DRAFT

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CHAPTER IV

THE NEED FOR A BALANCING PROCESS

Our government has adopted a wide variety of national goals. Many of these goals -- checking inflation, spurring economic growth, reducing unemployment, protecting our national security, increasing social security, cleaning up the environment, improving energy sufficiency -- conflict with one another, and many of them compete for the same resources. The central task of modern democratic government is to make wise balancing choices among courses of action that pursue one or more of these conflicting and competing objectives.

We have delegated many of these important decisions to regulatory agencies. But we have given each of the agencies one set of primary goals to achieve, with only limited responsibility for balancing a proposed action in pursuit of its goals against the adverse impacts on the pursuit of other goals. For most of the agencies, no effective mechanisms exist for coordinating the decisions of one agency with those of other agencies, or conforming them to the balancing judgments of generalists such as the elected President and Congress. Appointed rather than elected, specialist rather than generalist, agency officials enjoy an independence from the political process -- and from one another -- that weakens the national ability to make balancing choices, or to hold anyone politically accountable when choices are made badly or not at all.

The Commission has given extensive consideration to this basic defect of the American regulatory system. We call it the lack of an effective process for making balancing choices among conflicting and competing goals.

The Three Faces of the Problem

The inability of our agencies to make balancing choices has three aspects: independence, single-mindedness, and multiplicity. These attributes of the modern American regulatory agency are no accident. It is fair to say that in an era when the problems of government were less complex and interdependent, we planned it that way.

Independence: Beginning with the Interstate Commerce Commission in 1887, we created a series of "independent" regulatory agencies.*/ Within broad policies set forth in their enabling statutes, they were to make rules and decisions independent of case by case Congressional or Executive direction. The theory was that agencies of appointed "experts" would make better decisions if they were allowed to apply their technical "expertise" without direction or influence by elected officials.**/ When Congress created each of the "independent" regulatory agencies, it conferred statutory protection against Executive Branch direction.***/

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*/ E.g., the Federal Communications Commission, the Federal Power Commission, the Federal Trade Commission, the Securities and Exchange Commission, and the Civil Aeronautics Board.

**/ See Commission Staff Paper by H. H. Bruff, "Presidential Participation in Agency Rulemaking."

***/ See, e.g., Humphreys Executor v. United States, 295 U.S. 602 (1935); Weiner v. United States, 357 U.S. 349 (1958).

By the time of the New Deal, agency independence had earned its share of critics. As noted in Chapter 2, a commission under the direction of Louis Brownlow recommended that all the independent agencies be placed under Executive Branch control. While this recommendation was repeated by later commissions, it was never adopted for any of the major independent agencies.*/ However, as Congress continued to create new agencies with new sets of primary goals, it initially placed a number of these agencies within one of the Executive Departments or subsequently transferred them to a Department.**/ Occasionally, it compromised by creating a new agency outside the Departments but within the Executive Branch, christening the baby as an "independent agency within the Executive Branch."***/ Since World War II, the Congress has granted fully independent status outside the Executive Branch to only a fraction of the new agencies it has created.

Nevertheless, some advocates of independence urge that even the decisions of these Executive Branch agencies should be insulated from Presidential intervention. They point out that some of these agencies are described as "independent"

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*/ In 1977, the Federal Power Commission was transferred to the new Department of Energy and renamed the Federal Energy Regulatory Commission, but its decision-making independence from control by the Secretary of Energy was expressly preserved.

**/ *E.g.*, the Internal Revenue Service (Treasury), the Food and Drug Administration (HEW), Social Security Administration (HEW), Occupational Safety and Health Administration (Labor), Commodity Credit Corporation (Agriculture), the National Highway and Traffic Safety Administration (Transportation), and the Federal Energy Administration (Energy).

***/ *E.g.*, the Environmental Protection Administration and (before transfer to the new Department of Energy) the Federal Energy Administration and the Energy Research and Development Administration.

by their enabling statutes, that in most cases they are required to make certain decisions "on the record" before them, and that Presidential intervention is therefore illegal or at least undesirable. Presidents in fact have been loathe to let it appear that they are influencing regulatory agencies, even those within the Executive Branch, to resolve issues one way rather than another.

