ministrations attempted to broaden the scope of regulatory review to include more executive agency rules. These reviews were primarily advisory, however, and rulemaking agencies generally were free to ignore the comments of review authorities.[24] The continuing inefficacy of centralized presidential oversight spurred increasing debate in the legal community, including the seminal Cutler and Johnson article of 1975,[25] and influential follow-up work by Professor Bruff[26] and the ABA Commission on Law and the Economy.[27] Nevertheless, Congress repeatedly has declined to enact legislation authorizing some form of centralized presidential oversight.[28]

2. *The Reagan Executive Order 12,291*

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

The Reagan Executive Order requires all executive[31] agencies to

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

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

[25] Cutler & Johnson, *supra* note 2.

[26] Bruff, *supra* note 2.

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

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

[29] E.O. 12,291, *supra* note 1.

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

[31] E.O. 12,291 is mandatory for executive agencies, *see* E.O. 12,291, *supra* note 1, at § 1(d); independent agencies may comply voluntarily with its provisions. Vice President Bush, in his capacity as head of the former Presidential Task Force on Regulatory Relief, formally requested seventeen independent agencies to comply voluntarily with the Order. *See* Letter from Vice President George Bush to independent agencies (March 25, 1981), *reprinted in Role of OMB in Regulation: Hearings of the Oversight and Investigations Subcomm. of the House Comm. on Energy & Commerce*, 97th Cong., 1st Sess. 177-78 (1981) [hearings hereinafter cited as *Hearings on Role of OMB*]. Although several independent agencies have promised to comply with the Order to the fullest extent possible, *see Hearings on Role of OMB*, *supra* at 179-94, only the Civil Aeronautics Board has committed itself to pre-publication review, *id.* at 179.

send all proposed and final regulations to OMB for pre-publication review. An agency may not issue the rule or proposal until it responds to OMB's comments. Any "major" rule—a rule with an impact of over $100 million, a rule which is expected to cause certain other adverse economic impacts, or any rule designated "major" at OMB's discretion—must be accompanied by a detailed "Regulatory Impact Analysis" (RIA) assessing its costs and benefits. OMB also reviews the adequacy of the RIA. Although the Office is given sixty days to review a proposed major rule, thirty days to review a final major rule, and ten days to review a non-major rule, it may extend its review without time limit simply by so notifying the agency.[32]

Under the Reagan Order OMB is directed to review each regulatory action to promote regulations that maximize "aggregate net benefits to society."[33] The Office is instructed, however, to exercise its powers only "to the extent permitted by law."[34]

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

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[32] *See* E.O. 12,291, *supra* note 1, § 1(d).

[33] *Id.* § 2(e). The Order requires OMB to review agency rules to ensure that:

a) They are based "on adequate information";
b) Their "potential benefits to society. . .outweigh the potential costs";
c) They involve "the least net cost to society";
d) They "maximize net benefits to society"; and,
e) They consider the condition of the economy and of regulated industries, and the future effects of the rules.

Id. § 2.

In addition to these oversight duties, OMB is directed (previously subject to review by the now-defunct Presidential Task Force on Regulatory Relief) to:

a) Prescribe procedures for agency drafting and mailing of RIA's;
b) Waive review or other requirements of the Order for any rules which it believes should be expeditiously promulgated;
c) Designate existing rules for review and set up review schedules for them;
d) Coordinate publication of an agenda of all contemplated executive agency rules;
e) Recommend changes to agencies' legislation, in coordination with the agencies; and,
f) Identify conflicting or overlapping rules of different agencies.

Id. §§ 3 to 9.

[34] *See, e.g., id.* §§ 2, 3.

