Robert T. Miki, Director of Regulatory Policy, U. S. Department of Commerce:

The gentlemen who proceeded me conveyed the Administration's commitment to regulatory relief. I think it is clearly understood that you have a major role in this effort. What I'd like to do is to follow up on some of the analysis issues that Tom Hopkins mentioned and some across-the-board issues that merit your attention and participation.

First, with regard to individual regulations. Tom Hopkins told you what is being expected of agencies which propose to issue regulations. You've been invited to make submissions regarding your priority concerns. You have a powerful tool at your command. The Task Force and the OMB activities have seasoned them with respect to what the regulatory agencies will be doing, the analyses they conduct, the timetables they will have to meet, and so on. I think that you really do need to expend your resources in conducting an anaylsis along the line of the agencies' regulatory impact analysis. That is basically being asked for in the one page sheet that was attached to the letters that were sent out. So what I'm suggesting is a counterpart analysis, that is an analysis on your part that can be set side by side with the agency's analysis. The reason I say this is that in many instances in the past, you have provided considerable materials. Often time I've noticed that the material is rather voluminous and the agency or whoever else is involved has to wade through a substantial amount of material to get to particular points that are comparable to the ones being made by the regulatory agency. What I'm suggesting is nothing new, merely that the materials that you present be

structured for maximum usefulness. The time that you spend doing in organized structured manner now, will save you a lot of time and effort in the future. My suggestion for the counterpart analysis is not in addition to the information requested by the Vice President's letter to the business community, rather it is an application of the request, that a summary and documentation be provided. I think that as Boyden pointed out, we're still asking for something that is not really voluminous.

We all remember the Environmental Impact Statement process and the tons of material that it generated. I know that I were back at various universities, the students would invariably ask, "Gee, how long should my answers be?" And I always said, "Well, they should be like a bikini, long enough to cover the subject, but short enough to make it interesting, or in your case, pertinent." Certainly, you won't be getting into all of the kind of things that are being requested of the regulatory agencies.

However, I think it is important that you provide:

-an estimate of the costs of compliance. Here you should include the technical and administrative costs, percluding people work. Then provide some documentation as to how you arrived at these figures.

-include adverse effects on the production process, on your cash flow, and capital structure of your particular industry.

-list the principal industries which are purchasers of your output, not a percentage of sales, just a listing (this would help determine what the ripple effect of a particular regulations, due to a subsequent effect on supply conditions, etc. of like industries).

With respect to benefits:

-specify the additional costs that you would incur and the

additional benefits thta would accrue. For example, all costs would be $5 Million to achieve an additional 3% benefit, whereas the previous 90% benefit was achieved at a cost of $3 Million

The groups have come up some alternatives, which would substantially achieve the goals being sougth, but do so in a more cost effective manner than they have been considered by the agency proposing the regulation. I think these all fit into a kind of summary, a kind of documentation that is being requested that would provide us with sufficient background information to participate within the rubrick of the Task Force.

Let me for a few minutes turn to broader issues. I think they're gut issues. I would like to see things from your perspective. Do you fill out multiple forms which are duplicative or overlapping? Do you have to follow differing testing protocals for differing regulation? Do you have to go through a number of certification procedures because of different regulations? Do you have to meet varying labelling requirements tha are imposed by federal and state government? Does meeting technology prescriptions by one agency put you afoul of another agency's regulations? Are regulations so detailed in their specifications that the legitimate objectives are lost in the forest of detail? If your answer is yes, I expect it would be, we'd like to hear about them. On forms that are duplicative and overlap, give us the form numbers where this takes place. Give us the citations of the sections involved in other overlaps, conflicts, and duplications. That kind of information would be quite helpful in looking at some of these problems that cut across or are generic problems. These are areas which costs and benefits do not touch directly, but I think they are important and we

would be pleased to consider your concerns in these various areas. It is of concern because if you've got one socket, and then you put in some multiple plugs, and multiple plugs on top of that, and then you plug in your appliances, you're going to have a short circuit somewhere in the system. The question is, do we have so many regulatory wires plugged into the circuit of business that we're causing a short circuit in your systems.

Unless we hear from you about htese occurrences, and your reasoned recommendations, we'll probably be poorly attuned to your problems. If you let us know and pass along your interest in these matters, we can get a better picture, and begin to attempt to reduce the duplications, the overlaps and conflicts. So this goes beyond the concept of individual regulations, but I think it is an important area that we would want to pay attention to. This is not to say that the individual regulations and the activities in regard to these individual regulations are not important. Tom's right, we've got to walk before we run, but the Department is quite willing to take on this additional task of looking at these kinds of issues. So let me just say that we invite your active participation. You are the ones that are burdened by regulations, you are the ones who should take the present opportunity to make yourselves heard, and to have your recommendations considered. Thank you.

Mr. DINGELL. The gentleman from Pennsylvania continues to be recognized.

Mr. RITTER. Mr. Chairman, I yield back the balance of my time.

Mr. DINGELL. The Chair thanks the gentleman.

The Chair recognizes counsel for purposes of asking questions.

Mr. MCLAIN. Thank you, Mr. Chairman.

Mr. Miller, I would like to begin, if I might, with one matter that I know is of particular interest to this subcommittee, and that is the question of the effect of the Executive order on independent agencies. In an interview in the April 1981 issue of Regulation magazine, you stated that the administration chose not to apply the order to independents for policy—not legal—reasons.

Could you tell us, if you would, what is the legal basis upon which you would rely should you have chosen to apply it to independent agencies?

Mr. MILLER. An opinion by the Office of Legal Counsel of the Department of Justice.

Mr. MCLAIN. Is that a written opinion?

Mr. MILLER. Yes.

Mr. MCLAIN. Will you please supply that to the subcommittee?

Mr. MILLER. I will be glad to. [See p. 152.]

Mr. MCLAIN. Would you please tell us now what the substance of that opinion said?

Mr. GRAY. Mr. McLain——

Mr. MILLER. I am not an attorney. The question was whether the requirements of the Executive order could apply to the so-called independent agencies. The answer was "Yes," and the opinion went to the reasons why. Now maybe Mr. Gray is better——

Mr. GRAY. I do not think it would be appropriate to release that opinion until such time as we extend the Executive order to the independent agencies, since the Executive order does not apply to the independent agencies.

Mr. DINGELL. If the gentleman would permit, is this a public document?

Mr. GRAY. No, sir.

Mr. DINGELL. Do you plead executive privilege on this matter?

Mr. GRAY. No, sir, I do not.

Mr. DINGELL. Do you wish to withhold it from the committee, and if so, on what grounds?

Mr. GRAY. Well, we will consider this, Mr. Chairman.

Mr. DINGELL. Sir?

Mr. GRAY. I say we will consider it, Mr. Chairman. I just do not know that it is relevant. We have not——

Mr. DINGELL. Do you desire to withhold this document from the committee, and if so, on what grounds?

Mr. GRAY. Is it possible to take that under advisement?

Mr. DINGELL. No. This is a committee, not a court. Besides, I take the matter under advisement, not you.

Mr. GRAY. I appreciate that.

Mr. DINGELL. Perhaps you could begin by advising us first, whether you desire to withhold it from the committee and second, if so, on what grounds?

Mr. GRAY. We would prefer to withhold it from the——

Mr. DINGELL. Sir?

Mr. GRAY. I said, Mr. Chairman, we would prefer to withhold it because of its lack of relevance. We have not asserted jurisdiction over the independent agencies.

Mr. DINGELL. The Chair finds that not to be a persuasive reason for withholding any public document from a committee of Congress. You are therefore instructed, unless you choose to withhold it and to set forth some appropriate statutory or constitutional grounds therefor, to make the document available to the Congress at your earliest convenience.

Mr. MILLER. Could I——

Mr. DINGELL. Certainly.

Mr. MILLER. Could I mention something, Mr. Chairman? My previous answer was predicated on a citation of the wrong opinion. The opinion I had in mind was the one that went with the Executive order. There was an earlier opinion that I think——

Mr. DINGELL. All right. In order to be helpful to you, we will take both documents.

The Chair recognizes counsel.

Mr. MCLAIN. Thank you, Mr. Chairman.

Let me pursue this matter a little bit further. In your press package released over the weekend you indicated that seven of the independent agencies responded to the Vice President's request that they comply voluntarily with the Executive order, those seven being: the Civil Aeronautics Board, Federal Energy Management Agency, Federal Energy Regulatory Commission, Federal Home Loan Bank Board, Federal Mine Safety and Health Review Commission, Interstate Commerce Commission, and Securities and Exchange Commission. Further you stated that they "indicated their willingness to abide by the spirit and the principles of the Executive order."

Could you tell us precisely what each of these agencies is doing to evidence such an abidance?

Mr. MILLER. Well, I think perhaps the best thing to do would be just to make available copies of the letters the Vice President received from the heads of these agencies.

Mr. MCLAIN. As well as any other information that they might have supplied to you pursuant to their abidance?

Mr. MILLER. Sure. Yes.

Mr. MCLAIN. Mr. Chairman, would the committee desire to have the record held for that material?

Mr. GORE [presiding]. Without objection. [See p. 179.]

Mr. MCLAIN. If I could also pursue the matter of your communications with outside parties, I note the memorandum from Director Stockman to the executive department heads, and that memorandum states that 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.

Will you convey to the agency any nonfactual information that you have received?

Mr. MILLER. At our discretion.

Mr. MCLAIN. Upon what standard——

Mr. MILLER. Oh, excuse me. Will we convey information——

Mr. MCLAIN. Of a nonfactual nature.

Mr. MILLER. Surely.
Mr. MCLAIN. All of that information——
Mr. MILLER. All of what information?
Mr. MCLAIN. [continuing] That you receive from outside parties?
Mr. MILLER. No. Let's back up. I think the predicate of my answer and your question were not the same.
Mr. MCLAIN. Let me rephrase it. The memorandum from Director Stockman says that you will convey all factual information that you receive to the department heads. Will you convey to them other information of a nonfactual nature which you receive from outside parties?
Mr. MILLER. If we think it pertinent.
Mr. MCLAIN. On what basis are you going to decide whether it is pertinent or not?
Mr. MILLER. Whether it is pursuant to the agency's performance under the Executive order.
Mr. MCLAIN. In order to do that, I trust that you would have to in some manner log those communications and describe what the nature of the communications are.
Mr. MILLER. That is incorrect.
Mr. MCLAIN. Do you intend to log your contacts with outside parties, personal contacts?
Mr. MILLER. We do not.
Mr. MCLAIN. Do you intend to log telephone contacts with outside parties?
Mr. MILLER. We do not.
Mr. MCLAIN. Are there any restrictions placed upon OMB staff in terms of who they can and cannot communicate with outside the agency?
Mr. MILLER. I have, as a matter of policy, instructed the desk officers not to communicate with outside parties——
Mr. MCLAIN. Is that instruction evidenced in writing?
Mr. MILLER. [continuing] with the following exception: If a need arises for them to acquire information from sources outside the Federal Government, they are authorized to make inquiries on their own, but they are forbidden from having contacts from the private sector directly pertaining to any regulatory matter before them.
Mr. MCLAIN. Is that instruction evidenced in writing?
Mr. MILLER. I have had three meetings where I have repeated this. I am not sure I have it in one of my standard operating procedure memos.
I am told by my deputy that he has so indicated in writing.
Mr. MCLAIN. Mr. Chairman, would the committee desire that that document be included in the record?
Mr. GORE. Without objection. [See p. 195.]
Mr. MCLAIN. Let me turn to your principal basis to which you devote about two pages of your prepared statement, and that is the basis upon which you rely in the memorandum from Director Stockman, the *Sierra Club* v. *Costle* case. Have you read that case?
Mr. MILLER. I have perused it. I do not want to hold myself out to be an expert on all facets of procedural law. But it seemed to me that the court's statement in that vein was quite explicit.
Mr. MCLAIN. As you read the case—it was quite explicit?

Mr. MILLER. Yes.
Mr. MCLAIN. I think it was quite explicit, also. Let's try to find out what it was explicit on.
Isn't it true that in the *Costle* case, the court specifically said that there were no allegations of the conduit-type communications with private parties and that they reserved judgment on that point?
Mr. MILLER. Would you direct me to the appropriate language? I would like to look at that.
Mr. MCLAIN. I do not know that I have that clipped the case right now.
Mr. MILLER. Well, I am reluctant to respond because, as I indicated, I have not covered this document in thorough detail. Not being a lawyer, I hesitate to characterize a judge's opinion without a complete study.
Mr. MCLAIN. Maybe Mr. Gray could help on that matter.
Mr. Gray, I am sure you are familiar with this case.
Mr. GRAY. I will try.
Mr. MCLAIN. The question is, is it not true that in *Costle*, the court specifically said that there were no allegations of conduit-type communications with private parties in the case, and that they reserved judgment on that point? They did not address that question.
Were there conduit-type communications? Aren't we talking about communications from the President to the agency, between the two?
Mr. GRAY. Well, I wish you could refer me to—your question again?
Mr. MCLAIN. My question is, did the *Costle* case involve conduit-type communications, or did that case address the question of Presidential communications between himself, his staff, and an agency head?
Mr. GRAY. That is correct.
Mr. MCLAIN. Thank you.
Isn't it also true that Costle involved a one-time briefing between the President, with his staff and an agency head?
Mr. GRAY. That is correct.
Mr. MCLAIN. Isn't it also true that the Costle contacts were during the post-comment period and not during the rule development stage?
Mr. GRAY. Well, the post-comment period is part of the rule development stage.
Mr. MCLAIN. However, it did involve communications during the post-comment period between the close of the comment period and the rule becoming final. Is that correct?
Mr. GRAY. That is correct.
Mr. MCLAIN. Can you tell us what relevance this case has to a question of your ex parte communications with private parties that might have an interest in a given rulemaking proceeding? Does it have any relevance?
Mr. GRAY. It does not have that much relevance to discussions we have with environmental groups, business groups, labor groups——

Mr. MCLAIN. However, it is the basis upon which you have relied in your guidelines of what you call ex parte communications, contacts with private people.

Mr. GRAY. We have said in our ex parte guidelines that we will not receive information from them if they have not given it to the agencies. We will not act as a conduit. That is, to the extent that this case says that you should not act as a conduit, we have issued guidelines——

Mr. MCLAIN. To what extent did this case say that?

Mr. GRAY. Then I am not sure I understand your question. This case stands for the proposition that the President or his agents not only have a right——

Mr. MCLAIN. His aides?

Mr. GRAY [continuing]. And his aides or people in the Executive Office of the President have not only a right but an obligation to discuss policy issues about what is in the record with agency officials. It is on that basis that we say that our Executive order is quite valid.

Now the ex parte guidelines are a slightly separate issue. It is a slightly separate question, not addressed directly in the case. We are not going to act as a conduit for outside parties; I therefore do not understand your question.

Mr. MILLER. Maybe it stems from this, Mr. McLain. Maybe you misread that last paragraph in Director Stockman's memorandum. He said: "Two additional matters should be noted. First, our procedures will be consistent with the holding of and policies discussed in *Sierra Club* v. *Costle.*" He did not mean to indicate that that was the only legal foundation on which these ex parte rules were promulgated, nor the authority of the President and his designees to have such communications.

Mr. MCLAIN. Dr. Miller, I am referring more to your prepared statement and specifically statements such as: "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 the agencies."

Mr. MILLER. Yes?

Mr. MCLAIN. *Costle* does not apply to your contacts with the interested public.

Mr. GRAY. What we have not done, Mr. McLain, is issue guidelines that require us to log our contacts, our communications with the agencies. That is what we have not done, and we have not done it because *Sierra Club* v. *Costle* says we do not have to do it.

Mr. MCLAIN. Let me, if I might, move on to another matter.

Dr. Miller, you commented in the Regulation magazine of August 1977—and I would like to quote you, if I might—"Agencies were not required under the program to place exclusive or even primary reliance in their decisionmaking on cost-benefit calculations where such a requirement could have been imposed only through legislation."

Would you please tell us what legislation was passed by Congress in the interim period that allowed President Reagan to impose such requirements?

Mr. MILLER. Could I have a copy of the interview? I am sorry I do not have one with me. I think the context, as I recollect, would be important. I would be glad to respond to your question, though.

Mr. DINGELL. Doctor perhaps you can help the Chair by advising us. There are a series of Federal statutes that fall within the purview of this matter.

Mr. MILLER. Right.

Mr. DINGELL. There also are a series of Federal regulatory agencies, both within the old-line departments and within the category of the independent agencies which are an arm of Congress.

Can you first of all submit to us for the record, please, a statement indicating which of the statutes that you will apply cost-benefit to where there is a provision in the statute which would authorize cost-benefit to be applied to cases and regulatory processes arising within the Federal regulatory system, please?

Mr. MILLER. Let me respond to that by saying, first of all, the Executive order indicates very clearly that the requirements thereof apply only to the extent permitted by law.

Mr. DINGELL. We are in full agreement, and I am delighted to hear that. I just want to be sure that that condition remains. In order that we might best monitor it, I would appreciate it if you would submit to us then the following: One, a statement of each of the statutes that will be subject to this which has cost-benefit included in the congressional language and a statement of those which do not. I would like also to have you submit to us a list of each of the independent regulatory bodies to whom cost-benefit will be applied, and a list of the old-line departments to which cost-benefit will be applied, and we will insert that in the record in the appropriate place.

[The information requested was not available to the subcommittee at the time of printing.]

Mr. DINGELL. Now, Doctor if you please, you had a comment.

Mr. MILLER. Sir, you have asked me to provide something that I cannot at this point agree can be——

Mr. DINGELL. No; submit it for the record, if you please.

Mr. MILLER. Yes; I understand but I do not know whether that can be accomplished within a time frame that makes any sense. The resources involved——

Mr. DINGELL. The committee is very comfortable. We will wait.

Mr. MILLER. Well, this may take years to do. The reason is that the laws, the enabling statutes for agencies across the Federal Government, are extraordinarily long. We would have to go through the Code of Federal Regulations to identify each case.

In some cases, as you know, Mr. Chairman, the law specifically requires some benefit-cost analysis; in a few other cases it authorizes it, but my understanding, Mr. Chairman, is that in most cases where it is not specifically prohibited then it is implicitly authorized.

Mr. GORE. Would the Chairman yield?

Mr. DINGELL. Well, can you tell me whether you—are you aware of any, any of these regulatory agencies or any of the statutes where cost benefit is permitted?

Mr. MILLER. In every case where it is not explicitly forbidden.

Mr. DINGELL. It is permitted in those instances? All right.

Mr. MILLER. There are only a few cases where it is specifically prohibited or it has no relevance to the decision. The Dulaney amendment to the Food, Drug and Cosmetic Act is a notable example. Also the usefulness or relevance of benefit-cost analysis has been circumscribed by the interpretation of the Supreme Court in yesterday's "Cotton Dust" decision, an interpretation of an extraordinarily vague statute passed by Congress.

Mr. DINGELL. Well, can you tell us then whether you did any research to find out which of these were subject to this cost-benefit analysis and which were not, before the orders were issued?

Mr. MILLER. Did we compile a formal study, numbered in the hundreds of pages, to list each case? The answer is "No."

Mr. DINGELL. Did you do any research at all?

Mr. MILLER. That is the reason the Executive order very specifically set out "to the extent permitted by law."

Mr. DINGELL. Well, I guess if folks inside the administrative branch of Government or in the independent regulatory agencies are supposed to comply to the degree that they are required by law, they would have to know whether or not they then could or should, or should or should not apply cost-benefit analysis to their regulatory process.

Mr. MILLER. That is right.

Mr. DINGELL. Now how are they supposed to know, and how are you supposed to know whether in fact they are supposed to do so or not do so if you have performed no study of this?

Mr. MILLER. I will be glad to answer that. In each agency there is a general counsel's office with attorneys whose job, among other things, is to know what the enabling statutes require and what they forbid and what they allow. Therefore, agencies have often pointed out that with respect to particular kinds of regulation, benefit-cost analysis or the principles cannot apply in full, or only in part or whatever. Quite frankly, we are reasonably short handed and have not in every case been able to verify their admonition that the President's principles do not apply.

Mr. DINGELL. Well, you seem to be in the rather anomalous position of having an order which you defend vigorously but not being able to tell us who you think it applies to or to tell us who might think on the basis of their own research that it applies to them. This leaves us, I think, in a rather curious position as regards the order.

Can you define to us how we get ourselves out of this situation where we do not know who the order applies to and where the people involved probably do not know that it applies to them? How do we deal with this?

Mr. MILLER. Well, Mr. Chairman, I think that is an inaccurate characterization.

Mr. DINGELL. Sir?

Mr. MILLER. My reading of the statutes and research on the statutes, reflected in books I have written, papers I have written, and speeches I have given have imparted to me the understanding that with only a few exceptions, agency benefit-cost analysis has some legitimate role to play at the option of the agency head in terms of making decisions.

Now I will be happy to try to provide you—and I do not want to try to seem evasive but to go through every single statute, Mr. Chairman, as you know, the Code of Federal Regulations is so massive and our staff resources are limited—we will be glad to provide you what we can.

Mr. DINGELL. I am not asking you to perform massive inquiries of this sort but I am trying to find out who you had in mind applying this to and which statutes you intended it would apply to, and you seem to be incapable of telling us today.

Now it is, I think, relatively important that we understand who this would apply to; who would know it applied to them; who would know it did not; who you knew it applied to; and who you had doubts about. I gather that we are sort of in the air as to who is subject to this.

Mr. MILLER. Could I say——

Mr. DINGELL. Sir?

Mr. MILLER. It applies to each of the departments of the Federal Government, the Environmental Protection Agency, and if you will wait just a moment I will read you some others.

Mr. DINGELL. Well, the Chair is going to recognize counsel again but I will yield briefly to the gentleman from Tennessee.

Mr. GORE. Thank you, Mr. Chairman.

Is a cost-benefit analysis appropriate under the OSHA law?

Mr. MILLER. It is arguable that it is in rulemakings under provisions except for 6(b)5. The Supreme Court ruled on that yesterday. Even in cases involving 6(b)5, benefit evaluation must be met according to the Supreme Court's decision in the *Benzene* case handed down 1 year ago.

Mr. GORE. Are cost-benefit analyses appropriate for new regulations promulgated pursuant to section 6(b)5 of OSHA?

