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August 5, 1980

Hon. Philip S. Hughes
Undersecretary
The Smithsonian Institution
1000 Jefferson Place, N.W.
Washington, D.C.

Dear Sam:

Since there was no time at the recent Presidential Management Panel meeting to discuss the important points raised by Senator Ribicoff in his July 29, 1980, letter reacting to my paper on the Presidential role in regulatory matters, I thought it might be useful to provide you with a summary of some of my reactions to these points. I do so not in order to advocate one or another "recommendation," but because I believe the Senator's letter does such a superb job of highlighting the crucial issues the Panel needs to address in this area and because I think the Panel needs to have as clear a sense as possible of the full range of options available and of the pros and cons of each.

Senator Ribicoff's letter basically takes issue with two of the ideas my paper suggests the Panel might usefully consider with respect to the Presidential role in the regulatory arena:

First, the idea of establishing in the regulatory arena a process similar to the one in place in the legislative arena for establishing Administration positions on major rules. As noted, the resulting regulatory review process would focus on major rule-makings only, not adjudicatory actions, rate-making proceedings, or licenses. It would require agencies to circulate proposed major rules for comment to other affected agencies, with OMB serving as a clearance agent on behalf of the President to surface major conflicts and ensure their resolution. As with the legislative clearance process, primary reliance would be placed on the analytical resources of the various agencies to identify problems, with OMB-Executive Office involvement restricted to those issues of major significance that cannot be resolved among the affected agencies themselves.

Second, the idea of moving forward toward establishing a common framework for assessing the costs of regulation, and, down the road, toward the institution of a full or partial "regulatory budget" as a management device for encouraging the use of the most cost-effective regulatory tools consistent with Congressional purposes.

The Senator's letter raises several issues about both of these ideas. In what follows, I would like to discuss each of these issues in turn, beginning with those that relate to the regulatory review idea.

Regulatory Review

Senator Ribicoff's basic objection to the regulatory review procedures idea is that it would constitute "Presidential or Executive Office control of individual rulemakings." It should be noted at the outset, however, that some systematic mechanism for regulatory review would still make sense even if no Presidential "control" were involved. Such a process would be useful to enable the President to formulate an Administration-wide position on major rules whether that position were ultimately forced on the regulatory agency or presented to it for its consideration. Indeed, the Senator seems to concede the validity of some such activity when he notes, on page five of his letter, that the President has "the unquestioned ability to set general policy directives for agency heads to follow" in the regulatory area. Under current circumstances, there is no systematic process for the President to formulate Administration-wide regulatory policies or to monitor the extent to which agencies are following them. Before it reaches the question of whether the President's policy directives should be binding on the agencies or merely advisory, the Panel could usefully consider what sort of process might best serve this policy development and monitoring function.

Beyond this initial issue, Senator Ribicoff raises seven additional objections to the regulatory review idea. Let me comment on each of them:

- o The Administration has not proposed giving the President the power to control individual rulemakings.

  The Administration position is that the President need not request this power from Congress because the Constitution already gives it to him. This position is clearly reflected in the exchange between CEA Chairman Schultze and Senator Eagleton quoted in footnote 28 of my paper. It is also reflected in a letter OMB Director McIntyre wrote to Senator Ribicoff on February 20, 1980, outlining the Administration position on this issue in the following terms:

  > "Apart from the line responsibility of agency heads, the President is constitutionally and politically accountable for the sound implementation of regulatory programs, consistent with applicable statutes. He strongly believes that this responsibility should be exercised actively, and he has done so....The President has also stated that he stands ready to use his authority personally to resolve differences about regulatory policy...Since the President's authority is based on his constitutional responsibilities as Chief Executive, we did not consider it necessary or appropriate to include in our proposal specific language providing for this role. We strongly oppose statutory specification of when and how the President may exercise his authority to oversee the regulatory operations of the Executive Branch."