Single-mindedness: The single-mindedness of regulatory agencies has also been considered a virtue, and is only beginning to be questioned. In an earlier day, as the nation sequentially identified one problem after another that appeared to require government intervention, it seemed logical to create a single regulatory agency for each. Although the Interstate Commerce Commission had a half century of experience in regulating railroad rates and routes before we decided in 1938 to do the same for airlines, we created a new agency to regulate the airlines. Even decades later, when within five years we found it necessary both to regulate air and water quality and to regulate the production and consumption of energy, Congress found it logical to confine each mission to a separate agency. That the goals of one agency could conflict with those of another, and that the cumulative impact of pursuing all goals of all agencies could materially affect costs, prices, employment and economic growth throughout the economy, are only beginning to be appreciated.

Multiplicity: The multiplicity of agencies is a natural outgrowth of their independence and single-mindedness. As the complexity of modern society created more and more problems requiring collective solutions, and as expanding economic growth increased our apparent capacity to achieve justice, security and a better life for all citizens, we continued our practice of creating a separate agency to tackle each new problem as it arose. Even when the new problem was only an extension of an older problem already confided to an existing agency, we often decided to create a new agency anyway, perhaps on the theory that two could do better than one. We gave the same or similar antitrust powers to the Department of Justice and the Federal Trade Commission, the same or similar "equal employment" powers to Justice, the Equal Employment Opportunity Commission, the Department of Labor and the Department of Health, Education and Welfare, and the same or similar powers to control industrial carcinogens to the Environmental Protection Agency, the Occupational Safety and Health Administration, the Food and Drug Administration and the Consumer Product Safety Commission.

Our present structure for improving energy self-sufficienty offers a good example of multiplicity. In what has been described as a far-reaching and efficient reorganization, we recently consolidated a few of our energy-oriented agencies into the new Department of Energy. But there are still at least fourteen federal regulatory agencies, independent of one another, with responsibilities that directly affect the price and supply of energy:

AGENCY	FUNCTION
Department of Energy	Price and production regulation for oil products, fuel selection for power plants, energy research and development.
Federal Energy Regulatory Commission */	Interstate gas pipeline and electricity rates and gas field prices; new conventional power plant licensing.
Nuclear ~~Energy~~ Regulatory Commission	Nuclear energy plant licensing, nuclear fuel export.
Department of the Interior	Offshore oil and gas leasing, public land leasing for oil, gas, and coal, coal mine safety, wilderness and endangered species protection. **/
Interstate Commerce Commission	Oil and coal slurry pipeline routes and rates.
Department of Commerce	Tanker construction and safety, marine sanctuaries.

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*/ Administratively a part of the new Department of Energy but with decision-making power independent of the Secretary's control.

**/ In the recent "snail-darter" case, the Attorney General found himself arguing in the Supreme Court on behalf of the Tennessee Valley Authority against the position of his Cabinet colleague, the Secretary of the Interior. Tennessee Valley Authority v. Hill, 46 U.S.L.W. 3657 (April 25, 1978) No. 76-1701. (Argued April 18, 1978).

AGENCY	FUNCTION
Environmental Protection ~~Administration~~ Agency	Vehicle and smokestack emission levels, veto over DOE power plant coal conversion orders.
National Highway Traffic ~~and Highway~~ Safety Administration (Department of Transportation)	Safety regulations affecting vehicle weight and fuel consumption; miles per gallon requirements for vehicle output.
Occupational Safety and Health Administration (Department of Labor)	Workplace levels for benzene and other energy-related substances.
Consumer Product Safety ~~Agency~~ Commission	Safety of home insulation and other energy saving materials.
Internal Revenue Service (Department of the Treasury)	Tax regulations affecting energy producers.
International Trade Commission	Import injury and relief including tariffs and quotas on energy imports.
Federal Trade Commission) Department of Justice)	Antitrust regulation and litigation involving energy industry.

With fourteen captains each holding a different spoke of the wheel, it is no wonder that the Government finds it difficult to steer a firm energy course.

Current Efforts to Provide Balance

In recent years, as we have learned that agency actions taken in pursuit of one goal can impair our efforts to achieve other goals, we have tried to make single mission agencies take these other goals into account. With Congressional encouragement, the Antitrust Division appears before the FCC, ICC and CAB to assert antitrust interests that may be affected by the actions these agencies are considering, and the Council on Wage and Price Stability appears before other regulatory agencies to present issues of inflationary impact. The National Environmental Policy Act requires every agency to prepare an environmental impact statement before taking major actions. When Congress gave the Federal Energy Administration power to require electric generating plants to convert from oil or gas to coal fuel, it directed that agency to consult with the Environmental Protection Agency about smokestack emission levels, but provided that if the two agencies could not agree, the EPA's views would control.

While these efforts at cross-pollination are certainly useful, they are merely devices for getting along within the existing pattern of independence, single-mindedness and multiplicity. They do not challenge or change it. They have little hope of providing the balancing judgments that the complexity of modern government demands, and that no independent single mission agency is likely to make by itself.

