

Review

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PERSPECTIVES ON A
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FEDERAL AGENCIES

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ARTICLE

RESTRAINING THE REGULATORS: LEGAL PERSPECTIVES ON A REGULATORY BUDGET FOR FEDERAL AGENCIES*

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The cry for regulatory reform presently resounds loud enough to be likely to bring about significant political action. One potential form such action could take is the development of regulatory budget legislation. Senate Bill 51 and House Bill 76, both introduced in the ninety-sixth Congress, were identical regulatory budget bills calling for the gradual imposition of limits on the costs of compliance that federal regulatory agencies could impose on the non-federal sector. This novel means of indirectly limiting federal regulators has been the source of much political discussion but little or no legal analysis.

In this Article, Messrs. Wood, Laws, and Breen provide a framework for legal analysis by describing some of the possible features of a regulatory budget and some of the conceptual problems involved in developing one. They present a series of theoretical options for splitting regulatory budget responsibility between the legislative and the executive branches, and suggest a design which they assert will foreclose a number of potential constitutional problems. Finally, the authors warn of serious potential conflicts between a regulatory budget and the Congressional Budget and Impoundment Control Act of 1974, and recommend that Congress solve such problems in any proposed legislation that may be designed to produce a regulatory budget.

Introduction

Federal regulatory agencies¹ have come under attack. Their critics have accused them of catering to special interests, stifling

* Opinions expressed in this article are those held by the authors individually. This article does not purport to reflect the views of any governmental department or agency.

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¹ For purposes of this Article, the term "regulatory agencies" generally includes those executive or independent administrative agencies responsible for making and enforcing rules to govern economic activities of the non-federal sectors. For example, regulatory agencies include the Occupational Safety and Health Administration, the Environmental Protection Agency, and the Securities and Exchange Commission. On the other hand, the term "regulatory agencies" does *not* include the federal courts, the Congress, or the Executive Office of the President. In the course of implementing

competition, and mandating wasteful or unnecessary expenditures.² In fact, "regulatory reform" has become a major concern of politicians and academicians alike.³

There is a large federal regulatory bureaucracy.⁴ That bureaucracy imposes very significant economic costs on the American economy. But how significant are these costs? There is no simple answer. Costs can be measured simply in terms of the level of net outlays of the regulatory agencies, or in terms of the direct and indirect economic burdens agencies impose on the sectors they regulate. Measured by net outlays, some twelve regulatory agencies together spent over \$8.53 billion in fiscal year 1979 alone.⁵ Estimates of the burdens imposed on

regulatory reform, one possible approach in defining the scope of a specific proposal would be to list the agencies to be covered. *See, e.g.*, The Regulatory Reform Act of 1977, S. 600, 95th Cong., 1st Sess. (1977), for a list of major federal agencies which might be considered "regulatory."

² *See, e.g.*, R. NOLL, REFORMING REGULATION: AN EVALUATION OF THE ASH COUNCIL PROPOSALS 100 (1971); *The Federal Paperwork Burden, Hearings Before the Subcomm. on Government Regulations of the Senate Select Comm. on Small Business*, 92d Cong., 2d Sess., and 93d Cong., 1st Sess. 461 (1972-1973); *Commission on Federal Paperwork, Hearings Before a Subcomm. of the House Comm. on Gov't Operations on H.R. 16424*, 93d Cong., 2d Sess. 34 (1974); S. PELTZMAN, REGULATION OF PHARMACEUTICAL INNOVATION (1974); 3 SENATE COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., 1ST SESS., STUDY ON FEDERAL REGULATION: PUBLIC PARTICIPATION IN REGULATORY AGENCY PROCEEDINGS 16-19 (Comm. Print 1977); U.S. GENERAL ACCOUNTING OFFICE, LOWER AIRLINE COSTS PER PASSENGER ARE POSSIBLE IN THE UNITED STATES AND COULD RESULT IN LOWER FARES ii-iii (1977).

³ *Cf.* AMERICAN ENTERPRISE INSTITUTE, THE CANDIDATES 1980: WHERE THEY STAND 66-67 (1980) (Ronald Reagan); B. MITNICK, THE POLITICAL ECONOMY OF REGULATION (1980).

⁴ The Congressional Budget Office estimated that in 1976 there were at least 84,000 employees working for regulatory agencies. U.S. CONGRESSIONAL BUDGET OFFICE, THE NUMBER OF FEDERAL EMPLOYEES ENGAGED IN REGULATORY ACTIVITIES at v (1976).

⁵ U.S. DEP'T. OF THE TREASURY, DOC. NO. 3278, TREASURY COMBINED STATEMENT OF RECEIPTS, EXPENDITURES AND BALANCES OF THE UNITED STATES GOVERNMENT FOR THE FISCAL YEAR ENDED SEPTEMBER 30, 1977 (1979). The twelve regulatory agencies include the Occupational Safety and Health Administration, the Civil Aeronautics Board, the Commodity Futures Trading Commission, the Securities and Exchange Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Nuclear Regulatory Commission, the Environmental Protection Agency, and the Federal Aviation Administration.

However, even the seemingly straightforward measure of tallying net outlays has ambiguities. Is it appropriate to include all of an agency's net outlays, or only those most directly related to regulatory programs? Some agencies, for example, sponsor public awareness advertising campaigns, or fund research. What about regulatory expenses of agencies not ordinarily thought of as regulatory? The Army Corps of Engineers, for example, is well known for its civil works projects and for its military preparedness role, but it also regulates harbors and navigable rivers. Questions such as these make even the "mechanical" tallying of agency expenditures dependent upon

the non-federal sector, however, range from \$10 billion to \$130 billion annually.⁶ These latter costs are the ones most commentators consider to be the greater evil.

This is not to say that all regulation is bad or unnecessary. Regulation is a tricky business: we want some of it, but not too much. For example, we want protection from exposure to thalidomide, but we do not want restrictions on access to safe and effective cures for cancer. In some theoretical sense, the optimal level of regulation is that amount just sufficient to balance marginal social costs and benefits, at the desired level of national economic activity. The practical calculus, however, is performed much more crudely.⁷

At present, the federal government has no mechanisms for consciously limiting the burdens which its regulatory agencies impose, or for setting priorities among them. Presently, a typical federal regulatory agency can write regulations or promulgate rules with only a partial understanding of the level of economic burdens they impose, and with little or no regard of similar costs imposed on the same groups of regulated industries by other federal agencies. Yet resources are finite. Therefore, unless the federal government has some efficient way of controlling the burdens it imposes through its regulatory bureaucracy, massive economic dislocation, and all the human misery it entails, ultimately may result.

Past Presidents have attempted to control the structure and effects of federal regulation by both institutional and informal means.⁸ Within the executive branch, there are now three well-established institutional mechanisms designed to monitor implicit federal regulatory costs:

nice definitions and interpretations. Therefore, the total cited in the text should be treated as an approximation.

⁶ 1 SENATE COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., 1ST SESS., STUDY ON FEDERAL REGULATION: THE REGULATORY APPOINTMENTS PROCESS, at III (Comm. Print 1977).

Regulation-imposed costs include reporting costs (e.g., additional costs of filling out forms and filing reports), compliance costs (e.g., costs required to purchase and install new capital equipment), and deadweight economic losses (e.g., implicit costs due to mandated anti-competitive or inefficient practices). Whatever the final incidence of these costs, significant costs probably are borne in the short run by each actor in the non-federal sector: private businesses, state and local governments, non-profit organizations, and individuals as consumers or wage earners.

⁷ See note 28 *infra*.

⁸ See generally DeMuth, *Constraining Regulatory Costs, Part I: The White House Review Programs*, REGULATION, Jan.-Feb., 1980, at 13.

(1) The Regulatory Council — composed of Cabinet-level officials — which sets policy on major issues relevant to multiple regulatory agencies;⁹

(2) The Council on Wage and Price Stability and the Regulatory Analysis Review Group — in the Executive Office of the President — which selectively reviews proposed regulations;¹⁰ and

(3) Executive Order No. 12,044,¹¹ which requires each covered agency¹² to analyze the benefits, costs, and alternatives associated with its major regulations.

These mechanisms, however, tend to provide only a narrow, case-by-case review of regulatory initiatives, in which the perspective of the proponent agency dominates.