Mr. MILLER. I have not read the decision in sufficient detail to give you a definitive answer, Mr. Gore. On the basis of my reading of the summary—I was very busy yesterday studying all the materials, so I was very, very busy and I have not had a chance to review that in great detail—but from my understanding, the Supreme Court ruled that the interpretation of the OSHA Act was that except for the feasibility aspect, benefit-cost analysis could not be the overriding criterion for promulgation of new rules.

Mr. GORE. Are you going to insist that OSHA apply a cost-benefit test to new regulations issued pursuant to section 6(b)5 of OSHA?

Mr. MILLER. Yes, in the following sense: first, to the degree that the decision is relevant, the Supreme Court's decision in the cotton dust standard allows for such; and, second, the Executive order requires certain analyses to be done with respect to the lowest-cost way of meeting any given objective. To the extent that the cotton dust standard prevents that, then the agencies are required to perform the analysis and to show what the effects of the legislative restraint would be, but of course their decision would be governed by the Supreme Court's interpretation.

Mr. GORE. Which said you could not.

Mr. DINGELL. The Chair thanks the gentleman.

The Chair recognizes counsel again.

Mr. MCLAIN. Dr. Miller, you were about to tell us what legislation Congress had enacted since 1977 where you stated that to re-

quire cost-benefit analysis as a decisionmaking tool, that that was a requirement which could only be imposed by legislation.

Mr. MILLER. Could I just identify that what you are referring to is a page from an article I published in the first issue of Regulation magazine entitled, "Lessons of the Economic Impact Statement Program." It was published in the July-August 1977 issue. Without even reading it, let me of course mention that this went to a discussion of President Ford's program and President Carter's program to that date.

Let me just read in the whole paragraph from which you quoted.

Mr. DINGELL. Without objection, the Chair will put the whole of it, the relevant portions, in the record and will recognize you for summary. [See p. 221.]

Mr. MILLER. May I either read it aloud or at least read it to myself so I can see what the contents are?

Mr. DINGELL. Either way.

Mr. MILLER. Let me just read it aloud: "In briefings on the program, agencies were told that a proposal need not be considered inflationary simply because it might generate cost. Rather, if the proposal would increase real output, that is, generate tangible and intangible benefits in excess of cost, then in a real sense it was anti-inflationary; but, if the action would decrease real output, that is, generate costs in excess of benefits, it was inflationary."

Here is the part that you quoted, Mr. McLain: "Agencies were not required under the program to place exclusive or even primary reliance in their decisionmaking on cost-benefit calculations where such a requirement could have been imposed only through legislation. Nevertheless, it was believed that requiring agency officials to address costs and benefits systematically would make them more sensitive to these issues."

Now what was your question about that?

Mr. MCLAIN. My question was, what legislation has Congress passed since you wrote that statement which allowed President Reagan to mandate that the decisionmaking be based upon cost-benefit calculations?

Mr. MILLER. What the paragraph says and what the sentence that you quoted says is that agencies were not told that they had to place exclusive or even primary reliance on cost-benefit calculations because there were certain laws that restrained it or restrained the——

Mr. MCLAIN. What it says is, to impose such a requirement would take legislation.

Mr. MILLER. That is right.

Mr. MCLAIN. Is that right?

Mr. MILLER. That is right, and the analogy would be if President Reagan's Executive order had been written and did not include the phrase "to the extent permitted by law." What I am saying there—and perhaps I inartfully said, Mr. McLain—was that there are situations as cited by Chairman Dingell where legislation does not permit the primary reason for a decision to be the results of a benefit-cost analysis.

Mr. MCLAIN. You were talking in terms though, were you not, of the Executive orders of President Ford and President Carter?

Mr. MILLER. That is right. I am saying that when we briefed people on President Ford's program we did not tell them, "Ignore your statutes; if you promulgate regulations, you have to base them on the outcome of this," because to do so would have been to violate the law because there are certain statutes that restrain that.

Mr. DINGELL. The harsh fact, then, is that you really do not know who this order covers and who it does not cover. Isn't that true?

Mr. MILLER. It applies to the Department of Commerce, the Department of Agriculture, the Department of Defense, the Department of Education, the Department of Energy, the Department of Health and Human Services, the Department of Housing and Urban Development, the Department of the Interior, the Department of Justice, the Department of Labor, the Department of State, the Department of Transportation, the Department of Treasury, and a number of other agencies in the executive branch of Government.

Mr. DINGELL. OK. However, you do not know which statutes under the purview of those agencies it applies to.

Mr. MILLER. I will not cite every statute for you. I just simply cannot remember them but I will provide something for the record.

Mr. DINGELL. However, you do not know which statutes under the purview of these agencies it applies to so you really do not know who is going to be covered by it or who is not going to be covered by it. Isn't that right?

Mr. MILLER. Congressman, I think I have answered the question to the best of my ability.

Mr. DINGELL. Well, I asked you to tell us which statutes were covered. You told us you had not made a study on that and what I am trying to figure out is, who is covered, what statutes are covered? You are telling me which departments are covered but you are not telling me which statutes are covered.

I am trying to figure out, if you do not know which statute is covered, aren't you falling afoul of the adjuration of the court that legislative bodies not cast large nets of small mesh to catch all the fish, and then decide which fish they should keep and which fish they should throw back? That is an ancient prohibition of the courts in terms of equity, in terms of bad lawmaking or bad regulations.

What I am trying to figure out is, who is covered, who is not covered? Which statute is covered, which statute is not covered? Now I have asked you to tell me which statute is covered or whether you studied them to find out which statutes were covered and which were not, and you told me you had not done it.

The next question I am trying to get to here is to figure out, if you do not know which statutes are covered, how are you supposed to know what the savings of this proposal are going to be? You have come up with a figure of $18 billion but you do not know what statutes are going to be covered and what statutes are not going to be covered. Now how do you get the figure of $18 billion if you do not know what statutes are covered?

Mr. MILLER. Well, each of the regulations identified in that attachment are regulations that the agency as well as OMB Counsel believe that the agency has sufficient discretion that—following the

President's principles which go beyond just the question of benefit-cost analysis—the agency can do something about them. Each of those is an instance.

Now I cannot provide you off the top of my head with a specific reference, legal reference, statutory reference to each one of those things. I do not——

Mr. DINGELL. Was cotton dust covered under this?

Mr. MILLER. The cotton dust question was one of those listed, and we believed that we had such discretion.

Mr. DINGELL. The court said yesterday that cotton dust was not covered.

Mr. MILLER. Well, to the degree that the court said specifically that, then that is the ruling and the Executive order requirements will not apply. Any requirements of the Executive order that conflict with that ruling will not apply.

Mr. DINGELL. Well, can you tell me any of the other statutes that were covered in the release of $15 billion to $18 billion, which you in your opinion can tell us firmly involved the power to consider cost benefit in the regulatory process?

Your figures on cotton dust were annual recurring costs of $246 million a year, one-time investment cost of $783 million.

I am trying to figure out which of the other statutes that you talked about would, in fact, involve the power of the agency to exercise judgments in regard to cost-benefit.

Mr. MILLER. Well, section 504 of the Rehabilitation Act of 1973 is one.

Mr. DINGELL. Sir?

Mr. MILLER. Pardon?

Mr. DINGELL. Which one was that?

Mr. MILLER. Section 504 of the Rehabilitation Act of 1973.

Mr. DINGELL. A judgment may be made under that statute as to cost-benefit?

Mr. MILLER. I am saying that is a possibility. I have not read the statute myself researching those grounds.

Mr. DINGELL. Are you telling us that you know or you do not know, on this point?

Mr. MARKS. Mr. Chairman?

Mr. DINGELL. Yes?

Mr. MARKS. If I may, I think the chairman's original request of Dr. Miller is one that, as I understand it, they will try to provide when they have the opportunity.

Mr. DINGELL. The Doctor said he did not have the time. I am content to have them submit it to us but——

Mr. MARKS. My thought is at this particular moment that to take the time of the committee now to try to go through all of those various statutes, which could run into thousands, might lead us into the recess.

Mr. GRAY. Mr. Chairman, may I clarify something? In terms of your question as to which agencies does the Executive order apply, there is more to the Executive order than just cost-benefit. Indeed, the sections setting forth the President's principles involve more than just cost-benefit.

For example, in the President's principles is the reference to cost effectiveness. This is an issue which appears to be preserved even

under the court's decision in the OSHA case. The figures that are in this statement do not necessarily relate to cost-benefit analysis; they relate to costs that may be eliminated even if——

Mr. DINGELL. Well, before the regulation goes into play cost benefit has to be found to be there. The power to assert cost-benefit based regulations has to be found to be present.

Mr. MILLER. [Shakes head negatively.]

Mr. GRAY. Mr. Chairman, I——

Mr. DINGELL. Maybe I misunderstood you but that is the way I understood it.

Mr. GRAY. The availability of cost-benefit analysis does not trigger the application of the Executive order.

Mr. DINGELL. That is involved in the savings, is it not?

Mr. GRAY. No, sir. These are——

Mr. DINGELL. Oh, you are not going to make any savings, then, by having cost-benefit analysis?

Mr. GRAY. Oh, yes. No, that is not——

Mr. DINGELL. Well, you either are or you are not. I am prepared to take your word on it. Which is the case?

Mr. MILLER. Could I indicate that the 1977 amendments to the Clean Water Act require EPA to consider the reasonableness of the cost, for the control of conventional pollutants. That is an instance where the agency is not only permitted but indeed required to assess the benefits and the costs.

Mr. DINGELL. Well, are you telling us that that particular Clean Water Act has a provision whereby the regulatory agency may consider cost-benefit?

Mr. MILLER. Yes, not only may, but it is required.

Mr. DINGELL. Is it there in the statute?

Mr. GRAY. Yes, sir.

Mr. MILLER. It is required.

Mr. DINGELL. Where?

Mr. GRAY. 33 U.S.C. 1314(b)(1).

Mr. DINGELL. We will get it; we will get it and take a look at it but——

Mr. GRAY. The Outer Continental Shelf Act Amendments of 1978, 43 U.S.C. 1347(b); the Flood Control Act of 1936, 33 U.S.C. 710(a); the Consumer Product Safety Act, 15 U.S.C. 2056(a).

Mr. DINGELL. The Chair finds this all very interesting.

The Chair is going to recognize counsel again.

Mr. MCLAIN. Thank you, Mr. Chairman.

If I could address the question of regulations that have been returned for review, you indicated in your press package released over the weekend, and you have included in the materials that you have supplied the subcommittee that there were 55 nonmajor rules that have been returned to the agencies for reconsideration.

You are aware of the request from Chairman Dingell to Mr. Stockman of June 8, 1981, where he asks for, among other things, a list of those proposed rulemakings which have been submitted to OMB under section 3(c)3 which have not yet been published in the Federal Register as Notice of Proposed Rulemaking as a result of suggested modification of OMB. I think we are talking basically about those 55 regulations.

Mr. MILLER. I may have made a mistake in responding. I think you asked for copies, did you not, rather than a list, and I said that we do not have copies?

Mr. MCLAIN. At another point we did ask for copies, for regulations that were published in a different form.

Mr. MILLER. Wait a minute. I have a copy of Chairman Dingell's letter in front of me. Which one of these——

Mr. DINGELL. In order to ease our mutual concern here, I will not ask for the originals; I will just ask for copies and I am quite content to receive those.

Mr. MILLER. You are asking, sir, for what?

Mr. DINGELL. I will not ask for the originals. I will just ask for copies, and the Chair will advise I will be quite content to receive those.

Mr. MILLER. We do not have copies.

Mr. DINGELL. You do not have copies?

Mr. MILLER. Yes, sir. We do not have copies.

Mr. DINGELL. Well, you can make a copy and give us the copy, and you keep the original and we will take the copy.

Mr. MILLER. We do not have an original.

Mr. DINGELL. Well, who has the original?

Mr. MILLER. Sir, the flow of paper into our office is awesome. Under the Paperwork Reduction Act, the irony is that the paper flow in our office increased from something like 3,000 transactions to 12,000 transactions, and so we do not even——

Mr. DINGELL. I am impressed but all I am asking for is copies of papers that are supposed to be in your files.

Mr. MILLER. I do not know how you allege that, sir, not knowing what our filing system is. I have just said we do not keep copies of the regulations.

Mr. DINGELL. I am beginning to believe it might be a little on the chaotic side but we shall pursue it, and maybe we will have some folks down there to look at the files.

The Chair recognizes counsel.

Mr. MCLAIN. Dr. Miller, I might simplify this: Will you submit to the subcommittee those 55 regulations that you have returned to the agencies for review?

Mr. MILLER. I do not have copies of them; I will give you a list of them.

Mr. MCLAIN. I said a list, would you submit——

Mr. MILLER. Sure.

Mr. MCLAIN. That is responsive to Chairman Dingell's original request, is it not?

Mr. MILLER. No, sir. I read his question as——

Mr. DINGELL. The Chair will simplify this whole business. I am distressed you do not have the documents but in lieu thereof, will you please submit the letters whereby you returned them to the agencies?

Mr. MILLER. In most cases those——

Mr. DINGELL. You must have copies of those?

Mr. MILLER. I will submit to you, sir, a list of the regulations. I do not have copies.

Mr. DINGELL. The list will be acceptable. We will receive the list, then, in the prayerful hope that your filing system will improve. [See p. 196.]

The Chair recognizes——

Mr. MILLER. Sir, I think that our filing system is very efficient in not keeping copies of these thousands of communications that come to us. We would occupy three floors in the New Executive Office Building rather than one.

Mr. DINGELL. We would just like to get the list.

The Chair recognizes counsel again.

Mr. MCLAIN. Tell me briefly, Dr. Miller, what the standards are that you apply to a rule to determine whether it should be reconsidered by the agency.

Mr. MILLER. The President's principles as set forth in the Executive order.

Mr. MCLAIN. You have also indicated in prior statements that of the some 172 regulations that were originally postponed by the President on January 29 for a period of 60 days, that some 37 of those postponed were further postponed at the end of the 60-day period. Is that correct?

Mr. MILLER. Yes.

Mr. MCLAIN. Are there still about 37 that are further postponed?

Mr. MILLER. Yes.

Mr. DINGELL. On that, Doctor, would you please submit to us a list of each. I will not ask you to get anything out of your files because I am afraid of what the answer would be, but if you will just get us a list we will be much appreciative.

Mr. MILLER. I will be happy to. [See p. 200.]

Mr. MCLAIN. Dr. Miller, what is your legal authority to postpone further than the 60-day period?

Mr. MILLER. I think there was a legal memorandum on the so-called 60-day postponement. Each agency has authority to postpone so the question, I guess, should be addressed to the agencies themselves.

Mr. DINGELL. No, you tell them to postpone, do you not?

Mr. MILLER. No, sir.

Mr. DINGELL. Who tells them to postpone?

Mr. MILLER. Let me answer that. The President of the United States, in a memorandum to the head of the departments and the EPA, asked the agency heads to postpone on their own initiative the effective dates of the regulations. Subsequently the agencies further postponed 37 of those same regulations that had been postponed during the 60-day period.

Mr. DINGELL. Now on what basis did they do that?

Mr. MILLER. Under the authority of their enabling statutes.

Mr. DINGELL. Under the authority of their enabling statutes?

Mr. MILLER. Right. If there was any question of that, I am sure that someone would have raised it in court. It is my understanding the Administrative Procedure Act clearly gives the agencies the authority to do that.

Mr. DINGELL. It does, if that does not prejudice the rights of one of the parties to the proceedings. Isn't that true?

Mr. MILLER. Well, if that is the case, I am sure that one of the prejudiced parties would have raised this issue.

Mr. DINGELL. Would you submit to us a copy of the opinion that you have referred to affording authority to direct the postponement for the period of time that——

Mr. MILLER. I am not absolutely sure there is a written document but we were given——

Mr. MCLAIN. Mr. Chairman, if I can be of assistance, there is a written document and the subcommittee has the written document.

Mr. DINGELL. Then in order to save Dr. Miller difficulty, the Chair will instruct that that be inserted in the record. [See p. 152.]

Mr. MCLAIN. That written document, I might add, limits its advice to a 60-day period and discusses in some detail the problems attendant to extending it further than that 60-day period.

Could you tell me what is the likelihood of these regulations that are being postponed further being voided because of the extended postponement and having to renew the notice and comment requirements again?

Mr. MILLER. I cannot give you a summary statistic on that. I will look into it.

Mr. MCLAIN. Dr. Miller, let me just raise a couple of points, if I could. The chairman has made reference to the press release over the weekend whereby the administration claimed credit for saving the public some $15 to $18 billion through your regulatory reform efforts. Let me just make a couple of statements about those numbers generically, and tell me if these statements are wrong.

Is it not true that many of those numbers simply take industry estimates for costly retrofitting of existing equipment, extrapolated into the future, or out-of-date agency estimates?

Mr. MILLER. We put together the very best estimates we could, but these were mainly from industry sources, almost all of them.

Mr. DINGELL. Did you receive anything from any nonindustry source? Is there anything from a nonindustry source in there?

Mr. MILLER. From nonindustry? Mr. Chairman, almost all of the information came from the agencies themselves.

Mr. DINGELL. From the agencies?

Mr. MILLER. From the agencies.

Mr. DINGELL. It came from agencies or it came from industry? Which?

Mr. MILLER. It came from the agencies.

Mr. GRAY. In the automobile package, for example, Mr. Chairman——

Mr. DINGELL. Pardon?

Mr. GRAY. In the automobile relief package released on April 5, those estimates in that package of 34 regulations of EPA and NHTSA were agency estimates which were in almost all respects lower than what the industry was claiming. We chose to use the agency estimates and the truth may very well lie somewhere in between. We do not know.

Mr. DINGELL. Counsel?

Mr. MCLAIN. Is it not true that those estimates which you published to justify the statement that you have saved the American public between $15 and $18 billion, is it not true that they do not take into account at all any of the benefits that might be derived from those regulations?

Mr. MILLER. Could I correct you, Mr. McLain? I do not think we said "have saved." "Hold the potential for saving," I think is the phrase——

Mr. DINGELL. Therefore, you are not saying that it would save or will save; you are just saying it could save.

Mr. MILLER. That is right.

Mr. DINGELL. I see.

Mr. MCLAIN. Then again, could it save nothing?

Mr. MILLER. It conceivably can save nothing. It conceivably can save many times the estimate.

Mr. MCLAIN. Isn't it true in some of these cases that the available analysis indicates that the benefits exceed the costs of these particular regulations?

Mr. MILLER. Yes.

Mr. MCLAIN. Therefore, in effect your regulatory reform effort could have cost the American people, could it not?

Mr. MILLER. You asked me whether the analyses that are available—we want to make sure that the analyses, that the decisions made, reflect the best evidence.

Mr. GORE. Will counsel yield?

Mr. MCLAIN. Is it not true——

Mr. GORE. Go ahead.

Mr. MCLAIN. Is it not true that based upon the analysis of those regulations which you have cited, that your regulatory reform efforts in holding them up could have cost the American people money?

Mr. MILLER. It is conceivable. The question arises, however, do we want to move forward with the regulation on the basis of inadequate information? If all that you require is some evidence that there are benefits, without knowing what those benefits are and without knowing anything about the costs, we have willy-nilly regulation.

Mr. McLain, in my judgment and in the judgment of this administration we have had far too much willy-nilly regulation in the past decade. This regimen that is implicit in the Executive order is going to require better regulation. It is going to require agencies to do a better job. It is going to require that agencies, when they promulgate a regulation or try to meet some objective, they meet it at lowest cost. That saves the consumer; that saves the taxpayer. It is going to require that when agencies issue a regulation for a given cost, they secure the objective, the highest objective, and that helps those who are the subject or who are the beneficiaries of the regulation. That is what this is all about.

Mr. DINGELL. The time of counsel has expired.

The Chair is going to recognize the gentleman from Tennessee.

Mr. GORE. Thank you, Mr. Chairman.

What were the potential benefits foregone compared to the potential costs avoided?

Mr. MILLER. I think in these instances, if you count the fact that alternative ways of achieving the same regulatory objective were to be considered by the agencies, on the whole I am absolutely convinced that of the regulations listed, the initiatives taken thus far, the costs far exceed the benefits.

Mr. GORE. What were the potential benefits?

Mr. MILLER. The benefits were sizeable but the costs were even——

Mr. GORE. What were they?

Mr. MILLER. I do not have an explicit estimate and that is one——

Mr. GORE. Well, you performed a cost-benefit analysis.

Mr. MILLER. If I could answer, Congressman Gore, one of the very difficult problems with regulation as we have known it in the past decade is the propensity of agencies not to estimate the economic ramifications of their proposed regulations. In this case we want the agencies to do that.

Mr. GORE. Now your justification for avoiding the regulations was the cost-benefit analysis. You cited in your statement a figure of $18 billion of costs avoided. What I want from you is, what was your estimate of the benefits foregone? Since you went through a cost-benefit analysis, I am sure you have it, unless you did not make an estimate of the benefits, unless you only estimated the costs.

Mr. MILLER. Congressman Gore, I am afraid that I have been so inarticulate in expressing to you the basis for this document. The basis for this document was not that each of the items listed was chosen after an extensive benefit-cost analysis. Each of the items was chosen after there was considerable concern about the overall impact of the regulation, good or bad, and that it should have the kind of analysis that the President set forward in the Executive order. Now not all of these, I should emphasize, are initiatives that are "major" under the terms of the Executive order but they are all initiatives that will be going through the Executive order process.

Mr. GORE. Now you have listed the costs on all of these but you have not listed any of the benefits. I have the document right here. You see, the question goes to the viability of cost-benefit analysis. You and I had a very lengthy discussion about this a couple of years ago and I still have not really gotten an answer from you.

This Executive order says that a regulation cannot be issued, it says, "Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society." Now let's take the regulation on the dumping of hazardous waste into that woman's well in Tennessee who gave birth to a deformed child. I want you to tell me, exactly what is the value of avoiding that child's birth defect?

Mr. MILLER. Well, Mr. Gore, I do not think that we probably will be able to close any further than we did when we had the same colloquy 2 years ago about the same person.

Mr. GORE. Well, what is the answer? You see, the difference is that somebody has to answer that question before they can protect that child. If you cannot answer it, how in blazes can they answer it? If they cannot answer it, how under this Executive order can they protect that child?