Single mission agencies have a natural tendency to regard their own mission as having at least equal importance to all other government goals. But as new economic or social problems appear on our horizons, a responsible government must adjust its priorities with increasing frequency. A critical regulatory issue of 1965 (auto safety) had to be accommodated to an equally critical regulatory issue of 1970 (clean air) long before the auto safety issue had been solved, just as both these critical issues had to be accommodated to 1975's (the energy gap) long before either auto safety or clean air had lost their importance.*/ And throughout this period, responsible government also had to consider the cumulative inflationary impact of our efforts to regulate in pursuit of these other goals. The separate single mission agencies responsible for each of these other goals are poorly oriented to make such vital adjustments. And because of their independence, their failure to do so is not a failure for which we can hold our elected officials responsible.

When major balancing decisions must be made, only elected officials and their immediate staffs can provide the requisite overview and coordination, make practical

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*/ Many auto safety regulations have the effect of increasing vehicle size and weight and therefore increasing gasoline consumption and undesirable emissions. Current emission control devices also tend to increase gasoline consumption.

political judgments that weigh competing claims, and stand accountable at the polls for the results. The Congress cannot perform these tasks by legislating the details of one regulatory decision after another; that is why Congress delegated power to the agencies in the first place.*/ The President is the elected official most capable of making the needed balancing decisions as particular critical issues arise, while the most appropriate and effective role for Congress is to review and where necessary to curb unwise Presidential intervention. But under the statutes that currently govern the structure and operation of most regulatory agencies, even those placed by statute within the Executive Branch, it is doubtful whether the President now has the legal power to intervene decisively to direct an agency to take a particular action, and it is clear that he lacks power to change most agency orders after they are issued.

There are a few notable statutory exceptions, mainly where the nation's foreign policy interests are involved. Civil Aeronautics Board decisions relating to routes between U.S. and foreign points are subject to Presidential review and approval.**/ International Trade Commission findings of import injury and its recommendations

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*/ Many regulatory statutes provide for legislative veto power over particular agency decisions, but this process raises a number of practical and constitutional difficulties discussed at pp. below.

**/ 49 U.S.C. § 1461

for relief to American industries and workers are subject to Presidential review and approval, and if the President's actions differ from the Commission's recommendations, those recommendations can be reinstated by concurrent resolution of the Senate and House.*/ The Federal Energy Administration (now part of the Department of Energy) may exempt particular petroleum products from regulation subject to Presidential review and approval, and the President's decision is in turn subject to disapproval by a resolution of either House.**/ Decisions of the Nuclear Regulatory Commission concerning the export of nuclear fuels are subject to Presidential review and approval.***/ And the Federal Power Commission's statutory power to approve the route of the projected gas pipeline from Prudhoe Bay in Alaska across Canada to other U.S.terminals was also subject to Presidential review and approval.****/ In the case of ITC's import injury findings and recommendations for relief, it is noteworthy that the statute authorizes the President not to provide the recommended relief if he "determines that provision of such relief is not in the national economic interest of the United States"*****/

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*/ 19 U.S.C. §§ 2252, 2253.

**/ 15 U.S.C. §§ 760, 760a

***/ Ex. Ord. No. 11902; see 42 U.S.C. § 5841.

****/ 15 U.S.C. § 719f

*****/ 19 U.S.C. § 2253 (a)(1)(A).

-- the most explicit statutory recognition to date of the need to make balancing judgments among conflicting regulatory goals. It is also noteworthy that the CAB and ITC (and the FPC until its recent transfer to the Department of Energy) are independent agencies outside the Executive Branch, and that the FEA was created as an "independent agency within the Executive Branch." Nevertheless, only the President's power to review and alter CAB decisions involving foreign routes has come under extensive criticism, primarily because on occasion the President, for reasons that appear to have minimal foreign policy significance, has selected a different U.S. airline than the airline selected by the Board. These precedents and criticisms have been considered in framing the recommendations that follow.

RECOMMENDATIONS

The Commission proposes the adoption of three closely related suggestions:

(1) a statutory grant of carefully limited Presidential power to direct certain regulatory agencies to take up and decide critical regulatory issues within a specified time period, and to modify or reverse certain agency actions relating to such issues,

(2) an Executive or statutory requirement that before completing major actions, regulatory agencies prepare analyses and conduct interagency reviews under Presidential auspices appraising

the impact of the proposed action on all statutory goals, and

(3) an appropriate and constitutional opportunity for Congressional review of each Presidential exercise of the power to intervene proposed above, and of certain other Presidential exercises of Congressionally delegated authority.