For example, section 3 of Executive Order No. 12,044 requires every executive branch agency (i.e., excepting the independent regulatory agencies) to prepare a "regulatory analysis" for any proposed regulations identified as likely to have major economic consequences.¹³

The order prescribes the following guidelines for identifying those regulations which require regulatory analyses:

(a) Criteria. Agency heads shall establish criteria for determining which regulations require regulatory analyses. The criteria established shall:

(1) ensure that regulatory analyses are performed for all regulations which will result in (a) an annual effect on the economy of \$100 million or more; or (b) a major increase in costs or prices for individual industries, levels of government or geographic regions; and

(2) provide that in the agency head's discretion, reg-

⁹ See UNITED STATES GOVERNMENT MANUAL 1980-81, at 724 (1980).

¹⁰ See *id.* at 108-09; Kelman, *Occupational Safety and Health Administration in THE POLITICS OF REGULATION* 256 (J.Q. Wilson ed. 1980).

¹¹ Exec. Order No. 12,044, 3 C.F.R. 154 (1978) extended to April 30, 1981 by Exec. Order No. 12,221, 45 Fed. Reg. 44,249 (1980) [hereinafter cited as Exec. Order No. 12,044].

¹² Covered agencies include both those under formal jurisdiction of the executive departments and those commonly known as the independent agencies. However, the President's unilateral authority over the independent regulatory agencies is narrowly circumscribed. Therefore, where executive orders are issued by the President, their applicability to independent regulatory commissions generally is intended to be advisory only. Executive Order No. 12,044 does not apply to independent agencies. Exec. Order No. 12,044, *supra*, note 11, at § 6(a)(5).

¹³ *Id.*

ulatory analysis may be completed on any proposed regulation.¹⁴

Agencies subject to the order must establish procedures for any regulations which require a regulatory analysis:

(b) Procedures. Agency heads shall establish procedures for developing the regulatory analysis and obtaining public comment.

(1) Each regulatory analysis shall contain a succinct statement of the problem; a description of the major alternative ways of dealing with the problem that were considered by the agency; an analysis of the economic consequences of each of these alternatives and a detailed explanation of the reasons for choosing one alternative over the others.

(2) Agencies shall include in their public notice of proposed rules an explanation of the regulatory approach that has been selected or is favored and a short description of the other alternatives considered. A statement of how the public may obtain a copy of the draft regulatory analysis shall also be included.

(3) Agencies shall prepare a final regulatory analysis to be made available when the final regulations are published.¹⁵

Because it applies only to very substantial regulatory agency action and because it leaves the analysis to be performed by the agency itself, Executive Order No. 12,044 is but a very modest check on the promulgation of federal regulations.

Relatedly, the President and the Executive Office of the President have been able to exert some restraining influence through their informal powers of control, including their ability to influence budgets, through the President's power to dismiss his appointees, through the Executive Office's ability to review and comment on proposed regulations, and through the Office's position, which allows it to mediate or arbitrate disagreements among the various federal agencies or among federal agencies and non-federal interest groups.¹⁶ As an example of the latter,

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See also text following note 50 and preceding note 51 *infra*. President Ford drew attention to the magnitude of federal regulation, perhaps with the intention of alerting Congress or the public to comment upon or to act to check agency action. See, e.g., Exec. Order No. 11,821, 39 Fed. Reg. 41,501 (1974) (expired) as modified by Exec.

consider the strict regulations that were initially proposed to limit cotton-dust air pollution in the textile industry. Those regulations were toned down after negotiations among a number of federal agencies, the industry, and workers' organizations.¹⁷ Many of those negotiations were coordinated and mediated by the President's Office of Management and Budget (OMB).¹⁸ Of course, the OMB must be circumspect when it attempts to influence the substantive content of proposed regulations; otherwise, it could be criticized or subjected to lawsuits alleging illegal interference with rulemaking authority vested in other agency heads by statute.¹⁹

Such existing controls do not provide at least three functional restraints:

- (1) a set of priorities for imposing costs, both within and among federal regulatory programs;
- (2) a mechanism to force consideration of alternative uses for those resources for the benefit of society; and
- (3) a measure of and a limit to the total and cumulative burden that may be imposed on each affected industry or sector.²⁰

A regulatory budget, along with related procedures, could be developed to provide these restraints.

This Article describes what a regulatory budget is, investigates which mix of legislative and executive functions in a regulatory budgetary process would most surely pass constitutional muster, and considers how a regulatory budget might interact with existing legislation, specifically, the Congressional Budget and Impoundment Control Act of 1974.

Order No. 11,949, 42 Fed. Reg. 1017 (1977) (expired), which required economic impact statements when major new regulations were proposed.

¹⁷ See W. GELLHORN, C. BYSE, & P. STRAUSS, *ADMINISTRATIVE LAW* 136-37 (7th ed. 1979).

¹⁸ See *id.*

¹⁹ The legal standards that govern the manner and timing by which a President or his or her appointees may attempt to persuade an executive branch official to exercise his or her discretion are currently the subject of significant debate in scholarly legal publications and in the courts. See, e.g., Bruff, *Presidential Power and Administrative Rulemaking*, 88 *YALE L.J.* 451 (1979); *In re Permanent Surface Mining Regulation Litigation*, No. 79-1144 (D.D.C., filed May 16, 1980). See also United States Department of Justice Memorandum Opinion written in connection with the *In re Permanent Surface Mining* case by Larry A. Hammond, Acting Assistant Attorney General, Office of Legal Counsel (January 17, 1979) (on file at the HARVARD JOURNAL OF LEGISLATION.)

²⁰ See *Regulatory Budgeting and the Need for Cost-Effectiveness in the Regulatory Process*, Hearing Before the Joint Economic Comm., 96th Cong., 1st Sess. 3 (1979) (statement of George C. Eads, Member of the Council of Economic Advisors).

I. WHAT IS A REGULATORY BUDGET?

A regulatory budget would set ceilings on the costs that regulatory agencies could impose on the non-federal sector by means of their power to promulgate and enforce regulations, and would coordinate those ceilings. A regulatory budget usefully can be analogized to the federal government's existing fiscal budget. Each was criticized as an untested innovation when first proposed.²¹ The fiscal budget provides accountability by equalizing federal expenditures and revenues (including receipts from debt issues). Similarly, proponents claim that a regulatory budget would provide accountability of the regulatory agencies by equalizing expenditures mandated by federal regulations and available national resources.²²

A regulatory budget could be designed and implemented in any of several possible forms. One form would establish an overall ceiling on the "total costs" that all federal regulatory agencies could impose on the non-federal sector every year. A related form would establish an overall ceiling for all agencies and individual ceilings for each covered department and agency. A third form would establish an overall ceiling, a ceiling for each covered department and agency, and a ceiling on particular programs, with special attention to overlaps among the different departments and agencies. Any of these forms might also break down overall ceilings into component categories of reporting costs, compliance costs, and deadweight economic losses.²³

Certain federal agencies or certain types of regulations logically may be excluded from the regulatory budget. For example, regulations governing internal government operations, such as personnel matters, procurement, and agency organizational procedure and practice should not be covered because they do not involve direct regulation of the non-federal sector.²⁴ Moreover,

²¹ Cf. *id.* at 6-8.

²² Interview with James J. Tozzi, Director of the Office of Regulatory and Information Policy, Office of Management and Budget, in Washington, D.C. (July, 1979); Mayer, *Tozzi's Task: To Turn Back Clock on Ineffective Rules*, Wash. Star, March 30, 1980, § A, at 14.

²³ See note 28 and accompanying text *infra* for a discussion of the complexities involved in measuring these costs.

²⁴ While federal contracting processes may include detailed procedures, a regulatory budget would not sensibly limit the costs to bidders of following those procedures, because the bids themselves, over time, would include the costs of complying with the

federal policymakers may decide to exempt certain agencies because of practical considerations involving the nature of their mandate. For example, the Internal Revenue Service and the federal law enforcement agencies may be excluded from general regulatory budget constraints because the costs they impose are fundamental to the structure of the national economy and because they do not regulate purely economic activities. This Article will assume, however, that the great majority of federal regulations intended to control the economic decisions of actors in the non-federal sector eventually could become subject to the regulatory budget.

