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ARTICLES

THE QUIET SHIFT OF POWER: OFFICE OF
MANAGEMENT & BUDGET SUPERVISION OF
ENVIRONMENTAL PROTECTION AGENCY RULEMAKING
UNDER EXECUTIVE ORDER 12,291

Erik D. Olson*

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When President Reagan signed Executive Order 12,291,¹ a simmering controversy over whether, and under what conditions, the President has the authority to supervise executive agency rulemaking² took on new significance. The Order delegates to the Office of

¹ 3 C.F.R. 127 (1982), reprinted in 5 U.S.C. § 601 note (1982) [cited hereinafter as E.O. 12,291]. The Order was signed on February 17, 1981.

² The constitutionality of, statutory limits upon, and need for presidential (or other executive branch) review of rulemaking have been debated heatedly by commentators. See, e.g., ABA Comm'n on Law and the Economy, *Federal Regulation: Roads to Reform* (1979) (arguing that procedurally limited presidential review of a handful of major rules each year would be desirable); Bernstein, *The Presidential Role in Administrative Rulemaking: Improving Policy Directives: One Vote for Not Tying the President's Hands*, 56 Tul. L. Rev. 818 (1982) (suggesting that while "the potential for abuse certainly exists," the President and a few senior White House aides should be able to participate freely in those rulemakings where Congress has left "flexibility for the accomodation of competing goals"); Bruff, *Presidential Power and Administrative Rulemaking*, 88 Yale L.J. 451 (1979) (arguing for presidential involvement, identifying possible constitutional and other more vague boundaries of permissible presidential intervention, and suggesting that the Supreme Court adopt a "more flexible" approach to separation of powers analysis with regard to presidential initiatives); Cutler & Johnson, *Regulation and the Political Process*, 84 Yale L.J. 1395 (1975) (contending that presidential control of regulatory agency activity is necessary under the practical and political realities of government); Davis, *Presidential Control of Rulemaking*, 56 Tul. L. Rev. 849 (1982) (arguing that the real issue is not whether the President may intervene in executive agency rulemaking ["of course he may"], but rather how such intervention should be procedurally limited to eliminate the "harmful element" of secrecy and undue displacement of agency statutory authority); Morrison, *Presidential Intervention in Informal Rulemaking: Striking the Proper Balance*, 56 Tul. L. Rev. 879 (1982) (asserting that there are few, if any, constitutional limits on Congress' power to circumscribe the President's role in informal rulemaking, and that Congress should declare that the President and White House staff be treated "just like anyone else"); Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 Mich. L. Rev. 193 (1981) (arguing, *inter alia*, that available evidence demonstrates Congress' intent to deny the President substantive control over administrative policymaking, and that the Order "exceeds the proper bounds of Presidential authority"); Shane, *Presidential Regulatory Oversight and the Separation of Powers: The Constitutionality of Executive Order 12,291*, 23 Ariz. L. Rev. 1235 (1981) (rebutting Rosenberg's arguments, despite a "decidedly agnostic" view of the substantive requirements of E.O. 12,291); Sunstein, *Cost-Benefit Analysis and the Separation of Powers*, 23 Ariz. L. Rev. 1267 (1982) (concluding that to avoid serious separation of powers problems, the cost-benefit requirement of E.O. 12,291 should be applied only to rules adopted under statutes designed to remedy market failures in an economic setting or to those that have efficiency-promoting applications not in conflict with the legislative purpose); Zamir, *Administrative Control of Administrative Action*, 56 Calif. L. Rev. 866 (1969) (arguing that, in general, an administrative superior such as the President may control his subordinates' actions); Zamir, *Administrative Control of Administrative Action: The Exceptions*, 51 N.Y.U.L. Rev. 587 (1976) (noting several statutory and judicially created exceptions to the general rule that an administrative superior may control the actions of his subordinates, such as in quasi-judicial proceedings); Comment, *Capitalizing on a Congressional Void: Executive Order 12,291*, 31 Am. U.L. Rev. 613 (1981) (arguing that the legal basis for E.O. 12,291 is sufficient, that the Order may promote accountability in administrative decisionmaking, and that Congress should codify effective presidential review); Note, *Delegation and Regulatory Reform: Letting the President*

Management and Budget (OMB) the authority to ensure, "to the extent permitted by law," that all informal executive agency rules conform to certain broad economic principles: that they be based on adequate information, that their benefits outweigh their costs, and that aggregate net benefits to society be maximized.³

For more than four years, OMB quietly has been reviewing all proposed and final informal executive agency rules—and certain other agency actions—to verify their conformity with administration policies. This article is the result of a comprehensive study of how OMB has conducted its review of Environmental Protection Agency (EPA) rules under the Reagan Executive Order.