A. Increased Presidential Authority

RECOMMENDATION: The Commission supports enactment of a statute authorizing the President to direct certain regulatory agencies to take up, decide, or reconsider, critical regulatory issues within a specified period of time, and thereafter to modify or reverse certain agency actions relating to such issues. "Critical" issues would be defined as those the President finds to be of major significance both to the national economic interest of the United States and to the achievement of statutory goals other than the goal primarily entrusted to the regulatory agency in question. The proposed statute would contain adequate procedural safeguards governing presidential exercises of this authority, provide time for congressional reaction before presidential orders become effective, and allow expedited judicial review of resulting agency action for conformity with statutory and constitutional standards.

The principal elements of the proposed statute would be as follows:

(1) Authority. The President would be authorized to direct any regulatory agency (a) to take up, decide or reconsider a critical regulatory issue within a specified period of time, and (b) thereafter to modify or reverse an agency policy, rule, regulation, or decision relating to such an issue, subject to the procedures and exceptions noted below. Before the President could modify an agency action, he would first have to direct the agency to reconsider the matter.

(2) Findings Required. The President could take such action only by Executive Order published in the Federal Register, setting forth presidential findings that the action or inaction of an agency (or a conflict in the actions of various agencies) related to a critical regulatory issue. "Critical" issues would be defined as those of major significance both to the national economic interest of the United States and to the achievement of statutory goals other than the goal primarily entrusted to the regulatory agency in question. Current examples would be energy decisions with a substantial impact on environmental goals or vice versa, and safety, health, or sectoral support decisions (e.g., agricultural acreage or subsidy actions) that have a substantial inflationary impact on prices and wages. In each case, the President's action would have to be one that the agency itself had statutory power to take. If the agency's statute requires the agency decision to be made "on the record" before it, the President's action would have to be based on that record. The President could however use his power to direct reconsideration so as to require that the record before the agency be reopened.

(3) Publication and Comments. No such Order could be issued until 30 days after publication of a notice in the Federal Register stating the President's intention to issue such an Order. No public hearing would be required, but any such notice would invite written comments from interested members of the public and all such comments would be maintained in a public docket file.

(4) Public Record. In exercising this authority, the President and his staff would be required to comply with applicable statutes or regulations governing the affected agency as to *ex parte* contacts and decision-making on the public record. The President and his staff should be free to receive oral presentations from interested private persons (except where the affected agency would be prohibited from doing so), but a public record of those making such presentations and a summary of the proceedings should be kept.

(5) Congressional Response. No such Order would take effect until the expiration of 70 legislative days following its issuance. Until the end of the 70-day period, the President would retain discretion to modify or withdraw the Order in light of further public comments and any action that may have been taken by either house or Congress. A modifying Order would start the 70-day period again.*/

(6) Termination Provision. The enabling statute would expire at the end of a limited period of years, unless extended by further legislation. The limited period would recognize the experimental nature of the proposal, and the need for renewal legislation would provide Congress with an effective check on a President's failure to conform his actions under the statute to the expressed reactions of Congress.

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*/ *See* Section C, below.

(7) Agency Actions Covered. The President's power would be limited primarily to "rule-making" agency actions. No Presidential order could be issued with respect to agency actions that fall within the category of "adjudications" subject to sections 556 and 557 of the Administrative Procedure Act, such as the grant, renewal, or revocation of a license or privilege or the issuance of a "cease and desist" order or penalty, with one exception. That exception would be where the issuance or non-issuance of a license -- *e.g.*, for building a critical energy plant -- raises a critical regulatory issue. Even in such cases, however, no presidential order could modify or reverse an agency's selection among competing applicants for a particular license or privilege.

(8) Agencies and Issues Covered. The enabling statute would define the agencies governed by this authority. The statute would exempt the money market functions of the Federal Reserve Board, the campaign financing functions of the Federal Election Commission, and non-economic regulatory issues (*e.g.*, the FCC's Fairness Doctrine) as to which there is still a broad concensus that they are better left entirely in independent non-Presidential hands. It would also exempt rate-making decisions applicable to single companies (*e.g.*, telephone or electric companies), but not those, (*e.g.*, air fares and rail freight rates) applicable to all carriers engaged in the affected service.*/

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*/ While there is no bright local-national line between single company and industry-wide rate actions, the single company exception seems to be the most practicable limitation on the President's authority to review rate decisions.

