

WHITE HOUSE REVIEW OF AGENCY RULEMAKING

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Since the earliest days of the Republic, presidents have taken the steps they deemed necessary to maintain some control over the activities of the executive branch — to ensure that officials' statements and actions followed presidential policies and were consistent with each other. For example, President Jefferson reported approvingly that President Washington had routinely reviewed the correspondence prepared by his cabinet officials before it was mailed, a practice that Jefferson resumed.³ With the growth of the executive branch, later presidents took more formal steps to maintain their influence over the executive bureaucracy. In 1921, the Bureau of the Budget was created to consolidate all executive branch budget submissions. Shortly thereafter, agency positions on proposed legislation were also routed through the Bureau of the Budget.

In the 1970s, growing dissatisfaction with government regulation led to formal presidential oversight of executive branch rulemaking. This oversight function was eventually entrusted to the Office of Management and Budget (OMB) within the Executive Office of the President. The same rationale applied: the president wanted to ensure that regulations were consistent with each other and with administration policies and priorities. Modest initial efforts begun during the Nixon administration have been strengthened and expanded by each president who followed.⁴

President Reagan's regulatory review program evolved from these earlier efforts and extended them in two crucial respects. First, the initial programs directed agencies to assess the social costs and benefits of their rules; the Reagan program directs agencies to *decide* regulatory questions according to the assessments of costs and benefits. It directs that, insofar as statutory law permits, agencies may take regulatory action only if the expected benefits to society outweigh the expected costs, and agencies must set their regulatory priorities to maximize the net aggregate benefits to society. Second, the initial

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The views expressed herein are solely those of the authors and should not be taken to represent the views of the United States Department of Justice or the Office of Management and Budget.

³ See T. JEFFERSON, *THE COMPLETE JEFFERSON* 306–07 (S. Padover ed. 1943).

⁴ For a review of the earlier programs, see DeMuth, *Constraining Regulatory Costs — Part I: The White House Review Programs*, *REGULATION*, Jan.–Feb. 1980, at 13.

programs required White House review of selected rulemaking proposals and were vague about the prerogatives of agencies to issue rules over the objections of the president's staff; the Reagan program requires White House review of virtually all rules, and requires agencies to reconsider rules in light of White House objections, while making it clear that agencies retain their statutory discretion and obligations.

The president implemented his program through Executive Orders 12,291 (issued on February 17, 1981)⁵ and 12,498 (issued on January 4, 1985).⁶ These orders direct the Office of Management and Budget respectively to review all proposed and final regulations before they are issued, and to publish the *Regulatory Program* — an annual statement of agency rulemaking plans and a compilation of all significant agency actions that may result in regulations. Any disagreements about whether agency rules or annual regulatory programs are consistent with the standards in the Executive Orders must be resolved before they are published, if necessary by a cabinet-level review group or by the president himself.⁷

All of the White House review programs instituted since the 1970s have been controversial within the government and among interest groups that follow rulemaking proceedings closely. But because President Reagan's program has asserted presidential control over agency rulemaking most explicitly, it has provoked by far the greatest controversy. The purpose of this Commentary is to explain the White House review programs and to respond to the more prominent criticisms that have been directed at the Reagan program.

I. THE EMERGENCE OF WHITE HOUSE REVIEW

Until about fifty years ago, this country's laws — rules of conduct that the government will enforce — were established only by vote of elected legislatures or by inferences from past enforcement actions (by courts or administrative tribunals) in particular disputes. Today, agencies of the executive branch also engage in lawmaking by issuing

⁵ 3 C.F.R. 127 (1981), reprinted in 5 U.S.C. § 601, at 431 (1982).

⁶ 50 Fed. Reg. 1036 (1985), reprinted in 5 U.S.C. § 601, at 40 (Supp. II 1984).