Mr. MILLER. Let me indicate to you some parameters on this, the first point being that, as you probably would agree, Congressman, the vast majority of regulations do not require that kind of life-or-death or cost—could I finish?—or birth defect issue. In those cases I do not think you, sir, would disagree substantially with the need

for trying to evaluate costs and benefits so as to make sure that the public is well-served by its regulatory apparatus.

Now in those cases where there are very subjective costs or very subjective benefits, you have first the question of cost effectiveness. That is, of the resources that the Federal sector and the private sector are devoting to the reduction of risk from hazardous wastes and other things, are we doing it in an appropriate manner? Are we——

Mr. GORE. No, no. That is not it. You are saying that they have to do it in a way that has a positive cost-benefit analysis or they cannot do it, and you still have not answered the question. Can you quantify the value of the avoidance of that child's birth defect, and thousands like that child, can you quantify it?

Mr. MILLER. Congressman Gore, I am trying to be responsive to your question.

Mr. GORE. Well, it is a very simple question, yes or no. Can you? Go ahead.

Mr. MILLER. The opportunity cost of not undertaking a regulation for protecting this child—and of course there is a difference between ex-post and ex-ante, the difference between the child that you know is deformed and the child that is at risk—in that event, the opportunity cost is using the resources somewhere else.

Now frankly, Congressman, we do not make those decisions. Congress makes those decisions in terms of the amount of regulation that it——

Mr. GORE. That is right. Go ahead. I was just agreeing with you; Congress does make the decision.

Mr. MILLER. Congress makes the decisions on the global amount of resources that is applied to it, in terms of the budgetary cost and the general guidelines for agencies to follow in regulating. Now I have often used a characterization of benefit-cost analysis where there are subjective benefits and costs, what I characterize as the pile of sand analogy.

If we had two large piles of sand on this table of comparable size, we would not be able to tell very easily which one was the larger. However, if we organized a brigade where we took a cup from each pile in sequence, as their absolute sizes diminished their relative sizes would become much more obvious.

In those cases involving benefit-cost analysis where some costs can be easily quantified and others not, where some benefits can be easily quantified and others not, it behooves the regulatory agency to do the quantification to the extent permissible, the extent feasible, and net out those costs that can be expressed in dollar terms and those benefits that can be expressed in dollar terms so as to focus on those not easily quantified benefits or not easily quantified costs.

Now this is made fairly apparent and clear in the guidelines that we have issued for developing a regulatory impact analysis. We have indicated in testimony before the Congress on many occasions, in speeches, and repeatedly in discussions with agencies that at times the determination that the benefits exceed costs will not be made on a simple arithmetic comparison of $2 amounts. On occasion there has to be some exercise of judgment.

There is nothing in the Executive order and I dare say, Congressman Gore, there is nothing in anything that I have said in print or in speaking, unless I misspoke, that contradicts that point.

Mr. GORE. Well, except the Executive order itself: It says, "Regulatory action shall not be undertaken unless the potential benefits to society outweigh the potential costs to society," and the burden of performing that analysis and quantifying the benefits and quantifying the costs is on the regulatory agency. If they cannot do it, then they cannot issue the regulation, and you have just been unable to do it. You cannot quantify the benefits in the hypothetical I cited, and I dare say hundreds if not thousands like it.

You have not exempted health and safety regulations from this net. You are requiring them to do it as well, and you are putting the burden on the people that the Congress is trying to protect. You are right in saying that the decision is that of the Congress. The Congress decides to protect that child and protect others in this society who need protection and who we, as elected representatives of the people, decide to protect with laws and with the delegation of authority to the agencies to implement those laws.

You are saying, "All right, now, in addition to that we are going to require in the implementation of those laws that they not implement them unless they can come up with this hocus-pocus cost-benefit analysis even where it is absolutely impossible to do so."

Mr. MILLER. Congressman Gore, you are welcome to that view of that, but I think you did misstate what is contained in the Executive order. Could I direct your attention to the Executive order, section 3, subsection D(1)—that each regulatory impact analysis is supposed to contain "a description of the potential benefits of the rule, including any beneficial effects that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits."

Paragraph (2) says, "a description of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms, and the identification of those likely to bear the costs."

I think that what you are saying does not reflect what is in the Executive order.

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

Dr. Miller, the Chair would like to ask you some questions, a couple of things. I would like to go through the way this thing is working, the regulatory process. We will go back to a case which is before a regulatory body.

The first thing they would do is, on completion of the case they would have to submit it to your agency. Is that correct?

Mr. MILLER. Well, please bear in mind, Mr. Chairman, that the Executive order applies only to informal rulemaking. Typically, what happens with a case of informal rulemaking is that an agency puts a proposed rule in the Federal Register for comment and then publishes the final rule in the Federal Register after the comment period has closed and the agency has reached its decision.

Mr. DINGELL. Now when do they submit it to you for review?

Mr. MILLER. That is a good question. Under the Executive order, the agency submits the proposed rule to us prior to its appearance in the Federal Register as a proposed rule.

Mr. DINGELL. Prior to——

Mr. MILLER. Prior to, that is right.

Mr. DINGELL. All right. We have that case clear in mind. What about a case where the proceeding had already gone through the entirety of the process? When was it submitted to you then?

Mr. MILLER. It will be submitted to us prior to the agency's publishing the final rule in the Federal Register.

Mr. DINGELL. Have you, under your regulations, dealt with any of the rules which had already been in place and which had for all intents and purposes achieved the force and effect of law?

Mr. MILLER. Well, one case was the Department of Transportation decision to postpone the effective date of the implementation of the passive restraint rule for the automobile industry. That was one that Secretary Brock Adams had——

Mr. DINGELL. I think he thoroughly screwed it up but my views on that are personal views. I am concerned here with the process and I am trying to find out when these things came to you and under what circumstances because I want to find out whether or not you have the appropriate and necessary procedural and due process rights protected to all persons.

Now if a rule was submitted to you after it had achieved the force and effect of law, when was it submitted to you, or were any in fact submitted to you under those conditions?

Mr. MILLER. Well, in that case, Chairman Dingell, the agency submitted it to us. In the case where Secretary Lewis postponed the effective date of the passive restraint rule, the agency submitted to us the proposal to postpone the rule before it appeared in the Federal Register.

He then also submitted to us for our review the regulatory impact analysis of the rule as well as the proposed final rule itself. In that particular case we had no consultations other than to say, "It comports with the President's principles."

Mr. DINGELL. Now what happens when this is submitted to you? What happens when the rule is submitted to you? What review do you make? What do you do? You say you want these rules submitted to you before they are put into the Federal Register but you have also told us that you do not want any of them submitted; that where any affected person would want to have you look at it, they would have to submit the papers to you at the same time they would submit them to the regulatory agency. Is that correct?

Mr. MILLER. Yes.

Mr. DINGELL. All right, now, how does anybody submit a paper to you at the same time they submit it to a regulatory agency if the proceeding has not yet been published in the Federal Register?

Mr. MILLER. They simply transmit it to the agency. Any time that someone wants to discuss with us an issue pertinent to a regulation that is either proposed formally in the Federal Register or is under development at the agency, we ask them to submit the same information to the agency.

Mr. GRAY. Mr. Chairman, I might add here that I do not believe there is anything in the Home Box Office decision that applies these ex parte principles in advance of a notice of proposed rulemaking but our ex parte guidelines do not make those distinctions.

We are not going to see material from outside groups under any circumstances that they——

Mr. DINGELL. You are not?

Mr. GRAY [continuing]. That they have not also submitted——

Mr. DINGELL. You do not receive papers from the outside groups at all?

Mr. GRAY. No.

Mr. DINGELL. You do not?

Mr. GRAY. Unless they have—we have instructed them not to give us anything that they have not also given to the agencies.

Mr. DINGELL. Say that again, please.

Mr. GRAY. We have instructed outside groups of whatever sort not to give us any material that they have not also given to the agencies, regardless of——

Mr. DINGELL. Is that a rule of yours which is in writing?

Mr. GRAY. Yes, sir.

Mr. DINGELL. Where?

Mr. MILLER. It is in the ex parte guidelines, sir, that Director Stockman issued on June 13. Sir, it even gets to the point of the ridiculous. When people come in my office to visit, no matter what the group, they say, 'Hello," and I say, 'Did you tell the agency that?"

Mr. DINGELL. Well, I am not sure I am for or against that. I am very concerned about ex parte communications, as you very well know.

Mr. MILLER. Right, as are we, and that is the reason that we developed those guidelines.

Mr. DINGELL. One thing that I am curious about is, how are you going to avoid becoming a court of appeals? If the agency issues a rule you will have authority to hold up that rule, will you not?

Mr. MILLER. In the general sense of the term.

Mr. DINGELL. Sir?

Mr. MILLER. Not authority in the sense of—in the general sense as you would understand it, we would be able to hold up the rule.

Mr. DINGELL. You would be able to hold up the rule?

Mr. MILLER. Right.

Mr. DINGELL. Therefore, under what authority would you hold up the rule? Under the Executive order?

Mr. MILLER. Yes, sir.

Mr. DINGELL. OK. Now how would you do that, just tell the agency that the rule is suspended?

Mr. MILLER. No, sir. There are a couple of things that could happen. The first is, we advise the agency that the rule as submitted comports with the President's program.

Mr. DINGELL. It does, or does not?

Mr. MILLER. The first is, we could advise the agency that it does comport with the President's program. The average length of time is 9 days and the shortest time——

Mr. DINGELL. I am not talking about the length of time. I am trying to find out how you hold it up, why you hold it up, under what authority you hold it up, and what happens when you hold it up.

Mr. MILLER. The second thing that could happen is that we tell an agency, "We are reviewing your regulation, your proposal. We

have not been able to determine whether it comports or fails to comport with the President's program. We need more time to make such an evaluation."

Mr. DINGELL. I am just trying to find out what authority you hold it up under.

Mr. MILLER. Under the Executive order.

Mr. DINGELL. Under the Executive order? All right. Therefore, the rule just does not go into effect during the time that you are engaged in your review, if you notify them. Is that right?

Mr. MILLER. If we ask the agency to hold it up for further reviews under the Executive order, they do that.

Mr. DINGELL. All right. Now in the event that you do this, what actions do you take to ascertain whether it comports with the President's Executive order or not? Do you hold hearings?

Mr. MILLER. No.

Mr. DINGELL. Do you receive testimony? Do you receive any documents? How do you inform yourself as to whether it conforms with the President's ruling or not?

Mr. MILLER. Mr. Chairman, there are two kinds of regulations under the Executive order. Major regulations are accompanied by a regulatory impact analysis, and of course in those situations we rely most heavily on the regulatory impact analysis for a determination of whether it comports with the rule.

Mr. DINGELL. All right.

Mr. MILLER. In the case of nonmajor regulations, we simply inspect the rule itself. If we need additional information, we go back to the agencies and ask the agencies to provide us with additional information in order to make a determination to——

Mr. DINGELL. To reopen the record and take additional testimony?

Mr. MILLER. No, sir.

Mr. DINGELL. Well, how do they get you the information if they do not do that? Let's suppose this is an on-the-record proceeding. How do they get you that information, if you say it is not in the record, without opening the record to receive additional testimony?

Mr. MILLER. Sir, they do not transmit the entire record to us.

Mr. DINGELL. They what?

Mr. MILLER. The information we request may well be in the record and the agency simply supplies it.

Mr. DINGELL. Let's suppose it is not.

Mr. MILLER. Well, then, we look at two stages in the informal rulemaking process: If it is a proposal that has not yet appeared in the Federal Register and information is not in the record, they simply can acquire—they will go and acquire additional information.

Mr. DINGELL. How? How are they supposed to acquire——

Mr. MILLER. As they acquire information that they supply to the record on their own volition. They do research; they contract; they find it from published sources and other means. How does an agency find any additional information that it supplies from its own staff?

Mr. DINGELL. You just say that they then go out and get the information any way they are minded?

Mr. MILLER. Pardon?

Mr. DINGELL. They go out and get the information any way they are minded?

Mr. MILLER. Just as they do for ordinary research that agencies perform in putting materials in the record. It is very frequent, Mr. Chairman, that agencies have informal rulemaking records in which the staff documents are placed and analyses are provided. Let me indicate, as you well know, in the preamble to most regulations there is a statement of what the impact would be. Not only that, but the Executive order contains a version of a provision that is often associated with Senator Bumpers' name—requiring agencies to verify that what they propose is within their statutory authority.

Mr. DINGELL. Do you review the record of these agencies?

Mr. MILLER. We do not review the whole record.

Mr. DINGELL. You do not?

Mr. MILLER. Need not, need not.

Mr. DINGELL. Do you review any portions of it?

Mr. MILLER. Occasionally. It is usually at our request, though, to the agency—our request to the agency to provide materials.

Mr. DINGELL. How do you know whether the agency's record and the agency's behavior comports with the President's guidelines under the Executive order?

Mr. MILLER. We are not evaluating the record and not evaluating the behavior of the agency; we are evaluating the rule itself.

Mr. DINGELL. Well, if the rule does not have anything in on the cost-benefit ratio or the economic impact, how do you know whether it comports with the President's Executive order or not?

Mr. MILLER. We make a judgment on many occasions—on most occasions, as a matter of fact.

Mr. DINGELL. On what basis do you make this judgment?

Mr. MILLER. On the basis of long-term experience with regulatory phenomena and good judgment based on careful analysis in the past.

Mr. DINGELL. Where do you get the information, though, on which you make this judgment? Do you hold hearings or do you receive information from any outside source?

Mr. MILLER. I have just indicated to you, sir, we do not hold hearings. We rely upon the information provided to us by the agencies. On some occasions we also receive information from outside parties.

Mr. DINGELL. What outside parties?

Mr. MILLER. Anyone who wishes to submit information to us.

Mr. DINGELL. Who would that be?

Mr. MILLER. That would be environmental groups, it would be business groups, it would be trade associations, it would be labor groups and others. However, such information——

Mr. DINGELL. Then on the basis of your review and this information submitted, you then return it to the agency for action. Now suppose you find it does not comport with the President's Executive order. Do you return it then to the agency for——

Mr. MILLER. Yes, we do, but——

Mr. DINGELL [continuing]. For what action? What action do you instruct the agency to take at that point?

Mr. MILLER. The record should show that when such information is provided from outside parties, to the degree this is factual information it is also transmitted to the agency for their record.

Mr. DINGELL. Well, but the record of the agency is at this point already closed, is is not?

Mr. MILLER. It depends on what point in the regulatory——

Mr. DINGELL. The agency cannot submit the matter to you until they have a decision, can they?

Mr. MILLER. No, sir.

Mr. DINGELL. They cannot and they do not.

Mr. MILLER. That is incorrect. I thought I described earlier, sir, that there are two stages in the process. The first stage is before the proposed regulation appears in the Federal Register. The second——

Mr. DINGELL. All right. Now we are not talking about that. We are talking about the second one.

Mr. MILLER. Yes.

Mr. DINGELL. In the second one, when you are getting ready to send it back to the agency because it does not comport with the President's instructions, as I gather it you are returning a final agency action to the agency for further action; are you not?

Mr. MILLER. Yes.

Mr. DINGELL. Therefore, at that point the record of the agency is already closed; is it not?

Mr. MILLER. The record of the agency is closed. The agency may on its own volition—if it thinks that it is proper or if it thinks, also, that it is required by law—may reopen the record. The important thing——

Mr. DINGELL. The agency can but there is no requirement here——

Mr. MILLER. The important thing, Mr. Chairman, is what I indicated in my testimony and the thing that was articulated by Judge Wald, the judge that came out of the consumer movement. Remember, the most liberal court of appeals in the land said that ultimately a regulation must rest on the merits as in the record.

Mr. DINGELL. Well, I do not think that is at issue between us at this point, Mr. Miller. The point that I am trying to get is, what happens? You receive a matter from the agency on which the record has been closed, on which they have come to a final decision. They are sending it down to you for review.

You then review it. I have been trying to find out on what basis you review it. You tell me you review it on the basis of longtime expertise and your own knowledge, and such other information as you can gather either from the record if you are minded to look at it, or from outside sources which you have sort of identified. Then if you disapprove it you send it back down to the agency. Is that right?

Mr. MILLER. If it is not consistent with the President's principles, yes, sir.

Mr. DINGELL. Now what instructions do you give the agency when you send it down, on the basis of your review?

Mr. MILLER. We tell them it does not comport with the President's program principles and we describe briefly in what way it does not.

Mr. DINGELL. All right, now, in what fashion would the order or the regulation not comply with the President's guidelines?

Mr. MILLER. Pardon?

Mr. DINGELL. At this point, in what fashion would the matter not comply with the President's guidelines?

Mr. MILLER. Well, sir, the principles articulated, the President's requirements are contained in section 2 of the Executive order. It may be a question of inaccurate information: We are simply unable to determine from a reasonable review whether the benefits exceed the cost. We may seek more information on alternative approaches.

I think it would be helpful, Congressman, if I just indicate here that section 3(f)(2) says, "Upon receiving notice that the Director intends to submit views with respect to any final regulatory impact analysis or final rule, the agency shall, subject to section 8(a)(2) of the order, refrain from publishing its final regulatory impact analysis or final rule until the agency has responded to the Director's views and incorporated those views and the agency's response in the rulemaking file."

Mr. DINGELL. Well, what I am trying to get now here is—what you are essentially saying then is that the matter can be returned to the agency under the following conditions, as I gather: Under section 2, if it is not based on adequate information. Is that right?

Mr. MILLER. Yes, sir.

Mr. DINGELL. If you find that the regulatory action will not confer benefits which outweigh the costs; is that right?

Mr. MILLER. Again, only to the degree that the agency has the discretion——

Mr. DINGELL. Sir?

Mr. MILLER. Only to the degree that the agency has discretion to consider those things. Of course, the agency may say——

Mr. DINGELL. Now wait, wait. You are making the decision. You do not know what the statute provides. The question then is whether the agency has to comply with that, and the agency's compliance is decided when the matter gets back to the agency; is it not? Isn't that when the issue is decided?

Mr. MILLER. That is right.

Mr. DINGELL. Sir?

Mr. MILLER. That is right, sir.

Mr. DINGELL. OK. Therefore, you return it and the agency then has to make a determination whether or not they are going to comply.

Now the next one would be: "The regulatory action shall be chosen to maximize the net benefits to society." That is the next ground on which you would return it. Then the next one would be alternative approaches to any regulatory objective: "The alternative involving the least net cost to society shall be chosen." Is that right?

Mr. MILLER. Yes, sir.

Mr. DINGELL. OK. Now is (e) under that involved: "Agencies shall set regulatory priorities maximizing the net aggregate benefits to society"? Is that included in the grounds on which you would return it to the agency?

Mr. MILLER. One might imagine a case where a regulation of not much substance required a lot of additional information but usually by the time that we are talking about, Mr. Chairman, in the scenario you described the conditions are already set, and so the——

Mr. DINGELL. All I am trying to find out is on what grounds you are going to return it.

Mr. MILLER. The grounds that are listed in section 2 of the Executive order.

Mr. DINGELL. Section 2? How about section 3?

Mr. MILLER. Section 3 of the order?

Mr. DINGELL. That is regulatory impact analysis and review. Will you return it on that basis?

Mr. MILLER. If an agency did not perform an adequate regulatory impact analysis——

Mr. DINGELL. You would then require that it also be returned?

Mr. MILLER. If the analysis and other information provided by the agencies was not sufficient for us to make a determination of whether the regulation comported with the President's principles, we would so return it.

Mr. DINGELL. OK. I am not quite sure whether the answer to my question was yes or no.

Mr. MILLER. You see, Mr. Chairman, the regulatory impact analysis is a tool for determining, an instrument for helping the agency and us to determine, whether the proposed rule comports with the President's——

Mr. DINGELL. Sir?

Mr. MILLER. The regulatory impact analysis is a tool for helping us determine and helping the agencies determine whether the proposed rule comports with the President's principles. As you can see, Mr. Chairman, section 3——

Mr. DINGELL. However, you just told us that you were not going to read the record on these matters.

Mr. MILLER [continuing]. Section 3(a) says, "in order to implement Section 2," so that refers back to the President's principles.

Mr. DINGELL. However, my question is: Is section 3 going to be the basis of returning these regulatory actions to the regulatory bodies?

Mr. Gray, are you saying "Yes" or "No"?

Mr. GRAY. Mr. Chairman, section 3 sets forth the procedures to be followed by the agencies.

Mr. DINGELL. Well, if they have not complied with the procedures, then are you going to require them to be returned or not?

Mr. GRAY. Well, part of the requirement of section 3 is to submit the rule.

Mr. DINGELL. Sir? If they do not comply with 3, are you going to have it returned or not? That is what I am trying to figure out,

Mr. GRAY. Yes, sir, parts of 3.

Mr. DINGELL. You will?

Mr. GRAY. Parts of 3, yes, sir.

Mr. DINGELL. Therefore, 3 is essentially a procedural requirement they have to comply with or it is going to get returned to them?

Mr. GRAY. Yes, sir, although part of the requirement is that they be sent, and if they have not been sent then we cannot——

Mr. DINGELL. I am just trying to find out here. I do not want you to feel that there is anything you ought to be apprehensive about in the questions I am asking.

Now will you review this matter before it goes to court or not? Will you review the matter before it goes to court or not?

Mr. Miller, do you need a brief recess?

Mr. MILLER. Yes, could I?

Mr. DINGELL. The committee will be in recess for 5 minutes.

[Brief recess.]

Mr. DINGELL. The subcommittee will come to order.

The Chair apologizes to you for any inconvenience at that particular time.

Mr. MILLER. Thank you, sir.

Mr. DINGELL. The Chair wants to know, as his next question, at the time the matter has been referred to you the rule has been published in the Federal Register, has it not?

Mr. MILLER. Yes, sir.

Mr. DINGELL. It comes up to you for review to see if it comports with the guidelines. Now does your action change the appellate rights of any person who might be affected by the rule?

Mr. MILLER. Not to my knowledge.

Mr. DINGELL. Does it impair their right to go into court?

Mr. MILLER. No, sir.

Mr. DINGELL. Let's assume somebody is in court. You then send the matter back down to the regulatory body for action in conformity with the President's views. What happens with regard to the rights of the person who has gone into court? Are they in any way affected?

Mr. MILLER. I do not think so. Mr. Gray might want to comment on that.

Mr. GRAY. I am not sure I clearly understand your question. Once a rule has been——

Mr. DINGELL. You have a final order. You folks are reviewing it. The court has the matter before it because somebody feels himself aggrieved by the rule and he is in court on the matter.