(9) Judicial Review. Any agency action resulting from such an Executive Order would be subject to judicial review to assure that it is in conformity with the statutory powers of the agency and that the President's action conforms to the standards specified in the proposed statute. Judicial review would be expedited in accordance with a statutory timetable not exceeding a specific number of days for all proceedings up to and including the filing of appeals or other petitions for review in the Supreme Court.

(10) No Effect on Existing Presidential Powers. The new Presidential authority and the conditions on its exercise would not affect the President's authority to review and approve agency decisions under existing statutes such as those discussed at pp. 10-12 above.

DISCUSSION

Procedural Safeguards

The proposed statute would subject presidential action to procedural safeguards designed to assure basic fairness. It would provide an appropriate oversight role for Congress. It would preserve judicial review to assure that the limitations of existing statutory law are observed. It would not permit Presidential intervention in the award of a license to one applicant over another -- the principal ground on which the President's existing powers to intervene have been criticized.

The statute would provide for public notice of proposed presidential actions and opportunity for public comment, with a public record to be kept of all _ex parte_ contacts with interested private persons. Where an affected agency's governing statutes or regulations prohibit such contacts, or limit the agency's consideration of an issue to materials contained in the record before it, the President would be subject to the same restrictions. The statute would also require the President, whenever he deems it appropriate to change an existing agency regulation or decision, to order the agency itself to reconsider the matter before the President takes further action. The statute would make clear that these procedural limitations only govern action pursuant to this authority, and neither expand nor limit present procedural constraints on other forms of presidential intervention in the regulatory process.

The statute would provide an appropriate oversight role for Congress by requiring a delay of 70 legislative days in the effectiveness of any Executive Order to give Congress a chance to react. The President could modify or withdraw an Order if there were sufficient adverse reaction in Congress during this period. Since the enabling statute would expire at the end of a limited period of years, unless extended by further legislation, Congress could decline to renew this power if a President persistently declined to conform his actions under the statute to the expressed reactions of Congress.

For the reasons given in the discussion of Recommendation 3, the Commission favors this method of Congressional oversight instead of the more popular legislative veto, because the constitutionality of the latter method is open to serious challenge.

Agency actions resulting from an Executive Order modifying or reversing an agency decision would be subject to expedited judicial review. The courts would determine whether resulting agency actions conformed with all applicable statutory provisions.

Scope of Presidential Authority

The President could not use his power to issue such Orders to articulate entirely new national policies, or to take any action beyond the powers that have already been delegated to regulatory agencies.

The statute would contain provisions exempting certain agencies, types of agency action, and issues from presidential intervention. Since the need for balancing decisions adopted by politically accountable officials extends throughout the entire range of government regulation, exemptions from the statute should be kept to a minimum. The proposed exemptions cover only matters that are primarily of an adjudicatory rather than a rule-making nature, such as selection among competing applicants for particular licenses or privileges, and a few other special cases as to which there is a broad public consensus that the subject is better left in independent non-Presidential hands. These would include the money market functions of the Federal Reserve Board, the campaign financing functions

of the Federal Elections Commission, the "Fairness Doctrine" functions of the Federal Communications Commission, and the rate-making functions of various agencies where a single company rather than an entire industry is involved.

The statute should apply both to independent and to executive branch agencies. No coherent principle underlies the existing statutory distinctions among "independent" agencies, executive branch agencies, and the anomalous cluster of "independent agenc[ies] within the executive branch." Agencies of all kinds consider basic economic and social policy decisions for which elected officials should be held responsible and accountable, at least when these decisions have adverse impacts on our efforts to achieve other conflicting or competing statutory goals. While some additional agencies or issues might remain free of presidential review, the Commission recommends that exemptions be kept to a minimum.

The President would of course exercise his balancing power on the advice of his immediate staff. Some might argue that since his immediate staff is appointed rather than elected, nothing would be gained by authorizing an appointed group of White House officials to override other appointed groups in the agencies. But under the proposal, appointed White House officials would approach a critical regulatory issue in the light of the President's statutory responsibility and political accountability for making balancing choices among all of our competing national goals, rather than with the

primary emphasis that agency officials would place on the goal entrusted to their own single-mission agency. Moreover, White House officials would have much more direct contact with the President, and he would participate personally in each decision to intervene. Under the statutes that already authorize direct Presidential intervention in particular cases, that has proven to be the case.

The Commission anticipates that issues critical enough to justify presidential intervention under the proposed new authority would arise infrequently, perhaps no more than three to four times each year. Sparingly used for truly critical issues, this authority could provide an important tool for effective and accountable government in this time of multiple and conflicting national goals.