⁷ In the nearly five years since Executive Order 12,291 was issued, OMB has reviewed nearly 12,000 proposed and final rules. It has found that 81% were consistent with the Executive Order in the form in which they were received from the agency. Another 13% were made consistent with the Executive Order when the agencies changed the proposal or rule to respond to problems identified by OMB. A further 2% were withdrawn by the agencies in response to OMB's review, and OMB returned 2% to the agencies for reconsideration in light of the criteria in Executive Order 12,291. See OMB, EXECUTIVE OFFICE OF THE PRESIDENT, REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT: APRIL 1, 1985—MARCH 31, 1986 (1985); J. Miller, Prepared Written Statement Before the Subcomm. on Intergovernmental Relations of the Sen. Comm. on Governmental Affairs on Executive Regulatory Oversight at 6-7 (Jan. 28, 1986) (copy on file at Harvard Law School Library).

rules and regulations — a kind of lawmaking peculiar to the large modern state. Agency regulations govern not only transactions between the government and private parties (such as the terms on which agricultural subsidies, Medicare reimbursements, and student loans are provided), but also transactions that are otherwise wholly private (such as the price of telephone service and electric power, and the design of automobiles and power plants).

Our federal government did not need agency rulemaking a century ago, but could not function without it today. Beginning with the New Deal and the demise in the late 1930s of the constitutional strictures on the appropriate role of the federal government, Congress gradually extended the reach of the federal government — through regulation, subsidization, and differential taxation — into numerous areas that had previously been the domain of state governments or private markets. By the mid-1970s, the federal government's reach included the operations and prices of public utilities and common carriers; the supply of agricultural products; the terms of labor contracts and the conditions of workplaces; the design of consumer products; the terms of importation and exportation; the provision of education, medical care, transportation, and financial services; the control of pollution; and much else.

Congress's ability to supervise these new regulatory activities did not grow proportionately, however, nor could it have. The essential inputs into the legislative process are time and information, both of which are in severely inelastic supply. The one legislative device authorized by the Constitution — the Congress — remained the cumbersome, inefficient institution the framers designed it to be. As a result, Congress increasingly delegated lawmaking authority to the executive branch, where decisionmaking is hierarchical, rather than consensual, and therefore speedier.

In the post-World War II years, the executive branch responded to the delegation of this new authority with a series of important innovations (constituting what we now call administrative law) that demonstrated its superior lawmaking versatility and encouraged further delegation. The most important of these innovations was "informal rulemaking": an agency publishes a proposed rule (say, that automobiles must be equipped with a certain kind of brake lights, or that a certain wood preservative must be taken off the market, or that hospices will be eligible for Medicare reimbursements if they meet certain operating standards); collects public comments on the proposal; and then publishes a final rule along with an explanation of the rule's rationale that takes account of the public comments. In this way, informal rulemaking combines the efficiencies of hierarchical decisionmaking with the legitimating features of legislative and judicial decisionmaking — public participation, due process, and reasoned explanation.

There is, of course, another, more conventional way to view the emergence of agency rulemaking: such rulemaking consists of "technical" decisions made by "experts" applying policies laid down in statutes, and the need for such rulemaking arises from the increasing specialization of knowledge in modern society. There is an element of truth in this story: as the extent and specialization of knowledge increases, a legislator (or a president) will be able to master less and less about more and more and of necessity will grow increasingly dependent on the advice of specialists. But the notion that rulemaking is *only* the application of expert knowledge is a constitutional fiction, employed to support a more extensive lawmaking apparatus than the Constitution provides for.

If rulemaking were just the application of neutral "expertise," there would be no occasion for notice-and-comment procedures or much of the rest of administrative law; that Congress and the courts have required such procedures shows that rulemakers possess substantial discretion to affect the distribution of society's resources. Should autos be equipped with airbags? Should Medicare pay optometrists as well as ophthalmologists for conducting post-surgical eye examinations? Should asbestos pipe be banned or cautioned against or ignored? Who should be permitted to fish for halibut off the Pacific Coast? However much expert knowledge may contribute to answering these questions, the answers (and thousands of others like them that the government provides each year) are political as well as technical⁸ and must be so as long as there are differences — in ability, income, age, preference, and so forth — among the individuals on whose behalf they are made.