Mr. GRAY. Well, normally he would not be in court until the rule had become final and he had a final order from which to appeal.

Mr. DINGELL. Do you get the rule before it becomes final?

Mr. GRAY. Yes, sir.

Mr. DINGELL. Do you change procedural law, through the Executive order of the President, under the Administrative Procedures Act that deals with the time at which the order becomes final?

Mr. MILLER. No.

Mr. GRAY. No, sir.

Mr. DINGELL. You do not? Well, when does the order become final, then, so that an individual can go into court? While you folks are reviewing it, or after you have completed your review?

Mr. MILLER. After.

Mr. DINGELL. After? I am not sure that that agrees with the Administrative Procedures Act because the Administrative Procedures Act states that the individual involved has a certain period of time during which he can file after the order is published in the Federal Register.

Mr. GRAY. He can certainly do that.

Mr. DINGELL. Sir?

Mr. GRAY. He can certainly do that under this Executive order. There is no——

Mr. DINGELL. He can?

Mr. MILLER. Sure.

Mr. DINGELL. All right, now, can you in any fashion review on any substantive question? In other words, do you in any fashion review the regulatory order on the basis of any substantive question or on the basis of any procedural defects which take place in the agency that are not mentioned in the Executive order?

Mr. MILLER. If some egregious procedural defect came to our attention we would mention it to the agencies but probably would not use that as a reason to return a regulation. There have been a couple of things that we have sent back in part because they reflected procedural abnormalities.

Mr. GRAY. I think I can also add, Mr. Chairman, my recollection is that during the 60-day freeze some of the agencies wanted to postpone or eliminate some rules without going through notice and comment. There may have been a close question of law involved. Our recommendation was that they not bypass the APA, and do it in a more slow way in order to insure against any adverse judicial review.

Mr. DINGELL. Well, I do not quarrel with that and I find that somewhat comforting but the question that bothers me most at this particular minute is: Do you have authority to send back a rule to a regulatory agency in any fashion, on the basis of any reason that is not set forth in the Executive order?

Mr. MILLER. That is a good question, Congressman. Let me see if I can explain. While we might do it, the agency would be under no compunction to follow our advice because it is only things that are pursuant to the Executive order that we should be speaking to. For example, if——

Mr. DINGELL. You can hold it up but they do not have to do it if it is outside the scope of this?

Mr. MILLER. That is exactly right.

Mr. DINGELL. Well, what I am trying to figure out is, what are your powers? Am I to detect here that you would hold it up for any reason that is not included in the President's Executive order?

Mr. MILLER. Yes.

Mr. GRAY. [Nods affirmatively.]

Mr. MILLER. But we would not hold it up.

Mr. DINGELL. You could hold it up for reasons not——

Mr. MILLER. Well, we could ask the agency to hold it up but the agency would simply disregard such a request.

Mr. DINGELL. Would it?

Mr. MILLER. Yes.

Mr. DINGELL. You are an officer of the Office of Management and Budget, are you not?

Mr. MILLER. Yes, sir.

Mr. DINGELL. They will be back before you within the year for review of their budget.

Mr. MILLER. Yes, sir. Now I have before my agency——

Mr. DINGELL. I am disposed to think you are treated with a great deal of respect, am I not?

Mr. MILLER. I think most agencies are sufficiently sophisticated to realize that I have very little impact on the agency's budget. You see, the way we are organized in the Office of Management and Budget, Chairman Dingell, is that—just roughly speaking—there is a budget side and there is a management side. Our activities are on the management side. I do not become involved as a routine measure on any kind of budget matters.

Mr. DINGELL. I have observed that there is some confusion between the two sides as to what their respective responsibilities are.

Mr. MILLER. Well, I am not confused on what I am supposed to do.

Mr. DINGELL. The Chair will yield briefly to the gentleman from Tennessee.

Mr. GORE. Thank you, Mr. Chairman.

I just wanted to cite for the record an interview in the American Enterprise Institute Journal on Government and Society, in which Mr. Miller is asked this same question: What happens if the agency disagrees with the task force, if the head of an agency disagrees with the task force?

Mr. Miller responds:

"He or she still has the legal authority to issue the regulation but that action could be risky, meaning that the President of the United States might decide to remove such person from office." He goes on and says later in the interview, 'You know, if you are the toughest kid on the block most kids will not pick a fight with you."

I think the message is clear.

Mr. DINGELL. Mr. Miller, is that your statement?

Mr. MILLER. That is, but——

Mr. DINGELL. Well, which is the committee then to believe, what you have told us here or what you said there?

Mr. MILLER. Sir, there is nothing inconsistent with my previous statement and what Congressman Gore read. What Congressman Gore read, the predicate was the task force itself; it is not Jim Miller, it is the task force. Our task force is headed by the Vice President of the United States.

Mr. DINGELL. You are indicating, then, that it might be perilous for anybody not to do what you sent back. Is that right?

Mr. MILLER. Pardon?

Mr. DINGELL. You are indicating, then, that it would be dangerous for any person in the Federal regulatory structure not to do what you sent back.

Mr. MILLER. Yes, I think that would be perilous if they took it on their own initiative to publish something that we sent back without first requesting the views or a ruling or consultation with the task force on regulatory relief. In other words, you understand, Mr. Chairman that ours is the first step in a process of consultation.

If the consultation is satisfactory, meaning that the conclusion is drawn that the regulatory proposal comports with the President's principles, then it need go no further. However, if the agency does not agree with our consultation to the effect that it does not comport with the President's principles, then the agency head can ask for this to be considered by the Presidential Task Force on Regulatory Relief.

Therefore, I think the quote from my article is accurate and it is an accurate representation of what my thinking is on the matter, as was my answer to your question, sir.

Mr. DINGELL. You were interviewed as executive director of the task force?

Mr. MILLER. Yes, sir, but you realize I am not a member of the task force. I am the chief staff person on the task force.

Mr. DINGELL. I understand, but you regard your statement there as factual.

Now the Chair is going to recognize one of our colleagues who has appeared, Mr. Rogers.

Mr. ROGERS. I thank the chairman.

Dr. Miller, I would like to commend you and your staff at the task force for taking on a chore that has been waiting for someone with courage for some time. The growth of regulations in this country has been alarming in the last few years. It costs billions of dollars to comply with senseless, silly, costly, burdensome regulations which superseded the congressional intent for the laws of this land.

I commend you and the White House and the administration for grappling with that problem and dealing with it within the law, and giving some relief to the taxpayers of this Nation and the consumers of this Nation who are paying the bill for this senseless action that has been going on. Therefore, I wish to commend you, and I wish you godspeed, and I wish you the best of everything as you take on that chore further.

Mr. MILLER. Thank you, sir.

Mr. ROGERS. I wish you would tell us about the growth of regulations over the past few years. Let's say, take the last 10 years. Can you give us some documentation of the growth?

Mr. MILLER. Yes, sir. It is difficult at times to get a perfect handle on the extent of regulation, whether you measure it by aggregate costs—where we have better figures than in the case of aggregate benefits, as I was relating to Congressman Gore—or there are other crude indices.

However, as the President pointed out in I believe his first state of the Union message, the budgetary expenditures of the Federal regulatory agencies quadrupled in the last 10 years. The number of pages published annually in the Federal Register almost tripled and the number of pages in the Code of Federal Regulations almost doubled, so we have had really a veritable explosion in the extent of Government regulation.

Now it does not mean it is all bad, but it certainly means that we should look very closely at the performance of the regulatory agencies and, as you indicated, we should be vigilant in making sure that excessive, inefficient regulations do not appear on the books.

Mr. ROGERS. It is estimated, Dr. Miller, if I am correct, that Americans spend 1.8 billion man-hours per year filling out Federal regulations. Is that an accurate figure?

Mr. MILLER. I understand it is slightly less but it is a very large number, sir. It is over 1 billion hours for sure. We are committed to making some changes in that regulatory burden, that paperwork burden.

Mr. ROGERS. Does that have any direct relation to inflation and the rising prices to consumers across the board?

Mr. MILLER. Whenever paperwork requirements that do not generate any appreciable benefits are imposed upon the private sector, on individuals, then that adds to inflation. It constitutes a waste of resources.

Mr. ROGERS. Now you have already answered this repeatedly today, and I must say consistently, many, many times but I would like you to answer it one more time: Have you taken care of the ex parte problem, if it is a problem?

Mr. MILLER. I think, sir, we have taken care of the problem in a way that is not only consistent with the law but goes further than what is required by law, and at the same time preserved the very important advisory relationship the President of the United States must have with his subordinate officials. The President is held responsible by the public, by the electorate, and he is also responsible under the Constitution of the United States.

Mr. ROGERS. By its very terms, doesn't the Executive order by its own terms preclude any transgression of laws?

Mr. MILLER. Absolutely.

Mr. ROGERS. The reason I asked you if you have taken care of the ex parte problem is because I am going to be presenting to you shortly the work product of some 400 members of the communities that I represent in my district who belong to a task force that I appointed, following up on the President's appointment of your task force, in which all 28 counties that I represent are represented on my task force——

Mr. MILLER. Right.

Mr. ROGERS [continuing]. With 28 people in each county representing 28 different occupations, businesses, professions, all facets and walks of life, devoted to finding out those Federal regulations that are so costly and useless in the Federal Register, that I am going to compile together and present to you on behalf of the citizens of my district.

Now if these people are precluded, these taxpaying citizens of this Nation, if they are precluded from giving to their Government chapter and verse of where the king is walking on our rights, then I think it is time we began to rethink just exactly how this Federal Government is put together. Are you telling me that they can or cannot present to you a chapter and verse recitation of these regulations they think excessive?

Mr. MILLER. Congressman Rogers, not only can they, we look forward to receiving such material. We are aware of the work you are doing, the fine work you are doing in your regulatory task force, and we look anxiously forward to receiving such information.

Mr. GRAY. It is, Congressman, a basic right guaranteed by the first amendment.

Mr. ROGERS. Well, I should hope so, and if there is anything in the statutes passed by this Congress which precludes that right of free speech and address of grievance to the Government, I think then we had better look at the constitutionality of any acts that so do.

I must tell you that Saturday 2 weeks ago some 400 members, grassroots citizens, met together in my hometown and spent an entire day doing nothing but this and they are not yet through. If there is anyone who doubts but that there is a very strong feeling

in the countryside to stop the cancerous growth of the Federal bureaucracy, then they are badly mistaken, because it is out there and it is strong, and they will not rest until action is taken and successfully taken. That is why I so strongly commend you and the President for tackling this cancer growing on the American society.

I yield back the balance of my time.

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

Gentlemen, you have indicated to us that the reasons set forth in the President's Executive order would not be the only basis on which a regulation should be sent back to the regulatory agency. Is that right?

Mr. MILLER. Well, sir, that is the only reason that an agency would have to pay attention to what we say.

Mr. DINGELL. However, could you send it back for other reasons?

Mr. MILLER. Yes, we could send something back.

Mr. DINGELL. Under what authority, then, would you send it back for other reasons?

Mr. MILLER. There really would not be any.

Mr. DINGELL. Sir?

Mr. MILLER. It really would not be—I guess in a sense if it were for a reason that is not tied in with the principles set forth in section 2 of the Executive order, we would have no authority to send it back.

Mr. DINGELL. You would have no authority but you have indicated that you would do so.

Mr. MILLER. I would do it by mistake.

Mr. DINGELL. Sir?

Mr. MILLER. I would do it only by mistake.

Mr. DINGELL. You would do it only by mistake?

Mr. MILLER. Right.

Mr. GRAY. Mr. Chairman——

Mr. DINGELL. In other words—all right. I am sorry. Mr. Gray?

Mr. GRAY. I just want to clarify one thing, that in addition to section 2 of the order, section 6(a)5 authorizes the task force and OMB to identify duplicative, overlapping and conflicting rules, existing or proposed, that are inconsistent with the policies of the underlying statutes governing the agencies other than the issuing agency or with the purposes of the order, and in each case requires appropriate interagency consultation to minimize or eliminate duplication, overlap, or conflict. I just want to emphasize that one of the reasons that a rule might be sent back or held up——

Mr. DINGELL. That is another reason.

Mr. MILLER. Well, I find that consistent with the——

Mr. DINGELL. How will you establish any of those facts, though?

Mr. GRAY. Whether there is conflict between two agencies?

Mr. DINGELL. Yes. How will you establish that?

Mr. GRAY. Usually it comes from the other agency with which a proposed rule is in conflict.

Mr. DINGELL. Well, what I am trying to learn is, are you going to have any regular procedures for doing this?

Mr. MILLER. What we do, Mr. Chairman, is ask the agencies when they send over proposals to us to check first to make sure that it is not duplicative. You know, the General Accounting Office report actually admonishes us to be more vigilant in this regard.

Now we also have something called the regulatory calendar. This was an initiative by the Carter administration which is a very fine one, and the Vice President announced on March 25 that this would be carried over and would continue to be published, so this is a source of information on duplication that we address.

Mr. DINGELL. You are not going to have any kind of a record before your agency at all; are you?

Mr. MILLER. No, we will not maintain a file and a record.

Mr. DINGELL. No record. Will you return it with a letter stating your reasons or will you just return it?

Mr. MILLER. It depends, sir, on whether it is a substantial regulation. I mean, if it is a fairly insignificant regulation the reasons for returning it will be communicated over the telephone.

Mr. DINGELL. You will communicate over the telephone?

Mr. MILLER. Yes, sir.

Mr. DINGELL. Therefore, essentially the agency then is going to have to respond by opening up its proceedings after it has closed its proceedings, on the basis of a telephone call from you folks. Is that right?

Mr. MILLER. Well, there are again two stages, sir. One is at the proposal stage, in which case there is no formal record.

Mr. DINGELL. I am talking about the final stage. I am not talking about the proposal stage.

Mr. MILLER. In the final stage—well, it depends on whether there were regulatory impact analyses. If there were, it is pursuant to the material that I read from the Executive order——

Mr. DINGELL. However, you will not return it with a letter.

Mr. MILLER. In that case, it would be. There would be formal comments that would be filed in the record. Now in the case of a nonmajor regulation there would not necessarily be formal written comments. There probably would be. The process is not that old, sir. It is a good question but——

Mr. DINGELL. Well, it is not my process. I am trying to find out what is in it, and I hope you know what is in it because I think that if you do not you are liable to have a great deal of litigation over this question.

Mr. MILLER. To my knowledge, we have not returned a final regulation without indicating in writing the reasons for returning it.

Mr. DINGELL. Now let's talk about rulemakings that are required by statute. Will you treat these exactly the same way that you have described the nonstatutory rulemakings that would be issued by the regulatory bodies?

Mr. MILLER. You are talking, sir, about formal rulemakings?

Mr. DINGELL. I am talking about formal rulemakings. Will you treat formal rulemakings required by statute in the same way?

Mr. MILLER. The Executive order does not cover formal rulemakings.

Mr. DINGELL. It does not cover formal rulemakings?

Mr. MILLER. It does not.

Mr. DINGELL. Will you have any power at all to require the return and the review of rules that are done under a formal rulemaking?

Mr. MILLER. No, sir.

Mr. DINGELL. You will not? All right. Now what about agencies that are independent agencies that voluntarily agree to comply? After they complete their record they will submit their rulemakings and the rules that they have issued to you for review?

Mr. MILLER. None have done so thus far.

Mr. DINGELL. I am advised that Mr. Shad at SEC has. I am advised that FTC has also done so.

Mr. MILLER. Perhaps I should explain, but, Mr. Chairman, under the Paperwork Reduction Act all agencies including independent agencies must send to the Office of Management and Budget for their——

Mr. DINGELL. That is only with regard to paperwork; is it not?

Mr. MILLER. As far as paperwork——

Mr. DINGELL. That is not with regard to formal rulemaking.

Mr. MILLER. That is right. We have reviewed a number of paperwork requirements but many times, the paperwork requirement is——

Mr. DINGELL. Let's not talk about paperwork requirements. That is not before us.

Mr. MILLER. A rule that is the result of a formal rulemaking often contains paperwork requirements, so the formal rule may have been submitted to us for review of the paperwork requirements, and in a number of cases they have been.

Mr. DINGELL. What I am trying to figure out, though, is where a Federal regulatory agency, the ICC, FTC, SEC, one of the independent agencies, completes a rulemaking acting under their authorities given them by Congress——

Mr. MILLER.Right.

Mr. DINGELL [continuing]. Do they as soon as they publish their rulemaking in the Federal Register, if they have agreed to function voluntarily, they submit that rule to you for review? Is that right?

Mr. MILLER. Yes, sir.

Mr. DINGELL. They do? Then what do you do?

Mr. MILLER. Well, we would identify as to whether it comported with the President's regulatory policies.

Could I wait just a second, sir, to——

Mr. DINGELL. My time is limited and your time is limited, and I just want to—I am trying to figure out what you are doing with these independent agencies which are a matter of special concern to this committee.

Now, you then would return it to the agency if it did not comport with the President's guidelines?

Mr. MILLER. Sir, could I indicate that it says who voluntarily required——

Mr. DINGELL. Sir?

Mr. MILLER. Sir, could I indicate that it says "who voluntarily re-went to the heads of the independent agencies, that is on pages 94 and 95 of this, sir.

It requests them to adhere voluntarily to sections 2 and 3 of the President's Executive order; section 2 is the principles and section 3 is the regulatory impact analysis. It does not, unless I am mistaken, require the agency—the Vice President was not even asking the heads of the independent agencies to send their regulations over for review by the Office of Management and Budget.

Mr. DINGELL. They are not required but if they voluntarily comply, they submit it to you, you find out whether it comports with the President's guidelines. If it does not comport with the President's guidelines, you then return it to the agency. Is that right or is that wrong?

Mr. MILLER. Just a moment, sir. Actually, I stand corrected on that. Section 3 does contain the provisions about the review of the regulatory impact analysis itself but not of the actual rule itself.

Mr. DINGELL. However, if they submit a rule to you voluntarily——

Mr. MILLER. Right.

Mr. DINGELL [continuing]. And you do not like it, then you return it to them if it does not comply with——

Mr. MILLER. We say we do not like it.

Mr. DINGELL. Sir?

Mr. MILLER. We would say we do not like it or that it does not——

Mr. DINGELL. Do you give them a written letter or some kind of a statement?

Mr. MILLER [continuing]. It does not comport with the President's regulatory principles. We—yes.

Mr. DINGELL. What I am trying to figure out is what you do if they submit a rule that you do not find is in accord with the President's——

Mr. MILLER. We would so advise them that it does not comport with the President's principles.

Mr. DINGELL. Will you do this by letter or formal opinion or will you do it otherwise?

Mr. MILLER. I would expect to do it by formal letter.

Mr. DINGELL. Formal letter? Will you set forth the reasons?

Mr. MILLER. Yes.

Mr. DINGELL. Will you have any other basis on which you would return it, for example, you did not agree with the substance of it or anything of that sort?

Mr. MILLER. Well, the only reasons would be the degree to which it comported with the President's principles.

Mr. DINGELL. Now on what basis would you decide that you were returning it to the agency? Would you hold hearings? Would you call in people to discuss it with you, or would you receive written statements? Would you review the record of the agency? On what basis would you do so?

Mr. MILLER. The same as applied to the executive branch agencies as described before.

Mr. DINGELL. Exactly the same basis you have already described?

Mr. MILLER. Right. However, let me just emphasize there is another reason for sending it back and that is the paperwork requirements. I just wanted to separate that——

Mr. DINGELL. I will not even talk about them. They are not under the jurisdiction of this committee. I am trying to find out on what basis you are going to be returning these things to the regulatory bodies because they are under the jurisdiction of the committee; the Paperwork Act is not. What I am trying to figure out is on what basis you would return them.

Well, all right, having established that, then would your action be reviewable in court?

Mr. MILLER. Sir, I think our action would hold the same standing as any ordinary intervenor before an independent regulatory agency.

Mr. DINGELL. In other words, you would have the same—in your action in returning the matter to the agency, you would stand just as any ordinary intervenor? You would not stand as some kind of an appellate agency which would essentially be returning their action to them for further consideration and action?

Mr. MILLER. If an independent agency were to say, "voluntarily we are going to do only things that comport with the President's principles as communicated to us by the Office of Management and Budget," then I suppose that the Office of Management and Budget would have a great deal of influence over the agencies, not by statute but by the agencies volunteering to respond to any kind of consultations we make with them.

Mr. DINGELL. What impact would your submission—returning this to the agency—have on the agency? Would it be that of an ordinary intervenor?

Mr. MILLER. Sir, I think you should address that question to the agency itself.

Mr. DINGELL. Sir?

Mr. MILLER. Sir, I think you should address that question to the agency. I do not know.

Mr. DINGELL. Well, dear friend, you are going to be sending these things down. I want to know what it is going to mean. I am going to ask the agencies that, too, but I want you to tell me.

Mr. MILLER. Sir, since it is a voluntary submission, since the President has chosen not to exercise authority over them with regard to the Executive order, how they comply is a matter for them to determine. I think it would be best to address the question to them how they will respond.

Mr. DINGELL. We intend to do so but I want to get your judgment on this matter.

Mr. MILLER. I would think that they would consider our analysis, and in the event that they agreed to comply with the system and they sent an analysis over for us to review, I think that is the first step of indicating that they would take seriously anything we said. If we identified substantial inadequacies in the work that they had done up to that stage, I would think it likely that they would take that information into account in making their final decision.

Mr. DINGELL. Well, what would they do with the papers that you sent them? Would they include them in the record, and would they treat them as an intervenor's submission or would they treat them as instructions from a court? Would they regard them as mandatory, permissive? What would be the penalty if they chose not to comply, either at law or otherwise? Would they lose their appropriations or authorizations, or would they get cut in the submissions of their budget to the Congress? What would happen to them?

Mr. GRAY. Mr. Chairman, let me see if I can shed some light on this. Many of your questions are somewhat anticipatory because it is my understanding that very, very few if any rules have come over.

[No response.]

Mr. DINGELL. Doctor, we thank you. The committee stands adjourned.

[The following letter and attachments were received:]

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

June 26, 1981

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

Dear Chairman Dingell:

This letter follows up on my June 18 appearance before the Subcommittee on Oversight and Investigations.