B. Regulatory Impact Analyses Subject to Executive Branch Review

RECOMMENDATION 2: The Commission supports issuance of an Executive Order directing all federal agencies, before completing a major regulatory action, to prepare a regulatory analysis open to public comment and to conduct an interagency review under Presidential auspices, as a basis for appraising the impact of the proposed regulatory action on the achievement of all relevant statutory goals, including but not limited to those entrusted to the initiating agency. To whatever extent an enabling statute is required to make such an order applicable to agencies defined by present statutes as independent from the Executive Branch, the Commission favors enactment of such a statute.

DISCUSSION

This proposal is an analogue to Recommendation 1. Recommendation 1 supports a statute authorizing the President to expedite, modify or reverse a limited class of agency decisions on critical policy issues, in order to make necessary balancing

choices among statutory goals going beyond those entrusted to the agency in question. Recommendation 2 supports Presidential action to require an initiating agency itself to prepare such a balancing analysis, and to submit the analysis to interagency and Cabinet discussion, before any major regulatory action is completed. Under this proposal final decision making authority would remain with the initiating agency (subject to the provisions of Recommendation 1), but that agency would have to engage in a balancing discipline involving scrutiny by other agencies and the Cabinet before taking final action.

There has been growing acceptance over the past decade that single-mission agencies need to take account of statutory goals beyond their own primary mission before taking action that may conflict with these other goals. The National Environmental Protection Act took an initial step in this direction by requiring that all agencies prepare Environmental Impact Statements before taking major actions to achieve their own statutory objectives. President Ford took a second major step with his 1974 Executive Order (No. 11821) requiring all agencies within the Executive Branch to prepare Inflation Impact Statements. President Carter has initiated a significant third step with his Executive Order No. 12044 of March 23, 1978, requiring Executive Branch agencies to prepare regulatory analyses of major proposed actions, with compliance to be monitored by the Office of Management and Budget. The present proposal enlarges on the Carter plan.

Experience with President Ford's Inflation Impact Statement program confirms that the preparation of regulatory analyses before major actions are completed can have a beneficial impact on the quality of agency decisions. However, the inflation impact statement concentrates exclusively on "cost/benefit analysis." While cost/benefit analysis is a critical element of the balancing process, we have not yet developed techniques for arraying all costs and benefits on a common value scale with any objective measure of accuracy. When proposed actions and their consequences are viewed in a political balance, "value" is often in the eye of the beholder. The Carter Order shifts the emphasis from "inflation impact" to "regulatory impact" statements, so as to permit subjective political evaluations of the costs, benefits, risks and practicality of various alternatives, without the need to express every element on a common value scale.

As originally proposed, the Carter Order would have imposed its discipline on independent agencies as well as Executive Branch agencies. The final Order, however, leaves the "independent" agencies untouched. The Commission regrets this omission. In the Commission's view, the President has constitutional power, in the present absence of any statute to the contrary, to prescribe housekeeping or procedural requirements for an independent federal agency that leave intact the policy-making and adjudicatory authority of the agency. Should the contrary point of view on this

issue prevail, the Commission supports enactment of a statute expressly authorizing the President to impose such disciplines on the independent agencies. The independent agencies have been entrusted with primary missions that may conflict with other statutory goals, and they ought to be subjected to the same balancing discipline as other regulatory agencies. Exceptions should be made only for those agencies and functions (e.g., the money market functions of the Federal Reserve Board, the campaign financing functions of the Federal Election Commission, the FCC's Fairness Doctrine, etc.) as to which a broad consensus exists that they should remain free of Presidential influence.

The original Carter proposal purported to preclude judicial review of whether an agency has complied with the new Order, but the final Order states merely that it is not "intended" to provide new grounds for judicial review. There is some question whether judicial review can be cut off by this or any other language in an Executive Order, but a majority of the Commission supports the effort. The President should be able to deal effectively himself with explicit failures to obey his Orders. Judicial review of the manner in which an agency prepares a regulatory impact statement is likely to be counterproductive, and would in any event cause substantial delay.

An important part of the balancing process should be to subject the initiating agency's analysis to the scrutiny of other interested agencies and Cabinet Departments. That scrutiny can best be conducted under Presidential auspices. The Carter Order empowers the Office of Management and Budget to "assure the effective implementation of this Order" -- a phrase that slipped by the draftsmen's zeal for plain English. It is not clear, however, that this means OMB will insist on or preside over such an interagency review. The President's Order makes no reference to the subject, except to say that the agency's regulatory process must allow opportunity for participation and comment by "other Federal agencies, state, and local governments, businesses, organizations and individual members of the public."