Informal rulemaking solved the problem of high-volume decision-making in the large modern state, but it created a new problem of political control and accountability. In regulatory statutes, Congress declares itself to be in favor of safe drugs and automobiles and clean air and lakes, and opposed to cancer and poisonous drinking water. Sometimes it goes so far as to say that these velleities should be pursued reasonably (the Consumer Product Safety Act) or should be achieved by a date certain (the Clean Air and Water Acts). But Congress leaves the rest to the administrative agencies, certain in the knowledge that whatever decisions they make will be subject to a cascade of informal congressional criticism (letters, press releases, and hearings) from all sides. On the only issues that count — the concrete issues such as whether asbestos products should be banned, or just how much sulfur dioxide should be permitted in the air — Congress rarely makes a formal, on-the-record decision. Congress has decided

⁸ See *Synar v. United States*, Civ. No. 85-3945, typescript op. at 40 (D.D.C. Feb. 7, 1986) (per curiam) (stating that it is not clear that decisions of a regulatory agency "so clearly involve scientific judgment rather than political choice that it is even theoretically desirable to insulate them from the democratic process").

none of the questions posed in the previous paragraph, for example, yet our government has decided (or is currently deciding) all of them.

The proliferation of rulemaking authorities also created new problems of policy coordination. By the late 1970s, authority to regulate the products and byproducts of nuclear technology was haphazardly divided among the Nuclear Regulatory Commission, the Environmental Protection Agency (EPA), and the Department of Energy. Authority over the production, use, and transportation of hazardous chemicals was similarly divided among the EPA, the Food and Drug Administration (FDA), the Federal Aviation Administration (FAA), the Department of Transportation, the Occupational Safety and Health Administration (OSHA), and the Consumer Product Safety Commission. Today, the fastest growing regulatory field in Washington, regulation of recombinant-DNA research, is divided among EPA, OSHA, the National Institutes of Health, the FDA, and the Department of Agriculture.

Under these circumstances, it was inevitable that presidents would attempt to impose order on the rulemaking process. Following the wave of new health, safety, and environmental legislation in the early 1970s, executive branch agencies were issuing thousands of rules each year. For better or worse, government was allocating billions of dollars through rulemaking — subject to none of the traditional devices of public finance (taxation, authorization, appropriation, and budgeting) through which Congress and the president exert a degree of control over government spending and share responsibility for the results. However decentralized the rulemaking process may have been in practice — and however prone to manipulation by congressional committees and their staffs and by private groups — the results belonged to the president as a political matter.⁹ Just as the growth of direct federal spending led to presidential oversight of agency bud-

⁹ This political fact is unavoidable and not at all undesirable. On these points, consider again President Jefferson, contrasting the degrees of executive control exercised by Presidents Washington and Adams:

[By personally reviewing all correspondence, President Washington] was always in accurate possession of all facts and proceedings in every part of the Union, and to whatsoever department they related; he formed a central point for the different branches; preserved an unity of object and action among them; exercised that participation in the suggestion of affairs which his office made incumbent on him; and met himself the due responsibility for whatever was done. During Mr. Adams' administration, his long and habitual absences from the seat of government, rendered this kind of communication impracticable, removed him from any share in the transaction of affairs, and parcelled out the government, in fact, among four independent heads, drawing sometimes in opposite directions. That the former is preferable to the latter course, cannot be doubted. It gave, indeed, to the heads of departments the trouble of making up, once a day, a packet of all their communications for the perusal of the President; it commonly also retarded one day their despatches by mail. But in pressing cases, this injury was prevented by presenting that case singly for immediate attention; and it produced us in return the benefit of his sanction for every act we did.

T. JEFFERSON, *supra* note 3, at 306.

gets in 1921, and just as the growth of legislation led to presidential oversight of agency positions on legislation in 1940, so the growth of regulation led to presidential oversight of the rulemaking process in the 1970s. And as long as administrative regulation remains the expansive and powerful method of governance that it is today, no president can refrain from controlling it if he wishes to advance his policies.