If a regulatory budget is to be developed, Congress or the agencies themselves must develop estimates of how much regulation is costing the economy now, and a methodology for predicting the probable costs regulation will impose in the future. Understandably, proponents and opponents of the regulatory budget concept dispute the adequacy of the data base which must be, and has not yet been, generated before implementing a regulatory budget. Data collection in certain areas has been going on quietly for a number of years. For example, for more than eight years the Bureau of Economic Analysis and the Bureau of the Census, two agencies of the Department of Commerce, have been collecting data from the private sector on the costs of complying with federal environmental laws and regulations;²⁵ the President's Council on Environmental Quality and the Environmental Protection Agency also have conducted systematic studies on federal environmental regulatory compliance costs.²⁶ Few other areas of the economy, however, have been analyzed as carefully.

Therefore, the regulatory budget, if adopted, may require incremental implementation, beginning with an "informational

additional procedures, or because these costs would be avoided by declining to contract with the federal government. The distinction here is between government as a sovereignty and government as a purchaser of goods and services.

²⁵ The Bureau of the Census and the Bureau of Economic Analysis have compiled cost data for environmental regulations since 1972. These data and analyses thereof have been published periodically in the U.S. DEPT. OF COMMERCE, *SURVEY OF CURRENT BUSINESS*. See, e.g., U.S. DEPT. OF COMMERCE, *Pollution Abatement and Control Expenditures in Constant Dollars*, *SURVEY OF CURRENT BUSINESS* (Feb., 1979).

²⁶ See, e.g., *Economics*, in ENVIRONMENTAL QUALITY: THE TENTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY, ch. 12 (1979) and sources cited therein.

regulatory budget" that would require every federal regulatory agency to develop a system for estimating the reporting costs, compliance costs, and deadweight economic losses of its regulations on the various sectors of the economy.²⁷ Only if and when these cost-reporting systems have been developed can a working regulatory budget be implemented. The initial regulatory budget cost estimates would be very rough. Measurement of indirect costs would require estimation of many economic parameters, such as the elasticities of supply and demand in each of many markets. Therefore, in the foreseeable future, only direct costs,²⁸ i.e., reporting costs and compliance costs, could be included in a regulatory budget.

27 Alternatively, because each agency may be self-interested in overestimating or underestimating present and future compliance costs, and because certain agencies may be better equipped for data gathering than others, an "independent" agency (such as the General Accounting Office) might be designated to develop these initial estimates.

28 Implementation of even an informational regulatory budget could not proceed before government accountants and economists resolve a number of difficult questions concerning precisely which of the various costs imposed by regulations would be counted as "regulatory compliance costs" for purposes of the regulatory budget, and how those costs should be measured. The most easily measured costs are those which regulations impose directly, including reporting costs and compliance costs. Nevertheless, regulations also impose large indirect costs on the non-federal sector, many of which can be best described as deadweight economic losses.

Indirect costs of regulation result from intentional or unintentional distortion of free markets, preventing the markets from reaching optimal levels of price and output. Indirect costs may appear as reductions in productivity or economic growth, or as increases in the inflation rate. They also may appear as improper governmental conduct and restraints on freedom from governmental control. Obviously, such indirect costs of regulation are difficult to quantify.

Exactly how such direct and indirect costs eventually are borne by shareholders, taxpayers, consumers, wage earners, or others is far from clear. The distribution of such costs could be estimated only after the estimation of economic parameters such as the elasticities of supply and demand for each particular industry and product, and after development of sophisticated econometric models. Consequently, implementation of a workable regulatory budget in the near future can occur only if regulatory compliance costs are defined to include the direct costs, but *not* the indirect costs, imposed by federal regulation.

This fact does not necessarily raise a serious objection to implementation of a full regulatory budget at some time. Many agencies may impose indirect costs through regulation which are more or less proportional to the direct costs of those same regulations. Of course, this is an assumption which must be verified, and the assumption will be less true of some economic regulatory agencies, such as the Interstate Commerce Commission, which impose indirect costs on the economy out of proportion to their associated direct costs. Knowing this at the outset, rough adjustments might be made in the allowable direct costs or in the multiplier used to gross up direct costs to direct plus indirect costs, while awaiting more precise measures of indirect costs. In any case, after a trial period, during which only an *informational* regulatory budget would be in force, a *mandatory* regulatory budget, limited to direct compliance costs, could be applied to many of the federal regulatory agencies.

Several specific proposals for the implementation of a broad regulatory budget have been developed. The most widely circulated of these proposals is Senate Bill 51,²⁹ sponsored by Senator Lloyd Bentsen of Texas.

Senate Bill 51 would initiate the process of developing a regulatory budget for virtually every agency of the executive branch. Only the Congress, the federal courts, the government of the District of Columbia, certain military authorities, and a few other entities not normally considered as federal executive agencies would be excluded from coverage.³⁰ The bill would include in its coverage practically all of the rules and regulations promulgated by covered agencies. "Rule" is defined as it is in the federal Administrative Procedure Act, which is incorporated by reference:

"rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.³¹

The bill would establish a "Business Advisory Council" consisting of between 25 and 50 business leaders, drawn from each

²⁹ The Regulatory Budget Act of 1979, S. 51, 96th Cong., 1st Sess. (1979). Representative Clarence J. Brown introduced an identical bill in the House: H.R. 76, 96th Cong., 1st Sess. (1979). The declared intent of S. 51 is to reduce the total costs of compliance with federal rules and regulations by 5 percent per year for each of the first five years of the mandatory budget. S. 51, § 1101(b).

Testifying before the Joint Economic Committee, James T. McIntyre, Jr., Director of the Office of Management and Budget (OMB), agreed that federal regulation should be performed as efficiently as possible. Although he stated that the Carter Administration did not believe that the government could measure the costs and benefits of regulations with sufficient precision to implement S. 51, he also stated that the OMB has been working with a number of agencies to develop the methodology needed to estimate regulatory compliance costs accurately and reliably. See *1980 Economic Report of the President: Hearings before the Joint Economic Committee*, 96th Cong. 2d Sess., pt. 1 (1980). Moreover, OMB's Office of Regulatory and Information Policy has sponsored an initial feasibility study to explore the possibilities of a regulatory budget and has drafted a bill designated as the "Regulatory Cost Accounting Act," which would establish an "informational," non-mandatory version of the regulatory budget for the executive branch. See Demuth, *Constraining Regulatory Costs (Part II): The Regulatory Budget*, REGULATION, Mar.-April, 1980, at 29, 30. Federal regulatory agencies, however, such as the Environmental Protection Agency, have expressed strong opposition to the draft OMB bill. See, e.g., *EPA Fears Proposed to Tally Costs Will Result in "Regulatory Budget"*, II ENVIR. REP. (BNA) 38 (Current Developments May 9, 1980); cf. Mayer, *Tozzi's Task*, note 22 *supra*.

³⁰ S. 51, 96th Cong., 1st Sess. § 1108(1979); cf. 5 U.S.C. § 551(1) (1976).

³¹ 5 U.S.C. § 551(4) (1976).

major industrial and commercial sector in the United States, to work with the President and the OMB in establishing a structure for the regulatory budget. The President, after consulting with the Council, would determine which classes of regulations would actually be covered by a final regulatory budget, and would develop methods to estimate regulatory compliance costs.³² "Compliance costs" are defined in the bill to include all costs imposed on the non-federal sector as a result of complying with rules or regulations promulgated by a federal agency, such as additional personnel costs, capital costs, rent, interest, and state and local taxes, due to specific rules demanding extra data collection and recordkeeping, preparation and submission of forms, purchase of necessary equipment, and change in the quality or mix of raw materials or output.³³ Thus, the bill generally attempts to avoid the thorny problems involved in measuring the various indirect costs which regulations impose by omitting reference to the deadweight economic losses caused by federal regulations.

