ROLE OF OMB IN REGULATION

United States. Congress. House. Committee on Energy and Commerce.

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THURSDAY, JUNE 18, 1981

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2123, Rayburn House Office Building, Hon. John D. Dingell (chairman) presiding.

Mr. DINGELL. The subcommittee will come to order.

Today, the subcommittee will examine the regulatory reform program of the administration.

On February 17, 1981, the President signed Executive Order 12291. The preamble states ambitious and meritorious desires: "Reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions . . . and insure well-reasoned regulations." These are goals with which no one, especially the Chair, would quarrel. Like the President, the Chair believes these goals can be realized.

Unlike the President, the Chair believes we can reduce regulatory burdens without totally displacing the discretionary authority of agency decisionmakers in violation of congressional delegations of rulemaking authority.

Unlike the President, the Chair believes we can increase agency accountability without destroying the safeguards against secret, undisclosed, and unreviewable contacts by governmental and nongovernmental interests seeking to influence the substance of agency action, as would be done if OMB is made the central and unrestrained clearinghouse, often, the Chair believes, in defiance of clear statutory directions by the Congress.

Unlike the President, the Chair believes we can insure more reasoned regulations without the creation of substantively oriented procedures designed to direct and control the rulemaking process.

These are also the well-reasoned conclusions of a 3-month study by the American Law Division of the Library of Congress, contained in an impressive and compelling legal memorandum prepared for the subcommittee and received yesterday.

These consequences led to the conclusion that the President exceeded his authority in issuing the order and that the order deprives interested persons of their constitutional right to due process of law.

The sentiments were echoed by this country's preeminent administrative law scholar, Prof. Kenneth Culp Davis. In the draft pre-

pared for his new treatise which Professor Davis shared with the subcommittee, he comments on the Executive order:

> . . . the reality may be that the Director and his staff may in many ways secretly influence the rulemaking. Indeed, the most crucial elements of the rulemaking may be immune to any kind of response by the persons who are vitally affected by the rulemaking. The basic question that is raised is whether or not all the progress that has been made in the development of procedural protections in rulemaking is now subverted with respect to Executive agencies by Executive Order 12291.

If these arguments were not persuasive enough, yesterday's Supreme Court decision in *American Textile Manufacturers Institute* v. *Donovan,* the cotton dust case, removed all doubt.

The Court spoke with clarity when it held:

> When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute . . . Congress uses specific language when intending that an agency engage in cost-benefit analysis.

We are not here today to pass final judgment on the President's successes or failures in regulatory reform. Such is a difficult task, and this is too early a time.

The Chair will note the Chair's concern for the administration's efforts to declare success. The headlines this weekend read: "Regulators said to save $18 billion." The Chair believes such a claim to be misleading to the point of being fraudulent.

We will inquire today and in succeeding proceedings into whether, in fact, the alleged savings are real, have been made, can be made, and upon what basis the claim is made.

We will discuss today the likely success or failure of this effort: First, with a panel who have been deeply involved in regulatory reform from different perspectives—the agency, the White House, and the public interest—and, second, with Dr. James C. Miller III, the Administrator for Information and Regulatory Affairs at OMB.

Regulatory reform is a subject that should command all of our attention. It is needed. The Chair and this subcommittee have been and will continue to work hard toward that end.

The Chair and this subcommittee, however, will not participate in a process that circumvents existing law and tramples on procedural protections in the name of reform. We are, after all, a nation of laws and not of men.

The Chair does add a footnote to the comments just made, and that is that years ago, under the leadership of then Speaker Sam Rayburn, the Subcommittee on Oversight was created.

One of the reasons that this subcommittee was created, the record should show, was because of ex parte communications and because of the attempts of the then administration to influence and to dictate the policies of independent agencies created by the Congress and attempts by that administration to subvert the independence of those independent agencies.

It is the hope of the Chair that this administration will not cause the purposes of this subcommittee to revert to the original purposes of the subcommittee at that time.

It is, however, the intention of the Chair of this subcommittee, if that kind of interest be necessary, to pursue with great vigor the original purposes of the subcommittee.

The Chair observes that some of my colleagues may have statements, and if so the Chair will be delighted to recognize its colleagues at this time.

Does the gentleman from Pennsylvania seek recognition for that purpose?

Mr. MARKS. I do, Mr. Chairman.

Mr. DINGELL. The Chair is happy to recognize the gentleman at this time.

Mr. MARKS. Thank you, Mr. Chairman.

I would like to welcome all of our witnesses this morning, especially Dr. Miller who was before this subcommittee just last year, although under somewhat different circumstances.

Speaking for my minority colleagues as well, I want you all to know that we appreciate your testimony and are looking forward to hearing it this morning.

Initially, I am convinced that it would be very helpful today to maintain an historical perspective. Let us be mindful that administrations of both parties have tried to impose discipline and reason on executive branch agencies because of their well-known tendencies to spew forth unneeded and certainly unwise regulations.

In fact, both Presidents Ford and Carter used Executive orders in their attempts to get a handle on this problem. Unfortunately, both were unsuccessful because they were just not aggressive enough in their approaches to tame the regulatory monster.

This administration is trying to build upon and to improve upon the foundations laid by the previous administration's Executive order.

Quite frankly, I do not consider it helpful to our non-partisan mutual desire to control regulation to make this into some kind of a political football.

Of course, each of us may disagree with the individual various methods, but the fact remains that those methods, tried until now, have been unsuccessful.

On the other hand, I have reason to believe that the testimony today will show that the current plan is functioning adequately and promises to be quite effective.

We, of course, will be interested in hearing the reaction of our witnesses today to the Supreme Court decision handed down yesterday in the Cotton Dust suit and, of course, its immediate effect specifically on Executive Order 12291 and generally on the process of regulatory relief.

Thank you, Mr. Chairman.

Mr. DINGELL. The Chair thanks the gentleman.

The Chair recognizes the gentleman from Tennessee. Before the Chair does so, the Chair thanks the gentleman for handling the hearing yesterday in the absence of the Chair. The Chair has been advised that the gentleman from Tennessee handled matters very well, and the Chair expresses the thanks of the Chair and also of the subcommittee to the gentleman from Tennessee.

Mr. GORE. Thank you very much, Mr. Chairman.

Mr. DINGELL. The gentleman is recognized.

Mr. GORE. Thank you, and I thank my colleagues for their indulgence for this opening statement.

I take this time because I feel that this hearing should be taken very seriously. I think it is the most significant hearing we have had this year.

I had the opportunity to chair hearings before this subcommittee on almost exactly the same subject 2 years ago, and at least one of our witnesses today was present on that occasion. It does involve the separation of powers and may be the beginning of an extremely long and difficult fight over these issues.

I want to commend you, Mr. Chairman, for initiating this investigation into the role of the Office of Management and Budget in regulation.

The OMB has been, and under our former colleague, Mr. Stockman's direction, obviously continues to be an extraordinarily useful institution to any President.

Ever since the establishment of the old Bureau of the Budget under the Budget and Accounting Act of 1921, the President has had a central place to bring together the competing priorities of Federal agencies under his direction and to fashion a financial program for submission to the Congress for ultimate review and approval.

Through long established processes, recently supplemented by the Budget and Impoundment Act of 1975, the Congress has developed a rational and open process for determining the priorities of the Nation, and OMB has contributed to that process.

It is perhaps not surprising, therefore, that the administration should turn to OMB as a place from which to direct its regulatory reform efforts.

In doing so, however, I believe that it has disregarded 50 years of procedural progress in making the regulatory process one that is equally as open as the budget process, that it has significantly overestimated this society's ability to fairly do the kind of analysis required under Executive Order 12291, that it is damaging the OMB's credibility in a cynical attempt to cripple important activities of the Government, and, perhaps most importantly, that it is coming dangerously close to violating the separation of powers doctrine that is at the heart of our constitutional system.

With the adoption of the Administrative Procedures Act, Congress explicitly established a neutral process for insuring that regulatory decisions would be carried out in the full light of day.

In the ensuing years, the Congress, and particularly this committee, has taken further steps to insure the propriety of the regulatory process by emphasizing the need for regulators to observe strict standards of conduct that scrupulously avoid ex parte communication as well as conflicts of interest or even the appearance of conflicts of interest.

I am concerned that the new arrogation of authority to OMB in the regulatory process is not accompanied by any thought about the safeguards that are needed to ensure an open regulatory process.

The imposition of an inflexible cost-benefit test on all regulations is troubling in two respects: First, we all know that our ability to do the kind of analysis commanded in the Executive order is chancey at best. For example, what dollar figure can be assigned to the avoidance of birth deformities?

I am continually astonished at statements by members of the administration, including one of our witnesses today, that blithely discount the benefits of regulation while trumpeting grossly inflated estimates of cost.

And I remain to be convinced that any kind of ethereal academic analysis can adequately value the benefits of lives saved by regulations that prevent the introduction of unsafe drugs, adulterated foods, and that attempt to mitigate insufferable conditions in workplaces.

Even if the analysis can be done, this administration is not providing the agencies with resources to do the job. Indeed, in a cynical fashion, the analytical resources of agency after agency are being cut, just as the demands placed upon them by OMB are increased.

The juxtaposition of increasingly rigid demands for analysis and decreased analytical resources cannot help but lead to the conclusion that this administration's real goal is to simply stop regulation. If this is indeed the goal, it would be best to say it outright.

Instead, the Director of the OMB's Office of Information and Regulatory Affairs cynically tells the public that agency heads will still be making the final decisions on regulations, when he really knows that people who defy his office will be fired.

Such a policy of "cooperation" between OMB and the agencies is not likely to do much for the morale of agency heads and their staffs who are tasked with the requirements for analysis.

Finally, I am concerned that Executive Order 12251 comes dangerously close to removing the substantive power entrusted to executive agencies by the Congress.

I fully understand that presidential actions regarding the organization and operation of the Government need to be accorded great deference, but I am concerned that executive Order 12251 in fact, if not directly, totally displaces the discretionary authority of agency decisionmakers in violation of congressional delegations of rulemaking authority.

The process of reforming regulation in this Nation is a necessary one, but it can only be accomplished in a way that ensures its legitimacy by formulating neutral, open processes that ensure that the elected representatives of the people in the Congress have an explicit opportunity to review the activities of the executive in a routine and continuous fashion.

If OMB is to be the President's whip in this area, it must take care not to impose analysis that guarantees no regulation or to impose processes that unfairly prejudice regulatory outcomes.

Thank you, Mr. Chairman.

Mr. DINGELL. The Chair thanks the gentleman.

The Chair recognizes now the gentleman from Kansas, Mr. Whittaker.

Mr. WHITTAKER. Thank you, Mr. Chairman.

I welcome the opportunity to have these hearings today, and I would personally like to congratulate the President and his task force on regulatory reform for taking action that is, in my opinion, long overdue.

From the very first days of his administration, President Reagan has taken a very aggressive posture in attempting to reduce the

regulatory burden placed on the American people, and I welcome the chance to discuss these improvements in a public forum such as this.

For too long, the American people have been at the mercy of the bureaucratic regulators in Washington who devise rules and regulations without taking into account the effect that they will have on the American people.

Just last week, this subcommittee spent many hours examining what happened when a couple of bureaucrats from the Food and Drug Administration decided to turn the contact lens industry upside-down by removing salt tablets from the market and mandating a premixed saline solution in its place.

No one bothered to examine the impact that this decision would have on the American consumer, and, as a result, we have all been stuck with a bill of over $500 million.

There is no doubt about it—there is too much regulation in this Nation and it is not only costing the American people millions of dollars, but it is adding to the inflation that we suffer.

By forcing Federal agencies to submit a cost-benefit study before a regulation is implemented, President Reagan has finally taken control over the executive branch of Government and is determined to let the businesses of this Nation get on with business by reducing the burdens of excessive regulation.

I do not see how anyone can object to knowing what the effects of a regulation will be before it takes effect. Why should we have to wait until after the damage has been done before we realize that a mistake has been made? It only makes good sense to know what the impact of a regulation will be ahead of time.

The President has taken command and is legally and properly exercising his authority as Chief executive. Rather than protect the rights of the regulators in Washington, he has chosen to protect the rights of American business and the American consumer. I believe that he should be congratulated for this action, and I look forward to monitoring the work of the task force as it begins its work.

Thank you again, Mr. Chairman.

Mr. DINGELL. The Chair thanks the gentleman.

The Chair recognizes now our colleague and friend, Mr. Synar.

Mr. SYNAR. Thank you, Mr. Chairman.

I thank the chairman for providing us with this opportunity to examine this administration's use of executive orders and cost-benefit analyses to accomplish the reform of the regulatory process.

As a member of the Judiciary Subcommittee on Administrative Law, I have been actively involved in drafting legislation which opens the rulemaking process up to greater public participation.

Our goal has been to create a bill which will enable all interested parties to have input as rules are being drafted and which provides for greater oversight of the process by the Congress, the executive, and the Federal courts.

This legislation is the direct result of a general consensus in Congress that real reform is necessary and must be enacted quickly and fairly. I am greatly alarmed, however, by the approach this administration has taken to achieve our common goal.

Real regulatory reform assures all interested parties—business and labor, environmentalists and developers, manufacturers and

consumers—that they are getting a fair hearing before the agencies. It is not done behind closed doors at the White House or in a private office at OMB.

Real regulatory reform will come only after open hearings and full debate in Congress, where all sides have the opportunity to share their views and follow the legislative process. It is not achieved by unilateral executive order.

And real regulatory reform will benefit all the people, permanently. It is not a 4-year public relations campaign that disappears after the next election, and it is not measured by the number of pages in the Federal Register or by comparing the costs of rules never written against the benefits of rules never achieved.

Mr. Chairman, it is the Congress, as the elected representatives of the people, who have created the executive agencies, it is the Congress who have written the laws these agencies implement, and it must be the Congress who revises and reforms the laws under which these agencies operate.

When a President of the United States acts on his own to manipulate the work of the Congress, he is circumventing the democratic process.

I am reminded of one of Mr. Reagan's predecessors, Richard Nixon—when he did not like the purposes for which Congress had appropriated money, he impounded the funds.

Now we have another President who, when he does not like the purposes for which Congress has created executive and independent agencies, seeks to impound the intent of Congress.

I submit today, Mr. Chairman, that the impoundment of open access to the rulemaking process is no less dangerous than the impoundment of funding which occurred under Mr. Nixon. I, for one, had thought we had seen the last of the imperial Presidency. I fear this morning that we have not.

Thank you, Mr. Chairman.

Mr. DINGELL. The Chair thanks the gentleman.

The Chair announces that a very lengthy document has been prepared for this subcommittee in response to the subcommittee's request. The document referred to is the Congressional Research Service's study entitled: "Presidential Control on Agency Rulemaking: An Analysis of the Constitutional Issues That May Be Raised by executive Order 12291."

The Chair announces that that will be published as a staff document by the subcommittee, and the Chair will observe that it will probably also be inserted in the hearing record at the end of the transcript because we will be referring to it during the discussion of this matter.

The Chair announces that our first panel of witnesses consists of Mr. George Eads, who is senior economist at The Rand Corp.; Joan Z. Bernstein, Esq., of Wald, Harkrader & Ross; and Douglas Parker, Esq., deputy director, Institute of Public Representation, Georgetown University Law Center.

Ladies and gentlemen, if you would each come forward to appear before the subcommittee as witnesses, we will hear your testimony.

The Chair is not sure this is in order, but in keeping with the practices of the subcommittee over the years, even though you are

here to advise us on matters of law, I think we will ask that you be sworn. Do you have any objection?

Mr. EADS. No, sir.

Ms. BERNSTEIN. No, sir.

Mr. PARKER. No, sir.

Mr. DINGELL. Then, will you raise your right hands? Do you solemnly swear the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. EADS. I do.

Ms. BERNSTEIN. I do.

Mr. PARKER. I do.

Mr. DINGELL. If you would each be seated, you may regard yourselves as sworn.

The Chair will advise that copies of the rules of the committee, rules of the House, and rules of the subcommittee relevant to your appearances are there at the witness table.

The Chair advises that we will hear first Mr. Eads' statement, then Ms. Bernstein's, and finally Mr. Parker's.

We do thank you very much—each and all—for your kindness and courtesy to the subcommittee and for your assistance to us. We know that you have put considerable work and effort into your statements, and we are very grateful to you for your assistance.

Mr. Eads, we recognize you first, and we do thank you.

TESTIMONY OF GEORGE C. EADS, SENIOR ECONOMIST, THE RAND CORP.; JOAN Z. BERNSTEIN, ATTORNEY, WALD, HARKRADER & ROSS; AND DOUGLAS PARKER, DIRECTOR, INSTITUTE FOR PUBLIC REPRESENTATION, GEORGETOWN UNIVERSITY LAW CENTER

Mr. EADS. Mr. Chairman and members of the subcommittee, I am pleased to have been invited to appear here today to comment on certain aspects of the Reagan administration's regulatory reform efforts.

At the outset, I need to state for the record that the views I will express are my own and do not necessarily reflect the opinions of the Rand Corp., or of any of the agencies or organizations that support its research.

I want to concentrate on the efforts by the Reagan administration to increase White House control over the activities of the executive branch regulatory agencies—agencies such as EPA, OSHA, and NHTSA.

Thus, I will not refer, at least in this prepared statement, to the question of the relationship between the White House and statutorily independent regulatory commissions such as the ICC, CAB, FCC, CPSC, FTC, and FERC.

My concerns with the Reagan regulatory oversight process are spelled out in the attached article that will be published within a few days in the May/June issue of the American Enterprise Institute's journal, Regulation.

I would like to thank AEI for permitting the article to be released early to enable me to refer to it at this hearing. Since you have it before you, I will merely summarize.

Mr. DINGELL. Without objection, it will be included in the record following your statement.

Mr. EADS. The article has two purposes: First, to describe in some detail the differences between the regulatory oversight procedures and institutions employed during the Carter administration and those established by President Reagan; and, second, to suggest what these differences may imply for regulatory reform.

I conclude that while the Reagan program bears some resemblance to Carter's, and indeed those of Presidents Nixon and Ford as well, there can be no doubt that it is intended to move considerably beyond any of these earlier programs.

Unfortunately, I am unable to conclude that the Reagan program will advance the cause of regulatory reform. Indeed, I fear just the opposite.

Let me begin by discussing the set of general requirements for rulemaking outlined in the Reagan Executive order.

The Carter administration always took pains to stress that its requirements for regulatory analysis should not be interpreted as subjecting rules to a cost-benefit test. Agencies were to identify costs and benefits, to quantify them insofar as possible, and—within the constraints of statutes—either to choose cost-effectiveness solutions or to explain why they had not.

The burden of proving that proposed rules were not cost-effective, and of pursuing the matter with the President if need be, lay with senior White House aides.

In contrast, except where expressly prohibited by law, President Reagan's Executive order requires that a cost-benefit test be applied—and met—and places the burden of proof for showing this on the agencies.

Regulatory actions are not even to be proposed unless agencies can demonstrate that the potential benefits to society outweigh the potential costs. How they are to make such a demonstration, especially when many regulatory benefits and costs are nonquantifiable, is left unspecified.

If the agency determines to regulate, it must choose, first, the objectives that maximize net benefits to society; and, second, the specific regulatory approaches that minimize net costs to society.

Finally, each agency is to set its regulatory priorities so as to maximize aggregate net social benefits, taking into account the condition of the national economy, the condition of the industries affected by its regulations, and the impact on those industries of regulatory actions contemplated by other agencies.

These requirements might not be all that objectionable if viewed as broad principles toward which agencies might strive in order to improve the efficiency of their regulatory programs. But as hard and fast demonstrations that must be made before new regulations can be issued, or existing regulations reformed, they are straitjackets which could paralyze the agencies.

To some, this result would be fine. As far as such people are concerned, the best thing that could be done with the regulatory process is to shut it down. These people consider anything which looks like a move in that direction to constitute progress. This view is naive on at least two counts.

First, it ignores the role that regulation must play in a society as complex as ours. Regulation has been misused at times in the past, and even useful regulation has sometimes been inappropriately administered.

But regulation is and will continue to be a legitimate activity of Government. It cannot be shut down any more than can the Government's other essential activities.

Second, this view ignores the need to reform the body of regulations now in place. Paralyzing the process by which new rules are issued paralyzes the reform of existing regulations.

Agencies cannot merely wave a wand and eliminate regulations. Facts must be gathered supporting the proposed changes, analyses on these changes must be performed, and public comments gathered.

As Nino Scalia has argued so eloquently, even those who believe that the best regulation is no regulation should be aware of these due process requirements and should be concerned about erecting impossible barriers to the issuance of regulations.

New general rulemaking requirements are not the only thing that President Reagan announced. He also has drastically centralized the power to administer regulatory oversight.

Under Carter, the various oversight functions were parceled out among several offices. In part, this was a deliberate decision reflecting the specialized capabilities of certain organizations. In part, it reflected the ongoing experimentation that occurred during the Carter administration.

The Reagan Executive order consolidates White House oversight functions in OMB's Office of Information and Regulatory Affairs, which I will refer to as OIRA.

In effect, OIRA becomes the gate through which all important regulations must pass—not just once, but twice—on their way to becoming law.

OIRA's powers are very broad. It can unilaterally determine which rules are major and thus subject to the full procedural requirements of the Executive order. It can exempt regulations from those requirements. For those rules determined to be major, OIRA can hold up the issuance of a Notice of Proposed Rulemaking until it is satisfied with its contents, subject only to being overruled by the President's Task Force on Regulatory Relief, which it helps staff.

It can also delay the issuance of a final rule for a period of time, subject to the same check. It can designate existing rules for analysis and establish schedules for such reviews.

It will publish the regulatory calendar. It will oversee the implementation of the Regulatory Flexibility Act, which requires regulations to be structured to take account of their impact on small business, and the Paperwork Reduction Act.

Finally, it is specifically charged with developing procedures for estimating the annual benefits and costs of agency regulations, on both an aggregate and an industrial sector basis—for purposes of compiling a regulatory budget.

OIRA's responsibilities are thus considerably broader than the sum of the responsibilities of the agencies and organizations it replaced. What procedures will it employ in carrying out these responsibilities? Again, there have been significant changes.

One important difference between the Carter and Reagan oversight processes is in the use made of the formal public comment period.

Under Carter, it was during this period that the regulatory analysis review group—RARG, for short—or the Office of Government Programs and Regulations in the Council on Wage and Price Stability—the successor to the office that I founded—prepared and filed on the record comments for important agency proposals.

These filings served a useful public education purpose as well as helping to assure that White House concerns were made a part of the rulemaking record.

The Reagan plan dispenses with public filings by Executive Office agencies such as COWPS and by interagency groups such as RARG.

Any views that OMB or any other agency may have on a proposed rule presumably will be reflected in the proposal when it is published. The public will have no opportunity to learn how these views may have differed from the views of the agency proposing the regulation. Some might consider that a good idea. I do not.

Mr. Chairman, I want to depart from my prepared statement at this point to call your attention to certain materials that were issued last Friday by the Office of Management and Budget describing the progress they believe that they have made in regulatory reform since the administration took office.

Included in that package is a memorandum dated June 11—which was, in effect, embargoed until June 13—to the heads of executive departments and agencies from David Stockman. The subject is: "Certain Communications Pursuant to Executive Order 12291: Federal Regulation."