Section I describes the institutional origin of E.O. 12,291. It notes the broad array of OMB powers which, together with the new Executive Order, give the Office substantial leverage over EPA policy and rulemaking.

Section II addresses legal and policy questions raised by OMB review. First, to what extent may the President or OMB control EPA rulemaking consistent with the Constitution and applicable statutes? Second, may non-statutory considerations, particularly economic costs and benefits, properly be engrafted onto agency decisionmaking? Third, what are the legal strictures on ex parte contacts between OMB and outside parties, and between OMB and EPA?

Section III observes how OMB reviews EPA rules under E.O. 12,291. This section describes the resulting shift in the locus of administrative power, and highlights many of the practical concerns arising from a President's attempt to use OMB to impress his will upon the executive branch. The Executive Order has effectively infused OMB input into much of EPA decisionmaking, with OMB in some cases exercising a de facto veto over EPA rules. Secrecy pervades virtually all of OMB review, and undisclosed industry lobbying of OMB in some cases appears to influence OMB's positions on EPA rules under review.

Change the Rules, 89 Yale L.J. 561 (1980) (contending that the task of reconciling balance, accountability, and regulatory effectiveness should be congressionally delegated to someone other than the President); R. Rauch, Re: Legal restrictions on Presidential Interference in EPA Rulemaking (Sept. 5, 1978, memorandum), reprinted in *Executive Branch Review of Environmental Regulations: Hearings Before the Subcomm. on Env't. Pollution of the Senate Comm. on Env't and Pub. Works*, 96th Cong., 1st Sess. 191-230 (1979) (arguing that presidential control of EPA rulemaking is an unconstitutional usurpation of Congress' legislative power) [hearings hereinafter cited as *Hearings on Executive Review*].

³ E.O. 12,291, *supra* note 1, § 2.

The article concludes that if regulatory review is to increase bureaucratic accountability and provide more reasoned decisionmaking, the courts and Congress must act. First, any regulatory review process should be required to be on the public record, in accordance with the policies underlying the Administrative Procedure Act. Second, if a regulatory review process is desired, OMB, because of its institutional anti-regulatory bias, lack of staff and expertise, broad array of ancillary powers, and propensity for secrecy, should not be the reviewer. Instead, a separate review group should be established to comment, on the record, and to raise disagreements with the agency for presidential review and resolution, where such presidential review is permitted by the relevant statute. Third, rules to which cost considerations are irrelevant according to statute should be explicitly exempted from review. Finally, the review authority must not be permitted to displace the agency in reaching rulemaking decisions.

Because of executive branch sensitivity to the issue of OMB review under E.O. 12,291, several cited sources of information within OMB and EPA have requested anonymity.

I. STATUTORY AND EXECUTIVE GRANTS OF AUTHORITY TO OMB

The Office of Management and Budget is probably the most powerful agency in the federal government. Because of the Office's carefully maintained low profile, however, the public generally is unaware of OMB's influence on federal policy.⁴ A wide array of powers has made OMB an influential, near omnipresent force within the executive branch.

A. *OMB's Synergistic Powers*

While a comprehensive discussion of the powers of OMB is be-

⁴ An in-depth study of OMB's power by the Congressional Research Service concluded: "Although it is often called the most powerful agency in the United States Government, the Office of Management and Budget remains somewhat mysterious to Congress and the public [because] OMB generally goes about its work quietly, outside the spotlight." J. Parris, Congressional Research Service, *The Office of Management and Budget: Background, Responsibilities, Recent Issues* i (1978) [hereinafter cited as CRS Study of OMB].