Under Senate Bill 51, each federal agency would be required to provide annual reports to the President, the Congress, and the Comptroller General, stating (1) the regulatory compliance costs imposed by that agency on the non-federal sector during the preceding fiscal year; (2) a comparison of those compliance costs with the regulatory budget established by Congress for the agency; (3) a full explanation for any excess of compliance costs over the agency's congressionally established regulatory budget for that fiscal year; and, (4) the estimated compliance costs for the current and the succeeding fiscal year for all existing and anticipated agency regulations.³⁴ The Comptroller General would evaluate such agency reports and inform Congress of inadequacies or errors.³⁵ For every fiscal year, the President would recommend to Congress a regulatory budget for each agency at the same time he submits his fiscal budget to Congress. If the President's proposed regulatory budget for an agency were lower than the estimated total compliance costs

32 S. 51, 96th Cong., 1st Sess. § 1102 (1979).

33 *Id.* at § 1108.

34 *Id.*

35 *Id.* at § 1103.

submitted by the agency, the President, in the Budget Message, would have to recommend specific actions which could be taken during the fiscal year to reduce compliance costs to the level mandated by the regulatory budget.³⁶ On or before September 15 of each year, Congress would be required to complete action on a concurrent resolution to establish a regulatory budget ceiling for every agency, i.e., setting the maximum total compliance costs for all that agency's regulations during the coming fiscal year. The Committees on the Budget of the House and Senate would set these regulatory budget ceilings after considering the estimates of the agencies, the recommendations of the President, and the views of the congressional standing committees, the Joint Economic Committee, and the Joint Committee on Internal Revenue Taxation.³⁷

Senate Bill 51 does not explicitly provide a mechanism for enforcing the agencies' regulatory budget ceilings, or for calling to account agencies which have imposed compliance costs on the non-federal sector in excess of the ceilings established by Congress' concurrent resolution. This is hardly surprising, since a single enforcement mechanism might not function well in every case. Here, Congress would be free to tailor remedies to account for the perceived culpability of the agency's exceeding its regulatory budget.

To coordinate the concept of regulatory budgeting with future legislation, Senate Bill 51 also requires each congressional committee to estimate the compliance costs that would be imposed by each bill or joint resolution reported upon after the effective date of the regulatory budget bill. Any House or Senate bill, resolution, or amendment which would have the effect of exceeding an agency's regulatory budget ceiling (if enacted) would be deemed to be out of order by Senate Bill 51 unless the House or Senate grants a waiver.³⁸ Finally, the OMB periodically would issue reports on pending legislation, estimating compliance costs and comparing them with the enforcing agencies' respective regulatory budgets.³⁹

³⁶ *Id.* at § 1104.

³⁷ *Id.* at § 1105.

³⁸ *Id.* at § 1107.

³⁹ *Id.* at § 1106.

Senate Bill 51 shows how regulatory budget legislation can dovetail existing, statutorily defined concepts and procedures into a full plan to control federal agencies. However, the bill also illustrates the additional burdens a regulatory budget may impose on Congress' own decision-making and bookkeeping machinery, as well as on the data collection and cost estimation facilities of existing management and regulatory agencies.

II. AN INITIAL LEGAL ANALYSIS

No matter how attractive the concept of a federal regulatory budget may be at this stage, the idea cannot be implemented rationally until a number of legal questions have been answered. These questions concern the division of power between the executive and legislative branches of the federal government.

The fundamental legal issue here is, assuming that a regulatory budget is desirable, which branch of government — Congress or the President — has the constitutional authority to compel its implementation, and in what form?

A regulatory budget could be fashioned in a number of different ways, with more or less of the initiative coming from the President. To keep the analysis of separation of powers manageable, this Article considers four options for implementing a regulatory budget, presented in order of a decreasing presidential role and an increasing congressional one. Specifically, Option 1 is based on a bold, unilateral assertion of presidential power to establish a regulatory budget. Option 2 is based on an initial authorization to the President by Congress to implement a regulatory budget, and in which Congress would retain some variable degree of control. Option 3 is the same as Option 2, but it would include a "one-house congressional veto." Finally, Option 4 is based on a full fiscal-budget-type process, involving both the President and Congress, and in which Congress would retain very substantial power to fix the levels of non-federal sector costs among — and perhaps within — regulatory agencies' programs. The following subsections will describe and discuss these alternative approaches to implementing a regulatory budget.

A. *Option 1: The Executive Order and Other Unilateral Executive Action*

The President could attempt to implement a regulatory budget unilaterally, either for the executive branch as a whole or for selected federal regulatory agencies, through the use of executive orders or through informal executive action.⁴⁰ However, he or she could not effect the full range of objectives of a regulatory budget in this fashion for three reasons. First, statutes authorizing agencies to promulgate regulations generally vest discretionary authority in the agency head, not directly in the President.⁴¹ The Supreme Court has held that when a federal officer is legally vested with discretionary authority, he or she may not be directed in the use of that discretion by a superior officer.⁴² In *United States ex rel. Accardi v. Shaughnessy*, the Supreme Court ruled: "If the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience."⁴³ The Court then held that the Attorney General could not direct the use of a subordinate's discretion, even where the Attorney General had himself granted the discretion to the subordinate and retained ultimate review of the decision for himself. Therefore, the President would have even less of a claim under unilateral action to establish a regulatory budget than did the Attorney General in *Shaughnessy*: since the President has not delegated authority to the agency head, and since he or she ordinarily has no right of ultimate review under the legislation delegating responsibility to the agency head, the President has even less power to control the discretion delegated to the agency head than if he or she had delegated the authority personally.

Second, the establishment of a federal regulatory budget by the President would, perforce, set priorities among agencies in their relative abilities to impose costs on the private sector

⁴⁰ See text accompanying notes 8 to 20 *supra*.

⁴¹ E.g., Occupational Safety and Health Act of 1970, Pub.L.No.91-596, § 6, 84 Stat. 1590 (1970) (amended 1974, 1978) (Secretary of Labor); Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 371 (1976) (then-Secretary of Health, Education, and Welfare).

⁴² *Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

⁴³ *Id.* at 266-67.

through regulations.⁴⁴ To stay within that budget, some agencies might have to forego enforcement of certain regulatory programs that were mandated by Congress. Since a regulatory budget would result in systematic enforcement of some laws, partial enforcement of others, and non-enforcement of still others, its operation would amount to executive lawmaking, a power not granted to the President by the federal Constitution.⁴⁵

Third, the concept of a regulatory budget is analogous to a presidential impoundment of funds, since the regulatory budget might prevent the full implementation of programs mandated by Congress. "Impoundment" results from an executive determination not to expend funds appropriated by Congress. Federal courts consistently have held that for the Executive to impound funds, he or she must have the permission of Congress.⁴⁶ In *Kennedy v. Mathews*,⁴⁷ the federal district court for the District of Columbia examined an appropriation of \$187.5 million to the Department of Health, Education, and Welfare. The appropriation act did not authorize the executive branch to prohibit the expenditure of the appropriated funds, and "since the executive branch [lacked] any inherent power to impound funds," the court granted plaintiffs injunctive relief, forcing all funds to be made available.⁴⁸ The court continued: "*There is no longer any doubt that in the absence of express Congressional authorization to withhold funds appropriated for implementation of a legislative program the executive branch must spend all funds.*"⁴⁹ (Emphasis added.)

If the President were to attempt to implement the regulatory budget by unilateral executive action, i.e., without specific congressional authorization, the federal courts may draw the analogy to fiscal impoundment and void the regulatory budget restrictions on agency action.⁵⁰

⁴⁴ *But see* text following note 98 and accompanying note 99 *infra*.

⁴⁵ U.S. CONST. art. I, § 1. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁴⁶ *E.g.*, *Train v. City of New York*, 420 U.S. 35 (1975); *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838).

⁴⁷ 413 F. Supp. 1240 (D.D.C. 1976).

⁴⁸ *Id.* at 1245.

⁴⁹ *Id.* at 1245. *See also* *Train v. City of New York*, 420 U.S. 35 (1975).

⁵⁰ *See* text accompanying notes 91 to 105 *infra*, for a discussion of regulatory budgets and legislatively imposed restrictions on impoundments codified in the Congressional Budget and Impoundment Control Act of 1974.

