try lobbying at OMB, the Office has made arguments that in some cases track industry positions verbatim.

NSPS's are issued pursuant to the Clean Air Act, which explicitly provides that all draft rules sent to OMB must be docketed prior to a rule's promulgation.[367] OMB comments are required to be docketed as well.[368] At the least, the Act directs that no rule may be based "in part or whole" on "any information or data which has not been placed in the docket,"[369] a command which would seem to require docketing of significant OMB comments. EPA's docketing practices appear to fall far short of the Act's mandates. At least five of the eleven NSPS dockets fail to include any reference to OMB's veto of the rule or to the accompanying written materials from OMB, and most of the dockets include absolutely no indication of OMB's extensive input into the rules.[370]

3. *National Ambient Air Quality Standard for Particulate Matter*

The Clean Air Act charges EPA to develop health-based standards for ambient air concentrations of certain pollutants, which

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[367] 42 U.S.C. § 7607(d)(4)(B)(ii) (1982) provides:

> The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

[368] *Id.* ("all written comments thereon by other agencies" as meaning all agencies other than EPA).

[369] *Id.* § 7607(d)(6)(C).

[370] *See* EPA Docket A-80-06 (large appliance surface coating NSPS) (no reference to OMB input, despite OMB's extensive input into the rules and its written veto of the rule in July 1, 1982); EPA Docket A-80-02 (petroleum dry cleaners NSPS) (no reference to OMB input, although OMB extensively criticized the EPA rules); EPA Docket OAQPS-79-05 (internal combustion engine NSPS) (the docket includes four internal EPA memos which make brief reference to OMB's problems with the rule; *see* docs. IV-H-1, IV-H-2, IV-H-3, and IV-H-4. Neither of the two letters from OMB vetoing the rule is docketed. *See supra* note 350.); EPA Docket A-79-47 (metal furniture surface coating NSPS) (no reference to OMB's return of the rule or input into the rulemaking); EPA Docket A-80-05 (metal coil surface coating NSPS) (no reference to OMB's return of the rule or input into the rulemaking).

Only the internal combustion engine docket, OAQPS-79-05, even refers to OMB's review. *See supra* notes 364-65 and accompanying text regarding the beverage can docket. (All dockets located in EPA Docket Room, Washington, D.C.).

"in the judgment of the Administrator . . . allow . . . an adequate margin of safety . . . to protect the public health."[371] The D.C. Circuit has emphasized the statutory command that these National Ambient Air Quality Standards (NAAQS's) are to be solely health based, and that health protection may not be compromised to reduce compliance costs.[372]

However, soon after EPA began reconsidering its NAAQS for particulate matter, discussion between OMB and EPA ensued as to whether EPA should prepare an RIA. Ultimately, EPA agreed to hire a contractor to assess the costs and benefits of regulatory alternatives.[373] In December 1983 EPA filed a formal draft RIA for the standards, and docketed a cost-benefit analysis of alternative standards.[374]

Some industry representatives, particularly the American Iron and Steel Institute (AISI), favor a relaxation of the particulate matter NAAQS. The original draft of the contractor study, however, indicated that *tightening* the standard, rather than *loosening* it, would create the greatest net societal benefit.[375] Industry attacked the contractor study when this result was revealed.[376]

OMB also has criticized the study, objecting in detail to several of the studies upon which it relies.[377] EPA's former Chief of Staff

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[371] 42 U.S.C. § 7409(b)(1) (1982).

[372] *See* American Petroleum Inst. v. Costle, 665 F.2d 1176 (D.C. Cir. 1981); Lead Industries Ass'n v. EPA, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980).

[373] Telephone interview with EPA, Office of Policy & Resource Management Official "I" (May 31, 1983).

[374] *See* EPA, Regulatory Impact Analysis on the National Ambient Air Quality Standards for Particulate Matter (Dec. 1983); Argonne National Laboratory, Costs and Air Quality Impacts of Alternative National Ambient Air Quality Standards for Particulate Matter (Jan. 1983) (Technical Support Document prepared for EPA). EPA states in the preamble to its proposal: "Neither the draft RIA nor the contractor reports have been considered in issuing this [NAAQS] proposal. The Administrator has not seen these documents nor has he been briefed on their contents." 49 Fed. Reg. 10,408, 10,421 (1984).

[375] Interview with EPA, Office of Policy & Resource Management Official "J" in Washington, D.C. (May 27, 1983).

