered to review proposals by OMB, the General Accounting Office, and the Congressional Budget Office and report expeditiously a congressionally approved deficit control plan. *Id.*, 99 Stat. at 1100. In addition, Congress presently maintains a Joint Economic Committee and a Joint Committee on Taxation; however these bodies perform more of an academic rather than legislative function. 15 U.S.C. §§ 1024-1025 (1982); 26 U.S.C. §§ 8021-8023 (1982). Thus, the novelty of the proposed Joint Committee on Regulatory Policy would be in its practice of regularly reporting out identical bills to be considered by each chamber.

regulation passes the cost-benefit analysis, the statute should provide affected citizens a cause of action to challenge the agency's data and analysis.[180] Agencies' conclusions would be presumptively valid, but the challenger should need to prove only by a preponderance of the evidence that the regulation would have failed a properly conducted cost-benefit analysis. If successful, the challenging party could request a remand to the agency, who could then choose whether to amend the regulation or transfer it to Congress for political consideration. To prevent challenging parties from abusing the cause of action, the statute should require challengers to post a substantial bond which would be forfeited if the court decided in the agency's favor.[181] If the action were brought in good faith, the challenging party would only forfeit an amount sufficient to pay litigation costs.[182] If brought in bad faith, however, the entire bond would be forfeited as a punitive and deterrent measure.

This statutory scheme would correct the deficiencies of E.O. 12,291 and fulfill the policies of the nondelegation doctrine. All lawmaking would be politically justified. All agency action would conform to narrow guidelines established by the legislative branch. Yet the decisionmaking process would remain receptive to as many viewpoints as possible, and would give proper weight to expert analysis of objective factors. To ensure conformance with the economic guidelines, agency action would be subject to judicial review. And finally the entire system would be firmly grounded in constitutional principles rather than teetering on the edge of constitutional impermissibility. It is not suggested that the statutory scheme would be a perfect process. However, it could honestly tout the label "regulatory reform."

180. *See generally* Raven-Hansen, *supra* note 142, at 330-51 (discussing the merits of judicial review of RIAs).

181. *Cf.* R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 131-36 (1985) (proposing greater use of user fees to defray the public cost of judicial action). The amount of the bond could vary to avoid overly onerous demands on public interest groups. In the alternative, the bond requirement might be waived upon presenting a strong prima facie case to the court.

182. The court should be given discretion to include the opponent's attorney's fees over and above the award of statutory costs. This would provide another level of deterrence for cases brought barely within the bounds of good faith.