The considerations discussed above suggest that presidents would have strengthened their control of agency rulemaking in the 1970s even if regulatory programs had been uncontroversial or widely admired, like the Park Service and the space program. But the regulatory programs were not widely admired or uncontroversial. In the 1970s, a growing body of academic literature showed that these programs frequently yielded highly perverse results — that they raised rather than lowered prices, restrained rather than promoted competition, injured rather than improved health and safety and other aspects of consumer welfare, and pursued generally accepted goals (cleaner air and safer drugs) in quite wasteful and inefficient ways.¹⁰ Popular disenchantment mirrored the academic disenchantment. Presidents Ford, Carter, and Reagan all made sharp attacks on the growth of federal regulation in their campaigns for office and included “regulatory reform” among their principal domestic goals; this period was the first time since the New Deal that presidents paid much attention at all to regulatory policy.

II. THE BENEFITS OF WHITE HOUSE REVIEW

Apart from specific statutory reforms (such as the Airline Deregulation Act of 1978), the establishment of White House review of agency rules was the most important political response to the growing popular and academic criticism of federal regulation. The characteristic failings of regulation that economists and other scholars have identified are twofold. First, regulation tends to be excessively cautious (forcing investments in risk reduction far in excess of the value that individuals place on avoiding the risks involved). Second, regulation tends to favor narrow, well-organized groups at the expense of the general public.¹¹ These failings are, at least in part, a conse-

¹⁰ For a sampling of this now-immense literature, see R. CRANDALL, *CONTROLLING INDUSTRIAL POLLUTION* (1983); *STUDIES IN PUBLIC REGULATION* (G. Fromm ed. 1981); B. ACKERMAN & W. HASSLER, *CLEAN COAL/DIRTY AIR* (1981); INSTITUTE FOR CONTEMPORARY STUDIES, *REGULATING BUSINESS: THE SEARCH FOR AN OPTIMUM* (1978); G. STIGLER, *THE CITIZEN AND THE STATE* (1975); and any issue of *The Journal of Law & Economics* or *Regulation*.

¹¹ Two conspicuous examples of excessive caution are the FDA's ban on saccharin and the National Highway Traffic Safety Administration's requirement of seatbelt-ignition interlock devices in the 1970s, both of which were overturned by Congress. The tendency of regulation

quence of the institutional incentives of regulators and the nature of the rulemaking process.

We all know that a government agency charged with the responsibility of defending the nation or constructing highways or promoting trade will invariably wish to spend "too much" on its goals. An agency succeeds by accomplishing the goals Congress set for it as thoroughly as possible — not by balancing its goals against other, equally worthy goals. This fact of agency life provides the justification for a countervailing administrative constraint in the form of a central budget office. Without some countervailing restraint, EPA and OSHA would "spend" — through regulations that spend society's resources but do not appear in the federal government's fiscal budget — "too much" on pollution control and workplace safety. This tendency is reinforced by the "public" participation in the rulemaking process, which as a practical matter is limited to those organized groups with the largest and most immediate stakes in the results. Although presidents and legislatures are themselves vulnerable to pressure from politically influential groups, the rulemaking process — operating in relative obscurity from public view but lavishly attended by interest groups — is even more vulnerable. A substantial number of agency rules could not survive public scrutiny and gain two legislative majorities and the signature of the president.

Centralized review of proposed regulations under a cost/benefit standard, by an office that has no program responsibilities and is accountable only to the president, is an appropriate response to the failings of regulation. It encourages policy coordination, greater political accountability, and more balanced regulatory decisions. This is not to say that cost/benefit analysis is capable of abolishing narrow political influence or that the institutional interests of a central budget office will always provide a precise counterweight to the interests of program administrators. Our claim is far weaker, though still ample to justify the review process: rulemakers should be accountable to the president before issuing their rules and should be obliged to demonstrate the costs and benefits of their rules as thoroughly as circumstances permit. Assessments of social costs and benefits force regulators to confront problems of covert redistribution and overzealous pursuit of agency goals, which experience has shown to be common

to reward well-organized groups at the expense of the general public was first recognized as an aspect of price and entry regulation, see G. STIGLER, *supra* note 10, at 114, 141, but it is now recognized as a central element of safety and environmental regulation as well. See, e.g., B. ACKERMAN & W. HASSLER, *supra* note 10, at 44-48; R. CRANDALL, *supra* note 10, at 110-30; Elliott, Ackerman & Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L., ECON., & ORG. 313 (1985); Leone & Jackson, *The Political Economy of Federal Regulatory Activity: The Case of Water-Pollution Controls*, in STUDIES IN PUBLIC REGULATION, *supra* note 10, at 231; Miller & Walton, *Protecting Workers' Hearing: An Economic Test for OSHA Initiatives*, REGULATION, Sept.-Oct. 1980, at 31.

