

## PUBLIC CHOICES FOR REGULATORY REFORM

### The Interagency Review Process

#### Background

As the number of regulatory programs continue to increase, it is apparent that the Executive Branch must adopt procedures which will insure proper coordination of its many agencies. Although many statutes recognize the need for interagency coordination and explicitly mandate that agencies must consult with each other in developing regulations, previous efforts to achieve interagency coordination of regulations on a government-wide basis have failed. These failures, because neither the Executive Branch nor the Congress has proposed procedural requirements which, if implemented would result in interagency coordination. Furthermore, neither the Congress nor the Executive Branch proposed a mechanism for enforcing the interagency coordination requirement.

Two complementary forces - public concern for over-regulation and the lack of a formal mechanism for interagency coordination throughout the entire Executive Branch -- present President Carter with a unique opportunity to initiate a regulatory reform program within the Executive Branch. Failure of the Executive Branch to implement regulatory reform measures could give added impetus to the Congress or the Judiciary to usurp the constitutional powers of the Executive Branch. It is becoming increasingly difficult for the Executive Branch to argue against Congressional and Judicial reform actions, however improper, if in fact the Executive Branch has not taken any actions to reform its regulatory actions under existing law.

#### Regulatory Policy Issues

The development and enforcement of formal procedures for interagency coordination strike at some of the most fundamental questions of regulatory policy, including for example:

- . What role should the President have in resolving conflicts among regulatory agencies?
- . If the President is to have a role, how is it to be exercised?
- . Under what conditions should the Head of the issuing

agency make the final decision on a regulatory matter -- and consequently the issue not be reviewable by the President -- not withstanding the objections raised by other agency heads?

- . What enforcement mechanism should be established to insure that the interagency coordination procedures are followed? What checks and balances are needed to insure that the enforcement mechanism does not dominate the process?
- . Which agencies and which programs should be covered by the interagency review process and which ones should be exempt?
- . How can the interagency review procedure be developed so as not to impede the timely promulgation of regulations?

The Executive Branch addressed some of these issues by initiating a formal interagency coordination process in 1971 for programs in the environment, health and safety areas. The process, frequently referred to as the Quality of Life Review, is more of a statement of a procedural policy than the establishment of a specific interagency coordination procedure. The procedures used to implement this policy directive evolved over the past six years and have been tailored to accommodate the individual needs of different agencies.

Consequently, the substance of the Quality of Life Review process is expressed in the form of its procedures. Whereas there is nearly complete agreement that there should be an interagency review of regulations, the procedures used to meet this objective are the subject of a continuing controversy, for it is through a specification of the procedural mechanisms that many of the aforementioned regulatory policy issues are addressed. It should be noted that the procedures used to implement the Quality of Life Review are not the result of explicit decisions made with respect to the aforementioned regulatory issues but instead evolved over time as the objectives of the process crystallized. The objectives to be met by the Quality of Life process, a summary of the procedures used to implement the process and a description of its strengths and weaknesses are set forth below.

#### The Quality of Life Review

The Quality of Life Review was established on October 5, 1971 in a memorandum from the Director of the Office of

Management and Budget to the heads of departments and agencies. The memorandum established a procedure for improving the interagency coordination of proposed agency regulations, standards, guidelines and similar materials pertaining to environmental quality, consumer protection and occupational and health and safety. The procedure applies to any agency action which could be expected to:

- . have a significant impact on the policies, programs and procedures of other agencies; or
- . impose significant costs on non-federal sectors; or
- . increase the demand for Federal funds for programs of Federal agencies which are beyond the funding levels provided for in the most recent budget request submitted to the Congress.

#### OBJECTIVES OF THE PROCESS

The Quality of Life Review Process is designed to serve several goals. The weight accorded to each goal determines the specific procedures to be utilized in the process. The primary objectives of the process include:

- . Providing the President with a mechanism for establishing Executive Branch policy on issues affecting a number of agencies.
- . Insuring that the head of each agency is apprised of the views of other agency heads prior to issuing a regulation.
- . Providing a mechanism for utilizing the technical expertise of a number of agencies in the formulation of the regulations of a given agency.
- . Avoiding duplication of regulatory activities.

The Office of Management and Budget is responsible for assuring that agencies conduct a Quality of Life Review of regulations. Basically the process consists of the following procedural steps:

- . Prior to proposing a regulation, an agency must submit its proposal to other agencies for review and comment.
- . Upon receipt of the views of other agencies, the

issuing agency analyzes the views of other agencies and compiles the following package. The original proposal, agency reactions to the proposal and the views of the issuing agency on the merits of the comments received from other agencies.