The Commission believes that OMB should be authorized to direct and supervise an interagency review in any case OMB finds to be of sufficient importance. The review should of course comply with any applicable *ex parte* rules of the agency initiating the proposed regulatory action. A summary of the review process should be included in the docket of the proceeding, and interested members of the public should be allowed to comment on the summary before final action is taken. The initiating agency's final action should also state the extent to which the agency had accepted or rejected the points developed in the review process. The final agency action would of course be subject to judicial review for compliance with the substantive and procedural requirements of the agency's governing statute.

As in the case of Recommendation 1, the proposal would not apply to agency adjudicatory proceedings, to selections among competing applicants for an agency license, or to company-by-company rate making proceedings.

The Commission believes that Recommendation 2 is a useful supplement to Recommendation 1, but not an adequate substitute for it. The indispensable function of balancing a proposed agency action against its impact on other conflicting and competing statutory goals can be more effectively performed if other interested agencies and the Cabinet participate directly in the process, as Recommendation 2 proposes. But our experience with human nature and the bureaucratic instinct makes it unwise to leave the final decision to the single mission agency that initiates the proposed action. Since President Ford first required agencies to prepare Inflation Impact Statements in 1974 no agency has yet filed a statement concluding that the benefits of the action it was considering were outweighed by the costs. The final authority in the balancing process ought to be a generalist responsible for formulating and executing a policy that achieves the most practicable balance among <u>all</u> our statutory goals. He ought also to be an elected official, directly accountable for the success or failure of his policy at the polls. Only the President with the help of his immediate staff can satisfy all of these requirements, best expressed in President Harry S. Truman's pithy phrase: "The buck stops here."

C. Congressional Review

RECOMMENDATION 3: The Commission supports an appropriate and constitutional form of Congressional review of Presidential actions under statutes delegating certain limited quasi-legislative powers to the President (e.g., powers to reorganize government agencies, to fix government pay scales, and to reconcile conflicts among the actions of single-mission agencies pursuing competing statutory goals). An appropriate and constitutional form of Congressional review can be achieved by statutes delegating particular powers for a limited period of two to three years, and providing for a period of seventy legislative days before any Presidential action under a delegated power takes effect, during which the President may withdraw or modify his action in the light of any legislative action that may have been taken by Congress or either House during that period. Such a statute would not provide that any such resolution would automatically invalidate the Presidential action, but the Congress could of course decline to renew the President's delegated authority if he repeatedly failed to respect Congressional reactions. The Commission opposes the indiscriminate inclusion of explicit legislative veto provisions in statutes delegating regulatory authority to independent and Executive Branch agencies.

DISCUSSION

Legislative veto provisions appear in many statutes delegating authority to the President or to Executive Branch or independent agencies. They typically provide that upon passage of a resolution of disapproval by one or both Houses of Congress within a 30 or 60 day period, the disapproved action is invalidated. The purpose of the legislative veto is to permit the Congress to delegate broad quasi-legislative authority while retaining power to override particular exercises of that authority.

Congress ordinarily overrides executive actions by enacting legislation. But since the President can veto any such legislation, Congress is frequently reluctant to

delegate authority unless its ability to override particular actions under that authority cannot be checkmated by the President. As a result, Presidents seeking broad delegations of authority from Congress have proposed subjecting their actions to legislative vetoes, and Congress itself has frequently insisted on inserting such provisions as a condition of delegating authority to the President.

The use of the legislative veto provision in federal statutes dates to the Legislative Appropriation Act of 1932, which gave the President authority to reorganize executive departments and agencies unless either House passed a resolution disapproving a particular reorganization plan within 60 legislative days after it was issued. To date, 295 statutes containing legislative veto provisions have been enacted, most of them during the last eight years. One-third of the total were enacted in 1975 alone.

The crest of the legislative veto wave may have been H. R. 76-12048, which passed the House of Representatives in 1976, but died at the end of the 94th Congress. It applies to all previous statutes delegating rule-making authority to independent and Executive Branch agencies, and invalidates any new rule (other than an emergency rule) if one or both Houses adopt a resolution of disapproval within a specified period following its issuance.

As a matter of political theory, there is a certain practical logic to the legislative veto. Congress enacts statutes delegating quasi-legislative power to regulatory

agencies precisely because Congress is physically incapable of legislating all the regulations we now think are needed. Congress finds it much more practicable to delegate that power in broad terms and to check and balance what its delegates do on a case-by-case basis. In some cases, as we point out below, there are valid policy objections to the exercise of a veto over one regulatory solution of a given problem without the responsibility to devise an alternative solution. But as a constitutional proposition, one is tempted to observe that if a legislative veto of the exercise of delegated power is not now constitutional, it ought to be.