in regulatory programs. OMB review subjects proposed rules to a "hard look" *before* they are issued and ensures that serious policy disagreements between a president's appointees (one with and the other without programmatic responsibilities in the area in question) will be brought to his attention.

Although the cost/benefit standard and the OMB review procedure are not necessarily related — for example, one can imagine a president elected on an "industrial policy" platform shaping regulatory policy very differently than has President Reagan — we think the standard and the review procedure will usually be complementary in practice. In any administration, the president is more likely to take a broad view of the nation's economic interest in a given rulemaking controversy than are any of his agency heads — where "broad" denotes the consideration of all of the likely benefits and costs of the rule. That the cost/benefit standard has so far recommended itself to both Democratic and Republican presidents is evidence for our position.

In addition, OMB is able to identify conflicts in the approaches adopted by different agencies with similar or related responsibilities and to coordinate their activities. The annual *Regulatory Program* is circulated in draft to give all of the regulatory agencies the opportunity to see what activity is under way at the other agencies and to express any concerns they have about coordination or conflict. It also gives the administration the opportunity to establish priorities; to move the scheduled completion times for particular rulemakings forward or back; and to coordinate related rules, such as those promulgated to implement the changes made by budget legislation or to conform with accounting or other government-wide management initiatives.

III. RESPONSES TO SOME CRITICISMS OF WHITE HOUSE REVIEW

Critics have attacked the White House review programs as being inconsistent with the Administrative Procedure Act, inconsistent with particular regulatory statutes to which they have been applied, and even unconstitutional. But the strictly legal questions raised by the review programs are not very difficult, and none of the legal attacks has been or is likely to be successful.¹² The president is the federal government's chief executive officer, and informal rulemaking is an important method of executing domestic policy. To be sure, most regulatory statutes vest decisionmaking authority not with the president but with "the Secretary," "the Administrator," or other agency heads. But the same is true of virtually all statutes that create pro-

¹² See, e.g., *Sierra Club v. Costle*, 657 F.2d 298, 405-06 (D.C. Cir. 1981); Dep't of Justice, Office of Legal Counsel Memorandum: Proposed Executive Order Entitled "Federal Regulation" (Feb. 13, 1981); Brief for Respondents at 77-87, *Association of Ethylene Oxide Users v. Rowland* (D.C. Cir. 1985) (Nos. 84-1252, 84-1392, 85-1014).

grams administered by a government agency. Agency heads exercise their statutory authority at the president's pleasure and have done so since the beginning of the Republic; it is his constitutional responsibility, not theirs, to take care that the laws are faithfully executed.¹³

The tension between an agency head's statutory responsibilities and his accountability to the president is not resolved in Executive Order 12,291 or in the earlier regulatory review orders. Nor is it resolved in any statute or in the Constitution itself. It is a political question that can be "answered" only through the tension and balance between the president and Congress — that is, the political branches — in overseeing the work of the agencies. Members of Congress and private groups opposed to a president's policies naturally use legal arguments in their efforts to limit the president's influence, and on occasion appeal to the courts for assistance; and of course it is possible that, in any particular case, OMB or the president may exercise discretion in a way that conflicts with statutory requirements, just as an agency itself may do. But the interesting *general* questions presented by White House review of agency rulemaking are not questions of law, but rather those of politics and of policy.