It is a two-page memorandum, and it is intended to either modify or clarify—I cannot tell which—the procedures I have been discussing.

In particular, the last two paragraphs of the memorandum seem to imply that OMB may, in fact, revive the process of on-the-record filings with agencies. That is the next-to-the-last paragraph of the memorandum——

Mr. DINGELL. You said it may use the process——

Mr. EADS. May develop formal filings as RARG did, or as COWPS did.

Mr. DINGELL. Mr. Eads, your statement is very helpful, but the acoustics are bad. Could you pull that mike a little closer to you?

Mr. EADS. Yes. I am discussing the memorandum that Budget Director Stockman sent out on June 11, which was actually released for public consumption on Friday at 6 p.m.

Mr. DINGELL. Without objection, it will be inserted in the record following your statement.

Mr. EADS. I am saying that the last two paragraphs of the memorandum suggest either a major clarification or a change in policy concerning the use of public filings.

Let me quote the paragraph, since you might want to ask Jim Miller about this. The second-to-the-last paragraph of the memo states: "On occasion, the task force staff and OMB will receive or

develop factual material which they believe should be considered by an agency during a particular informal rulemaking. In accordance with advice provided by the Department of Justice, such material, when submitted to an agency for its consideration, will be identified as material appropriate for the whole record of the agency rulemaking."

I do not know how they plan to interpret it. It was my understanding—which I confirmed with a number of people—that at least prior to the issuance of this memo they did not plan to have public filings either for OMB or anyone else.

But if this, in fact, contemplates routine public filings on all occasions when OMB and an agency differ, then my testimony should be corrected. Again, you will have to ask Jim Miller for comments on what this means.

Mr. GORE. Will the chairman yield?

Mr. DINGELL. The Chair does not have the floor. The Chair would like to see the witness proceed. We will recognize our colleague for questions at the appropriate time.

Mr. GORE. I will wait. The timing of the memo—I think our witness should not be concerned that his statement is sort of outdated by this memo. I do not think it is outdated at all. In fact, this memo was prepared after the notice of the hearing and after OMB started preparing for the hearing.

Mr. DINGELL. Nor does the Chair, and the Chair will advise that the Chair will instruct the staff at this time that they will see to it that appropriate memos and so forth from the Office of Management and Budget be inserted in the record as might be appropriate.

Mr. MARKS. Mr. Chairman?

Mr. DINGELL. Does the gentleman from Pennsylvania seek recognition?

Mr. MARKS. Yes, sir.

Mr. DINGELL. For what purpose?

Mr. MARKS. For the purpose of asking the chairman to perhaps ask the witness at this point whether or not, having read that memo—which we all have—whether that would change his testimony significantly at this particular point.

Mr. DINGELL. The Chair does not want to open up for questions of the panel at this particular time. The Chair will recognize the gentleman for that question at the earliest possible moment.

The Chair again recognizes Mr. Eads.

Mr. EADS. Returning to my prepared statement, the Reagan and Carter procedures also differ substantially in the way they operate during the period after the formal public comment period has closed—the "postcomment" period.

The Carter procedures provided for monitoring of important regulations by top Presidential advisers—the CEA Chairman, the OMB Director, the President's Assistant for Domestic Policy, his inflation adviser, and his science adviser.

These individuals—or, more usually, their aides—met regularly to track important rulemakings, assign responsibility for White House/agency liaison, and decide whether or not to involve the President. The substance of any White House/agency interaction was recorded by the agency and included in the rulemaking file.

Under Reagan, OIRA is the primary instrument of postcomment involvement. Thirty days before a rule is to be issued, the agency proposing it must transmit the rule, together with the final regulatory impact analysis, to OIRA.

If OIRA objects, it can hold up the rule until its objections are resolved or until it is overruled by the President's Task Force on Regulatory Relief or by the President himself.

Only in the event of disagreement on the final rule, and then possibly only in the event of unresolved disagreement, will the substance of these discussions be recorded and put into the rulemaking file, where they will be available to courts that may review the regulation.

Mr. Chairman, again it is necessary for me to depart from my statement for a moment because the final paragraph of Mr. Stockman's memo contains an even more cryptic comment.

The second sentence of the final paragraph says:

> Our procedures will be consistent with the holding of and policies discussed in *Sierra Club* v. *Costle,* No. 79-1565, Slip Opinion, at 212 to 220, D.C. Circuit, April 29, 1981.

Not having been able to get hold of that opinion at this point, I am not sure whether that is a clarification about how they will log postcomment discussions or whether it indicates that they intend to adopt the procedures that the Carter administration used.

It was my impression that they contemplated very different procedures, and again this is a matter that I would be happy to get into in the questions and that maybe should be addressed to Mr. Miller.

Another aspect of the Reagan postcomment process that differs significantly from that employed by the Carter administration is the attention paid to controlling ex parte contacts.

The problem of policing such contacts is always difficult, but under Carter great pains were taken to minimize the possibility that they could "taint" a rulemaking.

Officials who either were or who might become involved in postcomment discussions were extremely careful to avoid contacts with outside parties such as industry representatives. The task of keeping in touch with an agency was informally assigned to a single person.

Individuals from White House offices having most frequent contacts with industry were excluded from postcomment activities to avoid their becoming a conduit for information not on the public record.

In those rare cases where information relating to the rulemaking was inadvertently received by those in the White House following the rule, a copy was immediately passed on to the agency with a request that it be placed in the rulemaking file.

The Reagan administration's decision to broaden the circle of individuals potentially involved in postcomment activities to include a number of Cabinet officers—the members of the President's Task Force on Regulatory Relief—will make the policy of policing outside contacts substantially more difficult.

It will be impractical to insure that these individuals, or their aides, any of whom have only sporadic involvement in rulemaking

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and who, in the natural course of their duties, have numerous contacts with industry, will confine themselves to the rulemaking record in reaching decisions.

Given the central role it will play in White House regulatory oversight, OIRA's ability to handle the duties assigned it becomes an extremely important question.

If it wants to conduct effective regulatory oversight, OIRA must show everybody involved—the agencies, the Congress, the courts, the regulatees, and the general public—that it can use its power responsibly. The assertion of authority must be matched by competence in exercising the authority.

Considering the enormous scope of its powers and its apparent intent to move aggressively, OIRA would find itself in trouble on these grounds even if its resources were ample, but they are not. Furthermore, to a large extent, the resources that OIRA does have are ill suited to the task of regulatory analysis.

This last point is particularly important for, considering the stress that the Reagan program lays on formal cost-benefit analysis, the meagerness of OIRA's analytical resources cannot help but undermine its credibility.

Of course, OMB will have help with regulatory oversight just as it does with budgetary oversight. Indeed, the overwhelming bulk of the responsibility for preparing supporting regulatory analyses—including the formal cost-benefit analyses now required under Executive Order 12291—must necessarily fall on the agencies themselves.

A major paradox of the Reagan program is that, while giving OIRA an extremely broad mandate and high political visibility, it lays a much greater analytical burden on the agencies that did the Carter procedures.

Unfortunately, the way the Reagan process is being operated, it is likely to weaken, not strengthen, the agencies' incentives to perform this role in a manner consistent with both Presidential objectives and legal requirements.

How are the agencies to be motivated? The quick answer is that President Reagan is appointing agency heads who share his basic regulatory philosophy. But that answer is certainly too quick. A general desire to check regulation does not easily translate into an effective program of regulatory management.

The agencies must possess both sufficient analytical capabilities and the incentive to use them wisely. Unfortunately, President Reagan's budget priorities show signs of reducing, not increasing, agency resources directed to analysis—resources that even prior to recent budget cuts would likely have been inadequate to meet all the demands that the Reagan program places on them.

Even more serious is the threat that OIRA will give the signal that, despite the words of the Executive order, analysis is really unimportant in determining whether regulations will be allowed to proceed—that the true litmus test is political acceptability.

There are already signs that this may occur. I cite one such instance in my article, and I am aware of others—specifically, in deciding which regulations should be held up in the so-called midnight regulations. As best as I can tell, OIRA did not give any attention to whether or not the regulations proposed by the agency were or were not well supported.

For example, the OSHA noise regulation which, in my opinion, was very well supported by the agency, not only on feasibility grounds but on grounds of cost-effectiveness and cost-benefit, were held up just the same as any others. The Food and Drug Administration's patient package insert regulations were also held up despite good economic support. But I think the greatest example of this problem is in the putting together of the auto relief package—actions to help the U.S. auto industry, issued April 6, 1981—where, regardless of what you think of the individual numbers that are claimed, the agencies are being given the signal that the results should come out a certain way before the necessary analysis has even been begun.

If you look carefully at the contents of the auto package, you will see that most of the claimed savings are anticipating the outcomes of regulatory proposals that have not even been issued and that will not be issued for some time.

The way I have always understood that regulation operates, the decision is to be based on the record accumulated during the rulemaking proceeding.

However, the White House is already claiming cost savings from diesel particulate regulations, emissions averaging, and a number of things where, when we in the Carter administration looked at them, a record was nonexistent. Not that the merits were arguable—there was just no evidence on the record on, for example, the feasibility of averaging. The White House seems to have already decided what the conclusion in the rulemaking should be.

If the agencies are not adequately supplied with analytical resources or if, either intentionally or inadvertently, they are signaled that the analyses they do produce do not matter, the cause of regulatory reform will be set back seriously. Regulatory analysis will be returned to the State it was once in—a tool used to justify predetermined outcomes.

Although I have already mentioned it in passing, I want to return briefly to an issue of great concern to me—that of public visibility and accountability.

Under Carter, there were complaints that the regulatory oversight activities of the White House were not sufficiently visible to the public.

Just how visible one can feasibly make any governmental process and still make it work is always a difficult question. But I do not see how anyone can charge that the Carter administration did not go quite far—perhaps as far as feasible—toward making sure that its involvement with the agencies concerning rulemaking was visible and on the record. And, I might add, that our processes have, in fact, been upheld by the courts—most recently in *Sierra Club* v. *Costle.*

In contrast, unless it has indeed been modified substantially by last Friday's Stockman memo, the Reagan process is intended to impose a virtual information blackout on intragovernmental discussions.

From the time that OIRA and the agencies begin talking prior to the issuance of the notice of proposed rulemaking until the OMB Director issues a notice of intent to submit views on the final record, absolutely no public record will be kept. It is even question-

able whether a record of IORA-agency contacts during this critical final period will be kept if agreement is eventually reached.

The Executive order can be read as requiring that a record be kept only in the event that OIRA finally gets overruled. In any case, nothing assures that whatever record is kept will be anything but perfunctory.

It might be argued that this merely creates a regulatory process analogous to that employed in putting together the financial budget and that its purpose is to encourage maximum give and take between OIRA and the agencies.

I find the budget analogy faulty because once the financial budget is put together it is submitted to the Congress and defended in open hearings. I know of no proposal to subject important regulations to such a routine congressional review and would oppose such a thing, just as I oppose a congressional regulatory veto.

The second point cannot be so easily dismissed, but I think the procedures we used during the Carter administration struck an appropriate balance between encouraging candid discussions—within the boundaries of the record—and keeping all interested parties reasonably well informed about what was going on.

Furthermore, the system of "on the record" filings by RARG and COWPS performed a useful public education role and also encouraged the agencies to improve the quality of their analyses. I bemoan their loss as I do the other steps that have been taken to render the Reagan oversight process invisible.

In a real sense, the Executive order of February 17 marks the final emergence of regulation as a governmental function deserving the same level of attention as the raising and spending of money.

We do not yet have—and, indeed, may never have—a formal regulatory budget. But enough basic budget-like controls are now in place, at least on paper, to permit the President to shape regulatory programs, singly and overall. But this by itself does not assure meaningful regulatory reform.

Whether the White House will use these controls to view regulation in the context of other Federal activities and coordinate the whole—for this is surely what regulatory budgeting means—or whether it ends up acting merely as a sharpshooter, taking aim at this or that politically sensitive regulation, depends critically on the Office of Management and Budget and, more particularly, on its new Office of Information and Regulatory Affairs.

Unfortunately, even at this early stage, there are signs that OIRA will choose, or will be forced by events to settle for, the sharpshooter's role.

If these signs are correct, then the result will be the hamstringing of regulatory reform. This will be a tragedy, for regulatory reform is indeed urgently needed.

That completes my prepared statement.

[Testimony resumes on p. 26.]

[Attachments to Mr. Ead's prepared statement follow:]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

June 11, 1981

M-81-9

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: DAVID A. STOCKMAN
DIRECTOR

SUBJECT: Certain Communications Pursuant to Executive Order 12291, "Federal Regulation"

Regulatory relief is one of the cornerstones of President Reagan's program of economic recovery. As an important step in achieving regulatory relief, on February 17, 1981, the President issued Executive Order 12291, "Federal Regulation." This memorandum explains how the Presidential Task Force on Regulatory Relief and the Office of Management and Budget (OMB) will communicate with the public and the agencies regarding proposed regulations covered by E.O. 12291. It also describes certain obligations of the public and agencies in this regard.

A major purpose of the Executive Order is to ensure that, to the extent permitted by law, regulatory decisions are based upon sound analysis of the potential consequences. Toward this end, a comprehensive factual basis is essential to assist agencies and other interested parties in assessing the economic and other ramifications of proposed regulations.

Under the Executive Order, both the Task Force and OMB will be reviewing factual materials related to regulatory proposals. Both the public and the agencies should understand that the primary forum for receiving factual communications regarding proposed rules is the agency issuing the proposal, not the Task Force or OMB. Factual materials that are sent to the Task Force or OMB regarding proposed regulations should indicate that they have also been sent to the relevant agency. Pursuant to this policy, the Task Force and OMB will regularly advise those members of the public with whom they communicate that relevant factual materials submitted to them should also be sent to the agency for inclusion in the rulemaking record. Accordingly, agencies receiving such materials from the public should take care to see that they are placed in the record.

On occasion, the Task Force staff and OMB will receive or develop factual material which they believe should be considered by an agency during a particular informal rulemaking. In accordance with advice provided by the Department of Justice, such material, when submitted to an agency for its consideration, will be identified as material appropriate for the whole record of the agency rulemaking.

Two additional matters should be noted. First, our procedures will be consistent with the holding of and policies discussed in Sierra Club v. Costle, No. 79-1565, slip op. at 212-20 (D.C. Cir. April 29, 1981). Second, these procedures apply only to informal rulemaking proceedings and are not in any sense intended to affect the more stringent ex parte rules applicable to agency adjudications and formal rulemakings. (Such proceedings are expressly intended by Congress to be more in the nature of formal judicial proceedings and involve bars against various forms of ex parte communication.)

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HARNESSING REGULATION

The Evolving Role of White House Oversight

George Eads

PRESIDENT REAGAN'S creation of a cabinet-level regulatory appeals group and his issuance of Executive Order 12291 represent the most thoroughgoing attempt thus far to bring the regulatory activities of executive branch agencies firmly under White House control. Not that the President or his aides will dictate each and every decision of those agencies. But the clear intent is that their regulatory programs bear a much heavier presidential imprint than ever before.

In a real sense, the executive order of February 17 marks the final emergence of regulation as a governmental function deserving the same level of attention as the raising and spending of money. We do not yet have a formal regulatory budget, but enough basic budget-like controls are now in place, at least on paper, to permit the President to shape regulatory programs, singly and overall. Whether the White House will use these controls to view regulation in the context of other federal activities and coordinate the whole—for this is surely what regulatory budgeting means—or whether it ends up acting merely as sharpshooter, taking aim at this or that politically sensitive regulation, depends critically on the Office of Management and Budget (OMB) and, more particularly, its new Office of Information and Regulatory Affairs (OIRA). Unfortunately, even at this early stage there are signs that OIRA will choose, or be forced by events to settle for, the sharpshooter's role.

To some, the new regulatory oversight mechanism should be judged by one measure: If it causes the regulation-issuing process to shut down, it has succeeded. If it does not, it has failed. This view is naive on at least two counts. First, it ignores the fact that, in becoming as important an instrument of government as taxing or spending, regulation has become just as indispensable. Clearly it is here to stay. Second, the view is naive because it also ignores the need to deal with the vast body of existing regulations. Doing this sensibly requires a well-functioning oversight process that can identify the rules needing review, develop information to support its case, and ensure that the agencies adopt the needed reform.

Thus, assessing the performance of the Office of Information and Regulatory Affairs will not be simple. Certainly OIRA will slow the pace of new regulations—probably a good idea. But how will it decide which regulations should be issued? How can it ensure that new regulations intrude on private decisions only to the degree necessary? And perhaps most important, can it establish a rational process for reviewing and reforming existing regulations?

George Eads, a member of President Carter's Council of Economic Advisers and chairman of the Regulatory Analysis Review Group (1979–81), is now a senior economist in the Washington office of the Rand Corporation. The views here are his own.

The New Framework

In theory, Executive Order 12291 provides all the tools needed to accomplish these tasks. The order certainly is impressive both in its scope

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and in the extent to which it rearranges the power relationships that prevailed under previous administrations.

Substantive Requirements. Certain sections of the order resemble or only modestly extend executive orders issued by Presidents Gerald Ford and Jimmy Carter. The prime example is the requirement that agencies subject proposed "major" rules to formal economic analysis and make these analyses (now to be called "regulatory impact analyses") available for public comment at the time rules are formally proposed.

In many important respects, however, the order moves far beyond the Carter and Ford systems. The Carter administration always took pains to stress that its requirements should not be interpreted as subjecting rules to a "cost-benefit test." Instead, agencies were to identify costs and benefits, to quantify them insofar as possible, and either to choose cost-effective solutions *or* to explain why they had not. Moreover, the burden of proving that proposed rules were *not* cost-effective lay not with the agencies but with senior White House aides. In addition, it was made clear that the administration was not trying to impose new substantive standards on those responsible for issuing rules.

Reagan's program goes much further. Except where expressly prohibited by law, the new executive order *requires* that a cost-benefit test be applied and met. An agency may not even propose regulatory action unless it can demonstrate that the potential benefits to society outweigh the potential costs. (How it is to make this demonstration, especially when many regulatory benefits and costs are nonquantifiable, is not explained.) If the agency proceeds to regulate, it must choose (1) the objectives that maximize net benefits to society and (2) the specific regulatory approaches that minimize net costs to society. Finally, each agency is to set its regulatory priorities so as to maximize aggregate net social benefits, taking into account three factors—the condition of the national economy, the condition of the industries affected by its regulations, and the impact on those industries of regulatory actions contemplated by other agencies. This last requirement is a puzzler. When asked recently how agencies could meet it, OIRA Administrator Miller replied: "Relatively easily . . . by consulting the regulatory calendars that each agency is required to publish twice a year" (see "Deregulation HQ," interview with Murray L. Weidenbaum and James C. Miller III, *Regulation*, March/April 1981). But that does not explain how, in practice, an agency is to calculate the cumulative impact of such regulations and how it is to coordinate its actions with those of other agencies.

Oversight Procedures. The oversight mechanism is also being drastically changed. Under Carter, the various oversight functions were deliberately parceled out among many offices. OMB monitored compliance with the regulatory analysis requirement and, beginning in late 1979, became increasingly important in monitoring regulatory paperwork as well. The Council on Wage and Price Stability (CWPS) and, in the case of particularly important regulations, the interagency Regulatory Analysis Review Group (RARG) maintained quality control of agency analysis by filings for the public record. The Regulatory Council compiled calendars of future proposed regulations, spotted and resolved regulatory conflicts, and encouraged the adoption of innovative regulatory techniques. Finally, several of the President's closest advisers followed important regulations from the close of the public comment period until the issuance of the final rule.

The Reagan executive order consolidates most White House oversight functions in OMB's Office of Information and Regulatory Affairs. In effect, OIRA has become the gate through which all important regulations must pass—not just once, but twice—on their way to becoming law. The order gives OIRA extremely broad powers. It can overrule agency determinations on whether a proposed rule is to be considered "major." In the case of a major rule, it must receive the draft regulatory impact analysis at least sixty days before the agency publishes the Notice of Proposed Rulemaking. If it finds the analysis weak or believes that important alternatives have been neglected, it can delay publication of the Notice of Proposed Rulemaking until the agency has adequately responded to its concerns. There is no requirement that a record be kept of these initiatives or of the agency's response. The agency may appeal only to the President's Task

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Force on Regulatory Relief or to the President himself.

It is important to note that all this is to take place *before* a regulation has been formally proposed. In that respect, the new process is like the behind-the-scenes preparation for the President's financial budget.

The Carter and Reagan systems also differ in the use made of the formal public comment period. Under Carter, it was during this period that RARG (for ten or so key regulations a year) or CWPS prepared and filed comments on agency proposals. In the case of RARG filings, a draft was written by analysts at the Council of Economic Advisers (CEA) and CWPS and circulated to all RARG members—including the agency whose proposal was under review—who then met formally to discuss the issues involved. Comments and dissents were incorporated into the draft, and the final report was placed on the public record at the close of the comment period. The Reagan plan dispenses with public filings by executive office agencies such as CWPS and interagency groups such as RARG. Any views that OIRA or any other agency may have on a proposed rule presumably will already be reflected in the proposal when it is published. Moreover, as noted earlier, the executive order does not provide the public with an opportunity to learn what these views were and how they differed from the views of the agency proposing the regulation.

After formal public comment, while the agency was drafting its final rule, the Carter procedures provided for monitoring by top presidential advisers—the CEA chairman, the OMB director, the President's assistant for domestic policy, as well as his inflation adviser and science adviser. They (or their aides) met regularly to track important rulemakings, assign responsibility for White House–agency liaison, and decide whether to involve the President. (The President was kept informed but, for a variety of reasons, rarely asked to mediate disputes with the agencies.) Under the Reagan system, OIRA fulfills this monitoring function, getting one more shot at the agency's proposal. Thirty days before the rule is to be issued, the agency must transmit the final regulatory impact analysis to OIRA. If OIRA objects, it can hold up the rule until its objections are resolved or until it is overruled by the President's task force or the President himself. Only in the event of disagreement on the final rule is the substance of these discussions to go into the rulemaking file, where it will be available to courts that may review the matter.

Another important difference between the two systems should be noted. During the so-called post-comment period, the Carter White House carefully limited its contacts with the agency so as to minimize the possibility of ex parte contacts that might "taint" the rulemaking. Thus the task of keeping in touch with the agency was informally assigned to a single person—usually the one who had been following the rulemaking most closely. And the White House offices having the most frequent contact with industry were excluded from agency–White House deliberations to avoid their becoming a conduit for information not on the public record. The Reagan administration's decision to broaden the circle of individuals potentially involved during this period to include a number of cabinet officers (as members of the President's Task Force on Regulatory Relief) will make the policing of outside contacts substantially more difficult. It will be impractical to ensure that these individuals, who have only sporadic involvement in rulemaking and who, in the course of their normal duties, have numerous contacts with industry, will confine themselves to the rulemaking record in reaching decisions.

Additional Responsibilities. The process described above applies to new rules. But the vast body of regulation already in place also needs attention. The Carter system required that agencies periodically review existing rules and eliminate or revise those that were outmoded. But it never created a formal "sunset" procedure to give this requirement force. Reagan's executive order does. It allows OIRA to designate existing rules for analysis and to establish schedules for such review. Revising a rule requires, of course, that a new rule be proposed, at which point the procedural and analytical standards of Reagan's executive order apply.