See also House Gov't Operations Comm., *Budget and Accounting: Appointments-Offices*, H.R. Rep. No. 697, 93d Cong., 1st Sess. (1973) (to accompany H.R. 11,137), reprinted in 1974 U.S. Code Cong. & Ad. News 2778, 2783 ("Next to the President, the [OMB] Director is the most powerful person in the Executive Branch.") [hereinafter cited as H.R. Rep. No. 697].

yond the scope of this article,⁵ it is important to note the breadth of OMB's reach within the federal government. As one former OMB official noted, "The Government works using three things: money, people, and regulations; the agency must get all three through OMB."⁶

The power of OMB over agency budgets is perhaps its best-known tool for influencing agency policy. Administrators of programs that OMB dislikes must fight vigorously to survive OMB budget review. OMB also has significant influence on agency personnel ceilings that in part determine agency resources and manpower.⁷

Contributing to OMB's power is its location in the Executive Office of the President. This vantage point gives it close ties to the White House, and substantial political clout.⁸

A third source of OMB influence is its administration of the Paperwork Reduction Act.⁹ Enacted during the Carter Administration, this Act's seemingly innocuous mandate that any agency information-gathering effort must bear the OMB imprimatur "allows OMB to get at a lot of rules."¹⁰ Even a cursory survey of the comments filed in OMB's Paperwork public docket reveals that industries are keenly aware of OMB's power to bottle up EPA programs by denying paperwork requests.¹¹

⁵ CRS Study of OMB, *supra* note 4, is an excellent although somewhat dated study of the broad powers of OMB.

⁶ Interview with Jim Tozzi, former OMB, Office of Information and Regulatory Affairs (OIRA) Deputy Adm'r, in Washington, D.C. (June 14, 1983).

⁷ The EPA noise pollution control program's demise illustrates the fate of a program unpopular with OMB. An April 1981 OMB critique of EPA argued: "There is serious question of whether noise is an appropriate area for EPA regulation." OMB Critique of EPA Programs (internal OMB memo), summarized in *Inside EPA: Special Report* (Inside Wash. Pubs.) 1 (April 24, 1981). (The OMB memo fails to note that Congress explicitly has directed the EPA Administrator to control noise pollution in the Noise Control Act of 1972. 42 U.S.C. §§ 4901-4918 (1982).) Shortly thereafter, EPA's FY 1983 budget passback from OMB showed a complete elimination of the noise program's operating budget. See *EPA Takes Major Hit in FY-83, Purchasing Power Halved, 2,000 in Staff Cuts*, Inside EPA (Inside Wash. Pubs.) 1 (Oct. 2, 1981).

⁸ See CRS Study of OMB, *supra* note 4; see also EPA "Issue Alerts" (1981-83) (series of memoranda from EPA Administrator to White House, citing OMB clearance of Agency actions as apparent litmus test of their political acceptability) (on file with author).

⁹ 44 U.S.C. §§ 3501-3520 (1982).

¹⁰ Interview with Jim Tozzi, former OMB, OIRA Deputy Adm'r, in Washington, D.C. (June 14, 1983). *Sub rosa* attacks on rules through the Paperwork Act probably are impermissible. See 44 U.S.C. § 3518(e) (Act shall not increase OMB's authority with respect to agency substantive policy); see *infra* note 83 (noting that the Act was not intended to be a substantive regulatory reform bill).

¹¹ See, e.g., OMB Paperwork Docket, 2,000 Series (located in New Executive Office Bldg.,

A host of other powers has been vested in OMB,¹² ranging from the Office's authority to review executive agency testimony

Third Floor, Washington, D.C.) (see especially Hazardous Waste Reporting Requirements Forms).

OMB has been severely criticized by the General Accounting Office (GAO) for diverging from the intended goals of the Paperwork Reduction Act, and instead emphasizing regulatory relief. See GAO, *Implementing the Paperwork Reduction Act: Some Progress, But Many Problems Remain* (1983).

OMB's Paperwork Act implementation is reviewed in detail in *Oversight of the Paperwork Reduction Act of 1980: Hearing Before the Subcomm. on Information Mgmt. and Regulatory Affairs of the Senate Comm. on Govt. Affairs, 98th Cong., 1st Sess. (1983)* (see especially Responses of OIRA to written questions submitted by Senator Levin, *id.* at 65).