Critics charge that the OMB regulatory review staff is not and cannot be as intimate with the subject matter of a complex regulation as is the staff of the originating agency. That is beside the point, however. OMB does not itself need to be an "expert" rulemaking agency; its role is to serve as the eyes and ears of the president and to advance generally the set of policies (or just "attitudes") that brought the president to the head of the government. The agency staff may be familiar with the content of scores of studies and documents that bear on their general subject area and that, in the case of a final rule, appear in the rulemaking record. The OMB staff is rarely able to bring new knowledge of a field to the attention of the agency. Yet the OMB staff is routinely able to ask hard questions, both substantive and methodological, to which an agency should be expected to have good answers before it proceeds to regulate. In this respect, the policy analysts, lawyers, statisticians, economists, and others who are on the

¹³ See U.S. CONST. art. II, § 2, cl. 1. The House of Delegates of the American Bar Association has recently resolved, in part, that:

1. The Constitution's choice of a unitary executive justifies presidential involvement in rulemaking activities of federal agencies. In particular, insofar as Executive Order 12291 and 12498 implement the President's constitutional authority to "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," those orders are appropriate exercises of presidential power.

2. The Constitutional principles that justify presidential involvement in rulemaking activities are applicable to both the executive and independent agencies and, thus, the executive orders should be extended to the independent agencies.

Section of Administrative Law, ABA, Report to the House of Delegates (resolution 100, passed Feb. 10, 1986) (quoting U.S. CONST. art. I, § 2, cl. 1).

OMB staff — many if not most of whom have either come from or will go to the regulatory agencies — are able to analyze the agency's justifications for its intended actions and to ask the questions that a sophisticated layman would ask. An agency that cannot explain itself and show as precisely as possible why and how the benefits of its rules will outweigh their costs, disservices both the public and the president.

The OMB staff is more expert than the agencies in one field — the field of regulation itself. A great deal has been learned about the techniques of regulation in the last decade, particularly about the use of market-like incentives to accomplish regulatory goals more efficiently than "command and control" government directives can. Because the OMB staff reviews regulations coming from a variety of agencies and contexts, it is often in a position to draw on its own experience and that of another agency in a different field to inform the way in which an agency proposes to approach a new subject.

For example, following the deregulation of airline entry in the late 1970s, the FAA's traditional procedure for allocating landing slots at high density airports became obsolete. The procedure required that any transfer of a landing slot from one carrier to another be approved by *all* of the carriers serving that airport, and prohibited transfers for consideration. This approach was compatible with airline regulation (when there was no new entry), but it quickly became unworkable when new entrants wished to serve high density airports and could do so only by obtaining landing slots with the unanimous approval of incumbent carriers. OMB suggested to the FAA that the agency allow carriers to buy and sell landing slots individually, without the approval of rival carriers. This approach had been successfully used by other regulatory agencies faced with similar resource allocation dilemmas (such as by the EPA in allocating pollution-control requirements, by the Departments of Agriculture and Interior in allocating some crop-growing and grazing rights, and by the Federal Energy Regulatory Commission in allocating hydroelectric licenses), but was still unfamiliar to the FAA. OMB played a crucial role in bringing the experience of other agencies to the attention of the FAA, and in December 1985 the agency issued a new rule permitting private marketing of landing slots.¹⁴

Another recent example concerns EPA's proposal to restrict the production, use, and importation of certain asbestos products. When EPA first submitted its proposal to OMB in late 1984, the agency's assessment of expected health benefits — which arose primarily from

¹⁴ See *High Density Traffic Airports; Slot Allocation and Transfer Methods*, 50 Fed. Reg. 52,180-98 (1985).

reduced occupational exposures — failed to take account of OSHA's plans to reduce substantially occupational exposure to asbestos. OMB had been working closely with OSHA on its asbestos proposal and was intimately familiar with its contents and likely health effects. As a result of OMB's comments on this and other aspects of EPA's proposal, the agency withdrew its proposed rule and submitted a revised one to OMB in December 1985. The revised EPA proposal took account of the expected effects of OSHA's new rule, which OMB knew was about to be issued in final form, and the EPA proposal was cleared and published in January 1986.¹⁵ We should add that OMB's role in this case was not limited to conveying information from one agency to another — which, after all, the agencies might have done for themselves — but required resolution of a complex and contentious jurisdictional conflict between two agencies whose statutory authorities overlapped.