OIRA has still more powers. President Reagan has abolished the Regulatory Council, transferring to OIRA the job of publishing the Regulatory Calendar and of identifying and eliminating duplicative, overlapping, and conflicting rules. OIRA will also implement the Federal Regulatory Flexibility Act of 1980, which

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addresses the regulatory problems of small business, and the Paperwork Reduction Act of 1980, which seeks to limit the paperwork that agencies impose along with their regulations. Finally, OIRA is specifically charged with developing procedures for estimating the annual benefits and costs of agency regulations, on both an aggregate and an industrial sector basis—"for purposes of compiling a regulatory budget."

Can OIRA Handle the Task?

If it wants to conduct effective regulatory oversight, OIRA must show everybody involved—the agencies, the Congress, the courts, the regulatees, and the public—that it can use its powers responsibly. Its assertion of authority must be matched by competence in exercising that authority. Considering the enormous scope of its powers and its apparent intent to move aggressively, OIRA would find itself in trouble on these grounds even if its resources were ample. But they are not. Furthermore, to a large extent they are ill-suited to the task of regulatory analysis.

Staff Resources. According to the Miller/Weidenbaum interview in *Regulation*, OIRA will have about ninety slots and will, in addition, be aided by OMB's regular staff. But the numbers give a misleading picture. Few if any of the ninety slots are new, because OIRA is a combination of three existing units: the Office of Regulatory and Information Policy (RIP) within OMB, the Office of Government Programs and Regulations from the now-abolished Council on Wage and Price Stability, and the Office of Statistical Policy (OSP) from the Department of Commerce. Moreover, of these, only the twenty-person CWPS staff is experienced in the techniques of regulatory analysis. The forty-five RIP analysts are primarily trained to monitor paperwork burdens and oversee the agencies' technical compliance with the executive order. The Statistical Policy Office's twenty-five analysts may be helpful to OIRA in standardizing techniques for cost-and-benefit accounting, but they are not regulatory specialists and are not likely to become so. As for drawing support from elsewhere in OMB, while some of OMB's 250 budget examiners may be available from time to time, their training and professional inclination equips them to monitor direct federal expenditures, not the indirect costs of regulation.

In short, because the influence of regulation pervades the entire economy, OIRA's duties are considerably broader than those of the conventional financial budgeters, while its resources are far smaller. But its analytical horsepower is significantly less than that of the offices whose functions it has assumed.

Considering the stress the Reagan program lays on formal cost-benefit analysis of regulations, . . . the meagerness of OIRA's analytical resources cannot help but undermine its credibility.

Analytical Capabilities. Considering the stress the Reagan program lays on formal cost-benefit analysis of regulations, taken both individually and in groups, the meagerness of OIRA's analytical resources cannot help but undermine its credibility. Even more serious is the likelihood that OIRA will miss opportunities for reform. Important issues may fall between the cracks because no one knows enough about their significance to challenge them, or because none of the parties involved has the incentive to raise them or the capability of analyzing them properly.

For example, during a 1980 proceeding of the Environmental Protection Agency (EPA), an opportunity arose to broaden the definition of "source" for purposes of new source reviews in areas of the country not meeting national ambient air quality standards. The importance of broadening the definition was brought to the attention of White House staff very late in the rulemaking process—and not, incidentally, by industry. The contemplated change would have been helpful to industry, especially steel, because it would have allowed a plant to make replacement investments free of EPA's new source reviews so long as its emissions were not significantly increased. The change also would have reduced total emissions. But EPA's more restrictive definition was a valuable weapon for forcing steel firms onto compliance schedules, because it permitted the agency to

hold any modernization investment "hostage." Thus EPA was opposed.

The White House analysts worked up estimates showing the favorable impact of the change on steel industry investment. However, after heated discussions between senior White House officials and EPA's leadership, EPA prevailed. (Subsequently, with the advent of the Reagan administration, EPA announced that it would repropose the regulation to permit the issue to be reexamined.)

In this instance, having a highly competent analytical staff strategically located within the White House with sufficient resources to prepare a well-documented analysis helped ensure that an important issue that otherwise might have slipped by at least got considered. It might be argued that, under Reagan, no agency will ever try to slip a regulatory change past the White House. My experience in several administrations suggests otherwise.

Agency parochialism is not the only thing that a strong White House analytical capability can help prevent. Sometimes there are important issues lurking in a rulemaking that only the White House has the incentive to raise. An example occurred during EPA's rulemaking on premanufacturing notification procedures for new chemicals and new chemical uses (which is still pending). White House analysts became concerned that the proposed procedures would adversely affect innovation in the chemicals industry and suggested a RARG review. EPA voted no, contending that this was not the proceeding in which to address the innovation issue and that the information needed to make a finding was not available. The chemical industry, for its part, seemed indifferent, possibly because the procedures in question would have an ambiguous effect on industry profits. By slowing the rate of innovation of new chemicals and increasing the cost of developing new uses for chemicals, the procedures could substantially enhance profits on the sale of *existing* products and differentially affect innovation in large and small firms.

Nevertheless, RARG launched a review, and the resulting report, filed by CWPS in March 1981, shed important light on an issue of national importance. It might be argued that in the Reagan administration the agencies themselves will see to it that all significant issues are raised and properly analyzed, or that OIRA, though thinly staffed and overworked, will be able to single out the issues of importance that the agencies let drop. I have my doubts. Or it might be argued that the agencies will forget about such "trivialities" as premanufacturing notification once the Reagan oversight process really gets rolling. Again I am doubtful. Congress may be in an antiregulatory mood right now, but it will be interesting to see how long the mood lasts if a new chemical harms someone and if the harm might have been prevented by tight regulation.

The matter of adequate resources is thus critical in determining how successful OIRA will be in shaping the regulatory process. Effective and credible oversight requires a staff that is familiar with both agency programs and the affected industries, and that also has the ability to set priorities and ask cross-cutting questions (including whether proposed "reforms" of one agency may increase costs elsewhere). Merely requesting industries, trade associations, and other interests to submit "hit lists" of regulations they would like to see eliminated (as Vice President Bush did on March 25) may be good politics. But it is no substitute for developing independent judgments as to which regulations make sense and which do not. Either OIRA's analytical resources will have to be greatly increased, or its objectives greatly trimmed—and maybe both.

Can the Agencies Do Their Part?

Of course, OMB will have help with regulatory oversight, just as it does with financial budget oversight. Indeed, the overwhelming bulk of the responsibility for preparing cost-benefit analyses must necessarily fall on the agencies themselves. A central White House staff can never know enough about the detailed workings of regulatory programs to prepare a large number of regulatory analyses from scratch; it generally will have to rely on raw material generated by the agency, and the quality of this material is crucial. A major paradox of the Reagan program is that while giving OIRA an extremely broad mandate and high political visibility, it lays a much greater analytical burden on the agencies than did the Carter procedures. Unfortunately, however, it is likely to weaken the agencies' incentive to perform

this role in a way consistent with both presidential objectives and legal requirements.

How are the agencies to be motivated? The quick answer is that President Reagan is appointing agency heads who share his basic regulatory philosophy. But that answer is certainly too quick. A general desire to check regulation does not easily translate into an effective program of regulatory management.

Improving Analytical Capabilities. Initially, the regulators typically responded to both President Ford's and President Carter's executive orders by preparing analyses designed solely to support regulatory options they had already chosen and to "prove" that their proposals actually generated few if any costs. Only gradually did they start to use these analyses for the intended purpose: to help decision makers identify the likely impacts of a *range* of possible regulatory actions. In general, it was not until an agency had been through a number of RARG or CWPS reviews that it began to appreciate the breadth of information that could be generated during a rulemaking. Indeed, one of the most important (and perhaps least appreciated) objectives of the RARG and CWPS efforts was to improve agency analytical skills. Through the collegial RARG process, the distinction between "good" and "bad" analysis was slowly being transmitted throughout the bureaucracy.

Even so, by the end of the Carter administration, very few agencies were good at regulatory analysis and some did not yet understand what it meant. There is little reason to think this situation has improved since then, and some reason to think it has worsened: because of budget cuts and hiring freeze, a number of the best analysts have returned to the private sector.

The prospects would be bleak enough if the agencies had only to analyze the impact of individual proposed or existing regulations. But each of them must also develop priorities for its entire regulatory program and understand how its proposed rules and those of other agencies accumulate to influence an industry or sector. I am not aware of any agency qualified to do this competently at the present time.

Paradoxically, the obligatory cost-benefit test may well be a hindrance to obtaining good analysis. Considering the state of the art in estimating both benefits and costs, the requirement amounts to an invitation to fraud. It would be much more sensible merely to require

Paradoxically, the obligatory cost-benefit test may well be a hindrance to obtaining good analysis. Considering the state of the art . . . the requirement amounts to an invitation to fraud.

that agencies identify (and quantify, to the extent possible) whatever costs and benefits they consider likely to flow from the proposed regulations. This, coupled with the lifting of all statutory bars to considering and balancing costs and benefits (such as the bars contained in the Delaney Amendment and the Clean Air Act), would be a powerful spur to sensible regulation. Unfortunately, not even the regulatory reformers in the Republican-controlled Senate seem willing to face this issue squarely. Instead, their major proposal would merely codify the procedural requirements of the executive order, tightening the procedural straightjacket that the courts have been increasingly imposing upon "informal" rulemaking.

But there is also a practical problem. Suddenly imposing a strict cost-benefit test on this gradual learning process means that sensible new regulations, or revisions in existing regulations, may be stalled for lack of acceptable supporting analysis.

Improving Incentives. A great deal depends on how OMB chooses to interpret the requirements of the new executive order. If OIRA acts as an understanding teacher, showing tolerance for agencies as they struggle to learn and providing them with the resources needed to upgrade their analytical skills, then improvement can continue. If OIRA operates as a stern judge, however, virtually all regulations that come to its attention will fail its test—and not necessarily because they are not cost-beneficial.

Finally, progress could stop entirely if a harassed and overextended OIRA yields to the worst temptation: to give each analysis only cursory review and then either permit rulemakings to proceed if the analysis reflects politically desired results or bounce it back if it

does not. The power of this temptation is suggested in the *Regulation* interview. When pressed on whether OIRA would apply the full procedural treatment to a rule purporting to *reduce* regulatory burdens by several hundred million dollars, Miller replied: "If OMB . . . were convinced on the basis of evidence, *however sparse*, that such a reduction would occur, a waiver would be granted immediately" (italics added). But he would give the full "treatment" to a rule that would raise costs, possibly even by only a small amount—if OMB chose to call the rule "major." This may seem an appealing short-run strategy for getting regulatory proposals changed without a lot of bother. But it runs serious risks of court intervention and, more to the point here, it undermines agency incentives to do serious analysis. Indeed, it returns regulatory analysis to the primitive stage of justifying predetermined outcomes.

Intervening Too Early?

Only occasionally, and usually only at an agency's request, did officials in the Carter White House concern themselves with actually shaping a regulatory proposal before it was opened to public comment. This approach had its drawbacks. As more than one expert has noted, agencies often tend to structure regulatory proposals in ways that severely limit their scope for final rulemaking. Yet RARG and CWPS, by carefully monitoring developing proposals, were able to ensure that rulemaking discretion was not unduly narrowed. And by zeroing in on agenda-setting actions—first-of-a-kind rulemakings, policy statements, and so on—the White House could further increase the range of options left open.

While the Reagan scheme's concentration on the pre-proposal stage permits—at least in theory—consideration of the broadest possible range of options, it is questionable how much this will help in practice. A major problem is that agencies use the Notice of Proposed Rulemaking in different ways. Sometimes agencies use it to identify options having a reasonable chance of adoption—in which case considerable effort has been expended before the formal notice is issued and a regulatory impact analysis would make sense. Other times, however, agencies use the NPRM as a tool for gathering data on the industries they intend to regulate and on the possible consequences of various regulatory options. After analyzing the data produced, they repropose the regulation. In this case, there is little point in doing a regulatory analysis before the second NPRM is issued. All that the agency and OIRA would have to work with would be sweeping claims of what the regulation *might* do if the agency went as far as it conceivably could under its authority. And the numbers submitted by interested parties would represent "worst case" scenarios—useful for attracting headlines but not for understanding what the effect of the actual regulation would be.

(It should be noted that some agencies employ a device called the Advanced Notice of Proposed Rulemaking, or ANPRM, to gather the information required to frame intelligent regulatory options. This should be encouraged. And if OIRA's formal powers do not now extend to ANPRMs, the temptation to extend them should be resisted. OIRA will have more than enough to do if it concentrates only on genuine NPRMs and ignores the fishing expeditions.)

Less Chance for Public Participation

During the Carter administration, some outside groups complained that they were unable to comment formally on CWPS's and RARG's contributions since those contributions were not filed until the end of the comment period. This view is echoed by Murray Weidenbaum in the *Regulation* interview. He dismisses RARG's influence by noting that its comments were filed "literally minutes before the comment period closed—which restricted somewhat their capacity for stimulating public dialogue." In practice, however, the filing schedule did not prove to be a serious problem. We found that, with months or often years elapsing between the close of public comment and the time a rule is made final, there was ample time for public discussion of and even formal public comment on a RARG intervention. In one case, an agency reopened a comment period expressly to receive comments on RARG's analysis. In another case, a "public interest" group prepared a detailed analysis of a RARG filing and CWPS prepared a rebuttal; both documents were placed

in the record, even though the comment period had closed. In short, under Carter, there was liberal opportunity for public comment on White House interventions up until the very last stage of rulemaking, and comments were liberally offered. And the filings performed a useful educational role for the public and the Congress.

Contrast this with the information blackout under the Reagan process. A record of the critical pre-proposal discussions between the agency and OIRA is not required, and no document reflecting the administration's views need be placed on public file. A record of agency-OIRA discussions after the comment period will be put into the file, if at all, only when the rule becomes final. And nothing ensures that this record will be in any way complete. No wonder that a Washington attorney (William Warfield Ross) has advised his fellow attorneys that "there may be highly significant conversations going on between agency heads and the White House" before or during rulemaking proceedings about which they know nothing. His conclusion: "Now more than ever, . . . the race will be to the swift, to the enterprising and to those with access to the levers of power, not only in the Congress and the regulatory agencies, but also in the presidential office" (*National Law Journal*, April 27, 1981).

Whither Regulatory Oversight?

The Reagan initiatives can best be viewed as a logical and significant extension of experimentation begun by President Nixon and carried forward by his successors, the exact form reflecting each President's character, view of regulation, and attitudes toward bureaucracy. Each successive experiment has borrowed from the previous ones and would not have been possible but for the earlier efforts. Reagan's version of regulatory oversight borrows much of its procedure from Nixon's "quality of life review" and many of its analytical requirements from Ford's inflation impact statements. It draws on the capacity for analysis nurtured by Carter and will rely heavily on what is perhaps his administration's most important innovation in this area—the Regulatory Calendar. However, it discards the concept of public filings in favor of behind-the-scenes discussions between agencies and OMB—a loss whose importance has yet to be understood. And while the Regulatory Council and RARG brought about greater interagency cooperation, not by commanding it, but by showing agencies that reform could be in *their* interest, OIRA seems inclined to abandon this approach—another important loss.

So, an experiment it certainly is. It is bound to be tested in the courts and, over the course of the Reagan administration, is likely to undergo major changes. For this reason it would be especially unfortunate if either its current structure or its current procedures were embodied into law. Let it first prove itself by operating under the more flexible arrangement of the executive order. Most important, Congress should avoid writing into law the developing "common law" of hybrid rulemaking in the mistaken notion that slowing the regulatory process to a crawl is somehow the same thing as deregulation. If Congress feels compelled to act, let it take on a task that the Carter administration certainly would have tackled had it won a second term—designing major changes in the substantive standards agencies apply in rulemaking. This does *not* mean legislating a mandatory cost-benefit test for all regulations. Congress should merely remove the statutory language that prevents agencies from considering costs and from undertaking both intra- and interagency balancing of objectives. This, combined with permitting tolerably flexible administrative procedures, would be sufficient to produce all the regulatory reform that one would reasonably want.

Congress should avoid writing into law the developing "common law" of hybrid rulemaking in the mistaken notion that slowing the regulatory process to a crawl is somehow the same thing as deregulation.

For regulation to be a useful tool in promoting society's goals, it needs to be harnessed. But the oversight process must be professionally run and adequately staffed. It must not mimic the Queen of Hearts in *Alice in Wonderland*, constantly running hither and yon shouting, "Off with his head." ■

Mr. DINGELL. Mr. Eads, the subcommittee thanks you for a very helpful statement.

The Chair recognizes now Ms. Bernstein for such statement she chooses to make.

TESTIMONY OF JOAN Z. BERNSTEIN

Ms. BERNSTEIN. Thank you, Mr. Chairman.

I, too, am delighted and pleased to have been included in this panel discussion of the subject of the Executive order and its impact on the regulatory process.

By way of my own background upon which I base my observations today, I go back to an early time in regulatory reform; namely, when I was a staff attorney in the Federal Trade Commission in the early 1970's. That effort, that seems rather primitive now, focused, at least in part, on examination of regulations as to their pro- or anti-competitive effect. The idea was to see whether the goal of the statute could not be met by a less, rather than a more, anti-competitive approach, and it was very valuable in terms of my professional growth.

Second, I was General Counsel in the Carter administration at the Environmental Protection Agency and at the Department of Health and Human Services.

When I first went to EPA, I was very much involved with the administration in setting up our own mechanism to find a way for the administration to implement its regulatory policy.

We then went about implementing the system, and I was, as General Counsel, of course, responsible for seeing to it that the Agency complied with the Executive order but also tried to help in seeing to it that the process worked effectively, both in terms of the Agency's mandate and in meeting its obligations both to the administration and to the Congress.

So I would like to briefly summarize my observations which are on the practical aspects of regulatory review rather than on the theoretical or the legal implications of centralized review.

I do not have a complete record of our specific reviews which we conducted while at EPA. I do remember four major ones which I have listed in my testimony, and they are PSD—the "Prevention of Significant Deterioration"—"Ozone, NSPS"—"New Source Performance Standards for Electric Utilities"—and one under the RCRA—the Resource Conservation and Recovery Act.

Several others, as I recall, were considered for full-scale regulatory review but were not reviewed.

Based on my experiences, I have concluded—in sort of lay language—that there are pluses and minuses to these reviews. Some call it "good news and bad."

Among the pluses that I see are that it did create a mechanism to insure consistent application of administration policy—always necessary. It also caused agencies, which might not otherwise do so, to consider alternatives and perhaps even to select the least burdensome—equally important.

The final decision, however, might be—and is often—demonstrably improved if the decision documents offer more than one option.

The review process also sharpens the economic analysis and broadens the sometimes narrow focus of the individual agency.

I will not complete the inventory of pluses because I think the administration probably will come forward with a complete inventory.

What about the bad news? I see a number of concerns which ought to be considered. While the new Executive order stops short of actually shifting decisionmaking authority, OMB does have much more authority under this review to review and therefore to delay decision.

The fact that an agency head can neither propose nor promulgate a regulation without having the approval of OMB at least creates the potential that someone other than the agency head will make the regulatory decision. Some call that interference. Whatever it is called, it creates some worrisome aspects about how well the system will work or not work.

While we at EPA began to implement our regulatory review, as I said, I was responsible—at least in part—for getting the Agency reorganized to meet these new requirements. The first thing we had to deal with was how to perform the economic analysis which the Executive order required.

This new Reagan administration order carries, in my judgment, much more explicit cost-benefit requirements, including those newly issued last Friday called: "The Interim Regulatory Impact Guidelines," which set out a pretty specific formulation.

At EPA in our day, even with a less exacting standard, we quickly found that we had to increase our economic analytical capacity. We had to hire people with new and different skills.

And we probably had at EPA better capacity than other agencies because we administered some laws, such as the Toxic Substances Control Act, which established risk-benefit tests by law. So we were already in the balancing business, and we had already attracted a number of capable people.

Other agencies of Government have historically had little or no reason to have to conduct economic analysis—for example, the Food and Drug Administration, which has historically dealt with scientific determinations of safety and efficacy and not with statutory balancing tests.

With an absolute cost-benefit requirement, the Food and Drug Administration, along with all the others, will quickly have to recruit people skilled in other disciplines. At the same time, these agencies are being asked to cut back on expenditure, time, people, and money.

If you are at an agency, that has got to be a problem in meeting the new requirements, and perhaps even in carrying out existing requirements.

If it is to be meaningful, the new review may require other types of expertise, especially at OMB. Many decisions, which I see in private practice as well as I saw in Government, involve extraordinarily complex technical bases, often highly controversial and highly expensive.

Some critics say that those mini-decisions are buried at the lowest levels of the agency—they never surface in any review process but actually dictate unnecessarily burdensome regulations.

As an example, at the EPA the final decision may well turn on what basic assumptions the Agency permits in the calculation of essential data—what goes into the model, for example.

Time and again, I have heard, from people who are close observers of the process, that the actual dispute between the Agency and the regulated party is really over how conservative those assumptions must be. The Agency will insist on the most conservative, and the regulated argue for the most liberal.

Without highly capable technical assistance to both resurface and reanalyze those assumptions, the review that is conducted, in my judgment, may end up being inconsequential and superficial but will have imposed a blizzard of additional paperwork by all concerned.

Perhaps OMB and the Vice President's staff will have that highly sophisticated capacity. The focus at present seems to be on the economics, and, if so, it will not deal with what many describe as an area which needs "scrutiny and reform."

It may also lead to additional uncertainties. My experience, both in and out of Government, has been that for those affected by Government decisions nothing is worse than uncertainty. The cost of delay and uncertainty is absolutely staggering.

Adding review periods to the beginning of the process and to the deliberative period—which seem to be open ended, I might add—raises the specter of more delay and more uncertainty.

Another aspect of uncertainty may result—the uncertainty of a company or its lawyer in figuring out how far to go.

It has been nonfacetiously suggested that the lawyer who does not argue all the way to Vice President Bush may be subjecting himself to a malpractice charge.

At first blush, it sounds somewhat outlandish. But suppose you are representing a client before a Government agency. Certainly, you must at least advise the client that there is a possibility that the decision he would normally believe is being made at the agency, where he has had notice and opportunity to comment, may be reversed someplace, somehow.

Should not that lawyer say: "Well, we really should make an appointment to see Vice President Bush to make absolutely certain that our views are heard at the right level"? I, for one, have already put Vice President Bush's number in my rolodex.

I also have a gnawing concern about how the permanent bureaucracy will respond. RIFS and cuts to the contrary notwithstanding, most of the Government's work will still be done by the usually skillful professionals who respond, like most of us, to incentives.

Certainly, Government agencies with different histories and different traditions behave in different ways. The EPA is a young agency which began as a rulemaking agency and tends to think of itself in regulatory process terms. It deals easily and well with the public aspects of the regulatory process.

Other, older agencies, some of which predate the adoption of the Administrative Procedures Act, think of the public aspects of the regulatory process as enormously burdensome and difficult and rather routinely tend to look for ways to avoid it. The Administrative Procedures Act itself, after all, was considered a regulatory reform in its time.

At least as to the rulemaking aspects, the reform was that it required Government agencies to conform with what we now consider the simplest, most rudimentary requirements—notice and comment. Before that, many decisions were often made with less than adequate notice and with no opportunity to comment.