¹² OMB tools to influence agency rules include:

a) OMB's role as a reviewer of agencies' Regulatory Flexibility Analyses, which analyze the impacts of new rules on small business. See Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (1982); see generally Verkuil, *A Critical Guide to the Regulatory Flexibility Act*, 1982 Duke L.J. 213 (1982).

b) OMB's traditional role as informal moderator of interagency disputes. Interview with OMB, OIRA Official "C" in Washington, D.C. (May 3, 1983).

c) OMB's power to review, edit, and approve or disapprove of all executive agency testimony before Congress regarding any proposed spending or enrolled legislation. See OMB, Revision of Circular No. A-19, Revised, Dated July 31, 1972: Legislative Coordination and Clearance (Sept. 20, 1979) (memorandum to the Heads of Executive Departments and Establishments) (available in Executive Office of the President (EOP) Library, 1st Floor, New Executive Office Bldg., Washington, D.C.) [hereinafter cited as OMB Circular A-19].

d) OMB's review power over all legislative proposals from executive agencies. *Id.*

e) OMB's review power over all proposed Executive Orders and Proclamations. See OMB, Memorandum to Heads of Executive Departments and Establishments: Proposed Executive Orders and Proclamations (M-81-8) (March 9, 1981) (signed by David A. Stockman) (available in EOP Library) [hereinafter cited as OMB Memo on Proposed Executive Orders].

f) OMB's former role as coordinator of reorganizations in executive agencies. See CRS Study of OMB, *supra* note 4, at 62-66. The Reorganization Act, 5 U.S.C. §§ 901-912 (1982), expired on April 7, 1981, meaning that no reorganization plan may go forward until the Act is extended. *Id.* § 905(b); see H.R. Rep. No. 128, 98th Cong., 1st Sess. (1983).

g) OMB's role as coordinator of administrative and management reforms in executive agencies. See CRS Study of OMB, *supra* note 4, at 50.

h) OMB's power to issue "circulars" and memoranda "to the Heads of Executive Departments and Agencies" on topics ranging from submission of procurement policies to establishment of employment ceilings. See OMB, Revised Table of Contents and Index for OMB Circulars and Federal Management Circulars under OMB Jurisdiction (M-82-8) (Sept. 21, 1982) (listing OMB Circulars in effect) (available in EOP Library).

i) OMB's emerging role as a promoter and broker of international deregulation efforts. See J. Tozzi, *Linking Domestic Regulatory Relief with International Regulatory Relief: A Report to the Task Force* (March 10, 1983, memorandum) (on file with author).

presented before Congress,¹³ proposed bills,¹⁴ and proposed executive orders,¹⁵ to its power, pursuant to the Antideficiency Act,¹⁶ to reapportion agency funds.

In sum, the Office has many arrows in its quiver other than E.O. 12,291. These powers enable OMB to exert broad and powerful influence upon agency decisionmaking.¹⁷

B. Executive Order 12,291

1. The Roots of the Reagan Executive Order

For several decades, some students of the administrative process have argued for greater accountability and presidential review of the activities of federal regulatory agencies. Others have suggested that Congress more intensely oversee the rulemaking process. Perceptions of bureaucratic irresponsibility are noted in the report of the Brownlow Committee of the 1930's, which referred to the federal agencies as the "headless 'fourth branch' of the Government" evading the control of Congress and the President.¹⁸

¹³ See OMB Circular A-19, *supra* note 12.

¹⁴ See *id.*

¹⁵ See OMB Memo on Proposed Executive Orders, *supra* note 12.

¹⁶ 31 U.S.C. §§ 1341(a), 1342, 1349(a), 1350, 1351, 1511-1519 (1982). OMB's power to apportion and reapportion pursuant to this Act was cited by the Office, for example, when it forced the Small Business Administration (SBA) to stop guaranteeing certain loans for the purchase or lease of pollution control equipment. See Testimony of the Honorable John D. Dingell Before the Subcommittee on Legislation and National Security, Committee on Government Operations, U.S. House of Representatives 2 (April 27, 1983) (copy on file with author).

The American Law Division of the Congressional Research Service (CRS) concluded that this OMB action "raises substantial questions of legal propriety. . . . There appears to be no firm legal basis for OMB's authority to order the termination of the program." M. Rosenberg, American Law Div., CRS, Subject: Authority of OMB to Suspend SBA's Pollution Control Equipment Loan Guarantee Program for Tax-Exempt Issuances 57-58 (April 22, 1983) (memorandum to Hon. Carl Levin).