The greatest benefit of OMB review, however, may result from the agency mechanisms established to respond to the kinds of questions that OMB raises. In response to Executive Order 12,291, agencies either established or enhanced their in-house capabilities to analyze their regulatory decisions. In response to Executive Order 12,498, before their options were foreclosed, agency heads established or enhanced their review of regulatory activity that was planned or under way. The regulatory planning process was in part a response to troublesome rules presented to OMB by agency heads who had themselves only recently learned that a rule of this kind was being developed. By then, there would often be some reason (such as commitments made in congressional testimony or in consent decrees) why the agency had no alternative but to issue the troublesome rule. The requirement that agency heads take a thorough look, once a year, at all significant rulemaking activity ensured for the first time that those matters were presented to agency policymaking officials while there was still time to make some policy. OMB's subsequent review of agency plans again ensures that the hard questions will be asked before an agency commits itself to a particular regulatory approach.

The regulatory review process has also been criticized because it is carried on largely out of the public eye. Although OMB will from time to time submit its analysis of a proposal for inclusion in the agency's rulemaking record, publication of OMB's analysis is the exception rather than the rule. The private nature of the regulatory review process has been both a strength and a weakness. It has been a strength because, like any other deliberative process, it can flourish only if the agency head or his delegate, and OMB as the president's delegate, are free to discuss frankly the merits of a regulatory proposal.

¹⁵ See *Asbestos; Proposed Mining and Import Restrictions and Proposed Manufacturing, Importation, and Processing Prohibitions*, 51 Fed. Reg. 3738-59 (1986).

Moreover, if the agency head and the Director of OMB disagree about what the president's policies call for in a particular context, they must be able to take their disagreement to the president (or to a cabinet group or other forum designated by the president) for resolution. The administration's deliberative process would be significantly compromised if the preliminary rounds in any such disagreement were routinely publicized.

The necessity to proceed privately has been a weakness only because it has put OMB at a disadvantage in responding to allegations that it does, or at least could, act as a "conduit" for information or influence to be introduced illicitly into the agency's decision calculus. These concerns are, however, misplaced. First, there are no statutory prohibitions of *ex parte* contacts by agencies engaged in informal rulemaking.¹⁶ Moreover, criticism focusing on *ex parte* contacts by OMB misses the point because communications that remain secret cannot determine the outcome of the regulatory process. The ultimate result of the rulemaking process must be a decision for which there is a rational and reasoned basis in the record. Nonrecord evidence cannot be used to support a rule, and any decision not anchored in the record will be overturned. Consequently, *ex parte* contacts are irrelevant as a legal matter.¹⁷

As a matter of practice, however, OMB generally does not meet with outsiders when it undertakes review of proposed or final regulations. The staff is forbidden to talk with nongovernment representatives without specific permission. The Administrator and the Deputy Administrator of OMB's Office of Information and Regulatory Affairs, under the constraints of the record evidence rule, have little incentive to communicate with outsiders.

On the other hand, to the extent that outsiders provide OMB with information or new perspectives that enable it to ask the program agency hard questions, the rulemaking process, and ultimately the rule itself, will be improved. There are also occasions when it may be more appropriate for OMB, as the president's agent, to meet with interested outsiders than for a single purpose agency to do so. Con-

¹⁶ See *Sierra Club v. Costle*, 657 F.2d 298, 401-02 (D.C. Cir. 1981).

¹⁷ Program agencies routinely meet with interested outsiders in the context of informal rulemaking. Treatment of these contacts varies among agencies. Some agencies document *ex parte* contacts that introduce significant facts obtained during the rulemaking process and include that documentation in the rulemaking record. Compare L. Thomas, Memorandum to All EPA Employees: Contacts with Persons Outside the Agency (May 31, 1985) (describing EPA practice), and 14 C.F.R. § 300.2 (1985) (describing requirements concerning *ex parte* contacts under DOT Order 2100.2), with 15 U.S.C. § 57a(j)-(k) (1982) (providing that the FTC must include in the rulemaking record verbatim transcripts or summaries of all *ex parte* contacts) and 16 C.F.R. §§ 1.13(c)(6), 1.18 (1985) (implementing the FTC Act amendments with respect to *ex parte* contacts). Some agencies have no such formal directives; their officials are not required to document meetings with outsiders.