I would submit that there are still agencies that make decisions on what I call the back of an envelope. They are sometimes called bulletins or interpretations or policy statements. Others do not call them anything and just tell people what to do—"Do it because I say so, like it or not."

The point is that the more one loads up the regulatory process with additional requirements, the more one drives those who are required by law and their jobs to make Government decisions go back into the dark—to get out the old back of the envelope and avoid publication of any sort.

I believe it would be very difficult for OMB to ferret out those areas because every day millions of decisions are made all over the Government, many relatively minor individually. The total is substantial, however, and the disincentive very real.

In conclusion, again, having been involved in trying to solve the problems that lead to efforts at reform for years, I am becoming more and more convinced that the real problems with Government will not be solved by additional review requirements and/or additional procedures.

If I had my druthers, I would put my confidence in those who are appointed or selected to carry out the reforms, strip down the procedural requirements within an agency so that the agency can quickly make its decisions, and let them be scrutinized more quickly in the courts and in the Congress of the United States sooner rather than later, and see if that does not breathe some fresh air into the process.

I really believe that the most frustrating excesses have less to do with regulation and much to do with the lack of commonsense responsiveness of people.

Its hard to politely say that most of the complaints are those created by a really senseless experience with somebody which was frustrating and infuriating. I've never known quite how to cope with that problem in an agency where there are hundreds or thousands of employees. No individual can possibly know all of the things that are going on and/or being said to people. I believe that the more complex, the more diffuse the review and decisional process, the less the agency controls its own decisionmaking, and the less incentive there is for people in the bureaucracy to behave responsibly and with commonsense. The more one can pass along the decisionmaking, and there is little enough incentive to make decisions in the Government as it is, the more it seems to me one increases the potential for empty headedness at every level of the Government. I can't think of anything that would be more counterproductive than to have those who work hard but are somehow disconnected to the process believe that they are not responsible for programs and decision.

My own personal judgment is that the increased number of procedural requirements, the increased amount of analytical work, the increased need for additional resources with both Carter's and Reagan's review processes, probably exceeds the gains which may come in the quality of the decisionmaking. I did not see major regulatory decisions revised in any major way during the Carter administration even though many were subject to the review process.

I also know that the political pressure to do something about regulation is severe. The political risk is that the review process creates all the problems I have described but does not result in dramatic improvement in at least the perception of a responsive government. If you add that to the equation, it really is not worth it.

Thank you.

Mr. DINGELL. Ms. Bernstein, the subcommittee thanks you for your very helpful statement.

We recognize now, Mr. Parker. Mr. Parker, we thank you also for your assistance to us.

TESTIMONY OF DOUGLAS PARKER

Mr. PARKER. Thank you, Mr. Chairman.

My name is Douglas Parker. I am the director of the Institute for Public Representation at Georgetown Law Center. We are a public interest law firm that represents groups that are otherwise unrepresented in the Government's process and groups whose access to the administrative process has historically been somewhat restricted.

I approach the questions of regulatory reform from a rather different perspective from the other participants on this panel. We are those outside the Government who are attempting to effect the process and to control the work that Mr. Eads and Ms. Bernstein were doing.

Our interest historically is in general issues of access to Government, including the courts and the administrative process. We have worked on matters of the Freedom of Information Act, public participation funding, control of ex parte communications and, in general, an effort to insure that agencies produce an adequate record for the kinds of regulations that they are adopting.

We have worked in the area of regulatory reform legislation over the last couple of years. I agreed with the opening statements made by members on both sides of the Chair. We recognize a need to reform the process. I do not think there is any question that the regulatory agencies have not, in many cases, been responsive to the public interest.

We are also concerned about access, and about some of the centralization issues that Mr. Gore referred to.

We have become particularly concerned about Executive Order 12291. We are concerned about the extent to which it actually makes the whole process less responsive, to which it obscures responsibility for decisionmaking, to which it opens the process to special interests with particular political access, and in general the way it dilutes the traditional rights of public participation in the administrative process.

There has been some reference made to the legality of the Executive order. I do not think it is all that clear that this Executive order is legal. I am not a constitutional law scholar, but the research that we have done indicates that it is not a clear question. I would bet that there will be legal challenges, not just to particular rulemakings, but to the entire Executive order process.

Many of the questions about legality relate to some of the points that were made here earlier concerning the extent to which OMB displaces agency decisionmaking.

Obviously, there has been considerable discussion on the question of the extent to which the OMB can impose a particular kind of cost-benefit analysis procedure on an agency. I think that is one question. There is obviously substantial interference with the agency's decisionmaking just in that area alone.

Further, the entire schedule of decisionmaking by an agency can be controlled by OMB. As the others have mentioned, the review process which is set up is really open ended. As long as OMB continues to say that it is reviewing a rule, the agency cannot issue the rule.

The OMB also is allowed to control the way the agency itself allocates its resources. They can designate major rules, and they can waive the major rule procedure for other types of rules.

By holding up certain types of rules through the review process, it essentially gives the agency nothing to do and forces it to attempt to operate in other areas.

Finally, OMB directs the agency's processes substantively by requiring it consider certain types of data and certain types of information. We think that adds up to a substantial question of whether the whole process here is one that displaces agency decisionmaking.

Our primary concern, however, is not really with somewhat abstract questions of constitutional power. That is troubling enough. But putting those questions of constitutional doctrine aside, our concern, as practicing lawyers representing people who are trying to get into this process, is, in general, the lack of procedural protections. We are the people on the outside knocking on the door.

There is a real risk, I think, as a result of this process, that, if we are interested in a particular rule, we are going to end up with a legal challenge to that rule in many, many cases. I would anticipate that in the event of a legal challenge, OMB would be a defendant in any such litigation. The question of who is in charge of the rulemaking is obviously a very substantial one here.

The problem, as I have outlined, is that the key decisions are shifted away from the agency to OMB, and the period of decisionmaking is shifted away from what we have traditionally thought is the normal process—the notice and comment period. The decisionmaking is shifted into a sort of pre-notice and comment period. Indeed, before there is any public notice at all of what is going on in the process and whether the agency is regulating or not, given the way the Executive order operates many of the decisions will be made before there is any public notice or any opportunity for public participation.

We have been concerned about this for a long time. We have raised with several agencies the question of whether various proce-

dural protections, particular controls over ex parte contacts, should apply before the notice of proposed rulemaking is even issued.

The Carter administration recognized that that was a problem, and they included in Executive Order 12044 some reference to encouraging agencies to open up the process as much as possible. Executive Order 12291 totally closes that down. Obviously, before any kind of rule is proposed, there will be a substantial amount of negotiation between the agency and OMB. Once that negotiation is complete—once the deal is made—so that the agency can issue its rule at all, it seems obvious that the agency is not going to change its mind.

The problem, as I have said, is that it is OMB which is making the decisions, and that that process really is entirely closed to us. It is OMB which becomes responsible for the final rule and not the agency itself.

The question is: What sort of control do we have over what OMB itself is doing here? The question is really not so much the relation between OMB and the agency—that is itself very troublesome. A real concern we have is how OMB itself reaches its decisions.

There is no assurance whatsover that OMB will disclose anything about how it operates. There is no assurance that it will state, publish, or disclose in any way when it directs an agency to prepare a particular type of regulatory impact analysis. There is no assurance that it will disclose when it directs an agency to obtain and evaluate new information. There is no assurance that the internal appeals process will be accessible to the public at all. And there is no assurance that there will be any control over OMB simply sitting on a regulation and doing nothing about it.

We simply do not know what is going on at OMB. The letter which was referred to—Mr. Stockman's memorandum which was issued last week—does not really spell things out very clearly. There is some talk in that memorandum about providing some sort of a record from OMB to the agencies. That is very unclear, and I think that is something that the subcommittee really should follow up. There is no assurance in the Stockman memorandum that all of the data which comes to OMB and which are the bases of its decisions will be submitted to the agency.

This subcommittee has an important role here. There is a process going on from which many groups, whether they are public interest groups such as ours, public interest groups different from ours, or small businesses, farmers, or whoever, are excluded. What is happening is that the process is getting increasingly centralized in one, very small part of the Federal Government, and the access to that is increasingly restricted.

I do not have Vice President Bush's phone number. I guess if I had it, I would put it in my Rolodex, too. I am not sure he would return my call. But to the extent that that gets to be the kind of process we are dealing with, I am very concerned about it.

Certainly, no group with limited resources and, at this stage, very little political access, is going to be able to do very much about the administrative process here.

On behalf of all of us who are feeling shut out of the process and who are seeing the traditional ways of participating in the administrative process closed to us, I certainly encourage this subcommittee to use its oversight powers to help us find out what is happening at OMB and to find out what sort of procedural protections they may offer us. Without that kind of help, I predict that we are not going to be able to find out anything about what is going on.

Thank you very much.

Mr. GORE [presiding]. Thank you.

A decision to return your telephone call might not meet a cost-benefit test.

Mr. PARKER. I think not.

Mr. GORE. I will recognize first of all counsel, Mr. McLain.

Mr. MCLAIN. Thank you, Mr. Chairman.

Mr. Parker, let me first follow up on a couple of points that you made, discussing the so-called Stockman memorandum to Department heads.

Does that memorandum prohibit any communications with outside parties that might have an interest in a rulemaking proceeding?

Mr. PARKER. No, it does not. There is nothing that would tend to restrict any kind of outside contact with OMB by anyone. It deals only, and in a very indirect way, with contacts between OMB and the agencies. There is nothing that would apply any sort of even minimal APA protections to OMB's own deliberations.

Mr. MCLAIN. Does that memorandum apply to any information that OMB might have gleaned from individuals other than factual information? By that, I mean that that implies to me a document. Does that imply the same to you?

Mr. PARKER. It does—or a study, or something—yes. It is hard to know exactly what they mean by factual data.

We have long thought that, in looking at the way decisions are made, the focus on factual information is somewhat naive. There is no reference in the Stockman memorandum to policy arguments, legal arguments, or just blatantly political arguments. There is no assurance whatsoever of any kind of control over those kinds of contacts.

Mr. MCLAIN. Do you read the memorandum to include any information that OMB or the task force might have received from the President himself or his assistants?

Mr. PARKER. No. I think the OMB memorandum takes the view that, in effect, Mr. Stockman is the President—that there is just no distinction between OMB and its staff and the President. Therefore, there is no need to disclose those kinds of contacts.

Mr. MCLAIN. The memorandum goes on in the last paragraph to mention the recent court of appeals case of *Sierra Club* versus *Costle* as its basis upon which they rely in the development of that memorandum.

Generally, what do you believe is the significance of that recent case—*Sierra Club* versus *Costle*—to contacts of OMB employees with private parties interested in a particular rulemaking proceeding?

Mr. PARKER. OMB contacts with private parties? I am not certain that the case deals directly with that question. I am not certain that it deals with relations between outside parties and OMB. The parts that I have read very carefully focus primarily on the ques-

tion of relations between OMB and the President on one side and the Agency itself on the other.

Mr. MCLAIN. Is it not true, Mr. Parker, that in *Costle* the court specifically said that there were no allegations of conduit-type communications and that that was a matter on which they would reserve judgment?

Mr. PARKER. Yes, there is a very specific footnote in which Judge Wald says that. In general, the *Costle* decision seems to endorse or recognize the validity of substantial contact among CEA, OMB, and agencies. I think the case takes a certain kind of realistic approach taken to that kind of contact.

It does not say that all intra-executive contacts of every kind are not subject to some procedural controls.

Mr. MCLAIN. Many of those contacts were logged contacts, by the way, were they not?

Mr. PARKER. Yes, that is correct. In that particular case, I think all but one——

Mr. MCLAIN. As I read the principal point of the case, did it not apply to a Presidential contact?

Ms. Bernstein is nodding her head.

Ms. BERNSTEIN. Yes. I felt as if I were in law school, Mr. McLain—I would have raised my hand.

I believe what was at issue specifically in that case and what was viewed by most as the most controversial was that there was one meeting between the Administrator of EPA and others from that Agency and the President himself with other people. I believe Mr. Eads even attended that meeting.

That was the only consultation that was not logged and was not recorded in that rulemaking.

Mr. MCLAIN. And that was during the postcomment period, was it not?

Ms. BERNSTEIN. That is correct.

Mr. MCLAIN. It was not during the rule promulgation stage?

Ms. BERNSTEIN. No—it was in the so-called deliberative period.

Mr. MCLAIN. And certainly not, as the Executive order allows, prior to a notice of proposed rulemaking.

Ms. BERNSTEIN. Right.

Mr. PARKER. Mr. McLain, I really did not answer your question, which really was talking about the notion of OMB acting as a conduit notion. There is a footnote in *Costle* that says that they are not addressing the question where OMB, CEA, or whoever is acting as a conduit for outside information. There are a lot of fears about the Executive order, and that is certainly one of them—that the process that has been set up is simply for OMB, which apparently has already looked at hundreds of regulations and is going to have its priorities set by outside contacts, to serve as a conduit for information, or certainly political pressures, to the Agencies.

Mr. MCLAIN. Would you find, Mr. Parker, that *Costle* could be distinguished clearly from those concerns that you have raised in your testimony before the subcommittee in terms of ex parte communications with outside parties?

Mr. PARKER. Yes, I think it is talking about a different kind of contact.

One thing that troubles me particularly—and this is something that has not been fully explored—is the extent to which Mr. Stockman is the President, I guess.

What is troublesome, I think, is to have an agency such as OMB, which is clearly not the President but rather is a separate agency in which the President is not directing OMB's own activities closely at all. I am troubled by the extent to which the same kinds of considerations apply in that kind of situation, where one agency is directly intervening in the process of another, as compared with situations such as happened in the *Costle* case where the President himself was sitting there, essentially jawboning with the head of the Agency.

Mr. MCLAIN. Mr. Eads, let me follow up on just one point that you mentioned in your prepared testimony. You stated: "Even more serious is the threat that the Office of Information and Regulator Affairs will give the signal that despite the words of the Executive order analysis is really unimportant in determining whether regulations will be allowed to proceed, and that the true litmus test is political acceptability. There are already signs that this may occur. I cite one such instance in my article. I am aware of others."

My question is: What are the others?

Mr. EADS. After I said that, I mentioned a number of them that concern me. I mentioned the decision to hold up the OSHA noise regulations—the final regulations—for which I felt OSHA had done an extremely thorough job of generating just the kind of economic analysis one would want. Still they were held up.

I mentioned the patient package insert regulations of FDA—where the same thing occurred. And I have also been quite concerned about the process by which commitments seem to have been made to change a lot of the automobile regulations before the supporting record has been generated.

Jim Miller is fond of talking about carrots and sticks, and I understand his stick. To me, it seems that the carrot should be that when an agency is capable and does a good job of showing—again, to the extent it is permitted by law to do so—that its regulations make sense, those regulations should go forward. OMB should, in fact, be a strong advocate of having those regulations go forward even if they do not happen to be politically correct.

But what I am seeing, I am afraid, is first the decision on what the next will be. Then the analysis, if it is done, tends to follow that.

Mr. MCLAIN. Ms. Bernstein, your statement indicates the possibility that agencies' decisions might be reversed—I think you say someplace, somehow.

Does not that imply a displacing of the agencies' congressionally delegated discretionary authority?

Ms. BERNSTEIN. To some extent it does, and the reason I said someplace, somehow, is that I believe it is still unclear. I know what the Executive order says, and I know what the statements also said, which was and is: "The Agency still makes the decision."

I believe it is too early to tell, though, if, in that process, decisions which the agency had made are, in fact, reversed, not on the basis of the economic analysis but, rather, on what I would call a value judgment. Then, the decision will be made someplace else.

Mr. McLAIN. But are you saying that the potential is there for the decision to be made by the Director of OMB?

Ms. BERNSTEIN. Yes.

Mr. McLAIN. Thank you.

Thank you, Mr. Chairman.

Mr. GORE. Let me try to get this clear in my own mind in as simple a language as possible. It seems to me that there is one major issue involved and then several subsidiary issues that relate to the major issue.

The major issue is: Who makes the decision to allocate resources in this society by regulation? That is really the major decision, is it not?

Ms. BERNSTEIN. Yes.

Mr. GORE. That is a question that has occupied constitutional lawyers since the beginning of this country, since the Constitution was put into effect, and there is a long history of analysis.

To sum it up, the Supreme Court decided in the *Youngstown Steel & Tube* case when President Truman, during the Korean War, seized the steel mills and cited as justification powers inherent in the Presidency—the Court was called upon to resolve this question of when the executive branch can arrogate unto itself the power to allocate resources within our society.

The Supreme Court decided in that definitive case that the executive branch has such power only when it is given to the executive branch in the Constitution or when it is it is explicitly given to the executive branch by the Congress. Am I OK so far?

Ms. BERNSTEIN. I believe so.

Mr. GORE. Now, there does not seem to be any dispute that the administration does not have a constitutional grant of power to arbitrarily allocate resources in this society by regulation, on its own.

Let me back up. In this matter, the Congress decided to delegate the power to regulate to the executive agencies, and it did so in a fairly explicit way.

Because of concerns about the potential abuse of that power, the Congress adopted procedural safeguards, many of them contained in the Administrative Procedures Act.

Under the Constitution and under the laws passed by Congress, those procedures have to be followed if the power to allocate resources by regulation is used justly and in a lawful manner.

If the Administration comes up with a new tricky device to circumvent all of those procedures, and in the process arrogates unto itself the power to make those decisions without reference to the safeguards attached to the original delegation of power by the Congress, then something has gone wrong.

Is that a fair statement of the concern that you three are expressing?

Mr. PARKER. It is my concern.

Mr. GORE. You agree with it?

Mr. PARKER. I do.

Ms. BERNSTEIN. I would say I agree also, Mr. Gore.

If I may add just a couple of remarks to your analysis which I know you did not mean to exclude—one is that you said the Congress delegates to the executive agency, and you know when you delegate to an executive agency that it is, indeed, part of the executive branch and that it has certain responsibilities to the Executive.

So there is a bit of a balancing that way because the responsibility between the head of an agency to the President is one that he or she must carry out.

Also important is the President's constitutional authority and responsibility to see to it that the laws be faithfully executed.

So it is not a one-sided debate, I do not think, and I do not think you meant to suggest that; it is a balance in the way the executive agencies carry out the mandate of the Congress, consistent with their authority to report and relate to the President of the United States who, after all, is elected.

Mr. GORE. Which is a replay of Justice Frankfurter's clarification?

Ms. BERNSTEIN. Yes, I think it is.

Mr. EADS. I am the sole nonlawyer on the panel, and I would like to add my particular perspective.

What has happened over the last 10 or 15 years is that the scope of regulation in our society has grown far beyond any level that anyone contemplated particularly when the courts were considering the Youngstown case.

The dilemma that we face is that, practically speaking, regulation must involve balancing and tradeoff, both within an agency's programs and among the programs of agencies. We have limited resources, and it is important that they be wisely used.

How much discretion an agency or the executive branch itself has to make such a balancing is, of course, a matter of law. It does strike me that if the White House wishes to claim that it has a very broad authority to do so, then it should come to the Congress and request such a grant of authority as a practical matter.

I think what the Supreme Court was saying yesterday was that, if Congress, in its wisdom, says that certain things shall be considered, even if the results of that make little economic sense, the administration should carry out the law. If they do not like the law, they should get the law changed.

There is a major problem now. Regulation is important. It is affecting our society. There is need for balancing. But I think your interpretation of where the law currently sits is the correct one.

Mr. GORE. You bring an interesting perspective to this debate, Mr. Eads. You began in the Ford administration on this subject of regulatory reform.

Your concern is similar to our other witnesses' but from a different perspective. You see, and you have cited quite plainly, the greatly expanded role of the Federal Government that began with the New Deal and the enormous scope of regulatory power and authority.

While some would picture this debate and this concern in terms of less government or more government, you are saying it is really quite different than that. The fact that all of this regulatory apparatus exists makes it all the more important, in your judgment, for the decisions to be openly arrived at and to take into account the need to balance carefully the interests affected.

What you are saying is, even though there may be a temporarily seductive appeal to a move to take over this process and hot-wire it

by the White House and the OMB, you, coming out of the Ford administration, say, in the long run, the potential for abuse is very real and we may run into very serious problems if we allow this to go unchallenged. Is that an overstatement of your concern?

Mr. EADS. I think my position is a fairly conservative one in the traditional meaning of that term. Now that regulation has become, in a real sense, as important to the society as the taxing and spending of money, the public has a right to know how these decisions are being made.

It is an incredibly hard job of both deciding how far balancing can and should go, given the law, and also of making rational decisions in the Government about allocating these large sums of money.

Mr. GORE. Yes.

Mr. EADS. I testified last week before Senator Stafford's committee on the Clean Air Act. I stated that I believe that the country is going to have to face up to the issue of whether it will allow costs to be explicitly considered in setting ambient standards. It is something we cannot duck any more. Practically speaking, they get in now, but only through the backdoor. It strikes me that we should face the question directly.

Regulatory oversight is a problem that has faced the last four Presidents. Considering their differences in personality, all four of the Presidents have seen the problem in remarkably similar terms: To walk the fine line between continual oversight and arbitrary intervention and to try to figure out how to make the oversight process a reasonable and open one.

I happen to think that, given a few more months and a few more revisions, the current process may turn out to be not all that different from the ones we have seen before, and I see the process of regulatory oversight by the White House as an evolving one.

Mr. GORE. But while it may appear at times to be a matter of subtle shading and degree, the simple question is: Who makes the decision? And you are either on one side of that line or another.

It may be that by a process of evolution we will get back on the other side of the line, but it appears, from the evidence we have been reviewing and will review in this hearing, that a lot of these things like cost-benefit analyses are usually a sham and serve merely to bring the decision back on the OMB side of the line and let them actually make the decision.

A ping-pong game of just interminably delaying regulations that they do not like or that some industry that has contacted them does not like is also a sham and brings the decision back on the OMB side of the line.

But all of those are subsidiary questions to the main one: Who makes the decision, and how does the power lawfully flow from the Constitution to that person making the decision?

I recognize my colleague, Mr. Marks.

Mr. MARKS. Thank you very much, Mr. Gore.

Mr. Parker, first of all, I am sorry I was not here for your testimony. We were called over for a vote, and it appeared as if we were going to have another one immediately, and so the chairman and I both stayed as a matter of fact, and that was the reason.

Ms. Bernstein, I read your formal statement before your testimony this morning, and I recollect that during the period of time that some of my colleagues were making their opening statement—both the chairman, perhaps, and Mr. Gore, in particular—there was a question raised as to the legality of the Executive order that we are here discussing—12291.

I did not note in your testimony that you read—although I may have just overlooked it—your own opinion which, as I read it now—and I am quoting:

> My personal opinion is that there is more than adequate legal authority for both the imposition of the requirements of the Executive order and for the review which the President has established.

I assume that you have no reason to change that opinion at this point?

Ms. BERNSTEIN. No, I do not, Mr. Marks.

Mr. MARKS. Mr. Eads, in your testimony, as you were proceeding—and I think it may have been on page 5 or 6—you referred to the memorandum that Director Stockman of OMB put out on June 11, 1981, and you referred to the last two paragraphs—if I remember correctly—of that memorandum.

I was not quite sure what you were telling us about that memorandum in the sense of what your statement or what you were reading from—in the sense of how that would change your testimony or how that would lighten your concerns to some degree if, in fact, it does.