Even though the President does not have authority to make a full regulatory budget legally binding throughout the executive branch, however, he or she may still be able to accomplish some of the objectives of a regulatory budget by using existing informal presidential powers. For example, the President or the OMB might be able to persuade the head of an executive agency to use the agency head's "discretion" to modify the substance of a regulation, or to delay or cease promulgation or enforcement of it. The President and the Executive Office of the President are able to exert great influence over executive branch agency heads through, *inter alia*, budgetary and political controls and the President's power to dismiss executive branch appointees with or without cause.⁵¹

Moreover, even though the President has no legal authority unilaterally to require agencies to implement regulatory budgets, and even though informal efforts at persuasion cannot achieve all the results expected from a regulatory budget, it might be argued that Congress has previously granted the President a discretionary authority broad enough to allow presidential implementation of the regulatory budget in the Reorganization Act of 1977 (the Act).⁵² That statute gave the President broad authority to reorganize the federal executive branch until April 6, 1980, subject to possible veto by either house of Congress. However, the Act specified that "no enforcement function or statutory program shall be abolished."⁵³ Because a regulatory budget might effectively limit or abolish those enforcement functions which exceed a programmatic or overall agency regulatory budget ceiling, the Act would have forbidden the use of that statute to establish a regulatory budget, even if the President had acted before April 6, 1980. No other statute appears to grant the President sufficient powers today to implement a regulatory budget. Therefore, a full regulatory budget will require some affirmative grant of power from Congress.

⁵¹ See, e.g., *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Myers v. United States*, 272 U.S. 52 (1926); *Ex Parte Hennen*, 38 U.S. (Pet.) 230 (1839).

⁵² 5 U.S.C. §§ 901-912 (Supp. II 1978). Similar grants of authority have been enacted since at least 1932. Pub. L. No. 72-212, tit. IV, 47 Stat. 382 (1932).

⁵³ 5 U.S.C. § 903(a)(2) (Supp. II 1978).

B. Option 2: Congressionally Authorized Executive Action

Under the second major option, Congress would enact legislation designating which federal agencies are to be covered by regulatory budgets, and establishing a process by which Congress would set the overall ceiling for the regulatory budgets of all covered agencies combined. Under this option, however, the President could determine the specific regulatory budget ceiling for each covered federal agency. Alternatively, the basic legislation could allow the President to set both the overall ceiling for the government-wide regulatory budget as well as the specific ceilings for each agency subjected to a regulatory budget by Congress. Or, the legislation could vest nearly absolute power in the President by allowing him or her to designate which federal departments and agencies would be subject to regulatory budgets, as well as allowing him or her to set the regulatory budget ceilings.

In any of these possible configurations, Congress would be delegating an extraordinary amount of authority to the President. Consequently, even though the Supreme Court has not voided as unconstitutional any congressional delegation of authority to the Executive since 1935,⁵⁴ there is still some possibility that such a sweeping delegation might be declared unconstitutional under the delegation doctrine. On the other hand, that possibility can be minimized by special care in drafting the specific language of the enabling legislation.

A statute adopting any of the possible variations of congressionally authorized executive action suggested above would effectively delegate to the President authority to determine which congressionally mandated programs would be implemented by regulation, and to what extent they would be implemented. In contrast, the "normal" congressional delegation of legislative authority to the Executive merely authorizes the President or the head of the federal department or agency to implement a more or less detailed legislative design through regulations or other mechanisms. In other words, the enabling

⁵⁴ *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

legislation which would authorize the President to establish a regulatory budget, without additional legislative oversight or guidance, essentially would allow the executive branch to overrule or limit select congressional decisions at the implementation level. This should be distinguished from the normal situation in which the President or agency head is authorized merely to supplement or implement legislative action. It might be argued that regulatory budgetary authority thus is different *in kind* from present grants of power encountered in ordinary delegation decisions. Assuming that Congress would adopt the Option 2 approach only if it wanted to give the President considerable flexibility in setting a regulatory budget for each affected federal agency, Congress would provide few standards by which the President's discretionary actions could be limited within constitutional bounds.⁵⁵ Since the problems with the delegation doctrine in an Option 2 arrangement would be very serious, they deserve further elaboration.

In hundreds of cases decided between the mid-19th century and the present day, the Supreme Court has upheld as constitutional significant and broadly worded congressional delegations of legislative authority to the President, and to executive or independent agencies. In all those years, the Supreme Court has voided similar congressional delegations in only two instances. The cutting edge ostensibly honed in most of these cases is that Congress must specify "meaningful standards" or an "intelligible principle" to guide the Executive in using delegated power.⁵⁶

In 1935, the Supreme Court held unconstitutional two statutory delegations of authority to federal officials. In *Panama Refining Co. v. Ryan*,⁵⁷ the Supreme Court held unconstitutional a provision of the National Industrial Recovery Act (NIRA) which delegated to the President authority to prohibit shipment in interstate commerce of oil produced in violation of state law.

⁵⁵ Cf. U.S. CONST. art. I, § 1 ("all legislative powers herein granted shall be vested in a Congress of the United States"); *Id.* art. III (powers of the Executive).

⁵⁶ See, e.g., *American Power & Light Co. v. S.E.C.*, 329 U.S. 90 (1946); *Opp Cotton Mills v. Adm'r*, 312 U.S. 126 (1941). See generally I K. DAVIS, ADMINISTRATIVE LAW TREATISE ch. 3, § 3.9 (2d ed. 1978).

⁵⁷ 293 U.S. 388 (1935). (However, the act in question provided for criminal penalties under circumstances obscuring the receipt of actual notice by potential defendants. This may have influenced the Court's holding.)

The Court declared that the broad congressional delegation contained no standards to guide the President's discretion, and that the general policy statements in NIRA were not adequate to remedy this constitutional defect.

Similarly, in *A.L.A. Schechter Poultry Corp. v. United States*,⁵⁸ the Supreme Court declared unconstitutional the far-reaching NIRA provisions which had attempted to delegate to the President congressional authority to approve codes governing business activity of industries subject to federal jurisdiction. The NIRA provisions in dispute attempted to delegate to the President the authority to fix prices for trade and industry, and to formulate and approve codes governing a wide range of business activity and practice, guided only by vague standards or goals such as one "to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries . . . and otherwise to rehabilitate industry and to conserve natural resources."⁵⁹ According to the Supreme Court,

In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered.⁶⁰

That broad and undirected delegation was more than the Court could tolerate under the Constitution in 1935. However, since 1935, the Supreme Court has done little more than assert that the constitutional delegation standard is one of "meaningful standards." Actual holdings of the Court have failed to enforce that standard on Congress: the holdings either accept extremely vague standards, or require virtually no standards at all. For example, in 1948, in *Lichter v. United States*,⁶¹ the Supreme Court held that the standard expressed by the term "excessive profits" was a constitutionally adequate limitation to guide an administrative agency in recovering such profits under the War Contracts Renegotiation Act.⁶² In fact, delegations upheld as

⁵⁸ 295 U.S. 495 (1935).

⁵⁹ *Id.* at 531 n.9 (Congress' declaration of policy).

⁶⁰ *Id.* at 541-42.

⁶¹ 334 U.S. 742 (1948).

⁶² The determination of sufficiency of the standard was based on the fact that

constitutional before *Panama Refinery* and *Schechter* were not much different from the delegations upheld after those cases. For example, in 1932, the Court in *New York Central Securities Corp. v. United States*⁶³ upheld a statute allowing consolidation of carriers when "in the public interest;" and in 1943, in *National Broadcasting Co. v. United States*,⁶⁴ the Court upheld a statute providing for the licensing of radio communications "as public convenience, interest, or necessity requires."

A number of cases demonstrate that the Court frequently has required *no* standard to limit delegated power. For example, *St. Louis & Iron Mountain Ry. v. Taylor*⁶⁵ upheld a statute which authorized the American Railway Association to set a mandatory height for drawbars on freight cars, but set no standard; *McKinley v. United States*⁶⁶ upheld a statute which authorized the Secretary of War to suppress "houses of ill fame . . . within such distance as he may deem needful of any military camp . . .,"⁶⁷ but set no standard; the *Intermountain Rate Cases*⁶⁸ upheld a statute authorizing the Interstate Commerce Commission to grant exemptions to established rate requirements, and also set no standards. Finally, *Fahey v. Mallonee*⁶⁹ upheld a statutory delegation of authority to provide for the liquidation of savings and loan associations, but set no standards; and *Carlson v. Landon*⁷⁰ sustained a statutory delegation of authority to the Attorney General, allowing him broad discretion to grant or deny bail to aliens, and also set no standards. Therefore, despite the numerous cases in which the Supreme Court has *stated* that congressional delegations of authority must be limited by "meaningful standards," in fact the Court has upheld against delegation doctrine attack many far-reaching

administrative practices had already been developed to interpret the term, as considered by Congress and as reflected in the statute. *Id.* See also *Yakus v. United States*, 321 U.S. 414 (1944).