- . Submittal of the Quality of Life Review package described above to the Office of Management and Budget.
- . Upon receipt of the Quality of Life Review package, the Office of Management and Budget reviews it to determine if there are any significant differences among the agencies.
- . If the Office of Management and Budget determines there are no significant differences, then the inter-agency review is completed. If there are significant policy differences, OMB convenes a meeting of agency heads or their representatives to resolve the issues.
- . The ultimate decision on a particular rulemaking is made by the head of the issuing agency taking into account the views received from the Quality of Life Process. In exceptional instances, the matter could be brought to the attention of the President.
- . The aforementioned process is repeated for final rulemaking.

#### EXEMPTIONS

The following actions are exempt from the process:

- All individual permits or licensing actions
- All enforcement actions

#### STRENGTHS

- . Provides the President with a formal mechanism for communicating his views to agency heads when inter-agency conflicts occur.
- . Provides a series of procedural safeguards which insure that senior technical staff and senior policy staff discuss issues before any agency is publicly committed to a particular course of action through

a proposed rulemaking.

- . Provides that major conflicts relating to a proposed regulatory action be discussed simultaneously by all agencies as opposed to a one-on-one written communications between the issuing agency and other agencies.
- . Provides insulation from undue political interference in rulemaking by exempting all licensing, permitting and enforcement actions from the process.
- . Is the only mechanism utilized in the Executive Branch to fulfill some of the objectives sought by the supporters of a one-House Congressional veto over regulations issued by Executive Branch Agencies.

#### WEAKNESSES

- . Many statutes vest the sole responsibility for making regulatory decisions with the head of an agency or a department, thus Presidential involvement is not warranted.
- . Interagency discussions of technical and policy issues often deal with minor problems and these discussions result in additional time delays in promulgating a regulation.
- . Often the issuing agency is placed in a position of having to defend its regulation to a group of other agencies which are unduly influenced by their respective constituencies.
- . Although the procedural requirements apply to all environmental, health and safety programs, these requirements are not uniformly enforced by the Office of Management and Budget.
- . The review process emphasizes procedural actions which must be taken by an agency prior to issuing a regulation but the process does not impose substantive analytical requirements which must be met by the issuing agency.

## Alternatives to the Quality of Life Review

The Quality of Life Review Process is only one of several alternatives for regulatory reform. However imperfect, the Quality of Life Review is the only procedural mechanism employed in the Executive Branch which provides a forum for a systematic discussion and multi-agency coordination and resolution of regulatory issues.

Other procedural mechanisms for interagency coordination are used to a lesser degree and still others have been proposed but not implemented. Some of the more prominent alternatives are discussed below.

### RELY SOLELY ON INFORMAL RULEMAKING

The Administrative Procedures Act (APA) was passed in 1946 to serve as a check on the growth of regulatory agencies that begun in the late thirties and early forties. The APA has remained substantially unamended with the exception of an amendment to include the Freedom of Information Act.

The Administrative Procedures Act sets forth the procedures to be followed when an agency issues regulations. The procedures utilized for issuing regulations can be divided into two groups:

- Informal rulemaking: regulations which tend to be an extension of the "legislative" process as opposed to an extension of the "judicial" process which deals heavily with the right of individual parties. Presently, most environmental, health and safety regulations are promulgated as informal rules.
- Formal rulemaking: regulations which deal with individual transactions related to the rights or property of a particular party. Transportation agencies such as the ICC and CAB, which issue rate determinations on specific tariffs between specific points are representative of agencies which utilize formal rulemaking procedures.

There is a substantial difference between the procedural mechanisms which an agency must follow in informal rulemaking as opposed to formal rulemaking. Under a formal rulemaking procedure, hearings are held before an Administrative Law Judge, agency witness and opposing witnesses are subject to cross-examination and all information upon which a regulatory decision is to be made must be based upon testimony given "on the record" in these quasi-

judicial or courtroom hearings.

In direct contrast to formal rulemaking, the procedures required under the Administrative Procedures Act for informal rulemaking are very loose and consist of:

- . publishing the proposed rule in the Federal Register
- . soliciting the views of interested persons
- . proposing the final rule

The Quality of Life Review complements the Administrative Procedures Act and is not intended to be a substitute for it. The Quality of Life Review does, however, accomplish the following objectives which are not realized from adhering only to the procedures required under the Administrative Procedures Act:

- . Provides for interagency coordination before a rule is proposed
- . Provides for a simultaneous discussion by all affected agencies on all issues
- . Provides a mechanism for resolving interagency conflicts among agency heads short of reorganizing them into one department.