Mr. EADS. Let me clarify that. My prepared statement says that the Reagan plan totally dispenses with public filings. From discussions I have had with various people, including Jim Miller, Nino Scalia, and various other people, it was my strong impression that the only time any paper record was going to be kept of OMB/agency interactions—and that would include comments and analyses that OMB had of proposed regulations—was going to be in this postcomment period. I understood that they were not contemplating formal filings.

In the course of preparing my article for regulation, I had occasion to talk with Scalia who interviewed Miller on that point in the course of preparing a piece in the March-April issue.

One of the questions that had been asked in the March-April issue was whether or not filings were contemplated. It was possible to read the answer in any one of two ways, so I made the point of talking to various people to find out, in preparing my article, whether I was right.

Mr. DINGELL. Without objection, the article will be included in the record. [See p. 211.]

Mr. EADS. What the piece that came out Friday does is suggest that when the task force staff—I assume that refers to the Vice President's task force, its that staff, which is identical to the OMB staff for all practical purposes—and OMB develop factual material pertinent to a rulemaking, they will do this in a formal way and submit it to the agency for the record.

Mr. MARKS. And advise the agency?

Mr. EADS. And advise the agency.

That suggests to me that at least in some cases something akin to the filings that we made will be prepared. I do not know what they will interpret the term "factual material" to be.

Mr. MARKS. Assuming it is a reasonable interpretation, you would therefore be somewhat relieved of your concern in that particular area?

Mr. EADS. Anything that puts agency/OMB contact on the record so that the public can know what it is, so that the courts can know what it is, so that analyses that are prepared in the Executive Office are made available, is something which helps to quiet my fears.

Mr. MARKS. You made another comment. Was it in the same vein—about the following paragraph? Did you not mention the last paragraph?

Mr. EADS. Yes, sir. We discussed that a little bit while you were out of the room.

Mr. MARKS. I am sorry if this is repetitive.

Mr. EADS. As I said, I have not been able to read the decision referred to, but it was my understanding that one of the points at issue in this case was the propriety of contacts between the White House—which means the whole Executive Office complex—and EPA. The courts had upheld specifically what we in the Carter administration did.

As I point out in the article, whenever any of the White House officers were going to have any discussions, with an agency, after the public comment period had closed, we informed the agency of that fact and informed them that they should keep a record of the conversation and put that record into the file. So, any time there was a substantial contact, it was included.

In preparing any article, I had raised this issue with a number of people. I had interpreted the reading of the Reagan Executive order that they intended to log all postcomment White House/agency contacts but I was told by others that it might be the administration's intention only to record things in the event that any White House/agency disagreement was not resolved.

Again, I do not know at this point exactly what this paragraph means, but to the extent that it will generate a more complete record of agency/White House contacts, it helps quiet my fears.

Mr. MARKS. Thank you, Mr. Eads.

Mr. Parker, although I did not hear your testimony—for which I have already apologized—Mr. Stewart advises me that you responded to majority counsel's question as to whether Mr. Stockman's memo prevents outside contacts concerning any policy effects or other matters with an unqualified no, I think you gave.

To your knowledge, has the Director of OMB under any administration had a policy prohibiting such contacts?

Mr. PARKER. I do not know. To my knowledge, there has not been such a policy.

On the other hand, I think the particular powers of this Director of OMB under this Executive order are rather different from those of prior OMB Directors, and I think it raises a lot more serious questions.

Mr. MARKS. Thank you very much.

Thank you, Mr. Chairman.

Mr. EADS. Mr. Marks, could I comment on that for just a second?

Mr. GORE. Please go ahead.

Mr. EADS. I know, in our administration, that there was no bar up to the time that any filings had to be made to anybody from any party talking to us about anything. Our logging procedures only went into effect when the public comment period closed.

It was our position that if an industry association or anybody wanted to talk to us about anything, up to the time we filed something before the public comment period closed, that such contacts did not have to be logged. If such contacts got reflected in any actions we took or any filings we made they would be already included in the filings.

As was pointed out, the procedures in this administration and the degree of involvement routinely contemplated is very different.

Mr. GORE. That question begs another, and you have just partly answered it. That is, has OMB ever had this kind of power in the regulatory process before?

Mr. EADS. No.

Mr. GORE. So the question is, then, should such ex parte contacts by industries affected by proposed regulations be implied, and if that is impractical it merely begs the ultimate question of these hearings, and that is, should OMB be making these regulatory decisions? That is the crux of the matter.

If you are going to have OMB making the final decision on a regulation, and an industry affected by the regulation can call up on the telephone and bend the guy's ear, and the cotton mill workers have no opportunity to do so and cannot present evidence to the person really making the decision, then the Congress never intended to delegate its power, given to it by the Constitution, to the executive branch in such a manner. It is not right.

Let me go back to another question. I am interested in how the Supreme Court case yesterday affects this issue. Have any of you had an opportunity to read it yet?

Ms. BERNSTEIN. Just what is in the newspapers.

Mr. EADS. The same thing.

Mr. GORE. Well, it is a hazardous exercise.

Ms. BERNSTEIN. I did read two newspapers.

Mr. GORE. The Court did address the use of cost-benefit analysis and said—and I quote—"When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute." It gives a number of examples of where the Congress has explicitly called for a cost-benefit analysis of regulations.

It says: "These and other statutes demonstrate that Congress uses specific language when intending that an agency engage in cost-benefit analysis." Then, skipping slightly, I pick up the quote: "We therefore reject the argument that Congress required cost-benefit analysis in section 6(b)(5)" of the OSHA Act.

The use of cost-benefit analysis, it seems to me, is again appealing if it can be done, but if it is not intended and if one of the reasons it is not intended by the Congress is that the Congress feels it is totally impractical and impossible, then the administration is on thin ice indeed in telling an agency, that has been delegated power by the Congress, that it has to perform a cost-benefit analysis and

it has to come out a particular way before the regulation can be enacted.

We had before this subcommittee a lengthy exchange with Mr. Miller 2 years ago—and he will be appearing in our next panel very shortly—about the impossibility of assigning a dollar figure to the avoidance of a birth defect.

We had hearings before this subcommittee that showed that exposure to hazardous chemical waste was almost certainly causing birth defects. We have delegated the responsibility to the EPA to regulate the discharge and disposal of hazardous waste.

Now, if at the time that was done, the EPA had to perform a detailed cost-benefit analysis and show that it turned out a particular way before the regulation could be enacted, they would have to come up with some kind of value on the avoidance of that child's birth defect. You cannot do that—you cannot do that—and to pretend that you can just sets up a roadblock, in my opinion.

I think our colleagues are anticipating that other vote. Maybe we should just go ahead.

I would like to thank our three witnesses on this panel. I am sorry that the business on the House floor is keeping some of our other colleagues from participating as fully as I know they had hoped to do and will as these hearings proceed. But, with that, you are excused, and we thank you very much.

I would like to call now Mr. James C. Miller III, Administrator of Information and Regulatory Affairs at the Office of Management and Budget; Mr. Miller is accompanied by Mr. Boyden Gray, General Counsel to the Vice President.

Gentlemen, welcome to you.

Actually, Mr. Gray is counsel to the task force. Is that correct?

Mr. GRAY. That is correct, Mr. Chairman.

Mr. GORE. If you gentlemen would identify yourselves to the reporter——

Mr. MILLER. Thank you, Mr. Chairman.

I am James Clifford Miller III. I am Administrator of the Office of Information and Regulatory Affairs at the Office of Management and Budget. I am also Executive Director of the Presidential Task Force on Regulatory Relief which is chaired by Vice President George Bush.

Accompanying me today is C. Boyden Gray, who is counsel to the Vice President and is also counsel to the Presidential Task Force on Regulatory Relief.

Mr. DINGELL. Mr. Miller, the Chair advises you that it is the practice of this committee to swear all witnesses who appear before us and it will therefore be necessary to administer the oath to you. Do you have any objections thereto?

Mr. MILLER. Oh, not at all.

Mr. DINGELL. Very well. Now the Chair also inquires, will your associates appear with you as witnesses or will they appear with you as counsel?

Mr. MILLER. I think the appropriate form would be as counsel.

Mr. DINGELL. As counsel?

Mr. MILLER. Yes, sir.

Mr. DINGELL. Then it will not be appropriate for us to administer the oath to them but the Chair must advise that in the event they

do desire to give testimony it will be necessary at that point to administer the oath.

Mr. MILLER. Sure.

Mr. DINGELL. The Chair observes copies of the rules of the committee, the rules of the subcommittee and the House relevant to appearances are before you at the table, and if you will rise and raise your right hand, the Chair will administer the oath.

Do you solemnly swear that the testimony you are about to give today is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. MILLER. Absolutely.

Mr. DINGELL. You may consider yourself under oath.

The Chair is happy to recognize you and to welcome you for such statement as you choose to give.

TESTIMONY OF JAMES C. MILLER III, ADMINISTRATOR FOR INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET, AND EXECUTIVE DIRECTOR, PRESIDENTIAL TASK FORCE ON REGULATORY RELIEF, ACCOMPANIED BY C. BOYDEN GRAY, COUNSEL, PRESIDENTIAL TASK FORCE ON REGULATORY RELIEF

Mr. MILLER. Thank you, Mr. Chairman.

I have a statement here which I crafted and I would like to read it in full if you would not mind.

Mr. Chairman and members of the subcommittee, I am privileged to appear here today because I regard these hearings as reflecting, at least in part, the importance of the President's program of regulatory relief. As you know, President Reagan has made regulatory relief one of the cornerstones of his program for economic recovery. This recovery program is designed to reduce inflation, create employment opportunities, encourage economic growth, and increase productivity.

It has four complementary components: First, a stringent budgetary policy to reduce the rate of growth in Federal spending; second, an incentive tax policy to increase after-tax returns and thus promote savings, work, and investment; third, a regulatory relief policy to eliminate unnecessary regulations and improve the performance of the regulatory agencies; and, finally, a stable monetary policy to reduce uncertainty and bring inflation under control.

Let me now address in more detail the third item in the President's program, regulatory relief. On January 22 President Reagan established a Cabinet-level task force on regulatory relief. It is chaired by Vice President Bush and includes as members Treasury Secretary Regan, Attorney General Smith, Commerce Secretary Baldrige, Labor Secretary Donovan, Office of Management and Budget Director Stockman, Assistant to the President for Policy Development Anderson, and Council of Economic Advisers Chairman Weidenbaum.

I serve as Executive Director of the task force. Rich Williamson, Assistant to the President for Intergovernmental Affairs, serves as Associate Director; and C. Boyden Gray, to my left, counsel to the Vice President, also serves as counsel to the task force.

The task force's basic charter is to, first, review major proposals by executive branch regulatory agencies, especially those proposals that would appear to have a major policy significance or where there is overlapping jurisdiction among the agencies; second, assess executive branch regulations already on the books, especially those that are particularly burdensome to the national economy or to key industrial sectors; and, third, oversee the development of legislative proposals in response to congressional timetables and, more importantly, to codify the President's views on the appropriate role and objectives of regulatory agencies. The President's action in creating the task force clearly establishes regulatory oversight at the highest levels.

To help carry out his program of regulatory relief, on February 17, President Reagan signed Executive Order 12291, "Federal Regulation." That order accomplishes three major tasks. First, it establishes the preeminence of the task force in matters involving regulatory relief. Second, it sets forth the President's regulatory principles.

These are, first, administrative decisions shall be based on adequate information concerning the need for and consequences of proposed Government action. Second, regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society. Third, regulatory objectives shall be chosen to maximize the net benefits to society. Fourth, among the alternative approaches to any given regulatory objective, the alternative involving the least cost to society shall be chosen. Fifth, agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future. According to the terms of the Executive order, agencies are expected to adhere to these principles to the extent permitted by law.

Third, the order establishes a review mechanism for assuring that agency actions comport with the President's regulatory principles. This review process is carried out under the overall direction of the Presidential task force on Regulatory Relief with major responsibility for implementation residing with the Director of OMB.

Under the terms of the Executive order, executive branch agencies must submit all proposed final regulations pursuant to informal rulemakings to OMB prior to publication in the Federal Register. Although independent regulatory agencies are not formally covered by the Executive order, on March 25 the Vice President requested them to comply voluntarily with certain of its basic components.

OMB then reviews these rules and reports to the agencies as to whether they comport with the President's regulatory principles. To aid in the review and consultation process and to make sure that agencies have a proper factual basis on which to make their most important regulatory decisions, agencies are required to prepare regulatory impact analyses for each rule that the agency or OMB has determined to be "major" according to criteria established in the order.

Any disagreement with OMB's views about the conformance of a proposed or final rule with the President's regulatory principles will be taken up by the task force or, if necessary, by the President. The agencies, however, retain authority over the final decision pursuant to their governing statutes.

Let me describe now, briefly, our implementation of the Executive order. As you know, under the Paperwork Reduction Act of 1980, Public Law 96-511, OMB's Office of Information and Regulatory Affairs—which I head—is responsible for reviewing and approving Federal information reporting requirements. Because this task and OMB's task under the Executive order are highly complementary, OMB has integrated its paperwork and regulation reviews within my office.

Thus, my office reviews proposed regulations simultaneously for both their reporting—that is, the paperwork—requirements and for the degree to which they comport with the President's regulatory principles. Consistent with the goals of the Paperwork Act and the Executive order, we have established a computerized tracking service to avoid delay and minimize administrative burdens on the agencies.

Between February 17—in other words, the date the order was signed—and June 10, my office reviewed 881 proposed or final regulations submitted by the agencies. As shown in attachment A, 764 of these submissions or 87.6 percent were judged to be consistent with the President's regulatory principles in the form submitted. An additional 36 submissions were judged to comport with the President's principles after slight changes were made by the agencies reflecting consultations with OMB. Thus, nearly 91 percent of the regulations submitted thus far have gone forward, and in a form consistent with the President's regulatory principles.

On the other hand, 26 submissions were withdrawn by the agencies following consultations with OMB, and 55 were returned to the agencies for their further consideration. In some cases, agencies have concluded that the submissions were not needed and thus no further action is contemplated. In most of these cases, however, the agencies will be making new submissions based on our consultations and perhaps those of other interested parties.

Let me add a few other statistics with regard to the review process. As shown in attachment A, some 846 of the 881 submissions received were reviewed within the initial time frame set forth in the Executive order; that is 96 percent. In only 35 cases or 4 percent was the review period extended.

Moreover, as shown in attachment B, our average turnaround time for agency submissions is 9 days. That, I believe, is a good record, one that reflects the admonitions of the Vice President and the Director that we respond expeditiously to agency submissions and not create "another layer of bureaucracy and red tape."

Mr. Chairman and members of the subcommittee, let me now turn to what I gather are some of your principle concerns, and those are the openness and legality of the process.

I believe that it is important to place this Executive order in its proper context. Each of the last three Presidents has issued Executive orders requiring agencies to analyze carefully the economic consequences of their major regulatory proposals. On November 27,

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1974, President Ford issued Executive Order 11821 entitled, "Inflation Impact Statements." He subsequently extended that Executive order by signing Executive Order 11949 and giving the program a new name, "Economic Impact Statements."

President Ford's program envisioned a largely advisory oversight role by OMB and the Council on Wage and Price Stability. Responsibility for carrying out the requirements of the order was left to the agencies. As a consequence, the impact was uneven.

Some agencies produced excellent analyses and others basically ignored the requirements. Often, analyses were strong in certain areas, usually with respect to costs, and weak in others, usually in assessing benefits and identifying alternatives. The analyses were often after-the-fact justifications for actions already contemplated rather than being a component part of the regulatory decisionmaking process.

On March 23, 1978, less than 3 months after the expiration of President Ford's Executive order and while some of the analyses were still being completed under that order, President Carter issued Executive Order 12044. Like its predecessors, this order required agencies to evaluate the economic consequences of their proposed regulations. Executive Order 12044 also expressly provided that "nothing in this order shall be considered to supersede existing statutory obligations governing rulemaking."

This provision corresponded to the provision in President Ford's orders that their requirements were to be followed "to the extent permitted by law." In a similar vein, President Reagan's Executive order imposes requirements on the agencies only "to the extent permitted by law" and only to the extent that its terms would not "conflict with deadlines imposed by statute or by judicial order."

The limited application of all three Executive orders is a crucial point, one that insures their legality and the legality of actions pursuant to them. If a statute expressly or by necessary implication prohibits the consideration of benefits or costs or alternatives by an agency during its rulemaking, then those provisions of Executive Order 12291 imposing them would not apply. If a statute or a court order establishes a date for a rulemaking action, then Executive Order 12291 cannot delay that action. In other words, if Congress or the courts have spoken on the matter, then the Executive order process will conform to that expression, not contradict it.

I hasten to emphasize, however, that there are substantial differences between President Reagan's Executive order and those of his predecessors. Specifically note, first, the spelling out of regulatory principles which the agencies must follow to the extent permitted by law; second, the creation of the Presidential Task Force on Regulatory Relief and the role it formally plays in the regulatory oversight process; and, third, the requirement that all proposed and final rules be reviewed by the Director of OMB, under the overall guidance of the Presidential task force.

In my view, these differences are key to the success of the President's program. Moreover, I believe that these and other features of the Executive order and its implementation are consonant with this subcommittee's concern for openness and fairness, a concern I should emphasize is shared by this administration.

Let me be more specific: We believe that the Executive order and the procedures we have established to implement it comport with relevant legal interpretations and with the need for maintaining openness, while at the same time preserving the extraordinarily important role the President must play in giving policy guidance to those who are subordinate to him and whose work is ultimately his responsibility.

The relevant law is quite clear. The Court of Appeals for the District of Columbia recently rejected a challenge to an Environmental Protection Agency rule based in part upon off-the-record contacts with the rulemaker by the public, by representatives of the President, and by Members of Congress. Judge Wald's analysis in *Sierra Club* v. *Costle* is worth quoting, and I quote:

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

Moreover, it is important to bear in mind that whether the advice given to the agencies is by the President or by his advisors, the ultimate regulatory decision must stand or fall on the merits as reflected in the record. Again, quoting Judge Wald:

> * * * The purposes of full-record review which underline the need for disclosing ex parte conversations in some settings do not require that courts know the details of every White House contact, including a Presidential one, in this informal rulemaking setting. After all, any rule issued here with or without White House assistance must have the requisite factual support in the rulemaking record, and under this particular statute the Administrator may not base the rule in whole or in part on any data or information which is not in the record, no matter what the source. The courts will monitor all of this but they need not be omniscient to perform their role effectively. Of course, it is always possible that undisclosed Presidential prodding may direct an outcome that is factually based on the record but different from the outcome that would have been attained in the absence of Presidential involvement. In such a case, it would be true that the political process did affect the outcome in a way that the courts could not police. But we do not believe that Congress intended that the courts convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of Presidential power. In sum, we find that the existence of intra-executive branch meetings during the post-comment period and the failure to docket one such meeting involving the President violated neither the procedures mandated by the Clean Air Act nor due process.

Consistent with the opinion of Judge Wald, and arguably going much further than the law requires, we have established a set of guidelines to govern our contacts with the interested public and with the agencies.

As you can see, the basic principle is that any factual information given to OMB and the task force should also be transferred to the agencies to be included in their rulemaking files. Furthermore, any time we procure facts or perform analyses based on such facts which impact on our consultations with the agencies, we also transmit such information for inclusion in the record.

Too often in the past, the Executive Office of the President has acted as a conduit for outside groups in back door "consultations" with agencies, sometimes using cost data and other information not in the record to influence decisionmakers. Our new Executive order, together with the new ex parte guidelines, estabishes a formal process for assuring that we will not act as a conduit and that such consultations will be based on what is in the public record. Mr. Chairman, I consider that one of the major accomplishments of this program.

Mr. Chairman and members of the subcommittee, I want to conclude by emphasizing that we are engaged in an effort that is extraordinarily important and are approaching the task in a manner that is legal, equitable, and consistent with the best professional thinking on the issue. Regulatory relief just has to be accomplished if the American people are to realize the full potential of the President's program of economic recovery.

The method the President has chosen to address the problem of excessive and inefficient regulation reflects lessons from prior experience but, at the same time, constitutes a break from the past and incorporates changes that should mean the difference between failure and success.

The President's approach also reflects current legal and policy opinion. The Executive order and our implementation of it has been reviewed by the Department of Justice's Office of Legal Counsel, by OMB Counsel, and by White House Counsel. It has been reviewed and analyzed by the private bar and in most of its salient characteristics it tracks closely with the major regulatory reform proposals now moving before the Congress. I have in mind here H.R. 746 and S. 1080.

Efforts to reform regulation are nothing new. But a commitment on this scale—by the President, by the agencies, and by the Congress—is unprecedented. In my opinion, a successful effort will require bold and perhaps even controversial action. We stand ready to explain our program and defend it where necessary. We will alter our approach when this makes sense but we will not be deterred from the task at hand.

Thank you very much.

[Attachments to Mr. Miller's prepared statement follow:]

Attachment A

Regulations Reviewed by OMB under E.O. 12291: Recommendation and Review Period, by Agency: February 17-June 10, 1981.