However, there is serious question whether any statute authorizing a legislative veto is constitutional. Since delegations of quasi-legislative authority to independent or executive branch agencies can only be accomplished by legislation involving the assent of both Houses and the President, it can be argued that any measure withdrawing that delegation as exercised in a particular case would likewise require legislation involving the assent of both Houses and the President. However this constitutional question may ultimately be resolved, legislative vetoes are an inefficient and not very helpful method of correcting what Congress may perceive to be mistakes in the drafting of complex rules intended to achieve a statutory goal. Unlike the normal process of legislative amendment, they totally destroy the rules as promulgated; they put nothing in their place, and they leave the agency in a quandary as to what if anything it should do next to perform its statutory mandate.

On the other hand, there are some important quasi-legislative aspects of managing the Government's business that Congress may reasonably refuse to delegate to the Executive unless Congress can exercise an effective item-by-item check on how the President uses that power. Existing examples are Executive Branch reorganization plans and periodic adjustments of government pay scales. In these and other cases (such as the Commission's Recommendation 1), an appropriate and constitutional form of Congressional review appears to be justified.

However, the legislative veto provisions presently in use may well prove to be constitutionally infirm for the reason noted above. Moreover, there is a risk that even unvetoed Presidential actions may fall under statutes including a legislative veto provision if the provision is held to be both unconstitutional and non-severable. This issue was posed but not decided in the recent Federal Judges' Pay Case, Atkins v. United States, 556 F.2d, 1028 (U.S. Ct. Claims, 1977), cert denied, 46 U.S.L.W. 3436 (Jan. 9, 1978) (No. 77-214). The Postal Revenues and Federal Salary Act of 1967 authorized the President to increase judicial and other salaries on recommendation of the Federal Salary Commission

unconstitutional. The Court of Claims split three-three on the constitutionality of the veto, with the seventh judge concurring in the result of a decision denying the judges' claim. In defending the action, the Department of Justice argued that while the veto action might well be unconstitutional,*/ the veto provision was non-severable from the remainder of the statute authorizing the President to raise salaries, and that the judges were therefore not entitled to the raise in any event. None of the judges reached this severability issue.

If this position of the United States is upheld in some other case, it poses a threat to <u>un</u>vetoed pay raises, reorganization plans, and other Executive or agency actions under delegations of power contained in statutes that do not contain express severability clauses.**/ For example, regulated businesses or individuals might successfully challenge current and future regulatory orders and enforcement proceedings initiated by agencies to which regulatory authority had been

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*/ In two subsequent cases against the Government, the Department of Justice has agreed with the Plaintiff that a legislative veto provision is unconstitutional, but no judicial ruling has yet come down. <u>Nixon v. Arnold</u> (D.C.D.C. No. 77-1935) (involving the Presidential Papers Act) and <u>Chadha v. Immigration and Naturalization Service</u>, CA-9, No. 77-1702 (involving a veto of an order staying deportation of an illegal alien).

**/ In <u>Nader v. Adams</u> (C.A.D.C. No. 78-1034), the plaintiff argues that the Department of Transportation's airbag order is invalid because the Department allegedly delayed the effective dates out of concern over a possible exercise of the legislative veto power under the governing statute, even though no veto in fact occurred.

transferred by a Reorganization Plan, even though the Plan in question had not been legislatively vetoed. The theory of such a challenge would be that Congress would not have granted the reorganization power without reserving the right to veto, and that if the right to veto is unconstitutional, the reorganization power itself is non-severable and actions taken by a tribunal authorized by such a plan must also fall, even though they have not been vetoed. A litigant's right to challenge the constitutionality of a tribunal that issues orders affecting him would appear to be supported by Glidden v. Zdanok, 370 U.S. 530 (1962). If a reorganized agency's powers were held to have been unconstitutionally acquired, Congress might of course enact a curing statute confirming the President's reorganization plan, but it might be unable to save agency regulations issued and enforcement actions taken in the interim. For some types of interim agency actions the courts might grant *de facto* validity for a limited period by analogy to decisions validating the acts of an unconstitutionally apportioned legislature pending the election of a properly apportioned one (see Buckley v. Valeo, 424 U. S. 1, 142 (1976)). But the resulting chaos might still be extensive. It ought to be avoided by adopting the substantially as effective and constitutionally safer form of Congressional review proposed by the Commission.