[35] OIRA, created by the Paperwork Reduction Act to implement that statute's paperwork review requirements, exercises primary E.O. 12,291 review power. It formerly was headed by Dr. James Miller III (currently FTC Chairman), who was replaced by Christopher DeMuth. DeMuth left OIRA in mid-1984. With a staff of about 80, OIRA is divided into two key offices. The Information and Regulatory Management Division (formerly headed by Jim Tozzi, now by Robert Bedell), employs in its Regulatory Policy Branch the "Desk Officers." Desk Officers are the front-line staff-level analysts of agency rules. At this writing EPA is

Task Force on Regulatory Relief,[36] which had oversight authority over OMB, now leaves an agency no formal recourse from an OMB review, except, perhaps, a request for presidential intervention. Such intervention is not explicitly provided for in E.O. 12,291.

II. Legal & Policy Issues Raised by OMB Review of EPA Rules

OMB review of EPA rules raises constitutional, statutory and policy concerns. Despite the clear language of E.O. 12,291 authorizing review only to the extent permitted by law,[37] OMB may encroach upon the discretion and judgment statutorily delegated to EPA, and may effectively introduce non-statutory criteria into agency decisionmaking. OMB review also encourages industry-OMB and OMB-EPA ex parte contacts which at best undermine decisionmaking integrity and at worst contravene the Administrative Procedure Act.

A. OMB Review: The Proper Scope

1. Presidential Review of Rulemaking

a. Arguments for Presidential Review

During the past decade, a chorus of academicians, private lawyers, and government policymakers has sung the praises of centralized presidential review of agency rulemaking.[38] In *Sierra Club v. Costle*,[39] Judge Wald of the D.C. Circuit advanced a common-sense justification for presidential review:

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

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

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

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

[37] *See* E.O. 12,291, *supra* note 1.

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

[39] 657 F.2d 298 (D.C. Cir. 1981).

> The authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking. Regulations such as those involved here demand a careful weighing of cost, environmental, and energy considerations. They also have broad implications for national economic policy. Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. Single mission agencies do not always have the answers to complex regulatory problems. An overworked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policymakers in other agencies as well as in the White House.[40]

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

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

b. Response to Arguments for Presidential Review

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

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[40] *Id.* at 406.

[41] *See* Pedersen, *How Well Can OMB Regulate the Regulators?*, Envtl. Forum, Aug. 1984, at 7, 10.

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

[43] *See, e.g.*, Cutler & Johnson, *supra* note 2.

[44] *See, e.g., id.*; ABA Comm'n on Law and the Economy, *supra* note 2.

considered politically unfavorable are relaxed without regard to costs and benefits.[45] OMB review politicizes technical issues,[46] if only because of the Office's admitted anti-regulatory bias.[47] Increased friction between the agencies can result, without improving the quality of agency decisions.[48]

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

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

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

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

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

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

[48] *See* Section III.D. Case Studies, *infra* text accompanying notes 326-80.

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

[50] *See infra* notes 298-300 and accompanying text.

2. The President's "Inherent" Power to Oversee Executive Agency Rulemaking

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

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

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

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

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

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

[55] U.S. Const. art II, § 2 ("The President. . .may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices. . . ."). For a discussion of this "trifling" power and other sources of presidential authority, see Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640-42 & n.9 (1952) (Jackson, J., concurring).

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

[57] 272 U.S. 52, 135 (1926).

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

whether the Constitution should expressly give the President the right to require opinions in writing from executive officers, if they had "already vested the illimitable executive power" in the President.[59] Even as strong a proponent of centralized executive authority as Alexander Hamilton took pains to point out the President's limited authority over government.[60] Hamilton warned that the new Constitution should prevent subordinate executive officers from "possessing the necessary insignificance and pliancy to render them the obsequious instruments of [the President's] pleasure."[61] Furthermore, nineteenth century Supreme Court authority,[62] early opinions of the Attorneys General,[63] and other authority[64] speak against an inherent presidential authority to control all executive agency activity.

Nonetheless, during the twentieth century claims to inherent presidential authority have proliferated.[65] Some commentators have welcomed such claims as the necessary offspring of the increasing complexities of modern-day government.[66] Others, however, are not so sanguine. Professor Tribe, for example, has urged that "claims to inherent executive power should henceforth be regarded with the great suspicion they deserve in an era that has already witnessed too much presidential aggrandizement."[67]

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

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

[60] *See* The Federalist Nos. 67, at 436-40, 69, at 444-50 (A. Hamilton) (B. Wright ed. 1961) (citing narrow limits within which President may exercise his authority, as opposed to broad powers enjoyed by Congress or a monarch).