Agency	Total Regulations	Recommendation: Consistent with E.O. — As Submitted	Recommendation: Consistent with E.O. — With minor changes after consultation	Recommendation: Inconsistent with E.O. — Withdrawn by Agency	Recommendation: Inconsistent with E.O. — Returned to Agency	Review Period — within E.O. Time Period	Review Period — Review Extended
TOTAL	881	764	36	26	55	846	35
Percent	*100.0*	*86.7*	*4.1*	*3.0*	*6.2*	*96.0*	*4.0*
DEPARTMENTS							
Agriculture	134	133	1	-	-	126	8
Commerce	53	38	3	10	2	52	1
Defense	1	1	-	-	-	1	-
Education	40	40	-	-	-	40	-
Energy	22	15	6	-	1	21	1
Health & Human Svcs.	20	12	2	-	6	20	-
Housing & Urban Devel.	40	11	-	-	29	40	-
Interior	28	22	4	1	1	27	1
Justice	26	23	-	1	2	25	1
Labor	37	36	1	-	-	37	-
State	5	4	-	1	-	5	-

Regulations Reviewed by OMB under E.O. 12291: Recommendation and Review Period, by Agency
February 17-June 10, 1981, continued

Agency	Total Regulations	Recommendation: Consistent with E.O. — As Submitted	Recommendation: Consistent with E.O. — With minor changes after consultation	Recommendation: Inconsistent with E.O. — Withdrawn by Agency	Recommendation: Inconsistent with E.O. — Returned to Agency	Review Period — within E.O. Time Period	Review Period — Review Extended Extended
DEPARTMENTS							
Tranportation	139	129	6	-	4	135	4
Treasury	5	5	-	-	-	5	-
AGENCIES							
Committee for Purchase From the Blind & Other Severely Handicapped	1	1	-	-	-	1	-
Community Services Admin.	1	1	-	-	-	1	-
Environmental Protection Agency	242	222	7	7	6	229	13
Federal Emergency Mgmt. Agency	5	3	-	1	1	4	1

Regulations Reviewed by OMB under E.O. 12291: Recommendation and Review Period, by Agency:
February 17-June 10, 1981, continued

Agency	Total Regulations	Recommendation: Consistent with E.O. — As Submitted	Recommendation: Consistent with E.O. — With minor changes after consultation	Recommendation: Inconsistent with E.O. — Withdrawn by Agency	Recommendation: Inconsistent with E.O. — Returned to Agency	Review Period — within E.O. Time Period	Review Period — Review Extended Extended
AGENCIES							
General Services Admin.	13	12	1	-	-	11	2
U. S. Metric Board	3	1	-	2	-	3	-
Nat. Aeronautices & Space Administration	2	1	-	1	-	2	-
Nat. Foundation on the Humanities	5	1	1	-	3	2	3
Office of the Federal Inspector for the Alaska Natural Gas Transp.	4	2	2	-	-	4	-
Office of Personnel Mgmt.	13	12	-	1	-	13	-
Panama Canal Comm.	1	-	-	1	-	1	-
Small Business Admin.	5	3	2	-	-	5	-
Veterans Admin.	36	36	-	-	-	36	-

Attachment B

Regulations Reviewed by OMB under E.O. 12291: Average Review Period, by Class of Rule: February 17–June 10, 1981

Class of Rule	Executive Order Section	Executive Order Days Allowed	Number of Rules	Average Review Period
TOTAL	N/A	N/A	881	9
1. Major rule to be published as notice of proposed rulemaking	3(c)(2)	60	1	8
2. Major rule to be published as final rule for which no notice of proposed rulemaking was published	3(c)(2)	60	6	8
3. Major rule to be published as final and for which a notice of proposed rulemaking was published	3(c)(1)	30	2	6
4. Proposed or final nonmajor rule	3(c)(3)	10	693	8
B. Report on final rule(s) already published for which effective date(s) will not be postponed	7(b)	15	74	8
C. Report on final rule(s) already published that will take effect as interim rule(s) while being reconsidered	7(d)	15	7	3
D. Report on pending proposals which will be promulgated as final rule(s) but have not been considered under the terms of the Order	7(f)	30	62	17
E. Report on emergency regulations(s)	8(a)(1)	N/A	33	6
F. Report on rule(s) for which consideration or reconsideration under the E.O. would conflict with statutory judicial deadlines	8(a)(2)	N/A	3	10

Mr. GORE [presiding]. Thank you very much, Mr. Miller.
I recognize first Mr. Synar.
Mr. SYNAR. Thank you, Mr. Chairman.
Mr. Miller and Mr. Gray, welcome.
Let me ask you, Mr. Miller, a question right off the top here. Your counsel today, Mr. Gray, in a recent speech on April 10, 1980 before the U.S. Chamber of Commerce made the following statement that I think we need some clarification on, and let me quote from Mr. Gray's speech:

> If you go to the agency first, don't be too pessimistic if they can't solve the problem there. If they don't, that's what the task force is for.
>
> We had an example of that not too long ago but the people were not being completely candid with their own top people or the task force. We told the lawyers representing the individual companies and the trade associations involved to come back to us if they had a problem.
>
> Two weeks later they showed up and I asked if they had a problem. They said they did, and we made a couple of phone calls and straightened it out, alerted the top people at the agency that there was a little hanky-panky going on at the bottom of the agency, and it was cleared up very rapidly, so the system does work if you use it as sort of an appeal. You can act as a doublecheck on the agency that you might encounter problems with.

Now I think this statement raises several questions. First, Mr. Miller, what is the legal and public policy basis for the use of the task force as an appeal for the business community from decisions of the regulatory agencies? Second, what are the instances in which the task force has been used as an appellate body? Third, to what extent are such ex parte communications going to be placed on the public record?

Mr. MILLER. Congressman Synar, that is a whole mouthful. Let me say my initial reaction to your first question is that it borders on a "When did you quit beating your wife?" type of question. I am not sure I can come up with an answer that would satisfy it, given the——

Mr. SYNAR. Well, Mr. Miller, are there any legal or public policy bases for that kind an appeal structure for the business community?

Mr. MILLER. I can describe for you, sir, the legal and public policy bases for the program, of but——

Mr. SYNAR. Not the program, the appeal structure to the task force.

Mr. MILLER. Pardon?

Mr. SYNAR. In this statement by Mr. Gray, it appears that the task force serves as a direct appeal body for any business community group or public sector group that wants to appeal. I am trying to find out what your legal or public basis is for being this type of an appeal structure.

Mr. MILLER. Could I answer it, first, by suggesting that we take the pejorative connotation out of the question. The task force does constitute, in a sense, an appeals board, but it is appeals not from business or industry, or consumer groups, or labor groups, or whatever. It is really an appeals process that involves the agencies and the Office of Management and Budget, the Office of Management and Budget being under the overall direction of the task force.

I would like to interrupt just a second, Congressman, if I could, and ask if Mr. Gray was correctly quoted.

Mr. SYNAR. Well, just a second, Mr. Miller. Let's come back to that. Let me ask you something. You said "agencies" and I would say that would probably be within the context of the legal and policy basis, but let me requote:

> We told the lawyers representing the individual companies and trade associations involved to come back to us if they had a problem.
> Two weeks later they showed up and I asked if they had a problem. They said they did. We made a couple of phone calls and straightened it out, alerted the people at the top of the agency that there was a little hanky-panky going on at the bottom of the agency, and they cleared it up very rapidly.

Now that does not appear to me to be an appeal from an agency. It appears to be circumventing the whole process of administrative law for any group that feels they have been inpinged upon to go straight to the task force.

Mr. GRAY. Congressman Synar, let me see if I can——

Mr. SYNAR. Mr. Chairman, before he testifies I would like him to be sworn in.

Mr. GRAY. That is fine.

Mr. GORE. The Chair will advise that Mr. Gray is appearing as counsel for the witness. If you wish to testify—and it might be a good idea, since you were the author of the statement in question—if you wish to testify we will have to swear you, however.

Mr. GRAY. That is fine.

Mr. GORE. Will you stand and be sworn?

Do you swear the testimony you are about to give is the truth, the whole truth and nothing but the truth, so help you God?

Mr. GRAY. I do.

Mr. GORE. The gentleman from Oklahoma is recognized.

Mr. SYNAR. Fine.

Mr. GRAY. I will see if I can answer it this way, Congressman, and that is, I think, an example of how we have approached the whole question of ex parte contacts: When they first came in to see us with materials I said, "Have you gone to the agency?"

They said, "No." I said, "Well, go to the agency. I do not want to see anything you are giving me until you first give it to the agency because I am not going to act as a conduit for your views," and so they did.

I said, "If you have a problem, if you think that they are not recognizing and paying attention to the material that you give them, bring the material to me and/or to us and we will see then what the problem is."

They came back, and what they had was an internal agency document which I thought should be brought to the attention of the top officials of the agency. The phone call was to alert them to the existence of a document in their own files.

If you want to call it an appeal, that is—I do not know if I was correctly quoted or not but——

Mr. SYNAR. This is a quote from your recent speech of April 10, from a transcript made off a tape of your speech, I think.

Mr. GRAY. We have heard views from all groups.

Mr. SYNAR. Mr. Gray, what I am trying to get to—and I am not trying to be in an adversary position—I want to know what the legal or public policy basis is for groups, trade associations to come directly to you when they feel they have not necessarily gotten the best treatment from the agencies. Where do you get this legal or public policy basis? I mean, that is what I am trying to get to. I am not saying that you are right or wrong. I want to know the basis by which I or a trade——

Mr. GRAY. Congressman, I know of no prohibition on the ability of the public to exercise first amendment rights to——

Mr. GORE. Will the gentleman yield?

Mr. SYNAR. Yes, I will.

Mr. GORE. The question is not what is the prohibition on the right of the public to appeal to you. The question is, what source of legal authority can you cite for serving as an appeal for business groups to come directly to you if they are dissatisfied with the progress or results of regulatory proceedings in the executive agencies?

Now it has to come either from the Constitution or from an explicit delegation of authority by the Congress. Does it come from the Constitution?

Mr. GRAY. Yes, sir.

Mr. GORE. Can you cite which portion of the Constitution is the source of that legal authority?

Mr. GRAY. I guess the principal source is that provision of the Constitution which vests in the President and his designees the authority to see that the laws are faithfully executed.

Mr. GORE. Precisely the source of authority cited by the lawyer who argued the case for President Truman in the Youngstown Steel and Tube case, and that was rejected by the Supreme Court.

Can you cite another source of authority in the Constitution?

Mr. GRAY. Mr. Chairman, I do not know that the Youngstown decision disqualified the public from communicating with the executive branch.

Mr. GORE. Well, again, the question is not addressed to the ability of the public to communicate to you. The question is, what source of legal authority do you have to "hot-wire" the regulatory proceedings at the agencies?

Mr. GRAY. I am not sure I know what you mean by "hot-wire."

Mr. GORE. To direct a result.

Mr. GRAY. Well, I believe, as Dr. Miller has testified, everything we are doing we think is very solidly based on opinion from——

Mr. SYNAR. Mr. Gray, that is what the Chairman is asking you. Can you give us some legal authority or public policy basis that gives you this authority? I mean, the whole root of this problem is that, if you listened to the opening statements, some of us think that maybe you all are stepping on some very serious constitutional questions. We want to know if you have based your whole statement that you are within the legal authority on the legal opinions of all these guys that are your hired guns in your administration—what is the basis that you are taking this type of authority, circumventing the whole process of administrative law, appeals, public hearings, public testimony——

Mr. GORE. Prohibition of ex parte communications.

Mr. SYNAR [continuing]. Ex parte communications, we want to know, what is your authority to do this?

Mr. MILLER. Could I respond to that, Congressman?

Mr. SYNAR. Sure.

Mr. MILLER. That is your characterization of what is going on. We think that the appropriate characterization of what is going on is that the President is seeing to it that the laws are faithfully executed. Now there is a Constitution. The President does have the authority and responsibility to see that the laws are faithfully executed.

Moreover, the basis for it was an Executive order which was signed by President Reagan on February 17. It puts in place a task force comprised of the chairman, being the Vice President of the United States, and our members——

Mr. SYNAR. Mr. Miller, we are all familiar with what the Executive order——

Mr. GORE. Let the witness respond.

Mr. MILLER. There is also an opinion by the Office of Legal Counsel with respect to the Executive order itself and the authorities granted to the Director of OMB, under direction of the task force, and whether these are permissible under law. We would be glad to make a copy of this available to you if you like.

With respect to the operation of the task force in touching base with people in the agencies, we also have an opinion from the Office of Legal Counsel, in the Department of Justice, as to what is required. I thought what I indicated in my testimony is that what Director Stockman issued in terms of guidelines went beyond what was required by the law.

Mr. SYNAR. Well, let me ask this question of Mr. Gray: Mr. Gray, do all people have the right to call you, all people, or just a select group of people?

Mr. GRAY. Anybody can call me.

Mr. MILLER. Anybody.

Mr. GRAY. In fact, we have met with——

Mr. SYNAR. Anybody?

Mr. MILLER. Yes.

Mr. SYNAR. My dad and mom who are upset about something?

Mr. GRAY. Absolutely.

Mr. SYNAR. They can call directly to you?

Mr. MILLER. Absolutely.

Mr. SYNAR. You will take their call?

Mr. MILLER. Congressman, we receive a lot of inquiries from——

Mr. SYNAR. Will they get to Boyden Gray, though, like these people in his statement of April 10? Will they get to you, or will my mom and dad have to go through agencies and everything else?

Mr. GRAY. We would hope that they would go to the agencies first and then come to us.

Mr. SYNAR. Okay. I know that we are not going to get anywhere on that. Let me ask one question: Are these ex parte communications ever going to be placed in the public record for all of us who are concerned about why and how decisions are made and the parameters of those decisions? Are they going to be made part of the record, such as the conversations you had with this example you used in the speech?

Mr. MILLER. If it is appropriate from a policy standpoint that they be put in the record, if it is required by the law, they will be put in the record.

Mr. SYNAR. How do you determine appropriateness of what should be included in the record or not? See, that is why we have the Administrative Procedures Act, to determine the appropriateness of the statements——

Mr. GRAY. That is right.

Mr. SYNAR [continuing]. But now you are telling me you all will determine whether it is appropriate.

Mr. MILLER. No, sir, I just said if it is consistent with the law. The Administrative Procedure Act is part of the law and we are going to act consistent with the requirements of the Administrative Procedure Act.

If the communication is advice, or a privileged kind of information that the President, the Vice President, or other members of the task force would not want to be shared with the public, then we will not share it. If everything is to be shared, then advice is not candid and to the point and straightforward. We want to make sure that the advice given is candid, straightforward and to the point.

However, if on the other hand it has a factual basis—it is something that is relevant for the record itself—that will be transmitted just as I described.

Mr. GORE. Will the gentleman yield?

Mr. SYNAR. Yes, sir.

Mr. GORE. I would like to ask unanimous consent to put in the record at this time a document from your group that was supplied in response to a request from the chairman. Without objection, that will be included in the record.

[The document referred to follows:]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

April 28, 1981

Honorable John D. Dingell
Chairman
Subcommittee on Oversight & Investigations
Committee on Energy and Commerce
U. S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in further response to your request of March 13, 1981, for "a list of those contacts made ... with representatives of any business, association or group which may be affected by the regulations in question ...." The regulations in question are those released during the Vice President's press conference of March 25. Again, I apologize for the delay of this response, for reasons discussed in my prior communications.

Enclosed is the relevant list of contacts with me or my staff. It includes date (where known), the name of the group represented, and a very short description of the purpose of the meeting. Because your request was made after most of these contacts had occurred, the list was prepared by reviewing schedules and notes, and from interviews with those who were present at the meetings. Unfortunately, the list does not include all such contacts, but it does include all that, following substantial effort, we have been able to reconstruct. Also the list does not include telephone contacts and other encounters which were not meetings held in our offices--such as numerous telephone contacts with members of Congress and their staffs. (We do not keep records of such matters.) Further, the list does not include my speeches or attendance and discussions at public sessions.

Finally, let me note three other matters. First, nearly all of the meetings summarized on the list were initiated by the businesses, associations, or groups identified. Second, we have tried to make sure that information conveyed to us has also been conveyed to the relevant agencies. For example, on March 25, the Vice President urged that comments from the public be sent to the agency concerned as well as to the Presidential Task Force on Regulatory Relief.

Third, the terseness of our descriptions of the contacts on the list is largely the result of the fact that we did not keep detailed records of these meetings or their content. As you can see, many of these sessions were of a general nature, in which attendees merely wished to express support for the President's program. (We have indicated whether a meeting dealt with particular regulations when we have been able to ascertain that it did.)

We appreciate your interest and the interest of other members of Congress in the President's program of regulatory relief.

Sincerely yours,

/s/ James C. Miller III

James C. Miller III
Administrator for Information and
Regulatory Affairs

Enclosure

DATE	NON-GOVERNMENT GROUPS REPRESENTED	SUBJECT
1/27/81	California State Assemblyman Leo T. McCarthy	Discussion of procedural approaches to regulatory relief at state level
1/29/81	Digital Corporation	Operation of new Office under Paperwork Reduction Act
1/29/81	Greyhound Corporation	Reform of interstate bus regulations
1/29/81	Air Transport Association	Progress and problems under airline deregulation
1/29/81	U.S. Chamber of Commerce, General Motors, Atlantic-Richfield	Support for regulatory relief
1/29/81	Procter & Gamble, General Motors	Support for "freeze" on new final regulations
2/9/81	U.S. Chamber of Commerce	Support for regulatory relief
2/10/81	American Productivity Center	Center's resources as applied to program of regulatory relief
2/12/81	Synthetic Organic Chemical Manufacturers Association	Support for regulatory relief
2/12/81	Briefing at White House with Hispanic representatives	President's economic recovery program
2/12/81	American Industrial Health Council	Standards for weighing benefits and costs of regulations
2/13/81	National Association of Manufacturers	Support for regulatory relief
2/18/81	American Mining Congress	Support for regulatory relief

DATE	NON-GOVERNMENT GROUPS REPRESENTED	SUBJECT
2/23/01	National Institute of Building Sciences	Discussion of their task force's research on costs of regulations affecting new construction
2/23/01	Chemical Manufacturers Association	Support for regulatory relief
2/23/01	Ford Motor Company	Auto regulations
2/24/01	Ford Motor Company	Import quotas
2/25/01	American Business Conference	Invitation to speak
2/25/01	American Bar Association	Procedural aspects of regulatory reform
2/26/01	CONSAD	General aspects of regulatory reform
2/26/01	Can Manufacturers Institute	Support for regulatory relief
2/26/01	U.S. Chamber of Commerce, Atlas Tool & Manufacturing Co., American Hardware Mfgrs. Association, Wrap-On Co., Inc., Wager Hinge Co.	Acceptance of Chamber-sponsored report, "Quality of Regulators"
2/27/01	CONSAD	General regulatory relief approaches
2/27/01	Eli Lilley Co.	FDA regulation of new drugs
3/5/01	National Association of Manufacturers	Support for regulatory relief
3/10/01	General Motors	Auto regulations
3/11/01	Sun Oil company	Support for regulatory relief
3/12/01	Group of Congressman Broyhill's business constituents	Support for regulatory relief
3/19/01	Delta Airlines	Effects and problems of airline deregulation
3/24/01	Georgia Power Co.	FERC regulations

Additional staff member contacts over relevant period for which precise date could not be ascertained.
International Paper—Discussion of BCT guidelines for pulp and paper effluents.
Garbage Compacter Manufacturers—Noise standards for garbage compacters.
Ralph Nader's organization—New drug policy.
Business Roundtable—Clean Air Act regulations.
Sheet Metal Association—Voluntary standard-setting procedures.
St. Joseph Lead Company—OSHA an EPA lead regulations.

Mr. GORE. It lists the groups represented in contacts before—in other words, the people who have contacted you. The gentleman from Oklahoma asked can anybody contact you. The list is the U.S. Chamber of Commerce, General Motors, Atlantic Richfield, Procter & Gamble, U.S. Chamber of Commerce again, American Productivity Center, Synthetic-Organic Chemical Manufacturers, Greyhound Corp., a group of Congressman Broyhill's businessmen constituents, Sun Oil Co., General Motors, the National Association of Manufacturers, the U.S. Chamber of Commerce again, Ford Motor Co. a couple of times, the Chemical Manufacturers Association, and so forth.

Mr. SYNAR. It does not look like my mom and dad are getting in there.

Mr. MILLER. Congressman, may I speak to that?

Mr. SYNAR. Sure.

Mr. MILLER. My office is open to anyone, within reason. I have a reasonable amount of time to give. I have given time to your staff. I have given time to a group of environmentalists that have come to me. I have given time to other congressional staff. The list that you read reflects the people that asked to see me. Now, I have no control over that.

Mr. GORE. Well, let me, if the gentleman will continue to yield—Mr. Gray, you have invited ex parte communications from—what was the name of the business group? This was the speech that you made before the chamber of commerce saying, "Hey, if you are not satisfied with the treatment you are getting over at the agencies, come see me. We might be able to take care of it for you."

Have you made any speeches to public interest groups or the like with a similar invitation?

Mr. GRAY. Yes, sir. In fact, we were nervous that we were not being asked to meet with environmental and consumer groups so we initiated meetings with the key environmental groups. There have been at least three major meetings with environmental groups and I have had other informed discussions with leaders in the environmental community.

The Vice President has had numerous discussions with people in the labor movement, and on one occasion we had a 2½-hour lunch with Lane Kirkland and several of his colleagues. We constantly seek these kinds of communications. We have met with handicapped groups. We are initiating further such meetings.

This is something that the Vice President takes very seriously. We will continue to do it, and my door is always open. I have listened, and taken virtually every phone call that I could possibly handle. I think the same is true of Jim, and also of Rich Williamson and the members of the task force.

Mr. GORE. If the gentleman will continue to yield, and then I will recognize my colleague, Mr. Marks—really, the question is the pro-

cedure, and the opportunity that organized interest groups have to bias the outcome and to get you to direct the result of regulatory proceedings under way.

Let me just cite you a couple of examples: When you met with the Chemical Manufacturers Association on February 23 of this year and discussed their support for regulatory relief, isn't there just a chance that they mentioned the hazardous waste disposal regulations which were ordered to be reviewed by your task force just 30 days later? I mean, isn't that what you discussed with them?

Mr. MILLER. No.

Mr. GORE. What did you discuss? You did not discuss the hazardous waste disposal regulations?

Mr. MILLER. No.

Mr. GORE. All right. What did you discuss?

Mr. MILLER. We discussed what I put on the piece of paper, Congressman.

Mr. GORE. Support for regulatory relief?

Mr. MILLER. Yes.

Mr. GORE. How long was the meeting?

Mr. MILLER. The meeting was 20 minutes, 30 minutes.

Mr. GORE. Did you mention hazardous waste?

Mr. MILLER. The answer is "No." I certainly do not recall that.

Mr. GORE. Wait a minute. You are under oath, now.

Mr. MILLER. I am under oath, yes.

Mr. GORE. The answer is 'No"? You had a 20-minute meeting with the Chemical Manufacturers Association talking about regulatory relief a month before you asked to pull back the regulations on hazardous waste disposal, and you are telling me under oath that you did not even mention hazardous waste with the Chemical Manufacturers Association?

Mr. MILLER. I am telling you, to the best of my recollection that topic did not come up, and I am under oath when I am saying that. I do not recollect that.

Mr. SYNAR. Would the chairman yield?

Mr. GORE. Let me get the response to the question.

Did they mention it?

Mr. MILLER. I do not recollect their mentioning it.

Mr. GORE. On January 29, 1981, you met with the Air Transport Association to discuss progress and problems under airline regulations. Didn't you really discuss the air carrier certification operating and maintenance rule, which is now undergoing review, or the general operating and flight rules, also being reviewed by your task force?

Mr. MILLER. No.

Mr. GORE. What about February 18, 1981? You met with the American Mining Congress and discussed "support for regulatory relief." Isn't it more likely that you discussed their support for the postponement of the Interior Department's rule on extraction of coal, which has now been postponed indefinitely?

Mr. MILLER. I cannot recall that particular meeting.

Mr. SYNAR. Would the chairman yield?

Mr. GORE. Yes.

Mr. MILLER. Could I, as a witness, finish answering the question?

When I indicated and wrote out the reasons for the meetings in response to Chairman Dingell's request, those characterizations were accurate to the best of my knowledge. More time has passed since I submitted that information to you; my memory is likely to be less accurate today than it was then.

Mr. GORE. Well, one of the problems is nobody knows what you did talk about.

Mr. SYNAR. Would the gentleman yield on that point? Will that——

Mr. MILLER. Is there any law, is there anything you can cite, that says that I have to provide such information? We have provided information to the best of our ability, Congressman.

Mr. GORE. Yes, there is a law. The Congress has specified procedures that are to be followed when its delegation of authority to regulate is exercised by the executive branch, and that provides for a record upon which these decisions are made. Are your discussions with these industry groups going to be part of the record that is used to support these regulations? The answer is "No," isn't it?

Mr. MILLER. Congressman, someone asks to come and visit and they give a general reason for their visit. Now you are saying that there is a requirement in the current law that when someone comes to visit and express a view, that I have to make a record of that and that information has to be made publicly available?

Mr. GORE. If you are in fact exercising the authority that the Congress has delegated to one of the executive agencies, they are required to follow those procedures. If you have arrogated that power to yourself, then you ought to be required to follow those procedures, or else you ought to give up the authority that you have arrogated.