Quite clearly, the question of whether the President does or does not have the authority to overrule the decision of the head of a non-independent regulatory agency on a particular rule is a complicated one that may ultimately have to be decided in the courts. The point here is not to suggest that it does or does not exist. Rather, the point is that the failure of the Administration to request such authority of the Congress cannot be taken as evidence that this power is not thought necessary or that it does not now exist,as has been suggested.

o Presidential control means "control by anonymous White House staffers."

This is a legitimate concern, but one that could be applied equally forcefully to the budgetary and legislative review processes, both of which have been in operation for many decades and both of which have developed procedures to minimize the problem. Beyond this, it is important to understand several additional points about how a process of regulatory review modelled on the legislative review process might work:

- What is involved is a set of procedures for interagency review. Most of the analysis would be done by the various affected agencies. What is more, most issues will be resolved between the proposing agency and any objecting agencies, with the OMB clearance group acting as a broker and enforcer of clear Administration policy positions.

- Only a few issues will be bumped up to the Director for resolution and fewer still to the President.

- The agency head is still the responsible issuing agent, answerable to Congress and the courts for the validity of the rule and its consistency with legislative intent and procedural safeguards.

Regularized procedures of this sort may, in fact, be a safeguard against ad hoc, episodic White House interventions in regulatory proceedings. In the process, they could inject a degree of professionalism into the process and provide a form of institutional protection to Presidents badgered to intervene unsystematically in this or that decision.

o Presidents would be encouraged to "force agencies to consider factors Congress has not authorized."

No review process can force agencies to consider unauthorized factors or act in violation of the law. The review process would not alter the legal responsibility of the agency head in any way. The resulting rule must be fully consistent with applicable statutes or it will be vulnerable to legal challenge. At most, what is at issue is the relative weight to be assigned to various legitimate concerns, not the introduction of unauthorized ones.

o Regulatory review would overwhelm the President and his staff in detail.

This, again, is a legitimate concern but also one for which the legislative clearance experience is instructive. Each year the OMB legislative review staff processes an average of 6,000-7,000 legislative documents (agency proposed bills, Congressional requests for OMB positions on bills, agency reports and testimony on proposed bills) and handles 300-400 "enrolled bills." It manages this workload with fewer than 20 professionals. This is possible through extensive use of agency commenters and by focusing detailed attention only on issues of truly Presidential dimensions. Even if, as Senator Ribicoff suggests, 165 "major" regulations would have to be subjected to interagency review through this process, it should be possible to devise management processes modelled on the legislative clearance pattern to handle them.

o Presidential control in any form would destroy the independence of the independent regulatory agencies and replace neutral technical considerations with political ones.

This objection could be avoided by applying the regulatory review process discussed here only to the executive branch regulatory agencies, not to the independents, though this distinction is not as clear as it might be.

At the same time, however, there are several reasons why this might not be the best approach:

- The independent agencies are now subject to OMB legislative clearance and this does not seem to have jeopardized their independence.

- The notion that the independent agencies are insulated from political pressures does not find support in the considerable body of political science and economics literature that has chronicled the extent to which these agencies have been "captured" by those they regulate.

- Whether they like it or not, the independent agencies do make political decisions, i.e. decisions that involve trade-offs among important national goals. Few of these decisions can be settled on purely technical grounds. They involve judgments and the weighting of different values. Because of this, a case can be made that they should reflect at least in part the views of our one nationally elected political official and not be settled by an insulated technical elite.

o Presidential involvement would "prejudice the basic fairness of the proceedings."

As noted earlier, the kind of regulatory review process under discussion here is primarily a mechanism for formulating Administration-wide positions on crucial regulations that involve important policy issues. How the positions so developed are communicated to the regulators, however,

is a separate question. Conceivably, they could be put on the record, thereby minimizing the expressed concern about any undermining of the basic fairness of the process.