63 287 U.S. 12 (1932).

64 319 U.S. 190 (1943).

65 210 U.S. 281 (1908).

66 249 U.S. 397 (1919).

67 *Id.* at 398.

68 234 U.S. 476 (1914).

69 332 U.S. 245 (1947).

70 342 U.S. 524 (1952). (The Court imputed standards from other provisions of the relevant act.)

delegations of legislative authority guided by practically no principle or standard whatever.

One cannot state with certainty whether *Panama Refining* or *Schechter* has been overruled implicitly by the many Supreme Court decisions decided since 1935 which have upheld broad delegation, or whether either remains a viable precedent. Its revival, as a fundamental constitutional principle, has been debated in the scholarly literature.⁷¹ Moreover, from time to time the Supreme Court has raised the spectre of the *Schechter* decision in *obiter dicta*, suggesting a palpable possibility that it remains available to destroy some egregious super-delegation of congressional authority, such as a regulatory budget under Option 2. For example, the opinion in *American Trucking Association v. United States*,⁷² decided in 1953, cited both *Schechter* and *Panama Refining* as sound precedent. Three dissenting justices also cited these two decisions with approval in the later case of *Arizona v. California*.⁷³

The delegation doctrine has received considerable recent attention in the lower federal courts as well. For example, in 1971, a three-judge panel of the federal district court of the District of Columbia reviewed the constitutionality of the Economic Stabilization Act of 1970. The court upheld the Act's extensive delegation of wage and price control authority to the President, but only after a thorough review of the Act, its legislative history, and numerous Supreme Court precedents, including *Schechter* and *Panama Refining*.⁷⁴ The court, in *Amalgamated Meat Cutters & Butcher Workmen v. Connally*,⁷⁵ relied primarily on the Supreme Court's decision in *Yakus v. United States*⁷⁶ (sustaining the constitutionality of the Emergency Price Control Act of 1942, a broad authorization for executive branch price setting). The court in *Amalgamated* cited arguments sim-

71 Compare Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575 (1975); T. Lowi, *THE END OF LIBERALISM* 297-99 (1969); and Merrill, *Standards — A Safeguard for the Exercise of Delegated Power*, 47 NEB. L. REV. 469 (1968).

72 344 U.S. 298, 313 (1953).

73 3783 U.S. 546, 626 (1963).

74 *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737 (D.D.C. 1971).

75 *Id.*

76 321 U.S. 414 (1944).

ilar to those used by the *Yakus* Court, and held that the 1970 statute and its legislative history provided adequate standards to ensure that the Executive would faithfully obey the expressed will of Congress.⁷⁷

In summary, therefore, it is far from clear that the federal courts would uphold the extraordinary delegation of authority implicit in the Option 2 regulatory budget plan under a delegation doctrine challenge, since Option 2 would delegate powers notably greater and possibly more substantial in kind than those considered in every one of the delegation cases. Obviously, if Congress were to decide to adopt an Option 2-type statute despite this possibility, the statute should be carefully drafted to maximize the likelihood that it will be upheld. The drafters would be well advised to study the Supreme Court's delegation decisions thoroughly and to incorporate those features which seem determinative in withstanding delegation doctrine challenge.⁷⁸

C. Option 3: Executive Action with a Possible Congressional Veto

Option 3 would be identical to Option 2, except that under Option 3 each significant exercise of presidential power would

⁷⁷ 337 F. Supp. at 746-52.

⁷⁸ Congress has authorized the Supreme Court to implement rules which would supersede conflicting congressional directions. 28 U.S.C. § 2072 (1976) authorizes the Supreme Court to prescribe rules of civil procedure for the federal courts, stating that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." *Id.* The Supreme Court periodically has published rules pursuant to this section, implicitly upholding the section as constitutional. However, there are several factors which distinguish this statutory section from a statute authorizing the President to establish regulatory budgets. First, 28 U.S.C. § 2072 (1976), by its own terms provides that this rulemaking power may not affect "substantive rights," only procedural rights. In contrast, any regulatory budget would limit the enforcement of *substantive* provisions of law. Second, 28 U.S.C. § 2072 (1976) provides that court rules must lie before Congress 90 days before they may become effective, during which time Congress may change or "veto" them. This is in contrast to the proposed regulatory budget bills considered in the preceding sections. *But see*, the next subsection, *infra*. Third, the judiciary may be less worried about congressional delegations to *courts* than to the *executive branch*. Judges might be expected to trust judges more than politicians; and every federal judge must be confirmed by the Senate. In contrast, the President is, in the usual case, never approved by either house of Congress. *But see* U.S. CONST. art. II, § 1; U.S. CONST. amend. XII (if a majority of the Electoral College fails to choose one person, the House of Representatives decides who shall be President).

be subject to a "one-house congressional veto." For example, the President could be required to send Congress his or her proposed regulatory budget affecting each covered department or agency. If neither the Senate nor the House of Representatives passed a resolution objecting to that specific regulatory budget level within a specified period of time (e.g., 60 days), that level would become the legal ceiling for costs that could be imposed by the appropriate agency.

A number of constitutional scholars praise the one-house veto as an additional, albeit belated, check on otherwise unbridled Executive discretion.⁷⁹ The one-house veto reserves significant power in Congress, enhancing the likelihood that, if challenged, the courts would not hold the legislation to be too great a delegation of power to the President.

However, the one-house veto itself has been attacked as unconstitutional on three separate grounds:

(1) The legislative power is vested in both houses of Congress acting together, not in either house acting alone;

(2) The Constitution places the veto power in the President, not in the Congress; and

(3) All executive power belongs to the President; thus once a power is delegated it should remain in the President to avoid turning legislators into administrators.⁸⁰

Although several courts have ruled on one-house veto provisions,⁸¹ these cases can not be considered to resolve the issue as it would apply to a regulatory budget. Specifically, in *Atkins*

79 See, e.g., *Providing Reorganization Authority to the President*, Hearings on H.R. 3131, H.R. 3407, and H.R. 3442 Before the Legislation and National Security Subcomm. of the House Comm. on Gov't Operations, 95th Cong., 1st Sess. 76 (1977) (statement of Laurence H. Tribe).

80 See McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1152-62 (1977); *Atkins v. United States*, 556 F.2d 1028, 1062 (1977). See also articles critical of the constitutionality of a congressional veto: Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953) and Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975). Articles supportive of the constitutionality of a congressional veto include Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467 (1962); Stewart, *Constitutionality of the Legislative Veto*, 13 HARV. J. LEGIS. 593 (1976); Cooper, *The Legislative Veto: Its Promise and Its Perils* in 7 PUBLIC POLICY YEARBOOK OF ADMINISTRATION 128-74 (1957).

81 *Buckley v. Valeo*, 424 U.S. 1 (1976); *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977) cert. denied, 434 U.S. 1009 (1978); *Pressler v. Simon*, 428 F. Supp. 302 (D.D.C. 1976) vacated and remanded, 431 U.S. 169 (1977).

v. United States,⁸² the Court of Claims, in 1977, upheld the one-house veto provision as it applied to the setting of congressional salaries. However, the *Atkins* court carefully limited its decision to the case at hand; there is an especially strong argument to be made for each house's independence vis-a-vis the other house and vis-a-vis the President. The court twice noted explicitly that the case did *not* involve a regulatory matter.⁸³ In *Pressler v. Simon*,⁸⁴ the federal district court for the District of Columbia, in 1976, upheld the operation of the one-house veto in the context of a challenge to the Postal Revenue and Salary Act of 1967 and the Executive Salary Cost-of-Living Adjustment Act of 1975. On appeal, the Supreme Court affirmed the ruling but did so without an opinion. Justice Rehnquist filed the only written opinion and noted therein that the affirmance did not necessarily uphold the one-house veto, since it could just as easily have been based on the conclusion that petitioner Pressler did not have standing to sue. Finally, in *Buckley v. Valeo*,⁸⁵ Justice White wrote, in the context of reviewing the statute that created the Federal Election Commission and empowered it to promulgate regulations:

I am of the view that the otherwise valid regulatory power ~~of a properly created independent agency is not rendered~~ constitutionally infirm, as violative of the President's veto power, by a statutory provision subjecting agency regulations to disapproval by either House of Congress.⁸⁶

However, Justice White was speaking only for himself. No other Justice addressed the issue, and the *per curiam* opinion expressly declined to rule on it.⁸⁷ Therefore, the existing cases leave the issue of the constitutionality of the one-house veto largely unresolved. So, while the one-house veto might make Option 3 less likely than Option 2 to be struck down as an overbroad delegation of authority, the veto presents its own constitutional questions, and further uncertainty, into such a regulatory budget proposal.