Mr. MILLER. Sir, could we have the appropriate citation? I am just at a loss.

Mr. GORE. I recommend this 150-page legal opinion from the American Law Division of the Library of Congress.[1]

Mr. MILLER. We have heard of such opinion; we have not been given an opportunity to review it.

Mr. GORE. I will give you one.

Mr. MILLER. The Office of Legal Counsel in the Department of Justice, and the appropriate section of the American Bar Association, with which we discussed the issue, brought no such question to our attention.

Mr. GORE. The Supreme Court addressed it yesterday, too.

Mr. DINGELL. The time of the gentleman has expired.

The Chair advises that we will continue to proceed under the 5-minute rule and try to see that all members are recognized in appropriate fashion and time.

The Chair recognizes now the gentleman from Pennsylvania, Mr. Marks.

Mr. MARKS. Thank you, Mr. Chairman.

Did you say the 15-minute rule?

Dr. Miller, given the legal questions that have been raised concerning the contacts between OMB and the public and between

[1] The opinion referred to was published as a committee print by the House Energy and Commerce Committee, "Presidential Control of Agency Rulemaking," serial No. 97-O.

OMB and the executive branch agencies, my understanding from your previous testimony was that you had asked an opinion of the Attorney General regarding such contacts. Is that correct?

Mr. MILLER. Yes, sir.

Mr. MARKS. Would you tell us, please, to the best of your recollection what advice you did receive as a result of that inquiry?

Mr. MILLER. Congressman Marks, I am not an attorney so perhaps the details would best be articulated by my colleague. However, basically it said that we were not under substantial admonitions except to the degree that we might be serving as a conduit for information. That is the reason these ex parte guidelines were issued by Director Stockman.

We knew that this was an issue that needed to be addressed from the very beginning. When the Executive order was being put together, a question arose whether to put these specific guidelines in the Executive order. However, we needed to put the Executive order out fast. The President wanted to sign it. Even so, we began working in earnest on these guidelines but I must admit it took much longer to get these out than I anticipated.

Mr. MARKS. Mr. Gray, would you like to add anything to that, or can you? May I add, is it possible for us to get a copy of that opinion?

Mr. GRAY. We will look into it. Yes, sir.

Mr. MARKS. Would you?

Mr. GRAY. I think I would add to what Jim has said, that we are not to acting as conduits for outside groups, whether they are business or environmental or labor or whatever. What this ex parte guideline does—which is different than anything done in the past—is that we are making it clear in writing what we have said many, many times informally to all groups who come in to see us, that we do not want to get any information from them that they have not given or are not giving to the agencies.

I think that is an important point to bear in mind. I am not aware that that has ever been done before. When Congressman Gore made reference to the fact that we should put on the record if we arrogate to ourselves the decisionmaking power involved with these agencies, I want to make two points about that.

We are making sure that information goes into the record. That is why we issued these guidelines; they have never been issued before in a form like this. However, the second point I think is that we have not arrogated the power to make decisions. The Executive order makes that clear; I think Jim's testimony makes that clear. The agencies retain the ultimate decisionmaking authority pursuant to their governing statutes.

Mr. MARKS. May I go back for just a moment? The opinion from the Attorney General that you mentioned previously in your testimony, is there a written opinion to that effect?

Mr. GRAY. Yes, sir, there is.

Mr. MARKS. Will you make that available to us?

Mr. GRAY. Yes, sir.

Mr. MARKS. Thank you.

Mr. DINGELL. Without objection, the document referred to will be inserted in the record at the appropriate place. [See p. 152.]

Mr. MARKS. Dr. Miller, I understand that the General Accounting Office is preparing a report on conflicting and overlapping regulations, as such. In this report, the GAO is supposed to examine the impact of the Executive order that we are now discussing in regulatory cases. I am wondering, could you briefly discuss the findings of this report with us at this point?

Mr. MILLER. Well, the findings of the report—and I have only seen a copy of a draft, and perhaps I should not be giving too much detail about it—but basically they feel that the problem of overlapping and duplicative regulation is not as widespread as generally thought, but that it is an important issue.

In that regard, they recommended that my office, through the use of the responsibilities and authorities under the Executive order, be more diligent in ferreting out problems of duplicative and overlapping regulations, and ask agencies to verify, when they propose regulations that they have made sure that their proposed regulations do not overlap or duplicate the efforts of other regulatory agencies.

Mr. MARKS. When do we expect that report to be out? Some time soon?

Mr. MILLER. It seemed to be in fairly final form—the version that I saw—so I should imagine in the next few weeks.

Mr. MARKS. Dr. Miller, again, would it in fact not simply paralyze the process of what we call providing coordination and policy advice if you would have in fact to account for every conversation with outside groups as well as with the agencies?

Mr. MILLER. Well, I would draw a distinction between conversations with outside groups and conversations with the agencies. I think it much more important to prevent public disclosure of conversations with the agencies than with outside groups. I welcome Congressman Synar or Congressman Gore to any meeting that I have with outside groups, so long as the other people—the outside group—have no problems with it.

Mr. DINGELL. Excuse me just a minute. I assume you would include the chairman, myself?

Mr. MILLER. Yes, sir. I welcome any Member of Congress or any member of your staff to sit in such meetings.

Mr. GORE. Would the gentleman yield?

What if they have a problem? What if the American Mining Congress says I cannot come and listen, or what if the Chemical Manufacturers Association says they do not want me there on the hazardous waste regulations? Have I been excluded?

Mr. MARKS. I suspect the President would take care of that.

Mr. GRAY. Congressman Gore, if I may, Jim and I both would be relieved, I think, if somebody would come and attend these meetings.

Mr. GORE. Pardon me?

Mr. GRAY. I said I think Jim and I would both be relieved if some people came and attended these meetings so we would not have to.

Mr. GORE. What if they said I could not come?

Mr. MILLER. I think that anyone who comes to a meeting, who asks to see me, should have as their prerogative——

Mr. GORE. To meet secretly?

Mr. MILLER [continuing]. Veto power over who attends the meeting and who does not. I am open, if you——

Mr. GORE. Oh, I see. To discuss these regulations that are going to affect the public?

Mr. MILLER. Congressman, could I finish my statement?

If your mother or father or Congressman Synar's mother or father wished to come, and they did not want my associates sitting in, I would observe that request.

Mr. MARKS. Excuse me. May I reclaim my time?

Mr. GORE. I am sorry.

Mr. MARKS. You have really had about 20 minutes. Thank you.

Dr. Miller, we are interested in knowing as to whether or not the Executive order has in fact been successful in reducing the unjustified regulatory burdens about which so many people complain. Can you amplify on that for us?

Mr. MILLER. Well, yes, sir. I think it has had a sizeable impact on the problem of excessive and inefficient regulation. I think the American people have considered regulatory excess and poor performance to be a substantial problem. The President believes that; I know he believes that, and he has instructed us very specifically to carry out his program of regulatory relief.

Now I tell you, it is difficult to get a very fine-tuned handle on some of these regulatory excesses because, quite frankly, one of the problems is that agencies have not done their regulatory impact analyses very well.

However, the materials that the Vice President released on June 13 contained some statistics that I think are important. One is that the regulatory initiatives announced to date involve regulations having a cost attributed to them of between $15 billion and $18 billion on a one-time basis, or annual savings of between $5.5 billion and $6 billion.

Now, as I stressed in the release and as I stressed at the press conference, these are very crude figures. They are arguably biased in the upward direction because some of the regulations will not be eliminated but only modified. They are arguably biased in the downward direction because, first, they are agency figures and these tend to be at the low end of the ranges, and second, because over 70 percent of the regulations we listed did not have any cost figures attached to them.

Therefore, this is a ballpark estimate—as I indicated at the press conference—but I think it is quite substantial. As Senator Dirksen used to say, a billion here and a billion there and pretty soon it adds up to real money.

Also, we find that the number of new rules published in the Federal Register has been cut approximately in half and the number of pages is down a third.

Now it is not the President's intent to stop all regulations but to make sure that those regulations, that do go forward do make sense and comport with his principles that he set out in the Executive order. I think we are making sizeable progress and I think that we have much more progress to make, and intend to make it.

Mr. MARKS. There is one other question that I would like to ask, if I may, and that has to do with the question that has been put this morning to others about the Executive Office review delaying

the regulatory process. I wonder if you might give us your view on that, what your experience has been, in fact, with that question?

Mr. MILLER. Well, part of this is, I guess, human nature for agencies to procrastinate in drafting up regulations. Typically, a regulation of the type we review takes months and months, if not years, to draw up. Under the Executive order, we review the regulation and consult with the agency about the degree to which it comports with the President's principles.

As I think I indicated in an attachment to my testimony, our record thus far in reviewing these regulations has been quite extraordinary, and I think it reflects extraordinarily hard work of my staff. The President and the Vice President admonished us, and the Director did too, that we should not delay our review of these regulations.

The last thing we want to do is have our review process be characterized as trying to block the regulations, so we give very expeditious treatment to these proposals when they come over. Nine days I think is a very short time period compared with the months and sometimes years it takes to draft the original regulation.

Besides that, I think that the process that the President has instituted here of providing some discipline on the agencies probably will speed up—the net effect will be to speed up—the regulatory decisionmaking process rather than slow it down.

Mr. MARKS. You know, I am not sure whether you heard it before but some of our witnesses before had some concerns about the staff and the adequacy of your staff in being able to handle the responsibilities that have been shifted to you. I wonder if you might comment on that for us?

Mr. MILLER. Well, sir, we have plans; we have a request in the fiscal year 1982 budget for additional slots for additional desk officers in my office who will be reviewing these regulations. We think with those additional resources that we will be able to meet the test—to meet the challenge—and to do a very fine job of reviewing these regulations.

We are somewhat shorthanded now, reflecting the fact that we are not quite into the fiscal year 1982 budget, and only through the extraordinary efforts of my staff are we able to accomplish the record that is before you. Let me mention something in that regard.

Quite frankly, Congressman, if OMB and the task force and the President were dealing with the same set of regulators as existed in President Carter's term—people who were not committed to reform—and if President Reagan had at his disposal only Executive Order 12044, it would be a hopelessly impossible task. I would need hundreds and hundreds of analysts to keep up.

Therefore, the important thing here, the key to our success is really, I believe, the fact that the regulatory appointees at the agencies—the Reagan political regulatory appointees—are people who are dedicated to reform. Ours is more a review process, like a journal referee, rather than a person that is writing a report or a rebuttal statement that is put in a journal.

Mr. MARKS. Thank you very much, Mr. Miller.

Thank you, Mr. Chairman, for your courtesy.

Mr. DINGELL. The Chair advises that the Chair recognizes because of the absence of time limits we have slipped past the 5-minute figure. The gentleman has been recognized for longer than 5 minutes.

The Chair will recognize next the gentleman from Indiana, Mr. Coates. Mr. Coates was here first. No? Well, the Chair will recognize the gentleman from Pennsylvania, then.

Mr. RITTER. Thank you, Mr. Chairman.

Just an opening observation: For 10 years the Federal Government has—along with many concerned interest groups—regulated in rather an emotional fashion with a lack of valid scientific base, a lack of reproducible science base. We have gone through 10 years of severe, burdensome overregulation. It seems to me that for once somebody is trying to do something about it.

We had the former employees of the Carter administration testifying earlier on a wonderful set of procedures that took pages and pages of documentation to analyze, to bring forth to us, and yet one of those people, Mrs. Bernstein, stated that they had not revised one major regulation. Therefore, they had this entire working bureaucracy set up with no results.

I think what we have to begin looking at is the fact that there are some people around today who are getting some results. I know there are questions that have been raised on procedures, and I think in a new set of processes, a new approach, those procedures will be ironed out. However, I think we have had enough emotionalism, and I think we have had enough emotionalism at these hearings today.

Mr. Synar and Mr. Gore were questioning the witnesses with a document which none of us in the minority had seen until just now. We feel as a minority that that kind of important documentation should be provided to us as a courtesy.

Both of my good friends made much of a quote alluding to Mr. Gray about working on a problem for some individuals, on page 22 of that report. I would like to read into the record, Mr. Chairman, Mr. Gray's opening remarks in that very speech. Keep in mind the fact that he sought out three environmental groups when none had previously contacted him.

I would just like to ask Mr. Miller a simple question, and I think it bears very importantly on what we are talking about because we are talking about results: Has Executive Office review of proposed and final regulations hindered agency efforts at promulgating regulations or regulatory improvement?

Mr. MILLER. If we mean promulgation of excessive and inefficient regulation, hopefully it has; if the question goes to whether our review has hindered the promulgation of regulations that make sense—and I consider the acid test as being whether they comport with the President's principles—it has not slowed down or hindered the rulemaking process.

Mr. RITTER. If I might, Mr. Chairman, before I give up the balance of my time I might like to read into the record the statement made by Boyden Gray:

I certainly think that we will not be demanding information. I think the point has been made over and over again as simply one of getting the best data from outside Government to assist the agencies in this work. The better data you provide, consumer groups provide, environmental groups provide, labor provides, et cetera, the better agencies will be able to go on preparing their regulatory impact statements, and the better we will be able to do in grading those analyses at OMB, and the better the result will be. It is something that is going to require effort all along the line but we do not want to generate paperwork that is useless.

I think it is clear that these individuals are trying to put a variety of perspectives into their actions, and I think I would like that placed in the record, Mr. Chairman.

Thank you.

Mr. DINGELL. If the gentleman would permit, the Chair is not quite sure what document the gentleman wishes to have inserted in the record.

Mr. RITTER. Well, that makes two of us, then. This was given to us moments before it was used, moments after it was introduced by our colleagues.

Mr. DINGELL. Could you identify it, if you will?

Mr. RITTER. There does not even seem to be a title on it.

Mr. DINGELL. Is this the statement of April 10, "Reform briefing, Hon. Joseph R. Wright, Deputy Secretary, U.S. Department of Commerce"? A transcript of the reform briefing of April 10, 1980? Is that what the gentleman wants in? The Chair is trying to find out what document the gentleman from Pennsylvania wants in the record. If he will identify it, we will try and get it in.

Mr. RITTER. This is the document, Mr. Chairman, that we received from majority staff. I assume if there is a——

Mr. DINGELL. I appreciate that but if the gentleman can identify it for the Chair, we will try and cooperate with him.

Mr. RITTER. I would suggest that the chairman ask——

Mr. DINGELL. If the gentleman wants a document in the record, Washington abounds in documents. The Chair seeks to have the gentleman identify what he wants in the record. If he will identify it for the Chair, the Chair will do its best to comply.

Mr. RITTER. Well, in Mr. Synar's testimony he characterized this document in one way or another. I would think that the staff of the majority understands precisely what this document is and where it came from. If they would please put a title on the document, then I would be able to identify it more fully.

Mr. DINGELL. Well, the Chair has to ask the gentleman from Pennsylvania to identify the document he wants in the record. The Chair is happy to oblige and cooperate with the gentleman but——

Mr. RITTER. I would like that portion which I read entered into the record, if the gentleman would yield.

Mr. DINGELL. The Chair is doing its best to rule on the gentleman's request. If the gentleman will identify the document, the Chair will be quite delighted to see to it that the gentleman has the cooperation of the Chair. Now the Chair was not in the room, and the gentleman is referring to a document.

Mr. RITTER. I would like the recorder to please read back Mr. Synar's characterization of this document, the document which originated from the majority staff.

Mr. DINGELL. I think that is probably beyond the capacity of the recorder. If the gentleman will search around and see what he can do about identifying the document, the Chair will be happy to rule on the gentleman's request, and the Chair will defer ruling until

such time as the gentleman is prepared to make the appropriate request to the Chair.

Mr. RITTER. That is perfectly all right with me but I think that——

Mr. DINGELL. The gentleman now is recognized either to inquire of the document or to proceed with the questioning under the rules.

Mr. RITTER. I would like to inquire from the majority staff precisely what the name of this document is because it was given to us without a title, Mr. Chairman.

Mr. DINGELL. Well, the gentleman is recognized for purposes of inquiring of the witness in the well and he is using his time, the Chair trusts, for that purpose. The Chair does advise that the timer is running on the gentleman and the Chair hopes he will use his time well. The Chair does not have the staff of the committee in the well.

Mr. RITTER. I would request that the document be returned to me, Mr. Chairman, and I will read the top line of the document if that is so desired, and identify it and characterize it in that fashion.

Mr. DINGELL. The Chair will be happy to return the document; if that is the document, the Chair will be delighted to return it to the gentleman so that he may read the top line and help the Chair to know what he wants in the record.

Mr. RITTER. The paragraph that I asked to be read into the record derives from the 'Transcription of Hall of Flags Regulatory Reform Meeting, April 10, 1980."

Mr. DINGELL. Does the gentleman want the whole document or some portion of it?

Mr. RITTER. That portion which I asked to read into the record, Mr. Chairman.

Mr. DINGELL. Well, in order to help the gentleman from Pennsylvania, who is having some difficulty, the Chair will be delighted to say that without objection, the appropriate portion of that document will be inserted in the record.

[Testimony resumes on p. 100.]

[The document referred to follows:]

TRANSCRIPTION OF HALL OF FLAGS REG REFORM BRIEFING, APRIL 10, 1980, U. S. CHAMBER OF COMMERCE, 10:00 A.M.

Honorable Joseph R. Wright, Jr., Deputy Secretary, U. S. Department of Commerce:

You're going to be hearing alot of details this morning in terms of a little bit more specifics of how you are going to be interfacing, hopefully with the Federal Government in terms of this important interprise. This morning, I'm going to start off with one of the shortest speeches you've ever given, in part because of the fact that I think it's so important what we're doing right now that it doesn't require a lot of adjectives, it is just a lot of nouns and verbs and that's it. In terms of the President's economic program, I was asked the other day if I could describe it in one sentence, because that is about all the time we have. Believe it or not we can, but we have to go back to somebody who came from the same state I did, and that is Will Rogers. At that time he sat there and said: "Don't tell me about the return on my money, tell me about the return of my money." That is the President's program, very simple.

I had a speech that was written for me and naturally I never use them, much to the chagrin of our entire public affairs office, but they came up with some points in terms of regulation and ~~it~~ they're pretty darn good, ~~it~~ really ~~is~~. It sat there, right in front of me and it says first of all, that the whole regulatory environment that has been built up for the past 30 or 40 years has had these impacts upon the American business community: First, it has been a major contributor to inflation. I don't think there's any question about that. I don't think we should get mired down in figuring out exactly how much it has cost because when you have a

drowning man and he's in 12 feet of water going down, one more gallon doesn't make any difference, so let's not spend our time figuring out exactly how many gallon are in that water, because he's drowning. Second, it has drained hundreds of billions dollars in capital from the key thing that we are interested in at the Department of Commerce (DoC), from modernization of plant and equipment, productivity, innovation, etc. Third, it has helped produce a negative rate of productivity growth and right now among the major nations that we are competing with in the world for international trade our productivity growth is 8th out of 8. We cannot afford that any longer. Fourth, it has cost the American worker thousands and perhaps millions of jobs. That is becoming more and more important as our unemployment rate goes up. Fifth, it has diverted the attention of business managers from their main job of making their firms more productive, particulary with your small and medium sized businesses, who are coming in the DoC and telling us, "we're not filling out those forms properly, we're just guessing, we don't have the time for it." Finally, it reduces the competitive ability overseas of American business. American business, right now, is competing pretty darn well overseas despite us. They don't have the Federal government working with them, they don't have the financial structure working with them, they have legal and business barriers, and they've done pretty well.

I was asked a couple of weeks ago of how to make American business competitive again. You don't have to make America competitive again. We've got the best competitive machine, starting all the way when most of us were little boys and girls, when we were taught to win. Our entire free enterprise system, our entire American business community, is taught to win. The DoC of this administration does not have to sit down and redesign the machine, for we are not intending to even attempt

that. We're just getting the sand out that's been thrown in the cogs for thirty years, and once you do that, the machine will start going again.

So I had to change the title of the speech, and the key that we are interested in from the DoC is to enable foreign producers that are not burdened by all these regulations to make major inroads in our domestic marketplace. I would guess a last issue, although it's not the most important, is one of the most frustrating. It has created a great deal of turmoil and lack of cooperation between American business and Washington to the point where a businessman can come into Washington right now, come to the DoC, can find out that he has no problem with delivering goods and services, for example, then go over to the Justice Department and be stopped, or the Department of Defense will stop him, or State will stop him. Finally, he'll come back over to us, throw his hands in the air and say, "just tell us the rules of the game for a change." So the exercise that we're going through is more than just exercise in terms of identifying some programs, we're trying to make a major change here. I believe that the commitment that President Reagan has on this program is probably about as strong as he has on any issue that the Federal government is dealing with right now. The Executive Order (EO) was signed, came out a couple of days after the inauguration, but had been in the preparation stages for weeks prior to the inauguration. As a matter of fact, the Transition Team had been working on it back in the November/December time frame. Right before it was published, I heard this story and I believe it: the staff within OMB and all the other agencies that had a chance to look at it prior to it going out were looking at it on the desk. The were a little shocked by the EO and started going through and crossing out paragraphs, and they said, "Oh, we really can't do this one, this one is a little strong,

"let's go and study this one," until they got to the fourth or fifth page and they looked down at the bottom and there was a signature on it and it said Ronald Reagan. All of the sudden, they went back and erased all the marks they had put on it.

The President was very dedicated to this EO and the cabinet is strictly behind him one hundred percent. It is important that you know this. This means getting rid of the obsolete regulations. That includes all regs, as I'm sure most of you know that as the previous Administration came out with the Midnight Regs, the Federal Register increased by 40 percent the last month before the inauguration. That freeze was important, but it goes beyond that freeze, it goes back to looking at those regs not just in those last stages, but the ones that were in there before. Eliminating the duplicative, the overlapping, and the conflicting regulations, since there is a ton of them, and we've just got to attack them with a vengence.

If it is necessary to regulate, for God's sake, make sure that the benefits exceed the cost. I think that's been one of our greatest faults, and then reducing the reporting requirements. That last part is a very important part of what we're talking about. Both Secretary Baldrige and myself at the DoC came from business and you're going to find that if you take a look at many, not only the cabinet, but sub-cabinet members within the Administration, you'll see that they did come from business and/or are the most business oriented group you've seen in Washington in a long time. The business that I came from, banking, is probably one of the most regulated of all businesses to do business in, in which the American companies were not only held down from a regulatory standpoint, but the regulations went into a social structure

of the Constitution. In particular, a company that I was with just went on ahead, if they were told (and they probably have been right now), to come in and help us get rid of these regulations, I guarantee you that they would have put together the most sophisticated staff papers that you've ever seen explaining both sides, they would have used this opportunity as one of the greatest opportunities for advancement within the banking industry that they've ever seen and would have absolutely been charged by it. They're probable doing this. All they needed was somebody to come in and say, "let's go, let's do it."

The DoC and again you'll find more information on this, is working very closely with the Vice-President's Task Force. We're in the early stages right now and our key role is to make sure that we provide the interface between American business and the White House in terms of chanelling in ideas, in terms of making sure as best we can that the staff work is properly done, in making sure that the other cabinet departments who have responsibility, exercise it. An example is the Department of Interior on the Clean Air Act, their covering most of the issues, staying out of the way where we shouldn't be, but being a true spokesman for American business. I believe the DoC has fallen down on that role over the years, and this is one of the big areas where we intend to pick it up.