[376] AISI went so far as to argue: "[W]e seriously question whether an RIA is required. . . .EPA has uniformly interpreted Executive Order 12291 as requiring an RIA only when there is an *adverse* impact on industry, which would not be true in this instance. Since a proper revised standard would be somewhat less stringent than the present standard, there would be no adverse impact on industry." Letter from E.F. Young, AISI, Vice President, Energy and Environment, to Richard Morgenstern, EPA, Office of Policy Analysis (Oct. 29, 1982), EPA Docket A-79-29, Document II-D-87, attachment (original emphasis) (located in EPA Docket Room, Washington, D.C.). *Cf. supra* note 278 (EPA drafted no RIA for hydrocarbon NAAQS revocation because the revocation would not increase regulatory compliance costs).

[377] Interview with EPA, Office of Policy & Resource Management Official "J" in Washing-

complained that during the NAAQS review, OMB "kept urging upon us consideration of the costs through certain types of analyses that really were not permitted . . . under the statute."[378] Vice President Bush himself, apparently prompted by communications from Bethlehem Steel, joined OMB's effort to impress upon EPA the steel industry's concern that the standards not produce undesirable economic impacts.[379]

The EPA docket for this rule revision contains the correspondence to and from the Vice President. There is, however, no record of communications between OMB and the steel industry, or of OMB's input into the rule.[380]

IV. Judicial and Legislative Remedies to Preserve the Integrity of Informal Rulemaking

The measures proposed below are intended to further the rationality of, public accessibility to, and accountability for informal rulemaking. Under existing law, much can be accomplished by holding OMB to the terms of the Executive Order, protecting agency authority and enforcing comment docketing requirements. Given the unsettled state of ex parte contacts law, though, legislative codification of a docketing requirement may be desirable. In addition, Congress should create a separate rule review authority, with codified procedures. Divesting OMB of this authority would protect agency decisionmaking from the considerable political influence which OMB exerts during E.O. 12,291 review.

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ton, D.C. (May 27, 1983).

[378] *Daniel Testimony, supra* note 46, at 81.

[379] A letter dated December 13, 1983, from Walter F. Williams, President and Chief Operating Officer of Bethlehem Steel, to Vice President Bush notes that if EPA were to adopt a stringent NAAQS for particulate matter "we would have no option but to oppose the proposal." A December 16, 1983, cover letter to the Vice President from Rep. Lyle Williams of Ohio, enclosing the Bethlehem Steel letter, notes that the Congressman was "most fearful that the proposal of the wrong standard would jeopardize the modernization of the U.S. Steel Industry and, if that be the case, then we in government would be prolonging unemployment in the industry." Rep. Williams notes that while "EPA is not to consider economics, [certain standards] could be handled financially by the industry and thus not jeopardize modernization."

A December 20, 1983, letter from the Vice President to Walter Williams at Bethlehem Steel states, "I appreciate your thoughts on this [NAAQS] issue and have shared your letter with Bill Ruckelshaus." The Vice President also noted that a meeting with Bethlehem officials on the issue was to be arranged. (All letters on file with author; also available in EPA Docket A-79-29, docs. II-B-23, located in EPA Docket Room, Washington, D.C.)

[380] EPA Docket A-79-29 (located in EPA Docket Room, Washington, D.C.); *id.*, docs. II-B-23.

A. Judicial Remedies

1 Preserving Congressionally Delegated Agency Authority

As this study[381] and congressional investigators[382] have asserted, OMB is able to substantially influence regulatory decisions delegated by Congress to the expert judgment of the EPA Administrator. This can constitute an impermissible shift of authority from the Administrator to the new "superagency," OMB. Neither E.O. 12,291[383] nor any congressional authorization[384] supports such a shift; the courts should prevent it.

To assure the integrity of regulatory decisionmaking, the courts need not insist on a hermetic seal between the agency and OMB. Interagency discussion to secure coordinated execution of the law, as advocated in *Sierra Club*,[385] can be accomodated. However, when OMB's influence becomes supervisory rather than advisory, the court must step in to protect the agency's statutory delegation of authority.[386]

In construing specific statutory delegations of authority to the EPA Administrator, the reviewing court should determine congressional intent regarding the role of technical expertise in the decisionmaking. The court's analysis should also be informed by a careful review of EPA's 1970 mandate,[387] and by Congress' longstanding view of EPA as a quasi-independent expert agency.[388]

Where Congress states the specific factors to be considered in rulemaking, an agency decision influenced by other factors is improper and likely judicial grounds to strike down the rule.[389] The reviewing court must ensure that OMB review under E.O. 12,291 does not effectively insert non-statutory factors into EPA's decisionmaking calculus. In particular, it should forbid review where a rule is required by statute to be based on specified, non-economic criteria. The Executive Order contemplates this limitation, provid-

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[381] *See supra* text accompanying notes 201-53; 326-80.