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

[62] *See, e.g.*, Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838) (denying the President the power to direct the Postmaster General's performance of his ministerial duty).

[63] Attorney General William Wirt, for example, advised President Monroe:

> If the laws. . .require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law; and were the President to perform it, he would not only not be taking care that the laws were faithfully executed, but he would be violating them himself.

1 Op. Att'y Gen. 624, 625 (1823); *see also* 18 Op. Att'y Gen. 33 (1884); 4 Op. Att'y Gen. 516 (1846). For a detailed review of these and other early opinions, see Rosenberg, *supra* note 2, at 204 & n.52-55.

[64] Early commentators, for example, noted the original intent that the President be primarily a political chief, not the administrative head of government. *See, e.g.*, 2 W. Willoughby, The Constitutional Law of the United States 1156 (1910).

[65] These claims have been inconsistently received by the Supreme Court. For discussion of the Court's treatment of the "inherent" executive powers, see Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. Cal. L. Rev. 863 (1983).

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

[67] L. Tribe, American Constitutional Law § 4-7 (1978).

President, in carrying out his duty to see that the laws are faithfully executed, may suggest that a subordinate executive official take certain regulatory action, if the action is fully supported by the administrative record and accords with a broad delegation of authority in the applicable statute (unless, of course, Congress has placed that decision beyond the President's control).[68] However, it is more difficult to accept the notion that an executive order which expressly precludes OMB from displacing discretion vested in other agencies may be the source of OMB's authority to be a "superagency" supervising rulemaking by EPA and other agencies. When a statutory provision clearly vests a decision in the expert judgment of the EPA Administrator, ultimately only the Administrator can "faithfully execute" the law.

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

Executive Order 12,291 expressly prohibits OMB from displacing decisionmaking authority delegated to agencies by law,[69] and provides that substantive review by OMB may take place only "to the extent permitted by law."[70] Furthermore, "independent" agencies are exempted from mandatory OMB review.[71] However, the Order's provisions, which in theory preclude conflicts between statutes and OMB review, are sometimes ignored or creatively interpreted in practice.[72]

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[68] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-38 (1952) (if the President "takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb") (Jackson, J., concurring).

[69] E.O. 12,291, *supra* note 1, § 3(f)(3).

[70] *See, e.g., id.* §§ 2, 6(a), 7(e), 7(g).

[71] *Id.* § 1(d) expressly exempts from the Order's mandatory provisions those independent agencies specified in the Paperwork Reduction Act, 44 U.S.C. § 3502(10) (1982) (definition of "independent regulatory agency" under the Act), and expressly applies those provisions to agencies listed in *id.* § 3502(1) (definition of "agency").

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

[72] *See infra* text accompanying notes 254-80.

a. The EPA Administrator: Repository of Congressionally Delegated Authority

In the late 1960s Congress began to enact an extensive body of legislation to address complex environmental, health and social problems. Some grants of rulemaking authority to agencies are broad and general.[73] Other legislation is detailed, setting forth specific decisionmaking criteria to guide the administrator's discretion.[74] In the case of EPA, Congress frequently has expressed its intent that the Administrator apply his or her own expertise, and that of the agency, in regulating technically sophisticated endeavors.[75]

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

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

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

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

Such clear delegations of authority to the EPA Administrator's judgment contrast starkly with legislative delegations to the President, which may be redelegated to EPA or other agencies. *See, e.g.*, Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9604-9606 (1982) (authorizing the President to take certain actions to respond to hazardous substance releases).

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

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

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

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

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

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

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

[80] For clear evidence that EPA was created by the President, with the approval of Congress, to carry out a well-defined mission to improve environmental quality, see *supra* note 78.