¹⁷ In recognition of OMB's broad powers, and in response to controversy over the Nixon administration OMB impoundment of certain funds, Congress codified a requirement that the OMB Director and Deputy Director be appointed with the advice and consent of the Senate. See Act of March 2, 1974, Pub. L. No. 93-250, 88 Stat. 11 (1974); H.R. Rep. No. 697, *supra* note 3.

¹⁸ The President's Comm. on Admin. Mgmt., Report of the Committee with Studies of Administrative Management in the Federal Government 40 (1937) (submitted to 74th Cong., 2d Sess.).

An Attorney General report drafted late in the New Deal also urged the President to exert more control, and argued for the creation of a central office of Federal Administrative Procedure. See Att'y Gen. Comm. on Admin. Procedure, Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess. (1941).

As early as 1952, it was proposed that the President be empowered to direct any agency to

Beginning with the Johnson Administration, OMB's predecessor, the Bureau of the Budget, made independent attempts to oversee and influence the development of important agency regulations in the President's name.¹⁹ Later, President Nixon initiated the "Quality of Life" review, an essentially standardless Executive Office of the President oversight procedure nominally applicable to all health and safety regulations, but in fact limited almost solely to review of EPA rules.²⁰ Under the Quality of Life procedure, EPA circulated its rules to other agencies for comment and criticism; OMB was the "broker," arbitrating interagency disputes, and often forging solutions to EPA-White House and EPA-Commerce Department disagreements.²¹

Subsequent executive orders under the Ford²² and Carter²³ ad-

follow the President's direction, if permitted within the limits of applicable statutes. *See* E. Redford, *Administration of National Economic Control* 318-20 (1952). *But see* H. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards* 153 (1962) (disagreeing with notion that President be allowed to direct certain agency actions).

¹⁹ Interview with Jim Tozzi, former OMB, OIRA Deputy Adm'r, in Washington, D.C. (June 14, 1983).

²⁰ *Id.* The Quality of Life review had its roots in a memorandum from George Shultz, then OMB Director, establishing interagency review of "proposed agency regulations, standards, guidelines and similar materials pertaining to environmental quality, consumer protection, and occupational and public health and safety." G. Shultz, OMB Director, Memorandum to Heads of Departments and Agencies (October 5, 1971), *quoted in* Federal Regulation and Regulatory Reform: Report by the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess. 121-22 (1976) [report hereinafter cited as *Report on Regulatory Reform*]. For accounts of how the Quality of Life review worked in practice, *see* J. Quarles, *Cleaning Up America: An Insider's View of the Environmental Protection Agency* 117-42 (1976); Bruff, *supra* note 2, at 464-65; *Hearings on Executive Review, supra* note 2, at 60-76 (statement of J. Quarles); *Office of Management and Budget Plays Critical Part in Environmental Policymaking, Faces Little External Review*, 7 *Env't Rep. (BNA)* 693 (Sept. 3, 1976).

Quality of Life review ended on January 25, 1977, by order of the acting EPA Administrator; no court challenge to the system's validity has been reported. *See* Rosenberg, *supra* note 2, at 216 n.100.

²¹ Interview with Jim Tozzi, former OMB, OIRA Deputy Adm'r, in Washington, D.C. (June 14, 1983); *see also* J. Quarles, *supra* note 20, at 117-42.

²² Exec. Order No. 11,821, 3 C.F.R. 926 (1971-75 Comp.), *reprinted in* 12 U.S.C. § 1964 app. at 592 (1976), *modified by* Exec. Order No. 11,949, 3 C.F.R. 161 (1977). The Ford Order required "Inflation Impact Statements" for "major regulations" of all executive branch agencies. *Id.* Roughly at the same time, Congress created the Council on Wage and Price Stability (CWPS), which reviewed a handful of key federal regulations each year and submitted its detailed economic assessment of the rules to the public record. Council on Wage & Price Stability Act, Pub. L. No. 93-387, 88 Stat. 750 (1974) (codified as amended at 12 U.S.C. § 1904 (1982)); *see also* Eads, *Harnessing Regulation: The Evolving Role of the White House Oversight, Reg.*, May-June 1981, at 20-21; Note, *The Inflation Impact Statement Program: An Assessment of the First Two Years*, 26 *Am. U.L. Rev.* 1138 (1977).

²³ Exec. Order No. 12,044, 3 C.F.R. 152 (1979), *reprinted in* 5 U.S.C. § 553 note (Supp. III