At that hearing, you asked that I provide several documents to you for inclusion in the formal record. (These are in addition to the materials provided in my letters of April 2, April 28, and June 17.) Enclosed are the following:

Attachment 1: Opinion by the Office of Legal Counsel concerning contacts between the Office of Management and Budget and Executive-branch agencies pursuant to Executive Order 12291;

Attachment 2: Opinion by the Office of Legal Counsel addressing the applicability of Executive Order 12291 to "independent" regulatory agencies;

Attachment 3: Vice President Bush's letter of March 25 to several agencies asking that they comply voluntarily with certain sections of Executive Order 12291;

Attachment 4: Compilation of responses received from agencies in response to the Vice President's letter of March 25;

Attachment 5: Memorandum from my deputy, James Tozzi, to Desk Officers concerning their contacts with outside parties;

Attachment 6: A list of the 55 regulations found by my office to be inconsistent with Executive Order 12291 and returned to the agencies; and,

Attachment 7: A list of the 37 regulations designated for further postponement at the end of the 60-day regulatory postponement period initiated by the President.

In addition, I am enclosing several other documents which I request be included in the printed record. All of these materials were referred to during the course of the hearing, and I believe many interested parties would consider the record incomplete without them:

Attachment 8: The formal recommendations of the Administrative Conference of the United States with respect to ex parte communications;

Attachment 9: Relevant excerpts from Sierra Club v. Costle;*

Attachment 10: The Supreme Court's decision in American Textile Manufacturers v. Donovan;*

Attachment 11: "Deregulation HQ," the transcript of an interview with Council of Economic Advisers Chairman Weidenbaum and me which appeared in the March/April 1981 issue of Regulation;

Attachment 12: "Lessons of the Economic Impact Statement Program," an article I published in the July/August 1977 issue of Regulation;

Attachment 13: "Summary of Reagan Administration's Regulatory Relief Actions," a report to the Presidential Task Force on Regulatory Relief by the Office of Management and Budget staff dated June 13, 1981;

Attachment 14: "The First 100 Days of Executive Order 12291," a report to the Presidential Task Force on Regulatory Relief by the Office of Management and Budget staff dated June 13, 1981;

*Attachments 9 and 10 may be found in subcommittee files.

Attachment 15: "The President's 60-Day Regulatory Postponement," a report to the Presidential Task Force on Regulatory Relief by the Office of Management and Budget staff dated June 13, 1981;*

Attachment 16: "Materials on President Reagan's Program of Regulatory Relief;"

Attachment 17: "Regulatory Relief for the Automobile Industry," dated April 6, 1981; and

Attachment 18: The Office of Legal Counsel's February 13 opinion on Executive Order 12291.

Thank you very much.

Sincerely yours,

James C. Miller III
Administrator for Information
and Regulatory Affairs

cc: Congressman Marc Marks

*The report cited in attachment 15 is included in attachment 16.

ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

United States Department of Justice
Washington, D.C. 20530

Attachment 1

Memorandum for Honorable David Stockman
Director, Office of Management and Budget

Re: Contacts Between OMB and Executive Branch Agencies Pursuant to Executive Order 12291

Your Office has requested the views of this Office regarding the legality of contacts which may occur between you and your staff and officials of Executive agencies in the implementation of Executive Order 12291 (Order). The Order generally requires these agencies to maximize the benefits and minimize the costs of regulations promulgated following informal rulemaking proceedings. Your Office is charged with ensuring compliance with these requirements by engaging in prepublication review of proposed and final rules and preliminary and final Regulatory Impact Analyses (RIA). In performing this oversight role, you and your staff will presumably communicate on a regular basis with agency officials regarding the substance of proposed regulations. You might also wish to transmit to these agencies information or arguments received from other federal agencies or from non-federal parties. Some or all of these contacts might be challenged under the so-called "ex parte contacts" doctrine developed in the D.C. Circuit. 1/

1/ Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959); Home Box Office, Inc. v. FCC, 567 F.2d 9 (per curiam)(D.C Cir.), cert. denied, 434 U.S. 829 (1977); Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977); United States Lines, Inc. v. FMC, 584 F.2d 519 (D.C. Cir. 1978); Hercules, Inc. v. EPA, 598 F.2d 91 (D.C. Cir. 1978); National Small Shipments Traffic Conference, Inc. v. ICC, 590 F.2d 345 (D.C. Cir. 1978); United Steelworkers of America v. Marshall, No. 79-1048 (D.C. Cir.), stayed in part, 101 S.Ct. 603 (1980).

While other circuits have not taken a clear position on ex parte contacts, the D.C. Circuit cases are particularly significant because so many federal regulatory actions are reviewed there and because, as a practical matter, the D.C. Circuit is often the court of last resort in light of the Supreme Court's limited docket.

We conclude that neither the ex parte contacts doctrine nor other generally applicable provisions of law impose any duties on you or your staff to refrain from communicating with rulemaking agencies. The law is uncertain as to whether rulemaking agencies must disclose communications from your Office which occur after publication of a notice of proposed rulemaking. In order to reduce the danger of reversal, we believe that rulemaking agencies should include in the administrative file and the record for judicial review: (1) oral or written information from your Office of a purely factual nature; and (2) oral or written material received from an interested party outside the Federal Government which influences the views your Office expresses to the agency. Your Office could assist rulemaking agencies in complying with these recommendations by following procedures similar to those described herein.

I. Ex Parte Contacts Doctrine

The D.C. Circuit has thrice addressed the question of ex parte contacts in informal rulemaking. In Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.)(per curiam), cert. denied, 434 U.S. 829 (1977), interested private parties engaged in wide-spread off-the-record communications with FCC Commissioners and staff regarding a proposed cable television rule. The court condemned the comments on several grounds, including the Due Process Clause, the judicial review requirements of the Administrative Procedure Act (APA), and what the court perceived to be a general need to ensure rationality and fairness in agency decision processes. In a broadly worded dictum, the court stated that such communications would be improper even if the FCC disclosed them in the administrative file in time to allow public comment and judicial review. The court also said that such comments would be permissible prior to publication of a notice of proposed rulemaking. 2/

In Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977), a different panel of the D.C. Circuit refused to apply Home Box Office retroactively. In dictum, the panel severely criticized the Home Box Office rationale and expressed its view that the doctrine should be limited to a narrow class of cases involving competing private claims to a valuable privilege. Id. at 477.

In United Steelworkers of America v. Marshall, No. 79-1048 (D.C. Cir.), stayed in part, 101 S.Ct. 603 (1980), the D.C. Circuit limited the ex parte contacts doctrine in the context of intra-agency communications. While formulating a final

2/ Home Box Office, Inc. v. FCC, 567 F.2d 9, 59 (per curiam)(D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

rule regulating workplace exposure to airborne lead, the Assistant Secretary of Labor consulted closely with a staff attorney who argued for the agency staff's proposed standard. The Assistant Secretary also commissioned private consultants to review and analyze the record, and partly relied on these studies in formulating a final rule. The court, per Chief Judge Wright, held that these off-the-record intra-agency communications were permissible, even if slanted towards a particular viewpoint, 3/ if they were part of the "deliberative process," a concept closely analogous to the deliberative process exemption under the Freedom of Information Act (FOIA). 4/

The doctrine developed in Home Box Office involves three distinct requirements: (1) a flat prohibition on agency receipt of views and information outside the usual channels for public comment; (2) a requirement that such views and information, if received, be memorialized and placed in the administrative file for public comment; and (3) a duty to place such views and information in the record for judicial review. In Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978), the Supreme Court severely undermined the Home Box Office doctrine. It held that, absent exceptional circumstances, a reviewing court may not impose special rulemaking procedures beyond those set forth in the APA.

We believe that Vermont Yankee is inconsistent with D.C. Circuit's flat ban on agency receipt of views or information outside the usual channels for public comment. This purely procedural prohibition finds no support whatever in the text or the legislative history of the APA. The APA contains no prohibition on such contacts in informal rulemaking, although it has always prohibited them in adjudication, 5/ and a recent amendment provides penalties and remedies when they occur in adjudication or formal rulemaking. 6/ Early versions of that amendment prohibited such contacts in informal rulemaking as well, 7/ but the provision was deleted with the intention of

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3/ Compare Association of National Advertisers, Inc. v. FTC, 627 F.2d 1151 (D.C. Cir. 1979)(disqualification for bias).

4/ 5 U.S.C. § 522(b)(5)(1976).

5/ Id. § 554(d).

6/ Government in the Sunshine Act, 5 U.S.C. § 557(d)(1976).

7/ See S. 260 93d Cong., 1st Sess. 1202, 119 Cong. Rec. 647-51 (1973); H.R. 1000, 93d Cong., 1st Sess. § 5(a), 119 Cong. Rec. 118, 169-70 (1973); Hearings on Government in the Sunshine Before the Subcomm. on Reorganization, Reserch, and International Organizations of the Senate Comm. on Government Operations, 93d Cong. 2d Sess. 189-254 (1974); Senate Committee on Government Operations, 93d Cong., 1st Sess., Government in the Sunshine: Response to Subcomm. Questionnaire (Comm. Print. 1973).

leaving informal rulemaking unaffected. 8/ We believe this history to be strong evidence that there is no basis for imposition by a court of a flat prohibition on agency receipt of views or information outside the ordinary channels. You and your staff may freely contact agencies regarding the substance of proposed regulations, and may do so by way of telephone calls, meetings, or other forms of communication unavailable to members of the public.

It is unclear whether the two other requirements of Home Box Office -- that the substance of contacts be placed in the administrative file and the record for judicial review -- can survive Vermont Yankee. These requirements might possibly be supportable, not as part of an "ex parte contacts" doctrine, but as implications of the APA's provisions for judicial review and for public participation in informal rulemaking, a question we discuss in the following section. What is clear, however, is that the disclosure obligations, if any, lie with the rulemaking agency and not with your Office. Your Office is therefore under no legal disability with respect to contacts with rulemaking agencies. At most, your Office could adopt procedures as a matter of policy to assist the agencies in complying with our recommendations or with rules fashioned by the agencies themselves to address this issue. 9/

8/ S. Rep. No. 354, 94th Cong., 1st Sess. 35 (1975); 121 Cong. Rec. 35,330 (1975)(remarks of Sen. Kennedy).

9/ Specific "hybrid rulemaking" statutes may sometimes impose special rules regarding contacts between your Office and rulemaking agencies. The Clean Air Act Amendments of 1977, for example, require that written documents compiled during your Office's review procedures be placed in the rulemaking docket prior to the promulgation of a final rule. 42 U.S.C. § 7607(d)(4)(B)(ii)(Supp. III 1979). These documents are excluded from the record on judicial review. Id. § 7607(d)(4)(B)(ii). Two challenges to inter-agency participation in Clean Air Act rulemaking are now pending in the D.C. Circuit. Sierra Club v. Costle, Nos. 79-1565 et al; American Petroleum Institute v. Costle, Nos. 79-1104 et al. In those cases EPA officials met with other Executive Branch officials to discuss a rule after the close of the public comment period; the substance of these meetings was not fully disclosed in the record for judicial review. The government takes the position that EPA fully complied with the Clean Air Act's requirements. The cases have been argued and await decision.

Internal agency regulations, which have the force of law until repealed, may also limit contacts with your Office during rulemaking. Cf. 47 C.F.R. § 1 (1979)(FCC); 16 CFR § 1012 (1979)(CPSC); 14 CFR § 300.2 (CAB).

II. Disclosure Obligations of Rulemaking Agencies

We believe that, at least as a matter of protection against reversal in the D.C. Circuit, rulemaking agencies should disclose in the administrative file and the record for judicial review substantive communications from your Office to the extent that they are (1) purely factual as opposed to deliberative in nature, or (2) received by your Office from a source outside of Executive or independent agencies. This conclusion is based on a combination of possible disclosure requirements in the APA and a deliberative process exception.

A. APA Provisions

The APA provides that judicial review of informal rulemaking shall be based on the "whole record." 5 U.S.C. § 706. The Supreme Court has never clearly stated what types of material must be included in the record for judicial review. Traditionally, informal rulemaking procedures were thought to leave the agency almost complete discretion as to what was included in the record; judicial review was correspondingly narrow and deferential. More recently, the Supreme Court has stated that judicial review of informal agency action should be "searching and careful," 10/ and that a reviewing court should remand a case to the agency if its determination is not "sustainable on the administrative record made." 11/ The relatively intensive judicial scrutiny implied by these statements seems incompatible with the traditional idea that the agency retains complete control over what goes in the record. Lower federal courts have expanded on the Supreme Court's tentative statements by inferring a requirement that the record for judicial review contain all material, whether factual, analytical, or argumentative, which is substantive in the sense that it might have influenced the agency's decision. 12/ Finally, the Supreme Court in Vermont Yankee gave somewhat conflicting signals on the question. 13/

10/ Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

11/ Camp v. Pitts, 411 U.S. 138, 143 (1973)(per curiam).

12/ See National Courier Ass'n v. Board of Governors, 516 F.2d 1229, 1241 (D.C. Cir. 1975). See generally Portland Cement Ass'n v. Ruckleshaus, 486 F.2d 375 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974); Kennecott Copper Corp. v. EPA, 462 F.2d 846 (D.C. Cir. 1972); International Harvester Co. v. Ruckleshaus, 478 F.2d 615 (D.C. Cir. 1973). Cf. Greater Boston Television Corp. v. FCC, 444 F.2d 941 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

13/ Compare Stewart, Vermont Yankee and The Evolution of Administrative Procedure, 91 Harv. L. Rev. 1805 (1978), with Byse, Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View, 91 Harv. L. Rev. 1823 (1978).

The Court's emphasis on the agency's discretion to structure its own procedures free of judicial interference suggests that this discretion should include the power to determine the content of the record for judicial review. On the other hand, the Court's remand of the case to the D.C. Circuit for a determination of whether the rule was sustainable on the administrative record points to a more stringent record requirement. 14/

The state of the law on this point is, in short, confused. We do not believe it to be particularly useful to attempt to predict whether the Supreme Court would require that substantive oral or written communications received by the agency be included in the record for judicial review. We would, however, recommend that agencies generally adopt this course to avoid a substantial danger of reversal in the D.C. Circuit without any assurance of vindication in the Supreme Court. 15/

We would also recommend that agencies generally include substantive oral or written communications in the administrative file for public comment and criticism, at least when these communications occur before the close of public comment. 16/ A "public comment" requirement could be inferred from the APA's provision for review on the whole record and its guarantee of an "opportunity to participate in the rule making," 5 U.S.C. § 553(c). On the other hand, such a requirement comes perilously close to the type of extra-statutory procedure Vermont Yankee forbids courts to require of agencies. In addition, the opportunity to comment on evidence in the record seems inconsistent with the realities of informal rulemaking, clearly sanctioned by the APA, that interested parties can file comments on the last day of the comment period and thereby deprive others outside the government of a chance to comment unless the agency, in its discretion, chooses to reopen the file. The argument for public comment is considerably weaker than the case for placing substantive material in the judicial record; our judgment

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14/ One commenter has argued that in light of the administrative record the Court should simply have affirmed the agency rather than remanding. Breyer, Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy, 91 Harv. L. Rev. 1833 (1978).

15/ The agency need not engage in unnecessary duplication of material already contained in the record, however.

16/ A case-by-case analysis may be required to determine whether the administrative file must be reopened to allow public comment on communications received after the close of the comment period. See Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.), cert denied, 426 U.S. 941 (1976).

is that the Supreme Court would not impose such a requirement. Nevertheless, the D.C. Circuit probably would require public comment, 17/ and the prospects of obtaining Supreme Court review of such a determination cannot be predicted.

B. Deliberative Process Exception

Notwithstanding these general recommendations, we believe that the rulemaking agency need not disclose substantive communications from your Office which form part of the agency's deliberative process. A variety of legal doctrines recognize a privilege against compelled disclosure of the federal government's deliberations. The need for non-disclosure is inherent in the President's constitutional power to "take Care that the Laws be faithfully executed," 18/ by "supervis[ing] the guid[ing]" Executive Branch agencies in their "construction of the statutes under which they act in order to secure the unitary and uniform execution of the laws which Art. II of the Constitution evidently contemplated in vesting executive power in the President alone." 19/ Similar concerns undergird the constitutionally based privilege for certain deliberative communications within the Executive Branch, 20/ as well as the rule against probing an administrator's mind in court absent a showing of bad faith or other exceptional circumstances. 21/ Congress has safeguarded the deliberative process by exempting deliberative documents from disclosure under the FOIA. 22/ Finally, the D.C. Circuit held the ex parte contacts doctrine inapplicable

17/ See Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.)(per curiam), cert. denied, 424 U.S. 829 (1977); Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.), cert. denied, 424 U.S. 941 (1976). Cf. United States Lines, Inc. v. FMC, 584 F.2d 519 (D.C. Cir. 1978)(informal adjudication).

18/ U.S. Const., Art. II, § 3. See also U.S. Const., Art. II, § 2 (presidential power to require written opinions from heads of Executive Departments).

19/ Myers v. United States, 272 U.S. 52, 135 (1926).

20/ See United States v. Nixon, 418 U.S. 683 (1974).

21/ See, e.g., United States v. Morgan, 313 U.S. 409, 422 (1941); National Courier Ass'n v. Board of Governors, 516 F.2d 1229, 1241-42 (D.C. Cir. 1975).

22/ 5 U.S.C. § 522(b)(5); see generally NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1974).

to deliberative process communications in United Steelworkers, supra. For similar reasons, we believe that oral or written communications which are part of the deliberative process need not be disclosed under any provisions of the APA.

Deliberative process communications are those designed to aid the agency in determining its course based on the facts of record. They include analyses of these facts, 23/ legal and policy arguments, 24/ and factual data that cannot be reasonably segregated from deliberative material. 25/ They do not include oral or written factual data which can be reasonably segregated from deliberative material. 26/ Thus the rulemaking agency need not disclose your Office's legal and policy arguments and analyses of the facts, but should generally disclose readily segregable factual material.

Communications from Executive or independent agencies are entitled to deliberative process protection. Your Office surely participates in the deliberative process when it exercises the power of the President delegated to you to "supervise and guide" the agency by communicating factual analyses or legal and policy arguments. We believe the deliberative process is also implicated when your Office acts as a "conduit" for views of other Executive agencies, since these agencies are part of an integrated Executive Branch headed by the President. We reach the same conclusion with respect to independent agencies. 27/ Although largely freed of presidential oversight and supervision, these agencies are part of a unitary government

23/ See United States Steelworkers of America v. Marshall, No. 79-1048, slip op. at 26, 38 (D.C. Cir.), stayed in part, 101 S.Ct. 603 (1980).

24/ See, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1974)(exemption 5 protects attorney-client and attorney work-product privileges); EPA v. Mink, 410 U.S. 73, 91 (1973)(exemption 5 protects "matters of law, policy or opinion").

25/ See EPA v. Mink, 410 U.S. 73, 88 (1973); United Steelworkers of America v. Marshall, No. 77-1048, slip op. at 44 (D.C. Cir.), stayed in part, 101 S.Ct. 603 (1980); Mead Data Central, Inc. v. United States Department of Air Force, 566 F.2d 242, 260-61 (D.C. Cir. 1977).

26/ See cases cited in note 25, supra. Also not within the deliberative process are communications which the agency adopts as the explanation for its action. See Rengotiation Board v. Grumman Aircraft Engineering Corp. 421 U.S. 168 (1975); NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975).

27/ Deliberative process documents transmitted from an independent agency to an Executive Branch agency would be exempt from disclosure under FOIA. 5 U.S.C. §§ 552(b)(5), 552(e).

which seeks as far as possible to coordinate its programs and policies. 28/

Our view is that the deliberative process does not extend to the legal or policy views of persons outside of Executive or independent agencies. These persons are not within the overall decision process of the rulemaking agency. Their views not being protected by a deliberative process exception, the rulemaking agency would be well advised to place these views in the administrative file and the record for judicial review if the views might affect the agency's decision. Agencies should follow this procedure even if the views are transmitted by an Executive or independent agency acting as a "conduit" for the third party.

III. OMB Procedures

As discussed above, your Office is under no legal obligation to limit its communications with rulemaking agencies. We also conclude that, as a matter of policy, the agencies should include in the administrative file and the record for judicial review substantive oral or written communications from your Office which (1) are purely factual in nature, or (2) are "conduit" transmissions of views or information from persons outside of Executive or independent agencies. Your Office could assist the rulemaking agencies in the task of distinguishing what should be disclosed from what may be kept out of the public record, as follows:

(1) Your Office could separate, as far as possible, purely factual material from arguments and analysis in oral or written comments it makes to the rulemaking agency under the Order. A format could be developed for comments which clearly draws this distinction. The agency should generally be entitled to rely on your Office's judgment that the transmitted material is deliberative rather than factual in nature.

(2) With respect to "conduit" communications, the official responsible for commenting to the rulemaking agency could determine whether his views have been influenced by oral or written communications received from someone outside of Executive or independent agencies. If so, your Office could require that the third party transmit this material to the rulemaking agency for inclusion in the administrative

28/ Our conclusions in this regard are consistent with Recommendation 80-6 of the Administrative Conference of the United States regarding Executive Branch Communications in Informal Rulemaking Proceedings.

file and the record for judicial review. The official may transmit to the rulemaking agency a statement of your Office's views, which need not be disclosed except to the extent it includes purely factual material.

Alternatively, or in conjunction with these procedures, your Office could seek to ensure that rulemaking agencies follow the advice contained in this memorandum. Agencies could institute a policy of disclosing in the administrative file and the record for judicial review all material which your Office identifies as purely factual in nature, as well as the identified conduit material transmitted under (2) above. The agencies would have to develop procedures for memorializing the non-deliberative parts of oral communications from your Office. Your Office could assist the agencies in following these recommendations by rendering informal advice or by more formal instructions.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

Attachment 2

ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

United States Department of Justice
Washington, D.C. 20530

12 FEB 1981

MEMORANDUM FOR HONORABLE DAVID STOCKMAN
Director
Office of Management and Budget

Re: Proposed Executive Order on Federal Regulation

The President is considering a proposed Executive Order designed to reduce regulatory burdens, to provide for presidential oversight of the administrative process, and to ensure well-reasoned regulations. The Order sets forth a number of requirements that Executive Branch agencies must adhere to in exercising their statutory rulemaking authority. Certain of the Order's procedural requirements would apply to the independent regulatory commissions as well. This memorandum discusses the legal basis for the proposed Order and examines issues that are raised by certain of its provisions. We conclude that the Order is within the President's authority.