This is not an NBO program, not cocktails and chitter-chat. Alot of people have said that trying to do anything in the Federal establishment is like trying to put racing stripes on a hippo. That's probably true in a lot of cases. But let me tell you something, we're not doing a paint job here, we're changing the animal, and we don't have a lot of time. Most of you are politically astute, and you know that the acceptibility

of a new administration lasts for a certain period of time. I think this one is going to last much longer, because what we're going to put in from the economic program all the way through to this deregulation is going to work. Now, all I ask you do is help us. Help us do the staff work properly, because you can do it much better than we can. Drive as hard as we're driving, because you've wanted to for years and now you've got your shot. The rest of the speakers will give you a little bit more detail of exactly how we're going to be working but I really wanted to set the tone. I wanted to set the seriousness, and I wanted to say that we will represent you promptly. Thank you.

Q: Are you planning to do anything about the financial regulations, the IRS regulations, and so forth, aside from those already postponed or set aside for review?

A: Absolutely. You're talking about the financial, reporting and accounting regs. There is so much to be done here that we're not eliminating anything. The thing that we are doing, though, is hitting the biggest ones, the ones that get the moost exposure to show that we can win. ONce you put a brick in the dike, it goes. That's the reason we're doing that. At the current time, there is so much to be covered here and this is the reason I'm asking for help from the business community, from those who are most interested with the regulations that have high priority for them, those are the prople who can help us most. We're concentrating on the big ones now so that we can have fast wins on major issues and go off and show the public that we can do it.

Q: Inaudible question on tax codes...

A: Let me say that getting the President's tax cut proposals through is a prerequisite. From the resulting positiveness in the economy, we can then go on and address the tax codes.

Q: Mr. Secretary, I think almost everyone in the room is very supportive of the administration's effort. I have a question in regards to the CoD in put into the administration's position on anti-trust policy, and of course that is specifically the AT & T case and the IBM case.

A: I was told this morning not to comment on the case since it is in the courts, so I won't comment on the case specifically. That ought to make everyone happy at our General Counsel's office to follow their advice. However, let me put it this way: I believe that that entire area of communications is an extremely important one, that through the NTIA, it is the DoC's responsiblility to set overall policy in terms of communication, the entire information flow, not only domestically but internationally. This is going to be something that we are going to be working with the Congress on. This case is right in the middle of that and there's major policy issues to be decided by the Federal Government in exactly that area. In terms of our role on that case, I just can't even talk about it right now.

Q: Just how far is the Administration willing to go in dealing in a concerted effort to bring about the regulatory reform/relief that we are

addressing here today?

A: Let me give you a general guideline. We went too far one way in terms of many of the regulations, and it seems like that everything we do has a social context in this country. I'll also give you a personal viewpoint, since that is too general a question for me to sit down and give you specifics on. I believe tha both myself and the DoC are willing to go a little bit too far in the other direction to bring some rationalization back to your area of business, sir, but in all of them. In addition, a total repeal may be the practical approach in some cases in your staff papers, if that's what you come up with. But I think most of the businesses will come to us knowing that at least some parts of any questionable regulations have some good purpose and practicality in them.

Dr. Thomas D. Hopkins, Acting Director, Council on Wage and Price Stability:

As you are well aware, under the new Executive Order (EO), a Regulatory Impact Analysis (RIA) must be prepared by the rule making agency for every new major regulatory proposal. Your critiques of these RIA's will be given very careful attention, being a valuable part of the rule making reform and relief process. What I want to spend a few minutes talking about is what we in the Executive Office are going to be looking to the rule make agencies to be providing in the way of RIA's and Bob Miki will be talking a little more specifically about the kinds of

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information that will be most useful for you to be providing to the Administration, on regulatory problems generally and specific rule making proceedings.

I think essentially that the kind of regulatory analysis, the type of document that we want will be one, most simply, that would not let get through the hoops next time around, kinds of regulations such as the Energy Department's Appliance Efficiency Standard of last year, and the Education Department's Bi-lingual regulatory proposals (which we think that a full regulatory analysis would clearly show to be poorly conceived), are both excessively burdensome regulations, the type of regulations that this Administration will try to make sure don't get promulgated and ferretted out if they have previously been promulgated. Now there are a couple different ways as to how to get a handle on what should be in the RIA from the agency and what should be in your submission to us or the agencies about the rulemakings.

1) Take a look at the kinds of critiques that the regulatory analysis group did of regs such as those two I just mentioned, of the Appliance Efficiency Standard and the Bi-lingual education proposals critiques that were done last year, which are, incidently, available through my office at COWPS. They identify the basic flaws and shortcomings in the analyses done by the agencies supporting those rulemakings, and flagged the kinds of things that need to be attended to in any critiques of other regulations or forthcoming regulations.

2) Another is to take a careful look at the Executive Order itself. Section 3 of the EO does spell out in some detail what a RIA must contain

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and that it must be provided for major regulations (and there is a definition in Section 1 as to what is a major regulation). We are in the process, in the Executive Office and through the mechanism of the Task Force of trying to prepare some additional guidance for the benefit of rule making agencies and for the benefit of the public that goes beyond what is stated in the EO itself. This is still in the process of drafting and I don't have anything firm or final to indicate in that regard, but let me try to sketch out what kinds of information, wha kinds of analyses we think best comport with the spirit of this new EO.

I'll be coming at it in the perspective of what is the kind of test, evaluative test, that we at the Task Force and the Executive Office will be using when we look at supporting documents from agencies trying to justify a new rule, looking at and critiquing the RIA.

First and foremost, we will want to have a document that clearly explains the need for and the consequences of the propsosed regulation. That statement will have to address items such as the following questions:

What precisely is the objective of the regulation?

What are the market imperfections that the regulation is addressing?

Would the proposed regulation improve the function of the market or might it too fail? And if so, if we have an imperfect regulation that is promulgated, and it might fail, is that likely to leave society worse off thatn living with lthe current problem that we have before we tried the

regulatory cure? The objective, after all, is to make sure we are comparing imperfect regulations with imperfect marketsn not perfect regulations (which we are never able to produce) with perfect markets.

What precisely is the problem that needs to be corrected by a regulatory action?

What is the cause of the market failure btat gave rise to the development of the regulation in the first place?

Is this a new problem, have conditions changed in some way to make a regulatory change desirable now, or is the regulatory solution being drummed up now solve the problem that existed ten years ago, but does not exist now?

How will this regulatory change achieve its stated objective?

The document should address alternative approaches to the problem at hand, including, most importantly, the alternative of taking no regulatory action at all. Agencies really should establish a baseline as to what the world will look like in the absence of a new regulation and are there things such as the adequacy of tort laws that itself could be relied upon to accomplish the object of the regulation.

We want a discussion of the alternatives that lie beyond the scope of the specific legislative provision under which the proposed regulation is being promulgated. The agency is not to limit its attention to those items that are just within its current statute, but discuss also the

costs and benefits of the alternatives which might require some statutory change. Alternatives to regulations would also include things such as food inspection rather than a regulatory mandate and so on. If we are talking about the existing statute and alternatives that are open to us within the scope of the existing statute, the examination would want to ask about the cost and benefits of alternative stringency levels; what would happen if we made the standard more or less stringent than the proposal being contemplated, what would ahppen if we ahd alternative effective dates, earlier, later, staggered, phased; alternative methods of insuring compliance, as well.

An examination of market oriented ways of regulating, and alternatives to the traditional command and control type regulation, for these alternatives, which have been getting short-tripped in the past, should include informational or labelling strategies that mandate a change buy rather mandate that information, should be available. Standards that are performance oriented rather than design specific. Standards or approaches that emdody economic encentives, such as fees, mission offsets, marketable permits to the command and control. These are the kinds of broad issues that have to be addressed every time we get one of these RIA's through for a major proposal and for each of these proposals we'll want estimates of costs, and of benefits.

On the cost side, the bottom line that we're interested in getting from the agency and in turn from you, is the present value of all of the potential costs to society that would result from the promulgation of the new regulation, costs that represent real resource expenditures and costs, and to support these estimates of the present value of the costs

of compliance. We'd like to have a schedule of the costs that would identify the type of costs that we are talking about (are these capital costs, recurring costs, or operating and maintenance costs). When would these costs be incurred (next year or two, not for 5 years, or time pattern for the imposition of the costs)? These costs should be expressed in constant dollar terms iwth assumptions clearly identified so we know whether we are talking about 1981 dollars or 1970 dollars. The cost should be properly discounted so that we do have in our present value estimates, consistant, sound, economic principals observed in coming up with these estimates. Both direct costs ought to be included, costs borne directly by industry, consumers and by governments. Indirect costs, such as not so much a direct compliance cost, but a cost hat may show an adverse effects n competition or productivity or innovation. Any major increase in cost for particular sectors, particular geographic areas would want to be indentified as well.

Turning to the benefit side, the bottom line here is the present value of all benefits that are likely to be generated for society by promulgation of this regulation. Quantify those that can be quantified into monetary terms and describe in non-monetary terms other social benefits that you can't put a price tag on, but describe them in sufficient clarity and detail so that we know that we are lookin at some real benefits and not some hoped-for, vaguely understood improvement. There should be an explanation of just how these benefits are likely to be generated by this regulation and over what time frame with proper discounting of the benefits, just as we have proper discounting of the costs when coming up with these estimates. It needs to be a schedule that would show the type of benefit being generated, to whom or what

types of beneficiaries we're talking about, and again the time pattern, just exactly when this would occur. Having gone as far as you can in estimating the present value of the costs and the present value of the benefits (recognizing the sum of the cost elements and the benefits elements can't be quantified and can't be put into dollar terms, but can at least be indentified), then how far can you go in coming up with a net benefit estimate resulting from this proposal compared to alternative proposals. Our effort will be to go as far as we can in an effort to get that kind of estimation and analysis done.

These are the kinds of things we're talking about with agencies as ways of insuring compliance with the spirit of the Executive Order. As I say, they're still in flux, these precise guidelines and concepts are not yet nailed down, but I wanted to give you a feel for what we are looking to the agencies to do in trying to comply with the EO, and that in turn should give you a feel for the kinds of information that will be most useful to us. I think the hallmark is going to be in stuff that we'll get from you that is factual, is succinct, and corresponds to these kinds of concerns. Thank you.

Q: To what extent will the independent agencies be affected by these guidelines and to what extent does figuring in opportunity costs figure in the make-up of these analyses?

A: I think we are very interested in opportunity cost concepts and their inclusion in the analyses, turning to your second question first, and on you first question, which is really more of a legal question, I would like to defer that to Boyden, if you could ask that question again,

on what extent the independent agencies will be affected.

Q: Will OMB be preparing a document critiquing any particular rule as in the past other did?

A: It's unclear whether it will be necessary for us to provide the major critiques written of rules as the RARD did in the past because we have a quite different type of leadership at the regulatory agencies and much closer cooperation with agency rule writers than has been the cas in the past. If we have a clear understanding right from the start with rule writers as to what type of analysis is expected of them, it may not be necessary for much in the way of formal critiques from OMB to the agencies, but certainly where OMB or the Task Force is concerned about the adequacy of the analysis, there are ways in which it is envisioned that these concerns would be communicated to the agency, the agency would identify its concerns and would put these concerns in the public record before issuing any final rule. So if there are nay problems of this sort, it would appear in the public record with sufficient detail.

Q: Inaudible question....

A: We have to sort of start walking and then hopefully move into a trot and gallop. I think that in the first instance we're going to be asking the agencies to have just very soundanalysis of the costs and benefits of each individual major rule action. There isn't a very considerable interest on trying to get a better handle on it than we've had before on cumulative cost burdens and cumulative benefit burdens, but

that can't be done overnight, and we may have situations arise where we have to make decisions on particular regulations before it is at all possible to have toted up cumulative effects of previous regulations on that sector or that industry. But certainly decisions on individual regulations to the extent that the data exists to the extent that the analysis can be done will take into account cumulative effects of other regulations on that industry, it is just a question of how much is feasible.

Q: Does the administration view it as possible that some agencies will use the cost/benefit requirement to enable them to subpeona or otherwise require businesses to submit cost figures to those agencies to perform these analyses, and secondly, will Jim Miller, who is now also head of government paperworks, so to speak, a clearing of government paperwork at OMB, see that role as a possible check on agencies that would generate additional paperwork for companies to have to answer?

A: Certainly I'm not aware of any talk of agencies using subpeona powers as a result of this Executive Order. Jim Miller in his role with the Paperwork Reduction Act and his staff will be taking a very careful look at agency requests for permission to send out additional forms, data gathering efforts, and has quite a lot of power under that new Paperwork Reduction Act to see to it that forms aren't sent out that really aren't absolutely essential and every effort is going to be made to reduce the reporting requirements, not to increase them.

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C. Boyden Gray, Esquire, Counsel to the Vice President, The White House:

Better clap now because you probably won't later. There is, in response to one of the last questions an obvious tension between reducing paperwork and asking for a lot of cost/benefit data. We don't want to turn this into one of the biggest paperwork exercises of all time. I certainly think that we will not be demanding information, I think the point that has been made over and over again is simply one of getting the best data from outside government to assist the agencies in this work. The better data you provide, consumer groups provide, environmental groups provide, labor provide, etc., the better the agencies will be ale to do on preparing their Regulatory Impact Analysis (RIA) and the better Tom will be able to do in grading those analyses at OMB and the better the result will be. It is something that's going to require effort all along the line, but we certainly don't want to generate paperwork that is useless.

Before I discuss some of the legal questions, I thought I might just do a little overview of the Task Force generally, to put this into context. There's been an awful lot of material written about the role of the Task Force. What I want to do here is emphasize that whatever we do and whatever OMB does is ultimately dependent on what the agencies do. They are the prime focus of this and we should not be viewed as the initiators of a lot of action. The focus will be at the agencies and that's where you should train your first efforts.

That is why the letter that went out says that while the Secretary of Commerce and the Task Force staff want copies, summaries of what you

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submit to the agencies, the initial papers, the underlying data, goes to the agencies first. There are a lot of reasons for that but I'll just give you two: they're the ones who make the decisions. Their new appointments there have been very receptive, and as Tom said, very cooperative and there are also legal reasons for it, because of exploited contracts we can not operate as a conduit for factual data that goes fromyou to us to the agencies, unless it is put in the record and it's a terrible burden for us to try to track to make sure agencies have everything if you submit it only to us. But is you submit to the agencies, there shouldn't be any problems with that as long as you've told an agency what you tell us, there's no problem with you telling us anything.

The Task Force, I think, then will operate as a coordinator, as a catalyst, as a prod. We can help set deadlines to get action which ar very important. There is nothing more productive than a reasonable deadline. We can eliminate conflicts and duplication. Bob Miki will talk about that in a few minutes. We can help set priorities based on where we think the greatest savings can be achieved at the least cost to other values. That's what we plan to do. We cannot make, to repeat, the decisions. The better job you do in getting the agencies the information, the less we have to do which is really the way it should be done.

Tom has gone over some of the points generally about what you should submit. It isn't very complicated. It's all common sense. If you can indentify a problem, the question is how to achieve the best solution at the cheapest cost and it may very well be to eliminate a particular regulation entirely. That is one option, it isn't always going to be the

solution but the quest is to find the best solution for a problem. That solution may require legislation, but it may also be achievable administratively and that will at times take some creative lawyering. When cost/benefit is done, the lawyering has to be done in conjunction with the work on the economics.

When you suggest an alternative, you're going to have to know what that alternative costs, how much money it will save, how will we achieve our statutory goal in a perhaps better way. But it isn't very complicated, but to sit down and see what can be done adminstratively, and if that can be, suggest that. If it can't be, suggest legislation. I think to take the Clean Air Act for an example, there are some things that cannot be done adminstratively and in the PSD area there are certain problems, red tape problems, permitting process, certain problems where you have complicated overlap and court decision and regulation and statute, there is probably no way to solve those problems administratively. All of those problems are under review by the Administration in preparing the Clean Air Act Revision that is coming this year.

But there are alot of things under the Clean Air Act that can be solved administratively. There is alot of discussion, for example, about peer-group review, scientific data. If you look at the Executive Order, you will see that there is authority at OMB and the Task Force to require an agency to seek and evaluate scientific data from additional second opinion, if you will (peer-group review, scientific data). That is just an example. There are a lot of other examples to give. We could go into Section 504, which is the access by the handicapped to transit systems, for example. There is a lot that can be done administratively. We may

determine in the end that we also want legislation, we're going to have both tracks, but it is my view that if a clean solution exists administratively, we should go for that as fast as possible. You can probably get some of these changes administratively, faster than we can get legislation.

It is a simple common sense look at a particular problem, what can be done, what can't be done. Now, some of the changes should be couched as petitions for reconsideration. That is one way of focusing the agencies on the changes that you want. A summary of this should go to the vaious points identifified in the letter to the various groups that we sent it. I think Bob Miki will say the DoC wouldlike to have a copy of the underlying data as well. What we will do is have the various recipients of the summaries and the underlying datas which will also be going to the agencies. We will assemble all of this to try to figure out what the priorities should be to help the agencies determine whether there are certain conflicts that they should address, but that don't know about because they only see part of the problem, or because there are costs that they don't know about because of relationship to other laws, to other agencies. However, I want to emphasize that the agency itself is still, and will be, the prime focus of what we hope to do.

If you take a look at the Automobile Package, the story by Clyde Farnsworth in the New York Times, on April 8, it is a pretty good overview of how we hope to proceed. You can see in that Automobile Package, together with the final rule on the one year postponement for the passive restraint, how the economic and micro-economic aspects are integrated. Cost/benefit analysis are integrated with legal requirements. It is quite straightforward, but it is a useful guide.

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What was done in that package, both in terms of the proposals and in terms of the final action announced, will give you an idea of how to proceed. It is a very good model to use, and I would urge you to get a copy of the Automobile Package and take a look at it.

In terms of the letter that was sent out, it is directed to trade associations. We hope that trade associations will act as a funnel, a filter, to simplify our work and the work of the agencies. But I want to emphasize that we by no means intend by directing that letter to trade associations to preclude individual companies fromseeking their own changes outside of their trade association. As you know, there are trade associations who have politics just as the White House has politics, and we don't want what often happens in trade associations, which is a search for a common ground to preclude a particular issue that may be of great importance to one company in an industry, and of great importance therefore to its suppliers and its customers. We don't want that kind of situation to be ignored so we hope that the companies represented here will work with their trade associations to do the best job possible. Then, we will know where common issues are that effect companies in an industry, or consumer groups in an umbrella group, or labor unions within an umbrella union. We want to know where the common issues are, and not stop an individual group from reporting something to an agency that effects them uniquely in a very important way.

I hope that I have sufficiently confused you so that you have no questions, but I think maybe the thing for me to do is try and answer questions rather than continue talking. Thank you.

Q: Inaudible question...

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A: Well, if you go to the agency first, don't be too pessimistic if they can't solve the problem there. If they don't, that is what the Task Force is for. We had an example of that not too long ago, but the people were not being completely candid with their own top people or with the Task Force. We told the lawyers representing the individual companies and trade associations involved to come back to us if they ahd a problem. Two weeks later they showed up and I asked if they had a problem. They said they did and we made a couple ofphone calls and straightened it out, alerted the top people at the agency that there was a little hanky panky going on in the bottom of the agency, and it was cleared up very rapidly. So the system does work if you use us as sort of an appeal. We can act as a double-check on the agency that you might encounter problems with.

Q: Question on the role the Task Force will play...

A: That's correct. If you may not have received a copy of the letter, it says to send your suggestions for change. As I said here, you might want to be couched in terms of a petition for reconsideration. Send the basic data to the agency first, and a copy of the summary to the Task Force. In the case of a business group, send a duplicate of the entire package to the DoC. This is for existing regulations that you think ought to be changed. Under the Executive Order, <u>proposed</u> regulations will come through this review process that Tom has outlined. <u>Existing</u> rules have the new authority for the Task Force to designate any of them for review, but we want you to take the initiative from the

outset, to get the agencies to reconsider. If they don't reconsider, and you think they should, then we might become involved.

Q: Do you expect much opposition to new and pending rules, as well as the Executive Order, in the form of court challenges and/or judicial review?

A: The Executive Order (EO) is not judicially reviewable, we hope. There is precedent to indicate that his kind of order is not reviewable. But, what an agency does in preparing its Regulatory Impact Analysis (RIA) will go into the record, obviously, into the record of the rule if it is challenged on appeal. We expect challenges to rules and we expect those challenges to be based on whatever they can be based upon. The EO will not make the challenges any easier or any harder. We think it willmake the challenges harder because the discipline of better data will provide stronger support in the end for whatever result is chosen and in fact better protect results from judicial review. There is going to be court action, there is no question about that.

Q: Do you expect an extension of the Executive Order and invitation from the Vice President to the independent agencies and businesses?

A: The Vice President has sent a letter to the independent agencies asking for them to continue their voluntary cooperation with the analysis portions of the Executive Order. It is my understanding that Carter had done the same with his EO, and that virtually all independent agencies complied, and I'm not aware of any refusal to comply with his letter. It

is, however, voluntary. The EO, by its terms, does not cover the independent agencies. This is not so much that we thought we lacked certain legal authority to do certain things, since I think we could have extended the EO and might still in the future. We chose not to do it really because of policy reasons that we had our plate more than full with the Executive Branch Agencies which do impose by far the greatest percentage of capital costs burdens that we think were issued during the campaign. We just didn't want to spread ourselves too thin. If we can get the main regulatory problems under control, we'll actually focus at that point more on the independents, but we'll wait and see how much progress we make with the Executive Branch.

Q: How much influence will the Administration bring to bear on balancing the competing interests of energy on the one hand and environment on the other?

A: This is, like in many case, the essence of governing, I suppose. How do you make these balancing judgements? The agencies will in the initial instance have to make these judgements. We are hoping that the analyses that come in from the private sector, what the agencies do with that data, and what Tom's group does, will lead us to rational judgements on it. But of course there are going to be balancing choices that will have to be made. My guess is that on tough issues, the Task Force will probably get involved, by discussing with the agency alternatives ways of trying to achieve what we all would view as a common goal.

Q: Will, once the responses come in from the Vice President's letter,

the Task Force set the priorities for the agencies or will they set them themselves?

A: I think the answer will be a combination. Bob Miki will go into more detail. One of the things that the Task Force can do is see conflicts between agencies themselves can't see. In those areas, conflict, or in the case of duplication, the Task Force will undoubtedly play a definite role. It will be the job of the DoC in connection with business interests to review those conflicts and those duplications. To tell the aencies things that perhaps they don't know. As to what needs to be done, it will be primarily be the agencies setting their own priorities and if we disagree with them, then of course we would tell them. It is a combination, a joint venture, if you will.

Q: What about if changes are sought with respect to Executive Orders, and where, or to whom, should they be directed?

A: If changes are sought with respect to Executive Orders, it would depend on the extent of the coverge of the EO. Most EO's form the basis of regulatory programs such as the Goals and Timetable, the EO dealing with Affirmative Action and Federally Assisted Construction. Those comments, if they deal with only a couple agencies, should go to those agencies directly. If there is an EO, and there is one dealing with flood control, which I think affects a lot of different agencies, then those comments should probably come to the Task Force.