#### RELY SOLELY ON FORMAL RULEMAKING

Since a number of regulatory agencies presently utilize formal rulemaking procedures, an obvious alternative to the Quality of Life Review is to utilize formal rulemaking procedures in the formulation of all regulations in all agencies.

The merits of this approach relative to the Quality of Life Review include:

- . Agency conflicts are resolved by an arbitrator with no affiliation whatsoever with any of the concerned agencies.
- . The sessions are open to the public and a record of the proceedings are available for review.
- . Federal agencies can not marshal the forces of their respective constituencies to influence the outcome of the proceeding.

The disadvantages of the formal rulemaking approach relative to the Quality of Life Review process include:

- . Discussions are usually limited to those among the Administrative Law Judge and attorneys. There is no opportunity for a dialogue among technical or policy officials.
- . There is no opportunity for a multi-agency discussion of all the pros and cons associated with a proposed regulatory action.
- . Formal rulemaking proceedings are costly, cumbersome and lengthy.

PROVIDE STATUTORY AUTHORITY FOR ONE AGENCY TO VETO THE  
REGULATIONS PROMULGATED BY ANOTHER AGENCY

This was one approach proposed in the House of Representatives during calendar year 1976. In one instance the Department of Agriculture would have been given the statutory authority to veto any action taken by the Environmental Protection Agency with respect to the registration of a pesticide.

This approach has the obvious advantage of giving a substantial incentive to the issuing agency to coordinate its actions with another agency whose programs are directly affected by a proposed rule. It has the obvious disadvantage of diluting the authority of the agency head statutorily responsible for meeting the goals of a particular act.

PROVIDE STATUTORY AUTHORITY TO THE PRESIDENT TO MODIFY  
OR REVERSE REGULATIONS SUBJECT TO A CONGRESSIONAL  
OVERRIDE

Under the Quality of Life Review, the authority of the President is limited to advising agency heads of his views on interagency conflicts. The final decision on a regulatory matter rests with the head of the issuing agency. Consequently, the head of any agency is perfectly free to issue a regulation even though the President might have expressed his reservations or, in extreme cases, his disapproval of the action. The President does, however, have the authority to remove an agency head. This limitation on Presidential authority is common to all of the previously discussed procedures for interagency coordination within the Executive Branch.

The alternative described herein increases the authority of the President to resolve interagency conflicts. It is predicated on following observations:



- . The President is the only person that is elected by all the people and is the most politically accountable official in the nation.
- . Article II, Section 3 of the Constitution requires that the President faithfully execute all the laws of the nation.
- . The Congress should be given authority, commensurate with that of the President, to insure that the appropriate checks and balances exist between the two Branches.

The proposal for combining the Presidential and Congressional responsibilities for the oversight of regulatory actions would work in the following manner:

- . The President would be authorized to modify or reverse any regulatory action.
- . The President would announce his intention to use this authority and would publish a finding in the Federal Register for comment.
- . Upon receipt of public views, the President would issue an Executive Order modifying or reversing a regulatory decision.
- . Congress, either by a concurrent resolution or possibly a one-House override, could nullify the Executive Order.

This approach gives considerable incentive to any given agency to coordinate its rulemaking with other agencies since any agency could appeal to the President for relief. This approach also has a self-policing feature in that the Executive Office of the President could remain out of all rulemaking procedures unless specifically requested by an agency head. There would be a natural tendency for the President to limit his intervention to truly significant policy issues since he, as opposed to the agency heads, would have to bear the major political responsibility for the decision.

There are some obvious disadvantages with this approach. First, there would be an increasingly greater tendency to resolve issues at the Presidential level in lieu of the agency head level -- as is presently the case in the Quality of Life Review. Secondly, interagency coordination would in essence be limited to Presidential intervention in lieu of deliberate dialogue on policy issues while the proposed regulation is under development.

## INCREASE THE ROLE OF THE CONGRESS

There is a belief among many practitioners of regulatory reform that regulatory conflicts arising from overlapping or conflicting statutory requirements, should be resolved by the Congress. Such an approach would insure that politically accountable officials make the basic regulatory decisions which govern our society -- not experts who see the problem from a one-dimensional perspective. Such an approach would tend to decrease the independence of the regulatory process from the political process.

There are two basic approaches to increasing the role of the Congress. One approach is for the Congress to write laws to a level of specificity which requires it to address the fundamental regulatory issues which the Executive and Judicial Branches are eventually faced to address during the implementation of a statute. The other approach is to provide a mechanism which would permit Congress to overturn or nullify regulations promulgated by Executive Branch Agencies.