First, for Executive Branch agencies the Order has the following major provisions. Agencies must take action only if the potential benefits outweigh the social costs; attempt to maximize social benefits; choose the least costly alternative in selecting among regulatory objectives; and set priorities with the aim of maximizing net benefits. All of these requirements must be followed "to the extent permitted by law." The Order would require agencies to prepare for each "major rule" a Regulatory Impact Analysis (RIA) setting forth a description of the potential costs and benefits of the proposed rule, a determination of its potential net benefits, and a description of alternative approaches that might substantially achieve regulatory goals at a lower cost. Agencies would be required to determine that any proposed regulation is within statutory authority and that the factual conclusions upon which the rule is based are substantially supported by the record viewed as a whole. The Director of the Office of Management and Budget and the Presidential Task Force on Regulatory Relief would be given authority, inter alia, to designate proposed or existing rules as major rules, to prepare uniform standards for measuring costs and benefits, to consult with the agencies concerning preparation of RIA's, to state approval or disapproval of RIA's and rules on the administrative record, to require agencies to respond to statements of disapproval (and to defer rulemaking while so consulting), and to establish schedules for review and possible revision

of existing major rules. The Order would require agencies to defer rules that are pending on the date of its issuance, including rules that have been issued as final rules but are not yet legally effective, and to reconsider them under the Order. By its terms, the Order would create no substantive or procedural rights enforceable by a party against the United States or its representatives, although the RIA would become part of the administrative record for judicial review of final rules. For the independent regulatory agencies, the Order would impose some procedural requirements, principally the preparation of RIA's, and would authorize the Director or the Task Force to exercise limited supervisory powers.

I. Legal Authority: Executive Branch agencies

The President's authority to issue the proposed Executive Order derives from his constitutional power to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3. It is well established that this provision authorizes the President, as head of the Executive Branch, to "supervise and guide" Executive officers in "their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." Myers v. United States, 272 U.S. 52, 135 (1926).1/

The supervisory authority recognized in Myers is based on the distinctive constitutional role of the President. The "take Care" clause charges the President with the function of coordinating the execution of many statutes simultaneously: "Unlike an administrative commission confined to the enforcement of the statute under which it was created . . . the President is a constitutional officer charged with taking care that a 'mass of legislation' be executed," Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 702 (1952) (Vinson, C.J., dissenting).

1/ In Buckley v. Valeo, 424 U.S. 1, 140-41 (1976), the Supreme Court held that any "significant governmental duty exercised pursuant to a public law" must be performed by an "Officer of the United States," appointed by the President or the Head of a Department pursuant to Art. II, § 2, cl. 2. We believe that this holding recognizes the importance of preserving the President's supervisory powers over those exercising statutory duties, subject of course to the power of Congress to confine presidential supervision by appropriate legislation. See also n.7, infra.

Moreover, because the President is the only elected official who has a national constituency, he is uniquely situated to design and execute a uniform method for undertaking regulatory initiatives that responds to the will of the public as a whole.2/ In fulfillment of the President's constitutional responsibility, the proposed Order promotes a coordinated system of regulation, ensuring a measure of uniformity in the interpretation and execution of a number of diverse statutes. If no such guidance were permitted, confusion and inconsistency could result as agencies interpreted open-ended statutes in differing ways.

Nevertheless, it is clear that the President's exercise of supervisory powers must conform to legislation enacted by Congress.3/ In issuing directives to govern the Executive Branch, the President may not, as a general proposition, require or permit agencies to transgress boundaries set by Congress. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). It is with these basic precepts in mind that the proposed Order must be approached.

We believe that an inquiry into congressional intent in enacting statutes delegating rulemaking authority will usually support the legality of presidential supervision of rulemaking by Executive Branch agencies. When Congress delegates legislative power to Executive Branch agencies, it is aware that those agencies perform their functions subject to presidential supervision on matters of both substance and procedure. This is not to say that Congress never intends in a specific case to restrict presidential supervision of an Executive agency; but it should not be presumed to have done so whenever it delegates rulemaking power directly to a subordinate Executive Branch official rather than the President. Indeed, after Myers it is unclear to what extent Congress may insulate Executive Branch agencies from presidential supervision.

2/ See Bruff, Presidential Power and Administrative Rulemaking, 88 Yale L.J. 451, 461-62 (1978).

3/ In certain circumstances, statutes could invade or intrude impermissibly upon the President's "inherent" powers, but that issue does not arise here.

Congress is also aware of the comparative insulation given to the independent regulatory agencies, and it has delegated rulemaking authority to such agencies when it has sought to minimize presidential interference. By contrast, the heads of non-independent agencies hold their positions at the pleasure of the President, who may remove them from office for any reason. It would be anomalous to attribute to Congress an intention to immunize from presidential supervision those who are, by force of Art. II, subject to removal when their performance in exercising their statutory duties displeases the President.

Of course, the fact that the President has both constitutional and implied statutory authority to supervise decisionmaking by Executive Branch agencies does not delimit the extent of permissible supervision. It does suggest, however, that supervision is more readily justified when it does not purport wholly to displace, but only to guide and limit, discretion which Congress has allocated to a particular subordinate official. A wholesale displacement might be held inconsistent with the statute vesting authority in the relevant official. See Myers v. United States, supra, at 135: "Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance." This suggestion is based on the view that Congress may constitutionally conclude that some statutory responsibilities should be carried out by particular officers without the President's revision, because such officers head agencies having the technical expertise and institutional competence that Congress intended the ultimate decisionmaker to possess.4/ Under this analysis, of course, lesser incursions on administrative discretion are easier to support than greater ones. This Office has often taken the position that the President may consult with those having statutory decisionmaking responsibilities, and may require them to consider statutorily relevant

4/ Cf. H. Friendly, The Federal Administrative Agencies (1962) (discussing concept of "agency expertise" as reason for delegation of power to particular agencies). The Myers Court reaffirmed, however, that even such officers may be dismissed at the pleasure of the President. 272 U.S. at 135.

matters that he deems appropriate, as long as the President does not divest the officer of ultimate statutory authority.5/ Of course, the President has the authority to inform an appointee that he will be discharged if he fails to base his decisions on policies the President seeks to implement.6/

A. The Order would impose requirements that are both procedural and substantive in nature. Procedurally, it would direct agencies to prepare an RIA assessing the costs and benefits of major rules. We discern no plausible legal objection to this requirement, which like most procedural requisites is at most an indirect constraint on the exercise of statutory discretion. At least as a general rule, the President's authority of "supervis[ion] in his administrative control," Myers v. United States, supra, at 135, permits him to require the agencies to follow procedures that are designed both to promote "unitary and uniform execution of the laws" and to aid the President in carrying out his constitutional duty to propose legislation. See U.S. Const., Art. II, § 3. We believe that a requirement that the agencies perform cost-benefit analysis meets these criteria. Further, the President's constitutional right to consult with officials in the Executive Branch permits him to require them to inform him of the costs and benefits of proposed action.7/ In our view, a requirement that rulemaking authorities prepare an RIA is the least that Myers must mean with respect to the President's authority to "supervise and guide" Executive officials.

B. Substantively, the Order would require agencies to exercise their discretion, within statutory limits, in accordance with the principles of cost-benefit analysis. More

5/ See generally, 1 Ops. Office of Legal Counsel Nos. 77-21, 77-56 (1977).

6/ See note 4 supra.

7/ See U.S. Const., Art. II., § 2 (President may "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices").

complex legal questions are raised by this requirement. Some statutes may prohibit agencies from basing a regulatory decision on an assessment of the costs and benefits of the proposed action. See, e.g., EPA v. National Crushed Stone Ass'n, 101 S. Ct. 295 (1980). The Order, however, expressly recognizes this possibility by requiring agency adherence to principles of cost-benefit analysis only "to the extent permitted by law." The issue is thus whether, when cost-benefit analysis is a statutorily authorized basis for decision, the President may require Executive agencies to be guided by principles of cost-benefit analysis even when an agency, acting without presidential guidance, might choose not to do so. We believe that such a requirement is permissible. First, there can be little doubt that, when a statute does not expressly or implicitly preclude it, an agency may take into account the costs and benefits of proposed action. Such a calculus would simply represent a logical method of assessing whether regulatory action authorized by statute would be desirable and, if so, what form that action should take. In our view, federal courts reviewing such actions would be unlikely to conclude that an assessment of costs and benefits was an impermissible basis for regulatory decisions.

Second, the requirement would not exceed the President's powers of "supervision." It leaves a considerable amount of decisionmaking discretion to the agency. Under the proposed Order, the agency head, and not the President, would be required to calculate potential costs and benefits and to determine whether the benefits justify the costs. The agency would thus retain considerable latitude in determining whether regulatory action is justified and what form such action should take. The limited requirements of the proposed Order should not be regarded as inconsistent with a legislative decision to place the basic authority to implement a statute in a particular agency. Any other conclusion would create a possible collision with constitutional principles, recognized in Myers, with respect to the President's authority as head of the Executive Branch.

C. We believe that the President would not exceed any limitations on his authority by authorizing the Task Force and the Director to supervise agency rulemaking as the Order would provide. The Order does not empower the Director

or the Task Force to displace the relevant agencies in discharging their statutory functions or in assessing and weighing the costs and benefits of proposed actions. The function of the Task Force and the Director would be supervisory in nature. It would include such tasks as the supplementation of factual data, the development and implementation of uniform systems of methodology, the identification of incorrect statements of fact, and the placement in the administrative record of a statement disapproving agency conclusions that do not appear to conform to the principles expressed in the President's Order. Procedurally, the Director and the Task Force would be authorized to require an agency to defer rulemaking while it responded to their statements of disapproval of proposed agency action. This power of consultation would not, however, include authority to reject an agency's ultimate judgment, delegated to it by law, that potential benefits outweigh costs, that priorities under the statute compel a particular course of action, or that adequate information is available to justify regulation. As to these matters, the role of the Director and the Task Force is advisory and consultative. The limited power of supervision embodied in the proposed Order is, therefore, consistent with the President's recognized powers to supervise the Executive Branch without displacing functions placed by law in particular agencies.

II. Independent Regulatory Commissions

We now consider whether the proposed Order may legally be applied to the independent regulatory commissions in certain respects. Principally, the Order would require independent agencies to prepare RIA's and would authorize the Director or the Task Force to exercise limited supervision over the RIA's. For reasons stated below, we believe that, under the best view of the law, these and some other requirements of the Order can be imposed on the independent agencies. We would emphasize, however, that an attempt to exercise supervision of these agencies through techniques such as those in the proposed Order would be lawful only if the Supreme Court is prepared to repudiate certain expansive dicta in the leading case on the subject, and that an attempt to infringe the autonomy of the independent agencies is very likely to produce

a confrontation with Congress, which has historically been jealous of its prerogatives with regard to them. 8/

The distinguishing characteristic of an independent regulatory commission is the presence of a provision in its enabling act that the President may remove its members from office only for cause. 9/ Many of these provisions are modeled on the FTC Act, which allows removal only for "inefficiency, neglect of duty, or malfeasance in office." 15 U.S.C. § 41. The leading case on the constitutional status of the independent agencies arose when President Roosevelt removed an FTC Commissioner without asserting cause to do so. Humphrey's Executor v. United States, 295 U.S. 602 (1935). The President was relying on Myers v. United States, supra, which had held that Congress could not constitutionally require the Senate's advice and consent to the removal of a postmaster. In Humphrey's Executor, a unanimous Court held that the FTC Act was constitutional, and limited the scope of Myers to "purely executive" officers. See also Wiener v. United States, 357 U.S. 349 (1958) (removal of Member Of War Claims Commission without asserted cause held illegal).

The holding of Humphrey's Executor is that Congress may constitutionally require cause for the removal of an FTC Commissioner; the Court's opinion, however, contains broad dicta endorsing a perceived congressional purpose to insulate the FTC almost entirely from Presidential supervision:

> The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the

8/ See the attached letter to the President from the Chairmen and Ranking Minority Members of six congressional committees, responding to a proposal that the requirements of E.O. 12044, which are similar to but weaker than those of the proposed Order, be applied to the independent agencies.

9/ Sometimes a cause provision is implied from a silent statute based on the functions an agency performs, usually adjudiction. Wiener v. United States, 357 U.S. 349 (1958). Accordingly, it is not always an easy task to identify an agency as being independent.

> law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts "appointed by law and informed by experience."

295 U.S. at 624 (quoting Illinois Cent. Ry. v. ICC, 206 U.S. 441 (1906)). The Court continued:

> Thus, . . . the Congressional intent to create a body of experts who shall gain experience by length of service -- a body which shall be independent of executive authority except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government. . . . And to hold that, nevertheless, the members of the commission continue in office at the mere will of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office.

Id. at 625-26 (emphasis in original).

If the dicta of Humphrey's Executor are taken at face value, the President's constitutional power to supervise the independent agencies is limited to his power of appointment, and none of the proposed Order's requirements may legally be applied to the independent agencies. 10/ We believe, however, that there are several reasons to conclude that the Supreme Court would today retreat from these dicta. First, the Court in Humphrey's Executor and Wiener focused primarily on the inappropriateness of Presidential interference in agency adjudication, a concern not pertinent to supervision of rulemaking. Second, insofar as the Court was concerned about rulemaking, it did not take account of the fact that Executive Branch and independent agencies engage in rulemaking

10/ The President would, however, be free to urge these agencies voluntarily to follow the Order. See, e.g., the President's Letter to the Heads of Independent Regulatory Agencies, urging them to follow E.O. 12044, 14 Weekly Comp. Pres. Docs. 563 (1978).

in a functionally indistinguishable fashion.11/ Third, the Court espoused what is now an outmoded view about the "apolitical" nature of regulation.12/ It is now recognized that rulemaking may legitimately reflect political influences of certain kinds from a number of sources, including Congress and the affected public. Fourth, the President has today a number of statutory powers over the independent agencies, which recognize the legitimacy of his influence in their activities. 13/

Although the removal cases do not precisely define the meaning of "inefficiency, neglect of duty, or malfeasance in office," both Humphrey's Executor and Wiener emphatically rejected general philosophical or policy differences between President and commissioners as fit grounds for dismissal. The cases thus strongly suggest, although they do not require, the conclusion that more specific policy differences do not justify removal. By implication, then, if substantive policy may not be a ground for removal, it may not be a ground for supervision that carries an express or implied threat of removal for noncompliance. See, e.g., Wiener, supra, 357 U.S. at 355-56.

It seems clear that Congress intends the independent agencies to be free of Presidential supervision on matters of substantive policy. See generally, e.g., Sen. Comm. on Governmental Affairs, Study on Federal Regulation, Vol. V, Regulatory Organization 25-32, 95th Cong., 1st Sess. (1977). We believe that the holding of Humphrey's Executor, shorn of the Court's broad dicta that these agencies are independent "except in [their] selection," fully supports the view that Congress may remove some rulemaking from Presidential supervision of the

11/ When Humphrey's Executor was decided, the rulemaking activity that the Court described as "quasi-legislative" was performed largely by independent agencies. Since that time, Congress has come to lodge broad rulemaking power in Executive Branch agencies as well.

12/ See generally, e.g., Freedman, Crisis and Legitimacy in the Administrative Process, 27 Stan. L. Rev. 1041, 1056-61 (1975). To say, however, that regulation is no longer regarded as completely "apolitical" is not to say that agency expertise is irrelevant. See note 4 supra.

13/ These are discussed infra.

sort that would be appropriate in the absence of such a provision. It remains necessary, then, to reconcile the holding of Humphrey's Executor with the President's duty under Article II, § 3, to "take Care that the Laws be faithfully executed." Certainly provisions requiring cause for removal must be read as expressing congressional intent to minimize Presidential supervision of these agencies. Accordingly, a frequent formulation of the President's power over the independent agencies has been that he may supervise them as necessary to ensure that they are faithfully executing the laws, although he may not displace their substantive discretion to decide particular adjudicative or rulemaking matters. 14/ Such a formulation would allow for many types of procedural supervision.

In addition to his constitutional powers, the President has been given some statutory powers that extend to independent as well as Executive Branch agencies. These powers include reorganization authority, OMB's budgetary and legislative request processes, the deferral or rescission of appropriations, and the selection of agency chairmen. 15/ We do not interpret these statutes to imply broad authority for presidential supervision of the independent agencies, because of the clear congressional intent to minimize presidential supervision that is expressed in removal restrictions. Nevertheless, we do believe that these statutes recognize the legitimacy of

14/ See, e.g., Landis, Report on Regulatory Agencies to the President-Elect 33 (1960):

> The congestion of the dockets of the agencies, the delays incident to the disposition of cases, the failure to evolve policies pursuant to basic statutory requirements are all a part of the President's constitutional concern to see that the laws are faithfully executed. The outcome of any particular adjudicatory matter is, however, as much beyond his concern, except where he has a statutory responsibility to intervene, as the outcome of any cause pending in the courts and his approach to such matters before the agencies should be exactly the same as his approach to matters pending before the courts.

15/ See generally Bruff, supra, 88 Yale L.J. at 491-95 (1979).

some presidential influence in the activities of independent agencies, especially when it consists of a coordinating role with only an indirect effect on substantive policymaking.16/

We believe that the foregoing constitutional and statutory analysis supports the application to the independent agencies of those portions of the Order that would be extended to them. The principal requirement is that independent agencies prepare RIA's. These analyses would have only an indirect effect on substantive discretion, since the identification of costs and benefits and the particular balance struck would be for the agency to make. It should also be possible for OMB to prescribe criteria for independent agencies to follow in preparing their RIA's, to consult with them in the process, and to disagree with an independent agency's analysis on the administrative record. None of these actions would directly displace the agencies' ultimate discretion to decide what rule best fulfills their statutory responsibilities. Nor would the requirements of § 4 of the Order that agencies confirm the legal and factual basis of their rules significantly intrude on statutory discretion. The RIA's and statements of legality could prove useful to both President and Congress

16/ In particular, two new statutes impose procedural requirements on independent agencies that are pertinent to assessing the legality of applying the proposed Order to them. First, the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, requires the preparation of agendas and analyses somewhat similar to those of the proposed Order. Insofar as the Order would make these procedural steps part of a broader analysis, it would minimize its new procedural burdens for these agencies. Second, the Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812, will give OMB a direct role in coordinating agency regulations that impose paperwork burdens on the public. The independent agencies, however, have explicit authority to override the Director's disapproval of their information collection requests (§ 3505(b)), although the Director may file public comments presenting his views of the wisdom of the requests (§ 3504(h)). We would also note that, with respect to non-independents, the Paperwork Reduction Act gives the Director broad authority to disapprove "unreasonable" agency collection of information requests, though not to disapprove the rule itself insofar as the two are separable. § 3504(h)(5)(C).

in considering legislation concerning these agencies. 17/ Also, the requirements of § 5 of the Order for agendas of proposed rules would have minimal impact on the statutory discretion of independent agencies, and may, we believe, legally be applied to them.

III. Suspension of proposed and final regulations.

The Order requires Executive Branch agencies (1) to suspend the effective date of rules that have been issued as final rules, but have not become legally effective; and (2) to reconsider rules that are proposed but have not yet been made final. After suspension of final rules, agencies must reconsider all such rules in accordance with the Order. These requirements are imposed only "to the extent permitted by law" and are thus inapplicable when a judicial or statutory deadline requires prompt action. Moreover, agencies must, in complying with these directives, adhere to the requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq., and all other laws.

For rules that have not yet been made final, the APA imposes no special procedural requirements. Agencies need not follow the notice and comment procedures of 5 U.S.C. § 553, for nothing in that provision requires an agency to allow a period for comment on a decision to delay final adoption of a proposed rule. The agency's decision may, however, be subject to judicial review, and the agency may have to furnish a reasoned explanation for that decision. See ASG Indust. v. CPSC, 593 F.2d 1323, 1335 (D.C. Cir. 1979); Action for Children's Television v. FCC, 564 F.2d 458, 478-79 (D.C. Cir. 1977). The explanation here -- that the agency needs time to prepare an RIA required by Executive Order -- is, we believe, sufficient.

The second category of regulations covered by the Executive Order raises somewhat different legal issues. Under 5 U.S.C. § 553(b), notice and comment procedures must be followed for "rulemaking" unless "the agency for good cause finds (and

17/ We note that the Order would not attempt to displace the substantive discretion of these agencies by directing them either to postpone issuing rules that they deem necessary (§ 7) or to select the most cost-effective rule when they would not otherwise be willing to do so (§ 2).

incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. § 551(5), the term "rulemaking" is defined as "agency process for formulating, amending, or repealing a rule." The initial question, then, is whether an agency's decision to "suspend" a final but not effective rule is "rulemaking" which triggers the procedural safeguards of § 553.

In a recent memorandum, this Office concluded that a 60-day suspension of the effective date of a final rule should not, in general, be regarded as rulemaking within the meaning of the APA.18/ We based our conclusion on "the clear congressional intent to give agencies discretion to extend the effective date provision beyond 30 days" and the absence of statutory language or history suggesting "that a delay in effective date is the sort of agency action that Congress intended to include within the procedural requirements of § 553(b)." Nevertheless, we believe that a short-term suspension of the effectiveness of a final rule is not the equivalent of an indefinite suspension coupled with a process designed to review the basis for the rule, with a view to establishing a new rule. Although the former seems fairly characterized as a mere extension of an effective date under § 553(d), the latter should probably be characterized as "agency process for formulating, amending, or repealing a rule" for purposes of § 553(b).

The difference between these two measures for purposes of § 553 becomes clear upon examination of the sequence of events that is expected to take place under each of them. Under the President's Memorandum of January 29, 1981, agencies are to defer the effective dates of final rules for sixty days in order to review them. The completion of that review will point to either of two dispositions. The rule might be allowed to take effect as published in final form, or it might be withdrawn for some proposed change. The first disposition would require no new procedures. The second disposition would

18/ Memorandum of January 28, 1981, for Honorable David Stockman, Director, Office of Management and Budget, from Larry L. Simms, Acting Assistant Attorney General, Office of Legal Counsel.

surely contemplate an amendment or repeal of the earlier rule subject to § 553's public procedures, but the earlier deferral of the rule's effective date would remain just that.19/

Under the proposed Order, the situation is analogous to the second possible disposition under the President's Memorandum. The Order, by requiring careful cost-benefit analysis of rules through the RIA process, would contemplate notices of proposed rulemaking on the preliminary RIA and a reexamination of the rule at the appropriate time. The issue to be decided at the time the rule is suspended indefinitely for the Order's process to take place is whether the rule, which has already been promulgated in final form, should be allowed to have interim effect while it is under review by the agency. We believe that this decision is one of "formulating, amending, or repealing a rule" that requires either notice and comment procedures or good cause for dispensing with them under § 553(b). Admittedly, the difference between a short deferral of the effectiveness of a rule and an indefinite suspension for reexamination is in part one of degree. But there is also a difference in kind: once a decision to begin the process of amending a rule is made, there is no longer a plausible argument that a rule that was to take effect is merely to be delayed for a brief period.