As a practical matter, however,it will be virtually impossible to shield agency heads with regulatory responsibilities from Presidential policy directives communicated off the record and informally --in the course of budget reviews, Cabinet sessions, private discussions, etc.-- that influence how the agency heads approach their regulatory responsibilities. Ultimately, the best protection against unfairness and the introduction of unauthorized factors may not be to forbid contact between the President and his agency heads on these issues or to surround these contacts with a procedural straight-jacket, but the possibility of challenging the resulting regulations in court or clarifying legislative intent through legislation. Neither of these protections would in any way be reduced by the establishment of a process for regulatory review.

o <u>There are alternatives to Presidential involvement which make better sense.</u>

The one alternative mentioned, interagency coordination through the good offices of the interagency Regulatory Council, has considerable promise but also real limitations. A long history of interagency coordination efforts in the Federal government suggests quite strongly that this device rarely works effectively over the long run in the absence of involvement of Presidential staff agencies to resolve conflicts among conflicting agency claims.

The other points mentioned in this portion of the Senator's letter all provide support for the notion of a systematic process of regulatory review at the center by emphasizing the authority and responsibility the President has "to set general regulatory policy." The key issue is whether this authority should continue to be exercised in the "catch-as-catch-can" fashion CEA Director Schultze conceded was still in force, or whether more systematic, regularized, and professional processes should be put in place to handle this growing area of Presidential responsibility.

<u>Regulatory Budget</u>

As it turns out, Senator Ribicoff and I are not as far apart on the question of a regulatory budget, or on the "mega-budget" concept I advance, as the Senator's letter seems to imply. Both of us raise serious questions about the methodological problems involved in such a budget, though my stress on the role of such a budget as a "management tool" instead of a "resource allocation tool," and my point about validity of avoiding the need to calculate the value of "benefits" suggest why I think these problems are manageable.

The key point, however, is that the recommendation I suggest the panel might consider making does not call for the immediate adoption of a regulatory budget but rather for the passage of a bill that will potentially lay the groundwork for such a budget by establishing a common methodology for agencies to use in calculating regulatory costs and by requiring that agencies begin to make such calculations. The bill would not establish a regulatory budget. Support for it, and for similar efforts with respect to the other tools of government action now excluded from the budget as suggested in my Recommendation 8, may thus be consistent with the Senator's endorsement of "further study in this area." What the Regulatory Cost Accounting Bill, or something like it, would do is to give some focus and direction to this further study.

Based on the discussion above, I believe there is a real basis for consensus between the positions outlined in Senator Ribicoff's letter and the ideas advanced in my paper. In particular, I believe it is possible to reach agreement on the following two questions:

1. Should improved, systematic procedures be established in the Executive Office to assist the President in formulating Administration-wide positions on major regulations prior to their promulgation?

2. Should steps be taken to develop the capability to calculate the costs of Federal regulatory activities, as well as of other Federal activities not now included in the budget?

Beyond this, there are several additional questions on which agreement may be more difficult, but still possible. These include the following:

3. Should the procedures for regulatory review mentioned above apply to regulations issued by the independent agencies as well as the executive branch agencies?

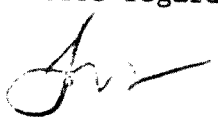
4. Should the panel endorse the Administration position on the question of the President's authority to overrule or direct the decisions of executive branch regulatory agency heads on major rule-makings involving the balancing of competing values, provided of course that the resulting action is consistent with applicable statutes? Should this power apply to the independent agencies as well?

5. Should the panel endorse the concept of a regulatory budget as an important goal to strive for in the foreseeable future?

6. Should the panel endorse the concept of a broader "mega-budget" as an important goal to strive for in the foreseeable future?

I hope these comments assist you, the staff, and the panel in sorting out the major issues involved in dealing with the appropriate Presidential role in the regulatory area. As I noted at the panel session in July, I believe this is a critical area of potential Presidential responsibility on which the Panel's views could be extremely important. The Senator's letter has helped immensely in highlighting some of the key issues, and I hope this note helps to clarify them further.

With best regards,



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