82 556 F.2d 1028 (Ct. Cl. 1977).

83 *Id.* at 1059.

84 428 F. Supp. 302 (D.D.C. 1976) *vacated and remanded*, 431 U.S. 169 (1977).

85 424 U.S. 1 (1976).

86 *Id.* at 284.

87 *Id.* at 140 n.176.

D. *Option 4: Joint Legislative and Executive Action*

Under Option 4, Congress would enact legislation designating which federal departments and agencies are to be governed by the regulatory budget, and creating a comprehensive regulatory budget process through which to implement that budget. This process would be analogous to the present fiscal budgetary process.⁸⁸ Under this approach, the President annually would propose a regulatory budget to cover each of the designated agencies. Congress would review the proposed regulatory budget and make the adjustments it deems necessary or desirable. Congress would enact the budget, with the President's signature, or over his veto.

Option 4 maximizes congressional involvement in the regulatory budget process. Nevertheless, Option 4 still involves congressional delegation to the executive branch. Even more than in the fiscal budgetary process, in the regulatory budgetary process each affected agency head might have discretion to choose which of his or her agency's regulatory programs would be enforced. For example, even where an agency's substantive legislation provides that the agency head "shall" promulgate implementing regulations for a regulatory program, the regulatory budget may result in an overriding grant of discretion to the agency head.⁸⁹ On the other hand, where an agency's substantive legislation provides that the agency head "may" promulgate implementing regulations, the regulatory budget will not result in an additional grant of discretion in the case of *new* regulations; however, the regulatory budget may result in additional discretion to selectively enforce *existing* regulations.

In spite of this new delegation, courts almost certainly would uphold Option 4 under a delegation doctrine attack. Unlike Option 2, where discretion would be delegated to the President, here the delegation would be to agency heads. This is a difference of several orders of magnitude.⁹⁰

⁸⁸ S. 51, discussed at text accompanying notes 29 to 39 *supra*, seems to incorporate an Option 4 proposal for joint legislative and executive action.

⁸⁹ This will be true whether the agency has already promulgated, or has yet to promulgate, regulations. The discretion of the agency head, however, will be affected only as it relates to regulatory functions. See text following note 98 and preceding note 99 *infra*.

⁹⁰ Cf. text accompanying notes 42 and 43 *supra*.

E. Comparing the Options

From a legal perspective, Option 4 raises the least serious constitutional problems. Moreover, in addition to providing the needed congressional involvement, Option 4 has the important pragmatic advantage of being closely analogous to the current fiscal budgetary process. Since Congress and the President already are familiar with the administrative mechanisms of a fiscal budget, the regulatory budget could be adopted and implemented sooner and more certainly under Option 4 than under any of the other options.

III. THE REGULATORY BUDGET AND THE CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT OF 1974

Once a specific regulatory budget mechanism is decided upon, legislative drafters must pay close attention to the interaction of their proposed statute with existing law and legislative policy. At least one important statute would bear an obvious relationship to any regulatory budget: the Congressional Budget and Impoundment Control Act of 1974 (the 1974 Act).⁹¹ A restrictive regulatory budget ceiling could force a federal agency to curtail or eliminate a regulatory program which Congress has authorized and funded.⁹² If curtailment or elimination can be traced to presidential action in setting a low regulatory budget ceiling for the agency, that action might reasonably be construed to invoke the provisions of the 1974 Act, including the requirement that the President send a special message to Congress, specifying amounts, reasons, justifications, and other relevant information concerning funds appropriated but not spent by the agencies.

Section 1012(a) of the 1974 Act specifically states that

Whenever the President determines that all or part of any budget authority will not be required to carry out the full objectives or scope of programs for which it is provided or that such budget authority should be rescinded for fiscal policy or other reasons (including the termination of au-

⁹¹ Pub. L. No. 93-344, 88 Stat. 297 (1974).

⁹² See text accompanying notes 46 to 50 *supra*.

thorized projects or activities for which budget authority has been provided), or whenever all or part of budget authority provided for only one fiscal year is to be reserved from obligation for such fiscal year, the President shall transmit to both Houses of Congress a special message. . . .⁹³

Similarly, section 1013(a) states that

Whenever the President, the Director of the Office of Management and Budget, the head of any department or agency of the United States, or any officer or employee of the United States proposes to defer any budget authority provided for a specific purpose or project, the President shall transmit to the House of Representatives and the Senate a special message. . . .⁹⁴

Since the 1974 Act specifically limits its scope to executive branch activities affecting a "budget authority," one of the threshold issues here is whether funds appropriated for regulatory programs constitute such "budget authority." Section 3 of the 1974 Act generally defines "budget authority" as "authority provided by law to enter into obligations which will result in immediate or future outlays involving Government funds."⁹⁵

The Office of Management and Budget defines "budget authority" to include funds to be spent by agencies for regulatory programs and to be received through the appropriations process:

Budget authority. Budget authority for any year represents the authority provided by law and becoming available during the year to incur obligations. [One] basic [form] of "budget authority" [is] the following:

Appropriation. Statutory authority that allows Federal agencies to incur obligations and to make payments out of the Treasury for specified purposes. This is the most common form of budget authority. (Note that certain types of appropriations *are not counted* as budget authority; these are appropriations: (a) to liquidate contract authority, (b) applied to the reduction of outstanding debt, (c) for refunds of receipts, and (d) for payment to the International Monetary Fund.)⁹⁶

⁹³ 31 U.S.C. § 1402 (1976).

⁹⁴ *Id.* at § 1403 (1976).

⁹⁵ *Id.* at § 1302 (1976 & Supp. II 1978).

⁹⁶ OMB Circular No. A-34, at 6 (1976)(emphasis in original).

The definition applies to "all appropriations, funds, and other authorizations, except deposit funds. . . ." Thus, appropriations for federal regulatory programs would appear to constitute "budget authority." Indeed, the Conference Committee Report on the 1974 Act provides additional support for this conclusion:

The managers intend that the definition of "budget outlays" and "budget authority" for purposes of the congressional budget process *be the same as that used for the executive budget* and that any item which is excluded by law from the executive budget may be excluded from any specification of budget outlays or budget authority in the congressional budget process.⁹⁸

Although regulatory agency budgets generally are considered under the 1974 Act as "budget authority," unless the regulatory budget ceilings impinge on the agencies' appropriations for those regulatory programs, the reporting requirements of the 1974 Act will not be invoked. For example, if an agency has exhausted its regulatory budget for a fiscal year but still has unspent appropriated funds, the agency could avoid the reporting requirements by spending the funds for other authorized purposes. For instance, where Congress has appropriated funds to regulatory agencies in a lump sum, those agencies might avoid direct conflicts with the 1974 Act by using those funds for non-regulatory purposes, such as meeting unexpected administrative expenses on training programs for its personnel, public awareness campaigns, or research, or for funding non-regulatory social programs. Thus, where the appropriation is not limited by statute to particular regulatory purposes, the agency can shift the funds to other purposes which do not impose costs governed by the regulatory budget. The Comptroller General has held that Congress has recognized that in most instances it is desirable to maintain executive flexibility to shift around funds within a particular lump-sum appropriation account so that agencies can make necessary adjustments for "unforeseen developments, changing requirements, incorrect price estimates, wage-rate adjustments . . . and legislation enacted subsequent to appropriations."⁹⁹

⁹⁷ *Id.* at 3.