Notice and comment procedures on the issue of the interim effectiveness of a rule that is due to undergo reexamination under the Order should take the following form. The agency should defer the rule's effective date for a period sufficient to allow a short time for notice and comment, an opportunity for the agency to consider the comments and decide the issue of interim effectiveness, and an interval before the rule

19/ Admittedly, one of the purposes of the 30-day effective date provision is to allow agencies to correct errors or oversights in final regulations. See Final Report, Attorney General's Committee on Administrative Procedure 114-15 (1941); Sannon v. United States, 460 F. Supp. 458, 467 (S.D. Fla. 1978). This purpose, however, does not suggest that agencies may make corrections, let alone withdraw rules, during the period between a rule's publication and its effective date without offering public procedures or showing good cause for dispensing with them. Proposed corrections -- or even repeals -- would of course be amendments for purposes of § 553(b).

takes effect sufficient to meet the purposes of § 553(d).

In deciding on the interim effectiveness of final rules subject to the Order's procedures, the final question is whether and under what circumstances agencies will have good cause to dispense with notice and comment procedures. Public procedures on interim effectiveness might be "unnecessary, impracticable, or contrary to the public interest," where the question whether there should be any rule at all was fully ventilated in the rule's comment process, or where it is clear that interim effect could impose substantial but short-term compliance costs. On the other hand, notice and comment might be needed where the rule's proponents had advanced substantial arguments for its early effectiveness, and where compliance costs are not likely to be wasted.

Such arguments must, of course, be assessed on a case-by-case basis. If the available record indicates that the costs of the rule at issue are not substantial and that the failure to allow the rule to become effective may itself be controversial, the likelihood that a court will require notice and public comment increases. The procedural requirements of the APA will, therefore, vary with the size and immediacy of the burdens imposed by the rule and the need for public comment on a decision to withdraw a final but not effective rule.

IV. Regulatory Review by Agency Heads.

Section 4 of the proposed Order would require agency heads to make express determinations that regulations they issue are authorized by law and are supported by the materials in the rulemaking record. These requirements are meant to assure agency compliance with existing legal principles that rules must be authorized by law, and that they should be adequately supported by a factual basis. Accordingly, we find no legal difficulty with them. In particular, they do not purport to change generally applicable statutory standards for judicial review of agency action, see 5 U.S.C. § 706, and could not have such an effect. They also do not purport to alter any specially applicable standards, such as those concerning the evidentiary standard that must be met to uphold a given rule, appearing in statutes governing a particular agency.

On the other hand, the section would add the significantly new procedural requirements that agency heads expressly determine that the legal and factual requisites for a rule have been met. The first requirement reflects the principle, central to administrative law, that agency action must be guided by the "supremacy of law." St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 84 (1936) (Brandeis, J.). This principle protects against excess of power and abusive exercise of power by administrators. See Report of the U.S. Attorney General's Comm. on Administrative Procedure, Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess. 76 (1941). The requirement that agency heads determine that a rule has "substantial support" in the materials before the agency means that a rule's necessary factual basis must be found to exist. This second requirement should not be confused with a "substantial evidence" standard of judicial review, which could be imposed only by statute. It embodies Recommendation 74-4 (subpart 3) of the Administrative Conference of the United States, 1 CFR § 305.74.4, which urges that for a rule to be considered rational, it should be adequately grounded in a factual basis. This requirement is consistent with the approach of courts that have carefully reviewed agency action under the "arbitrary and capricious" standard of the Administrative Procedure Act, 5 U.S.C. § 706 (2)(A). See, e.g., Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.) (en banc), cert. denied, 426 U.S. 941 (1976).

V. Judicial Review.

The Order states that it is not intended to create any rights or benefits enforceable by a party to litigation against the United States, its agencies, or any other person. At the same time, it provides that determinations of costs and benefits, and the RIA itself, are meant to form part of the agency record for purposes of judicial review. The effect of this provision is to preclude direct judicial review of an agency's compliance with the Order. The provision makes clear the President's intention not to create private rights, an intention that should be controlling here. See Independent Meat Packers Ass'n v. Butz, 526 F.2d 228 (8th Cir. 1975), cert. denied, 424 U.S. 966 (1976) (no judicial enforcement of Executive Order requiring consideration of inflationary impact of regulations, in part because such

Order had not been issued pursuant to delegation from Congress); Legal Aid Soc. of Alameda County v. Brennan, 608 F.2d 1319 (9th Cir. 1979) (judicial review available of compliance with an Executive Order that had been ratified by Congress). Even without the provision, compliance with the Order would probably be immunized from review because the Order has not been promulgated pursuant to a specific grant of authority from Congress to the President and thus lacks the "force and effect of law" concerning private parties. See Independent Meat Packers Ass'n v. Butz, supra; National Renderers Ass'n v. EPA, 541 F.2d 1281, 1291-1292 (8th Cir. 1976); Hiatt Grain Feed, Inc. v. Bergland, 446 F. Supp. 457, 501- 502 (D. Kan. 1978). The bar on judicial review of agency compliance with the Order does not, of course, prohibit a court from hearing a constitutional or statutory attack on the legality of the Order itself or of agency action taken pursuant to its requirements.

Because the regulatory impact analysis that will be required by the Order will become part of the agency record for judicial review, courts may consider the RIA in determining whether an agency's action under review is consistent with the governing statutes. This, of course, is true of all matters appearing in the rulemaking record.

Larry L. Simms
Acting Assistant Attorney General
Office of Legal Counsel

United States Senate

COMMITTEE ON
GOVERNMENTAL AFFAIRS
WASHINGTON, D.C. 20510

December 16, 1977

The President
The White House
Washington, D. C.

Dear Mr. President:

We welcome the opportunity to comment on your draft Executive Order designed to improve government regulations. We applaud your decision to make this Order available in draft form to give the public a full opportunity to review and comment on it.

In asking for comments on the Order, you have specifically requested that comments respond to the question: "Should the procedures outlined in the Executive Order apply to the independent regulatory agencies"? Other issues are raised as well, but our comments will be restricted to this particular question.

It is our unqualified view that the answer is No. The Executive Order cannot lawfully be applied to the independent regulatory commissions. To do so would violate the intent of Congress that the Executive Branch not control the rules these agencies issue.

Essentially, the draft Executive Order is designed to do three things. First, it requires agencies to prepare a "regulatory analysis" for any regulation having a significant economic effect, analyzing all of the economic consequences of the proposed regulation and assessing all potential alternative approaches. Second, it requires agencies to undertake a periodic review of their existing regulations, to determine whether these regulations are meeting certain basic goals. Third, it requires agencies to prepare work plans and regulatory agendas for their significant regulatory activities and to provide additional notice to the public.

Under the Order, the OMB is assigned responsibility for reviewing agency compliance with these requirements. Agencies will be required to submit their new procedures

to OMB by February 15, 1978, for OMB's approval. Regulations which have been prepared in violation of the Order's procedures could not be issued.

Mr. President, we agree completely with the basic objectives of the proposed Executive Order. Regulatory reform is a major goal of this Congress, and we would very much like to see these objectives achieved.

However, we have serious difficulty with the means used to accomplish these ends. In our opinion, the proposed Order cannot lawfully be applied to the independent regulatory commissions without an express statutory basis. At present no such basis exists.

Our opinion is based on a review of the judicial precedents and statutory law governing the independent regulatory agencies. We have also reviewed the opinion of the Justice Department dated July 22, 1977, which purports to support the Executive Order. A brief summary of our review may be helpful.

For the President to promulgate an Executive Order without a new Congressional statute, he must do so either (1) pursuant to an implied power derived from the Constitution, or (2) pursuant to a previous grant of statutory authority. In this case, we can find neither.

1. The only implied power upon which the President could conceivably rely--and in fact, the Attorney General's opinion does rely on it--is the responsibility of the President set forth in Article II, Section 3, of the Constitution: "to take care that the laws be faithfully executed." But there are a long line of Supreme Court cases, beginning with the 1838 decision in Kendall v. United States, and culminating in the famous steel seizure case (Youngstown Steel), which hold that the President cannot use this clause to impose new requirements where an express or implied Congressional authorization is lacking. The Youngstown Steel case in particular found that in situations where Congress has insulated an area from Presidential domination, the President has no such implied authority.

The history of the regulatory commissions is replete with efforts by Congress to insulate the commissions from Presidential domination. From the creation of the ICC in 1887, continuing through the creation of the FTC and

the independent agencies of the New Deal, down to the new independent regulatory commissions created during the past few years, Congress has made it abundantly clear that these commissions are not subject to Presidential direction or control. Congress, and not the Executive, controls the guidelines for the independent regulatory agencies. Congress created these agencies. Congress provided for their organization. Congress adopted their statutory mandates. Congress controls their budgets and oversees their performance. Congress specifies agency procedures.

Congress has also determined that, in exercising the quasi-judicial and quasi-legislative authority which Congress had delegated to the agencies, agency actions shall not be subject to review or modification by either Congress or the Executive; only the courts may review final agency actions. And to ensure that the agencies will be able to act in a fully independent fashion, without fear of control or domination from the Executive, Congress has given agency members a set term, and provided that commissioners may be removed from office only for "inefficiency, malfeasance, or neglect of duty."

The Humphrey's Executor case, decided by the Supreme Court in 1935, established beyond question the constitutional ability of Congress to create agencies independent of Executive control. The Humphrey's Executor case dealt with a Presidential attempt to remove an FTC commissioner. The Court pointed out that aside from the appointment of commissioners, which Congress had given to the President, Congress had provided that the FTC was to be completely free of any Presidentially-imposed obligations. The Court said that the FTC is --

> "a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government."

Then the Court went on to say:

> "The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies. . . . Such a body

> cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in contemplation of the statute, must be free from executive control."

Thus, both law and tradition clearly demonstrate that the President is not free to act on his own initiative in setting procedures and requirements for the independent regulatory agencies. On the contrary, Congress by its actions has treated the independent agencies as "arms of Congress." Accordingly, this is an area which falls completely outside any implied Presidential authority under the Constitution (Youngstown Steel).

2. If there is no implied Constitutional authority, can Presidential power to act in this instance be derived from some express statutory authority? Again, we can find none.

As the foregoing has demonstrated, the statutory powers which Congress has granted the Executive in connection with the independent regulatory agencies are extremely limited. We know of only three Executive prerogatives which apply across-the-board to the independent regulatory commissions--(i) the power to make appointments to the commissions and to designate agency chairmen; (ii) the power to appraise agency budgets prior to submission to Congress (31 U.S.C. 2); and (iii) the power to subject commission staff to Federal civil service rules on hiring, ethics, and related personnel matters (5 U.S.C. 2102, 3101; 18 U.S.C. 208).

There is no way the proposed Executive Order, which governs agency procedures for developing and issuing regulations, can be said to fall within any of the three categories above. The Order does not concern budget preparation; nor does it concern the appointment authority; nor does it concern personnel standards and procedures.

We have reviewed previous Executive Orders to determine their applicability to the independent regulatory commissions. That review discloses only a single order with such coverage--the May 8, 1965, Order of President Johnson which sets ethical standards of conduct for all

government employees, including employees of the regulatory agencies. That Order, however, was based on explicit statutory authority--namely, the statutes in the third category above, as well as the President's general power to delegate to Executive Branch officials (3 U.S.C. 301).

All of the other Executive Orders which we reviewed exempt independent regulatory commissions from their coverage. Executive Orders 11821 and 11949, issued by former President Ford two years ago, illustrate that pattern. Those Orders were designed to do the same thing which this proposed Order is designed to do--namely, require agencies to consider the costs and benefits of proposed regulatory agencies. The Executive Branch, however, never sought to require compliance by the independent agencies. And the independent agencies did not implement the Orders. Executive Orders 11821 and 11949 thus constitute an important acknowledgement that the President's power does not extend to these agencies.

Absent either statutory authority or implied Constitutional authority, we conclude that the President would be acting without basis in law if the proposed Executive Order were applied to the independent regulatory commissions.

One final point merits emphasis. The opinion of the Attorney General suggests that the independent agencies are off limits as far as substantive requirements are concerned, but that the President can impose strictly procedural obligations on the agencies. We reject this view for two reasons.

First, there is nothing in either the statutes or the judicial precedents which makes such a distinction. Aside from the areas in which specific statutory authority is granted, the courts have refused to allow Presidential control of the independent regulatory commissions. The courts make no distinction between substantive control and procedural control.

Second, such a distinction is almost impossible to draw. Procedures inevitably affect the substance of agency action; they cannot be divorced from substantive policies.

A reading of the proposed Executive Order makes this evident. The proposed Order on its face establishes

substantive standards the independent regulatory agencies must meet when they issue any rule. For example --

> The Order states that no independent regulatory agency may adopt regulations unless "the least burdensome of the acceptable alternatives has been chosen" (Sec. 3(d));
>
> The Order requires that agencies consider the economic impact and costs and benefits of proposed regulations before they are issued, and that OMB review the criteria used by the agencies (Secs. 4 and 6);
>
> The Order requires that agencies review existing regulations so that those that no longer meet statutory goals may be eliminated (Sec. 5).

This desire to influence the substantive content of the regulations clearly violates the intent of Congress. When Congress created the independent regulatory agencies, it prohibited Executive Branch influence. The proposed Order undermines this. OMB would inevitably become involved in substantive questions. OMB could influence which regulations the independent regulatory agencies review and which they repeal or amend. OMB could influence the nature of the economic regulatory analysis and thus the content of the rules issued by the independent regulatory agencies. OMB could prohibit an independent regulatory agency from adopting the most effective regulation if there are other "acceptable alternatives" which would impose less burdens. OMB could assure action on some proposed regulations and reject all others by influencing the semi-annual agendas each agency must adopt.

In short, we can find no basis for making the distinction between an Executive Order which affects commission procedures and an Executive Order which affects substantive mandates. To do either, the Executive must come to Congress for a statute.

Mr. President, we hope these views will be helpful to you.

Sincerely,

The President

December 16, 1977
Page Seven

Abe Ribicoff
Chairman, Committee on
Governmental Affairs

Charles Percy
Ranking Minority Member
Committee on Governmental Affai

James O. Eastland
Chairman, Committee on the
Judiciary

Strom Thurmond
Ranking Minority Member
Committee on the Judiciary

Warren Magnuson
Chairman, Committee on Commerce

James B. Pearson
Ranking Minority Member
Committee on Commerce

William Proxmire
Chairman, Committee on Banking,
Housing and Urban Affairs

Edward W. Brooke
Ranking Minority Member
Committee on Banking, Housing
and Urban Affairs

James Abourezk
Chairman, Subcommittee on Admin-
istrative Practices and Pro-
cedures

Paul Laxalt
Ranking Minority Member
Subcommittee on Administrative
Practices and Procedures

James Allen
Chairman, Subcommittee on
Separation of Powers

Orrin G. Hatch
Ranking Minority Member
Subcommittee on Separation of
Powers

Jacob K. Javits
Ranking Minority Member
Committee on Human Resources

cc: Mr. Wayne Granquist

Attachment 3

OFFICE OF THE VICE PRESIDENT
WASHINGTON
MAR 25 1981

Honorable Paul A. Volcker
Chairman, Board of Governors
of Federal Reserve System
20th & Constitution Avenue, N.W.
Washington, D.C. 20551

Dear Chairman Volcker:

President Reagan is deeply concerned about the burden of Federal regulations and paperwork, and strongly believes we need to reduce the intrusion of the Federal government into our daily lives. He has established a Task Force on Regulatory Relief, which I chair, and he has issued Executive Order 12291 to establish procedures for careful review of new and existing regulations to assure their compliance with his goals of reducing regulatory burdens.

In this Executive Order, President Reagan ordered cabinet departments and agencies to choose, among feasible alternative approaches to any given regulatory objective, the alternative involving the least net cost to society. To help focus these efforts, he ordered that these agencies prepare a regulatory impact analysis of major regulatory actions.

We appreciate that your organization's internal procedures may make it difficult for you to comply with every provision of Executive Order 12291. For upcoming major regulations, however, I am requesting that you voluntarily adhere to Sections 2 and 3 of the Order. To the extent you can comply with the spirit of the Order, this will help demonstrate to the American people the willingness of all components of the Federal government to respond to their concerns about unnecessary intrusion of government into their daily lives.

By the enclosed communication, I have today carried out the President's wish to disband the U.S. Regulatory Council. You should note, however, that the staff will continue to prepare for publication the extraordinarily useful Regulatory Calendar. We solicit and urge your continued, and valued, participation in the Regulatory Calendar project.

President Reagan joins me in asking for your cooperation. Working together, we will be able to coordinate and reduce the cumulative burden of needless and overly rigid government regulation.

Sincerely,

George Bush

Enclosure

The addressees are:

Honorable Paul A. Volcker
Chairman, Board of Governors of
Federal Reserve System

Honorable Marvin S. Cohen
Chairman, Civil Aeronautics Board

Honorable James M. Stone
Chairman, Commodity Futures
Trading Commission

Honorable Stewart Statler
Acting Chairman, Consumer Product
Safety Commission

Honorable Charles D. Ferris
Chairman, Federal Communications
Commission

Honorable Irvine H. Sprague
Chairman, Federal Deposit
Insurance Corporation

Honorable Georgianna Sheldon
Acting Chairwoman, Federal Energy
Regulatory Commission

Honorable John H. Dalton
Chairman, Federal Home Loan
Bank Board

Honorable Leslie Canuk
Acting Chairwoman, Federal
Maritime Commission

Honorable David A. Clanton
Acting Chairman, Federal Trade
Commission

Honorable Marcus Alexis
Acting Chairman, Interstate
Commerce Commission

Honorable Richard V. Backley
Chairman, Mine Enforcement Safety
and Health Review Commission

Honorable John Fanning
Chairman, National Labor
Relations Board

Honorable Joseph Hendrie
Chairman, Nuclear Regulatory
Commission

Honorable Frank R. Barnako
Acting Chairman, Occupational Safety
and Health Review Commission

Honorable Janet D. Steiger
Acting Chairwoman, Postal Rate
Commission

Honorable John Shad
Chairman, Securities and
Exchange Commission

Attachment 4

AGENCY RESPONSES TO THE VICE PRESIDENT'S LETTER OF MARCH 25 REQUESTING VOLUNTARY COMPLIANCE WITH EXECUTIVE ORDER 12291 RECEIVED AS OF JUNE 26, 1981:

CIVIL AERONAUTICS BOARD
WASHINGTON, D.C. 20423 IN REPLY REFER TO B-30-35

April 30, 1981

Mr. William Nichols
General Counsel
Office of Management and Budget
Old Executive Office Building
Room 464
Washington, D.C. 20503

Dear Mr. Nichols:

We have been pleased to arrange with your office, through Mr. Jeff Eisenach, procedures by which the CAB will voluntarily submit its rulemaking actions for OMB comment in accordance with Executive Order 12291 and the letter of March 25, 1981, from Vice President Bush. Under the normal OMB procedure, proposed regulations would be processed by the office of Information and Regulatory Affairs, which is directed by Dr. James Miller.

As you may be aware, Dr. Miller is testifying in his individual capacity in our Competitive Marketing Investigation, a formal multiphased hearing case to review the structure of air transportation retailing, which is currently governed by private industry agreements. Objections to his appearance on conflict of interest grounds, originally upheld by the law judge, were overruled by the Board, and Dr. Miller has stated that he will disqualify himself from future consideration of any Board actions arising from the matter that may cause the appearance of a conflict of interest.

The Board has not finally decided to admit Dr. Miller's testimony. Nor is it clear whether any rulemaking actions will flow from the investigation. Should both events occur, I think it desirable that any OMB review not be conducted in the office of Information and Regulatory Affairs, to avoid the appearance of undue influence. If it is not possible to insulate OMB's review from that office, then my current inclination is not to submit actions in that area for comment.

If you agree in principle, we can wait until any rulemaking action is developed to work out the details.

Sincerely,

David M. Kirstein
General Counsel

60%

REC'D JUN 8 1981

UNITED STATES OF AMERICA
COMMODITY FUTURES TRADING COMMISSION
2033 K Street, N.W.
Washington, D.C. 20581

May 29, 1981

The Honorable George Bush
Vice President of the United States
Washington, D.C.

Dear Mr. Vice President:

Thank you for your letter of March 25, 1981 concerning Executive Order 12291. The Commodity Futures Trading Commission shares the President's concern that government regulations not needlessly burden the regulated sectors of the economy. Accordingly, we concur with the spirit of this Executive Order. We do have some concern, however, regarding several provisions of the Order.

We are currently preparing a more detailed response that specifies our concerns. However, because of the importance of this matter, we wish to allow the newly-designated Chairman of the Commission, Mr. Philip Johnson, an opportunity to participate in the formulation of our response. Therefore, a more detailed response from the Commission will be forthcoming in a short period of time.

Sincerely,

Jane K. Stuckey

Jane K. Stuckey
Secretary to the Commission

APR 6 1981

Honorable George Bush
The Vice President of the
United States
Washington, DC 20501

Dear Mr. Vice President:

Thank you for your memorandum of March 25, 1981, to the Heads of Executive Departments and Agencies concerning the consolidation of regulatory oversight. You may be assured that we, in the Federal Emergency Management Agency, are most supportive of the steps taken thus far by your Task Force and the Office of Management and Budget to bring Federal regulations procedures under control and to improve the rulemaking process.

We are now in the process of developing our semi-annual agenda which could be included in the "Regulatory Calendar," and we have made submissions to the Calendar. We will provide our reports to the Office of Management and Budget in the next few weeks. Also, I would advise you that we are preparing new rulemaking policies and practices for use by this agency which will reflect the new guidelines issued by the Task Force and incorporated in Executive Order 12291. Our regulations outlining these rulemaking requirements are being provided to OMB for its review and comment under the Executive Order.