With respect to the first approach -- the need for Congress to write more articulate laws -- Judge Carl McGowan of the D.C. Circuit Court of Appeals states:

"When by Congressional delegation tantamount to abdication the policy choices are largely committed to agency rule-making, the record before the reviewing court is essentially the same. No matter how the standard of review is articulated, there is a wide latitude for judges to note their policy views in the same manner as a legislator ... The pattern taking shape appears to be that of Congress intent on bringing Federal power to bear in an ever-widening range of human affairs but having no better answer for the maintaining, supervision and enforcement of the exercise of that power than the employment of the Federal Courts."

The essence of Judge McGowan's argument is that the Congress is not only relying upon the courts to assure that the Executive Branch functions properly, but in fact is more often leaving hard policy decisions up to the administrators and ultimately the courts for resolution. The device used is the broad grant of administrative authority subject to Judicial review but unhampered by clear statements of Congressional intent.

Consequently, Congress by granting broad authority to different agencies sets the stage for conflicts between them. Resolution of such conflicts is particularly difficult

because, in the absense of specific legislative guidance, no one can say for certain which of the contending agencies has exceeded its mandate. The problem is exacerbated when private interlopers succeed in having the courts reverse the administratively achieved resolutions. Obviously, such circumstances call for methods of arbitration between the agencies and of narrowing the likelihood for Judicial disruption.

The Executive Branch could take actions which put greater pressure on the Congress to write more articulate laws. Such an approach could include:

- . Formulating a view of the permissible limits of Congressional power to delegate authority; veto any legislation transgressing these limits.
- . Using these permissible limits as a guide in requesting the Attorney General not to defend any statute deemed excessively broad.
- . Requesting the Attorney General to seek a Supreme Court definition of the delegability of legislative authority.

A number of legal scholars contend that the second approach outlined herein -- either a one-House or concurrent resolution veto of agency regulations -- is in all probability unconstitutional. Assuming for the moment that this is in fact the case, it should be noted that it would probably be a considerable time before such an issue were resolved by the Supreme Court.

In such an event, the Congress could move to have Executive Branch Agencies begin to forward their regulations for review by Congressional Committees. This sequence of events could lead to a considerable disruption if Executive Branch programs. Consequently, there is an urgent need for the Executive Branch to get its house in order.

#### IV. OPTIONS

The preceding sections present a wide range of choice for implementing regulatory reform measures. The following options were discussed:

- . Retain the Quality of Life Review
- . Rely solely on informal rulemaking
- . Rely solely on formal rulemaking
- . Provide statutory authority for one agency to veto the regulations promulgated by another agency
- . Provide statutory authority to the President to modify or reverse regulations subject to a Congressional override
- . Increase the role of the Judiciary
- . Increase the role of the Congress
- . Retain the Economic Impact Statement Process

Clearly, different persons will review the above list and arrive at different conclusions with respect to the viability of a particular option. It appears, however, given the urgency of the need for regulatory reform, that the most viable options available for immediate implementation are:

1. Abolish Both the Quality of Life Review and the Economic Impact Statement Process.

This option would result in relying completely on informal rulemaking procedures and the subsequent litigation in the courts to achieve the goals of interagency coordination. The Executive Office of the President would issue advisory guidelines for interagency coordination but would not enforce them upon the agencies.

2. Issue an Executive Order Which Establishes the Formal Procedural and Analytical Requirements for Inter-Agency Coordination of All Regulations in All Agencies.

This option would result in the issuance of an Executive Order to the heads of all agencies and departments with respect to the interagency coordination of regulations.

The Executive Order would outline the procedures to be followed by individual agencies, including the manner in which interagency conflicts are to be resolved. It would also focus on the economic analyses to be performed prior to the promulgation of a proposed rule. The Quality of Life Review and the Economic Impact Statement Process would be abolished.

3. Initiate Formal Rulemaking Proceedings in All Agencies.

As a matter of administrative policy, all Executive Branch agencies would utilize formal rulemaking procedures in the formulation of regulations. There would be no requirements for interagency coordination but any agency could petition to be heard in any hearing conducted by any agency.

4. Provide Statutory Authority to the President to Modify or Reverse Regulations Subject to a Congressional Override.

This option would provide officials elected at the Federal level, the President and the Congress, the authority to modify, or reverse any regulation issued by any Executive Branch agency. A procedural mechanism would have to be developed which would delineate the conditions which would have to be met in order that an issue be brought to the attention of the President. Pending enactment of this legislation, all agencies would utilize formal rulemaking procedures unless exempted by the President.