sider the example of the Deputy Administrator's meeting with Canadian government representatives concerning EPA's proposed asbestos ban. The Canadian government requested a meeting with OMB, presumably in order to discuss not the scientific or technical issues, in which EPA is expert, but the foreign policy implications of the proposed rule. In these circumstances, an agency with a broader perspective is better suited to represent the administration than the program agency in which rulemaking authority is lodged.

Some congressmen have joined with so-called "public interest" groups to complain that the OMB process might be a source of illicit influence for regulated industries. The fact is, however, that the only action Congress has taken in this regard reflected its frustration with OMB's *unresponsiveness* to a regulated industry. A rider to OMB's appropriation bill forbids OMB to review agricultural marketing orders under Executive Order 12,291.¹⁸ This measure was enacted at the insistence of agricultural interests that were angry at OMB's application of the order's economic principles to modify or disapprove their marketing orders.

Some critics have also argued that OMB's review of pre-regulatory initiatives under Executive Order 12,498 is especially inappropriate. They allege that such review gives OMB the ability to influence regulatory action before the program agency has had an opportunity to assess the dimensions of a problem through advance notices of proposed rulemaking, conferences, surveys, contract research, and the like. The allegation is correct — but we count it as a benefit rather than a cost. Scarce government resources must be allocated according to some set of priorities; the question is whether those priorities will be set unilaterally by each agency or by the president's administration as a whole through a process that reflects conflicting agency demands and the president's policies. Naturally, interest groups that stand to benefit from allocation of resources to "their" issue would prefer that planning authority rest exclusively in "their" program agency. There, such groups have a greater opportunity to shape the outcome of the regulatory process to their liking through years of pre-rulemaking orchestration with agency staff, congressional staff, and the trade press. The purpose of regulatory planning is precisely to give the president and his political appointees greater influence over rulemaking at the expense of the "permanent establishment" by bringing their views to bear early enough that their options are not narrowed to a stark "yes" or "no" on a decision memo.

Finally, some have questioned whether the process itself is cost beneficial. Because the administrative cost of running the program is

¹⁸ See H.R.J. Res. 413, 98th Cong., 1st Sess. (1983) (incorporating by reference H.R. 4139, 98th Cong., 1st Sess. (1983)).

trivial compared to the social cost of even a single ill-advised major regulation, most criticism has focused instead on the delay that OMB review entails. Although there have been some well-publicized instances of an agency's regulation remaining under OMB's consideration for many months, such anecdotes are misleading. First, the vast majority of proposals and regulations submitted to OMB are cleared almost immediately. Eighty percent of the regulations reviewed by OMB are cleared without change, and almost all of these spend fewer than ten days at OMB. The overall average time for regulatory review is just sixteen days. Second, a regulation that remains under review for many months is not languishing in the bottom of someone's in-box. If the rule remains under review for such a time, it is typically because OMB has asked for additional information necessary to resolve the cost-benefit issues and is waiting for the agency to supply such information. If the subject matter is complex or if an agency is having difficulty answering OMB's questions, considerable time may pass between the initial submission of the regulation to OMB and its clearance or return to the agency for reconsideration. The minor costs resulting from briefly delaying the implementation of regulations that OMB ultimately approves as cost-effective, however, are a small price to pay for avoiding the huge costs of issuing ill-considered regulations.

IV. CONCLUSION

Both regulatory review and regulatory planning are necessary management tools of any administration that intends to affect the regulatory state during its time in office. Just as every president since President Nixon has understood the need for a regulatory review process, we are confident that no future president will disestablish the processes of regulatory review and regulatory planning. To be sure, different presidents, representing different parties in different times, will give their own content to these procedures. The criteria by which a particular administration evaluates regulations may change. But every president has a program, and no program can be implemented in the modern regulatory state without regulatory planning and regulatory review by the Executive Office of the President.