If the Task Force or its staff have questions on FEMA regulations management, please contact Mr. George Jett our General Counsel at 634-4100.

Sincerely yours,

Bernard T. Gallagher
Acting Director

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON 20426

IN REPLY REFER TO:

Honorable George Bush
The Vice President of the
United States
Washington, D.C. 20501

MAY 6 1981

Dear Mr. Vice President:

Thank you for your letter of March 25, 1981, outlining the President's program for reducing regulatory burdens.

With the formation of the Federal Energy Regulatory Commission (FERC) in October 1977, the need for a serious and indepth review of our regulations and the associated burdens on industry became obvious to all those associated with the regulatory process. I would like to take this opportunity to briefly summarize the FERC's energy data validation program which has been instrumental in reducing industry reporting burden.

On March 23, 1978, Executive Order 12044, "Improving Government Regulations," required executive agencies to adopt procedures to improve existing and future regulations. This Order exempted FERC by virtue of its independent regulatory status. However, former Chairman Curtis, in keeping with the spirit and intent of the Order, voluntarily chose to comply with the Order and established guidelines to be used in the preparation of all rules and regulations proposed for Commission consideration.

In August 1978, a Validation Team was established within FERC to review all public use forms required by the Commission. Systematically, each data element on these forms has been, or is in the process of being, reviewed by this Validation Team to determine which elements of data are, in fact, now used for regulatory purposes. The elements not used for regulatory purposes are recommended for elimination in Commission rulemakings.

The validation process of public use forms is tracked in the "Information Systems Report" (copy enclosed), an internal staff publication which summarizes information on each form and tracks the status of the individual validation reviews. Initially, 72 public use forms were included in this document representing approximately 1.5 million hours of annual reporting requirements on industry.

The FERC's validation program exceeded the expectations of all involved with this program. This validation effort has identified reductions and eliminations of approximately 45 percent of the burden related to those public use forms in place on October 1, 1979. Final Rules have been issued eliminating approximately 30 percent of the October 1979 burden, while the remaining 15 percent are at various stages of the validation and formal rulemaking processes.

On November 30, 1979, the FERC voluntarily chose to comply with Executive Order 12174, which exempted the independent regulatory agencies, and submitted an Information Collection Budget (ICB) to OMB for approval in June 1980.

While the validation process may appear to be a relatively simple task, our experience with this program over the past two years provides evidence to the contrary. The validation of these forms and applications often involves the rewriting of complete sections of the Commission's regulations, and requires rulemakings by the Commission. Due to public interest in these rulemakings, extensions of the comment period are not unusual. For example, the comment period on FPC Form No. 1 was twice extended for a total comment period in excess of four months; several public meetings were also held on this rulemaking in accordance with the provisions of the Administrative Procedures Act.

With a growing public awareness of what appears to be excessive Government regulation, more stringent requirements for rulemakings are in effect or in the drafting stages in Congress. While the intent of these new rulemaking requirements is well understood, these new procedural requirements have also delayed the processing of our validation rulemakings which recommend the reduction or elimination of existing reporting requirements.

In closing, I would like to reaffirm the FERC's commitment to eliminate the collection of data not required to carry out our legislative mandates. In fact, the General Accounting Office recently completed an initial review of the data reduction programs at five independent regulatory agencies with the conclusion that the FERC had developed procedures which could easily be emulated by other agencies. I believe that our commitment to this effort is best exemplified by our voluntary initiatives to review our data requirements long before this effort became mandatory.

Sincerely,

Georgiana Sheldon
Acting Chairman

Enclosure

Federal Home Loan Bank Board

JOHN H. DALTON
CHAIRMAN

1700 G Street, N.W.
Washington, D.C. 20552
Federal Home Loan Bank System
Federal Home Loan Mortgage Corporation
Federal Savings and Loan Insurance Corporation

APR 14 1981

The Vice President
The White House
Washington, D. C. 20500

Dear Mr. Vice President:

As Chairman of the Federal Home Loan Bank Board, I am pleased to respond to your letter dated March 25, 1981, and express the Board's strong support for the goals of the Task Force on Regulatory Relief and Executive Order 12291. Your letter specifically requests that the Board voluntarily comply with the spirit of Executive Order 12291, and sections 2 and 3 in particular, although the Order does not apply to the Board.

As you may know, the Board's resolution on regulatory simplification (Board Resolution No. 80-584) incorporates the policies of requiring new regulations to achieve goals in the most efficient and least burdensome manner possible and preparing impact analyses for major new regulations. Accordingly, the Board believes that it already adheres to the spirit of the Order and the substance of sections 2 and 3.

You can be assured of the Board's continued cooperation in the efforts of the Task Force.

Sincerely,

John H. Dalton

John H. Dalton

Federal Maritime Commission
Washington, D.C. 20573

Office of the Chairman

June 10, 1981

The Honorable George Bush
Vice President
The White House
Washington, D.C. 20500

Dear Mr. Vice President:

This responds to your letter of March 25, 1981, in which you request that the Federal Maritime Commission voluntarily adhere to the spirit of Executive Order 12291, which is designed to reduce the regulatory burden imposed by Federal agencies on the public.

As you point out, the Order is not binding on independent regulatory agencies such as this Commission. We, however, very much share the concern of the President and yourself that regulatory requirements be reduced to the maximum extent possible consistent with the Commission's statutory obligations. To this end, we currently consider factors such as those described in section 2 of the Executive Order when publishing a proposed or final rule.

It should be emphasized, however, that our statutory responsibilities do not afford us the flexibility to follow the exact requirements of the Order in all cases. As an example, the recent enactment of Public Law 95-475 governing the conduct of domestic rate cases incorporated time limits for the promulgation of rules which could not have been accomplished within the framework of the Order. There have been numerous instances of similar legislation affecting this agency over the past decade.

In closing, let me again assure you of our intention to comply with the spirit of Executive Order 12291 to the fullest extent possible.

Sincerely,

Leslie L. Kanuk
Acting Chairman

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

OFFICE OF THE CHAIRMAN

April 13, 1981

Honorable George Bush
Vice President of the United States
Washington, D.C. 20500

Dear Mr. Vice President:

I have received your letter of March 25, 1981 regarding the President's efforts toward reducing regulatory burdens. In that letter you requested the cooperation of this agency with regard to Sections 2 and 3 of Executive Order 12291 and with the Regulation Calendar project.

In the past the Commission has made contributions to the Regulation Calendar Appendix on Public Participation and I am pleased to report that we will continue to make at least that contribution in the future.

I have examined Executive Order 12291 and, as you indicated in your letter, its application to this Commission may be limited.

As you know, the Federal Mine Safety and Health Review Commission was established by Congress as an independent agency for resolving disputes between the Mine Safety and Health Administration of the Department of Labor (MSHA) and mine operators under the Federal Mine Safety and Health Act of 1977. MSHA is the enforcing agency and it is MSHA which promulgates all substantive rules and regulations. By statute the Commission may establish only procedural rules of adjudication.

Rules of adjudication procedure do not fit precisely the provisions of Sections 2 and 3 of Executive Order 12291. They are not "major" rules as that term is defined in the Order. Nevertheless, it is quite possible that certain other provisions of Sections 2 and 3 may apply to them. Therefore, we will examine those sections very closely in the event that we publish any additional Rules of Procedure and we will adhere to the applicable provisions whenever possible.

Please call upon me if I may be of any further assistance to you in your endeavor.

Sincerely,

RICHARD V. BACKLEY
Chairman

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE CHAIRMAN

JUN 25 1981

Honorable George Bush
Vice President of the United States
The White House
Washington, D.C. 20501

Dear Mr. Vice President:

The Federal Trade Commission is pleased to respond to your letter and memorandum of March 25, 1981. The Commission pledges its continued participation in the Regulatory Calendar and its full support for the policies and goals reflected in President Reagan's Executive Order 12291 on federal regulation. The Commission shares the President's determination that regulatory objectives be met at the minimum net cost to society.

The primary source of the Commission's rulemaking authority is Section 18 of the Federal Trade Commission Act, which authorizes the Commission to promulgate rules defining unfair or deceptive acts or practices. Such rules may also impose affirmative requirements upon industry designed for the purpose of preventing such acts or practices. The Commission is also empowered by Section 6(g) of the FTC Act to promulgate rules relating to unfair methods of competition; however, no such rules have been adopted. Several other statutes, such as the Magnuson-Moss Warranty Act, authorize implementing regulations in their narrow subject areas.

The Commission's own rulemaking policies are fully consistent with those reflected in Section 2 of Executive Order 12291. In order to assure that the Commission's decisions are based on adequate information concerning the need for and consequences of proposed rulemaking, the Commission in June 1978 established the Impact Evaluation Unit in the Bureau of Consumer Protection. One of the responsibilities of this unit is to conduct prospective studies to ensure that new regulatory proposals are designed to provide benefits that substantially exceed their costs. Persons outside the agency are also encouraged to provide the Commission with information on the need for, and the potential costs and benefits of, possible regulations even before a notice of proposed rulemaking is published. In an advance notice of proposed rulemaking, the Commission describes its regulatory objectives and identifies regulatory alternatives under consideration, as required by Section 18(b)(2) of the Federal Trade Commission Improvements Act of 1980, 94 Stat. 376. The Commission also invites interested persons to comment on the rulemaking under consideration and to propose additional alternatives for achieving the Commission's objectives.

The preliminary regulatory analysis that the Commission must issue in connection with the publication of a notice of proposed rulemaking further assures that the Commission will have an adequate factual basis for a decision whether to promulgate a rule. Under Section 22 of the FTC Act, as amended, 94 Stat. 374, 388, that analysis must contain:

(1) a concise statement of the need for, and the objectives of, the proposed rule;

(2) a description of any reasonable alternatives to the proposed rule which may accomplish the stated objective of the rule in a manner consistent with applicable law; and

(3) for the proposed rule, and for each of the alternatives described in the analysis, a preliminary analysis of the projected benefits and any adverse economic or other effects and a preliminary analysis of the effectiveness of the proposed rule and each alternative in meeting the stated objectives of the proposed rule.

The Commission is also required under Section 22 of the FTC Act to issue a final regulatory analysis of each rule at the time of promulgation containing:

(1) a concise statement of the need for, and the objectives of, the final rule;

(2) a description of any alternatives to the final rule which were considered by the Commission;

(3) an analysis of the projected benefits and any adverse economic or other effects of the final rule;

(4) an explanation of the reasons for the determination of the Commission that the final rule will attain its objectives in a manner consistent with applicable law and the reasons the particular alternative was chosen; and

(5) a summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues.

The Commission closely reviews each regulatory proposal brought before it for final approval to ensure that federal regulatory action is necessary and that the proposed rule minimizes any burden imposed on industry, especially small businesses. If these conditions are not met, the Commission will terminate the proceeding without promulgating any rule.

The Commission uses the tools of zero-based budgeting, quarterly budget reviews, and bimonthly policy review sessions to help it pinpoint those areas of activity which promise the greatest benefits in terms of increased competition and reduced consumer deception in the marketplace. In this manner the Commission, consistent with Section 2(e) of the President's Order, is already "set[ting] 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."

The Commission's current practices are also consistent with the concept of regulatory impact analysis reflected in Section 3 of Executive Order 12291. The preliminary and final regulatory analyses required by the Federal Trade Commission Act are substantially similar to the analyses required of the executive agencies for major rules under subsection 3(d). In addition to complying fully with its own statute, the Commission will make every effort to include the information listed in subsection 3(d) within its final regulatory analyses of all rules that would be considered "major" under the Order. Moreover, the Commission will be guided by that subsection in drafting its preliminary regulatory analyses of all rules, as well as its final analyses of rules that may not be considered major.

In order to assist OMB further in the execution of its responsibilities under subsection 6(a)(5) of the Order, the Commission will send the Director copies of its advance notices of proposed rulemaking and its semiannual regulatory agendas, as well as its published notices of proposed and final rulemaking.

The four members of this Commission are evenly divided on the question of complying voluntarily with Section 3 of Executive Order 12291, which provides for OMB review of notices of proposed rulemakings and preliminary regulatory analyses, as requested by your letter. The absence of a majority renders the Commission legally unable to comply with your request. The Commission believes, however, that it would be useful to state the divergent views of individual members of the Commission.

Commissioner Bailey and I believe that even though the Commission is not required, by virtue of its independent status, to comply with Executive Order 12291, the Commission should provisionally determine to send to the Director of the Office of Management and Budget notices of proposed rulemaking and preliminary regulatory analyses in future major proceedings. Under such a procedure, these would be provided to OMB at the same time they are sent to Congress under Section 18(b)(2)(B) of the Federal Trade Commission Act, as amended, i.e., at least thirty days before publication. OMB comments would be fully considered by the Commission in issuing preliminary and final regulatory analyses. As to major rulemakings that are already in progress, Commissioner Bailey and I would send final regulatory analyses to OMB for review at least thirty days prior to publication. We would also send for review final regulatory analyses that differ substantially from preliminary analyses reviewed by OMB. All comments would be included in the rulemaking records and would be considered to the fullest extent practicable.

However, Commissioner Bailey and I believe that if OMB was unable to comment on a final regulatory analysis before the Commission felt it must move forward to promulgate a rule, there would still be an opportunity for OMB comment. No rule promulgated by the Commission before September 30, 1982, will take effect for at least ninety days of continuous Congressional session after promulgation, because of the legislative veto provisions in Section 21 of the FTC Act, as amended, 94 Stat. 374, 393.

For rules that are not major, Commissioner Bailey and I would, consistent with Section 3(c)(3) of the Executive Order, send OMB notices of proposed rulemaking and final rules ten days before publication. Such notice would also be given for final major rules where OMB had already reviewed a preliminary regulatory analysis that was substantially the same as the final analysis.

While Commissioner Dixon recognizes the value in apprising the Office of Management and Budget of regulatory proposals throughout the government so that it may identify duplicative, overlapping, and conflicting proposals, as well as those that "are inconsistent with the policies underlying statutes governing agencies other than the issuing agency or with the purposes of [the President's] Order," he believes that Congress' determination to establish the Commission as a regulatory agency independent of the Executive Branch makes it inappropriate for the Commission to submit regulatory analyses and notices of proposed and final rulemaking to that Office for review prior to publication.

Commissioner Dixon believes that the rulemaking process is presently structured in a way that will provide OMB with ample opportunity to comment without infringing upon the independence of the agency.

Commissioner Pertschuk opposes prepublication review by OMB of the Commission's notices of rulemaking and regulatory analyses. He believes the FTC Improvements Act of 1980, through its creation of an elaborate system for legislative oversight of Commission rulemaking, reaffirmed the Congress' determination that the Commission is an agency independent of the Executive Branch. The new Act requires Commission procedures which afford ample opportunities for OMB and other interested parties to provide timely comment on the impact of any proposed rule. In Commissioner Pertschuk's view, however, the Act does not contemplate or permit special opportunities for review by OMB. For these reasons, Commissioner Pertschuk would consider any initiative by the Commission, without authorization from Congress, to provide preferential status to OMB in our rulemakings to be a violation of the principle of independence reaffirmed by Congress in the FTC Improvements Act. For a fuller statement of Commissioner Pertschuk's views on this issue, see his separate statement attached to this letter.

By direction of the Commission.

David A. Clanton
Acting Chairman

Separate Statement
of
Commissioner Pertschuk

I oppose the Administration's request that the Commission submit its notices of rulemaking and regulatory analyses to the Office of Management and Budget for final review prior to their publication.

The last Congress addressed itself specifically to the Commission's rulemaking processes. In so doing it made very clear its intention that all interested parties, including other government agencies, be afforded full opportunity for informal comment to the Commission in response to a mandatory advance notice of proposed rulemaking. It also affirmed, in no uncertain terms, the Commission's special status as an agency independent of the Executive Branch and responsive to the Congress. It did so in two particulars: (1) by requiring a 30 day period for pre-publication review of notices of proposed rulemaking and preliminary regulatory analyses by the oversight committees of Congress; and (2) by establishing an elaborate system of Congressional veto to which all Commission rules henceforth are to be subjected.

Under these procedures, OMB as well as other government agencies will have ample opportunity, along with all other interested parties, to comment both informally, in response to advance notices of proposed rulemaking, and formally, on the record, in our rulemaking proceedings.

As the text of this letter abundantly demonstrates, the Commission's procedures are now structured to afford exhaustive opportunity for OMB to provide the Commission timely counsel on the impact of any proposed rule.

Presidential oversight of FTC rulemaking is neither contemplated by nor consistent with the system for Congressional review of Commission rules. Indeed, if OMB were given special access to the Commission's final notices of rulemaking and final regulatory analyses prior to their publication, it would have an opportunity for advance review that Congress did not even confer upon itself. For these reasons, I would consider any initiative by the Commission, without authorization from Congress, to provide preferential status to the executive branch in our rulemakings to be a violation of the principle of independence reaffirmed by Congress in the FTC Improvements Act. I therefore oppose and would dissent from any action by the Commission to give OMB an opportunity for pre-publication review of the Commission's notices of rulemaking and regulatory analyses.

ICC

Interstate Commerce Commission
Washington, D.C. 20423

OF THE CHAIRMAN

April 1, 1981

The Honorable George Bush
Vice-President
The White House
Washington, D. C.

Dear Mr. Vice President:

In a letter dated March 25, you requested that the Interstate Commerce Commission comply voluntarily with Sections 2 and 3 of Executive Order 12291. Although the Commission is an independent regulatory agency created as an arm of Congress, the Commission intends to comply fully with the spirit of your request to coordinate and reduce the cumulative burden of needless and overly rigid government regulation.

We share the President's objectives. As I am sure you know, the Commission has, in fact, over the past several years, eliminated unnecessary regulation and substantially modified its regulation of the trucking, rail, bus, and water carrier industries in response to changing economic conditions. Substantial deregulation has taken place both administratively and in response to congressional directives.

Current Commission procedures already provide that regulatory action not be undertaken unless the potential benefit to society from the regulation outweigh the potential costs, and the alternative involving the least cost to society is certainly the preferred option.

Furthermore, in connection with every major rule, the Commission considers potential costs and benefits in reaching a decision.

We will continue to publish a semi-annual regulatory agenda.

The path of reducing regulatory burdens, reducing paperwork requirements, and streamlining administrative decision-making is one the Commission has already chosen to follow.

If I can be of any further assistance, please do not hesitate o contact me.

Sincerely,

Marcus Alexis

Marcus Alexis
Acting Chairman

E.F. Hutton & Company Inc. One Battery Park Plaza, New York, N.Y. 10004 212 742 6732

John S. R. Shad
Vice Chairman of the Board
Chairman, Finance Committee

April 9, 1981

The Honorable George Bush
Vice President
The White House
Washington, D.C.

Dear Vice President Bush:

Thanks very much for your letter of March 25th concerning deregulation and Executive Order 12291; which was forwarded to me here as the Chairman-designate of the SEC. As indicated in my April 6th Senate confirmation hearing, I wholeheartedly concur with these objectives and will do my level best to implement them.

Sincerely yours,

John S. R. Shad

JSRS/kd

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

Attachment 5

MEMORANDUM TO DESK OFFICERS

SUBJECT: Contacts with Non-Federal Employees

I would like to restate the policy I have enunciated on the aforementioned topic.

In the discharge of your duties, numerous outside groups will want to meet with you. While there are no legal constraints on such discussions, there are constraints on your time, consequently, I prefer that you not have any verbal communications with such groups. You are encouraged, however, to review any written material they submit to you and the affected agency.

The above guidance is not applicable to your review of paperwork clearances.

Jim J. Tozzi

Attachment 6

REGULATIONS REVIEWED BY OMB UNDER E.O. 12291 AND RETURNED TO AGENCIES: FEBRUARY 17 - JUNE 10, 1981

Number	Title
2	Wind Energy Technology Application Program
14	Federal Financial Participation in the Costs of Cooperative Agreement with Court and Law Enforcement Officials
838	Section 8 Housing Assistance Payments Program - Financing Adjustment for Fair Market Rents
435	Proposed Revisions of Regulations Pertaining to Nonimmigrant "F-1" Students and Schools Approved for their Attendance
702	Formula Grants for Juvenile Justice
656	Use of Alcohol or Drugs
719	Elimination of Nonessential Crewmember Duties
787	Hanggliders and Other Ultralight Vehicles Proposed Operating Requirements
83	Timber Effluent Guidelines for Best Practicable Control (BPT) and Best Conventional Control (BCT) Technology
87	Amendments to General Pretreatment Regulations for Indutrial Sources
532	Revisions to Improved Fuel Economy Labeling
15	Federal Crime Insurance Program
849	Minimum Levels of Financial Responsibility
131	Point Reyes - Farallon Islands National Marine Sanctuary Regulations
132	Channel Islands National Marine Sanctuary Regulation
512	Classification of Anesthesiology Devices (Final Rule)

Number	Title
513	Classification of Physical Medicine Devices (Final Rule)
515	Classification of Ophthalmic Devices - Proposed Rules
516	Classification of Clinical Chemistry and Clinical Toxicology Devices - Proposed Rules
597	Classification of Ear, Nose and Throat Devices Proposed Rules
196	Part 51 - Environmental Criteria and Standards - Projects in Designated Clear Zones
197	Part 200 - Change in Provisions and Characteristics of Dibentures, Book Entry - Proposed Rule
198	Part 200 - Introduction - Subpart S - Minimum Property Standards - Proposed Addition of Water Conservation Requirements to HUD
199	Part 885 - Section 202 - Loans for Housing for the Elderly or Handicapped - Proposed Rule
200	Part 51 - Environmental Criteria and Standards, Projects Near Hazardous Operations
201	Subpart 200 - Subpart S - Change to HUD 4900.1, MPS for 1 & 2-Family Dwellings - Proposed Rule
202	Part 804 - Low Rent Housing Home Ownership Opportunities - 805 - Indian Housing and Part 841, Public Housing Development Phase
203	Part 200 - Subpart S - Introduction, Minimum Property Standards, Proposed Revision of Use of Materials Bulletin No. 78A for PE, BAS, Vinyl Chloride
204	Part 16 - Privacy Act of 1974 - Proposed Rule
205	Part 200 - Use of Materials Bulletin No. 79, Acrylonitrile-Butadiene
206	Part 570 - Grant Administration Requirement for Use of Escrow Accounts for Property Rehabilitation Loans and Grants in CDBG - Proposed Rule