⁹⁸ H.R. REP. NO. 1101, 93d Cong., 2d Sess. 50 (1974) (emphasis added).

⁹⁹ Cf. 55 COMP. GEN. 307, 318 (1975) (citing, in part, Fisher, *Reprogramming of Funds by the Defense Department*, 36 J. POL. 77, 78 (1974)).

Breakdowns of lump-sum appropriations often are made in Committee reports, but

If a covered agency does not spend its entire appropriation, however, this action would be a "rescission" or a "deferral" as encompassed by the 1974 Act. The Congressional Budget and Impoundment Control Act's reporting requirements then would have to be met.

This statutory analysis can be succinctly summarized by a short series of questions that should be considered by policy-makers contemplating a regulatory budget:

(1) Do the regulatory program funds constitute budget authority? If the answer here is yes, as it should be in most cases, then:

(2) Does the regulatory budget seem to mandate program cuts or reductions? If yes, then:

(3) Does the agency have the authority to expend its funds for other authorized purposes? If yes, then:

(4) Will the agency actually expend the funds for other authorized purposes?

If the answer to all of these questions is yes, then a special message will not have to be sent to Congress. Negative answers will either establish that the 1974 Act is not applicable ("no" to (1)), that the regulatory budget does not trigger the 1974 Act ("no" to (2)), or that a message must be sent to Congress under the provisions of the 1974 Act ("no" to (3) or (4)).

Two illustrations suggest the usefulness of this model of statutory analysis. The Environmental Protection Agency's (EPA's) total appropriation for the abatement and control of pollution was nearly \$693 million for fiscal year 1980.¹⁰⁰ Assume that \$150 million of that amount is designated specifically for regulatory programs. Under the model analysis:

(1) Do the regulatory program funds constitute budget authority?

As suggested above, such appropriations would constitute budget authority under the 1974 Act.

(2) Does the regulatory budget seem to mandate program cuts or reduction?

Assume here that a regulatory budget of \$5.5 billion has been established for these EPA programs. Assume further that the

according to the Comptroller General, these breakdowns are not binding on administrative officers where they are not carried into the appropriation act itself. See 17 COMP. GEN. 147, 150 (1937).

¹⁰⁰ Pub. No. L. 95-392, tit. II, 92 Stat. 791 (1978).

EPA reasonably estimates that an expenditure of \$100 million in program funds will impose \$5.5 billion in compliance costs on non-federal entities. Thus, the EPA will have \$50 million in funds earmarked for regulatory programs that cannot be expended due to the regulatory budget.

(3) Does the agency have the authority to expend the funds precluded from regulatory use, for other authorized purposes? The regulatory program of EPA is funded via a lump-sum appropriation, but its appropriation for regulatory programs comes under a line item labelled "abatement and control." Thus, the EPA would have the authority to expend or obligate the \$50 million only for other authorized purposes within the scope of program authority contained in that line item. For example, the funds could be used instead to provide certain types of additional technical assistance to federal, state, local, or interstate and private entities, functions that are carried out under that "abatement and control" heading.¹⁰¹ It could *not* be transferred to a municipality for the construction of a waste water treatment facility, a function that usually is carried out under the appropriations line item heading of "construction grants."¹⁰²

(4) Will the agency actually expend the funds for other authorized purposes?

Assume that all authorized purposes under the heading "abatement and control," except regulatory programs, have full funding available. Since the \$50 million will not be expended for other authorized purposes, Congress must be notified under the 1974 Act.¹⁰³

Consider another hypothetical, involving the Coast Guard.

(1) Do the regulatory program funds constitute "budgetary authority?"

¹⁰¹ This assumes that these sources of additional assistance either are not deemed to be regulatory under the regulatory budget legislation or do not impose any further compliance costs on the non-federal sector.

¹⁰² See H.R. REP. NO. 1255, 95th Cong., 2d Sess. 26, 29 (1978).

¹⁰³ The Comptroller General's office has noted:

If the Congress desires to restrict the availability of a particular appropriation to the several items and amounts thereof submitted in the budget estimates, such control may be effected by limiting such items in the appropriation act itself. (Emphasis added.)

Letter from Frank H. Wertz, Assistant Comptroller General to Warren Olney III, Director of the Administrative Office of the United States Courts (June 27, 1962)(Doc. No. B-149163). (on file at the Harvard Journal on Legislation).

As suggested above, its appropriation probably would constitute budgetary authority. That appropriation is assumed to be \$10 million for the fiscal year ending September 30, 1979, for "regulatory programs and functions."¹⁰⁴

(2) Does the regulatory budget seem to mandate program cuts or reduction?

Assume that the agency receives a regulatory budget of \$100 million and reasonably estimates that an expenditure of \$8.5 million of regulatory program funds will impose the maximum \$100 million in compliance costs on non-federal entities.

(3) Does the agency have the authority to expend the funds precluded from regulatory use for other authorized purposes? In this illustration the *only* "authorized purposes" are "regulatory programs and functions." If the expenditure of \$8.5 million results in meeting the regulatory budget ceiling, and there is no way in which the remaining \$1.5 million may be expended for "regulatory programs and functions," then the Coast Guard does not have the authority to expend the funds for any other purpose. However, unexpended regulatory funds might still be used for regulatory functions which do not impose costs on the private sector such as training programs for regulatory personnel or advertising programs to increase public awareness of regulatory requirements. When used in this way, no message to Congress is necessary.

Thus, with the appropriation itself limited to regulatory programs, an inability to expend those funds for regulatory programs will preclude their use elsewhere, and the President must so inform Congress under the provisions of the 1974 Act. There is no need to advance to issue (4) here.

These examples were, out of necessity, somewhat simplified. In practice, the designation of amounts for regulatory programs may be very difficult to ascertain, even at the committee level. The examples show that each individual case of a regulatory budget that causes the cancellation or curtailment of an agency's regulatory program will have to be closely examined to determine whether any action will be required under the 1974 Act. In some instances, holding back program funds in order to

104 33 U.S.C. § 157(a) (1976).

comply with the regulatory budget will result in an "impoundment" or "deferral." In order to coordinate and evaluate impact of a regulatory budget on the responses required under the 1974 Act, some "fine tuning" of the regulatory budget legislation or implementing executive action will be required. There are three possible approaches:

(1) Determine that in all cases in which program funds must be withheld due to limits imposed by a regulatory budget, such an action *will not* constitute an impoundment or deferral for purposes of the 1974 Act. This can be accomplished with appropriate language in the regulatory budget legislation.

(2) Determine that in all cases in which program funds must be withheld due to limits imposed by a regulatory budget, such an action *will* constitute an impoundment or deferral for purposes of the 1974 Act. This also can be accomplished through appropriate language in the regulatory budget legislation.

(3) Determine that in all cases in which program funds are withheld due to limits imposed by a regulatory budget, such an action *will not* constitute an impoundment or deferral for purposes of the 1974 Act; the covered agency, however, could be required to inform the appropriate committees of Congress, where it otherwise would have to send a special message to Congress. In fact, this third approach currently is being followed where lump-sum appropriations are utilized in a manner different from that intended by Congress under the 1974 Act. The Comptroller General has held that

If an agency finds it is desirable or necessary to take advantage of that flexibility by deviating from what Congress had in mind in appropriating particular funds, the agency can be expected to so inform Congress through recognized and accepted practices.¹⁰⁵

This approach can be implemented either through appropriate language in the regulatory budget legislation, or through a combination of legislation and executive order. This approach represents a compromise, balancing disclosure with flexibility. The choice among these approaches is a policy question which Congress should consider and make explicit.

105 55 COMP. GEN. 307, 318 (1975).

Conclusion

The concept of a regulatory budget is likely to be the subject of significant and continuing debate among federal policymakers. That debate should focus on the likelihood of success of a regulatory budget in providing a handle with which to control the level of regulation-imposed costs and in meeting constitutional and statutory dilemmas. If policymakers decide to develop a regulatory budget, the budgetary mechanism should provide for close relations between the legislative and executive branches, and the enabling legislation should explicitly resolve as many of the potential statutory conflicts as possible.