[382] *See, e.g.*, Oversight Subcomm. Report on Executive Privilege, *supra* note 79, at 12. 282-94.

[383] *See supra* note 1, § 3(f)(3).

[384] *See supra* notes 100-03 and accompanying text.

[385] Sierra Club v. Costle, 657 F.2d 298, 406 (D.C. Cir. 1981); *see supra* text accompanying note 40.

[386] *See supra* text accompanying notes 73-81.

[387] EPA was created pursuant to Reorg. Plan No. 3 of 1970, *supra* note 76.

[388] *See supra* notes 78-80.

[389] *See supra* notes 104-18 and accompanying text; *see also* note 148.

ing for OMB review only to the extent permitted by law.[390]

In the end, the reviewing court should keep in mind the Supreme Court's admonition, "[I]f 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.*"[391] Thus, where a statute expressly commits a decision to the expert judgment of the agency administrator, the presumption should be that Congress intended to have the administrator make that decision free from OMB pressure.

2. *Restricting Ex Parte Contacts*

Responding to judicial and public concern, EPA Administrator William Ruckelshaus instituted a policy requiring all rule-related written communications received by EPA from outside parties and summaries of all substantial rule-related oral contacts to be docketed.[392]

OMB's comments to EPA are at least as appropriate for docketing as are those of outside parties. The Office asserts: "We believe that *all* of our comments [on rules] are significant."[393] In fact, OMB comments often are remarkably influential on the shape of EPA rules; this argues strongly for their disclosure on the record for public and judicial scrutiny.

OMB argues that in order to have frank, candid and open policy discussion with agencies, its communications generally should be off the record.[394] This, of course, does not rebut a requirement to disclose communication of *factual* materials.[395]

Even policy-oriented discussions, conducted at the lower staff levels, would not seem to merit exemption from the APA's requirement that the public and the courts be informed of the basis of agency actions. Former EPA Administrator Douglas Costle has suggested that where OMB staff are acting in their day-to-day role as overseers, they must yield any presumed mantle of executive

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[390] *See, e.g.*, E.O. 12,291, *supra* note 1, §§ 2, 6(a), 7(e), 7(g).

[391] United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 266-67 (1954) (emphasis added).

[392] Ruckelshaus memorandum, *supra* note 304.

[393] OMB Response to House Questionnaire, *supra* note 83 (Question 8), *reprinted in Hearings, supra* note 83, at 976 (emphasis added).

[394] *See, e.g., id.* (Questions 10, 11), *reprinted in Hearings, supra* note 83, at 977-79.

[395] ACUS Recommendation 80-6, 1 C.F.R § 305.80-6 (1984) recommends docketing of factual contacts between executive office staff and agencies.

privilege.[396] Withholding the privilege for staff-level contacts does not conflict with *Sierra Club v. Costle*,[397] with executive privilege case law,[398] or with the *Vermont Yankee* proscription of judicially created, non-statutory procedural requirements.[399]

The reviewing court should apply principles of ex parte contacts doctrine[400] to OMB contacts during E.O. 12,291 rule review. Specifically, the court should require that:

> 1. All written material received by OMB from outside parties regarding a rulemaking be placed in the agency's rulemaking docket.
>
> 2. All substantial oral communications between OMB and outside parties going to the merits of a rule be summarized and placed in the agency's rulemaking docket.
>
> 3. OMB be prohibited, after the comment period closes, from discussing the rulemaking with parties outside the federal government.
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> 4. OMB-agency communications, if written, be docketed by the agency; oral communications, if going to the merits of a rule or if merely "conduit" communications,[401] be summarized and

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Interview with Douglas Costle, former EPA Adm'r, in Washington, D.C. (Aug. 17, 1983).

[397] 657 F.2d 298, 404-08 (D.C. Cir. 1981). As discussed *supra* notes 173-78 and accompanying text, *Sierra Club* held that a strictly policy-oriented meeting involving the President himself and the EPA Administrator need not be docketed. However, as has been pointed out by Professor George Eads and others, the *Sierra Club* opinion cannot be used to justify cloaking in secrecy OMB-EPA staff level contacts. *See Hearings, supra* note 83, at 1138 (testimony of George Eads) ("I was amused to. . .see the Reagan Administration attempt to cloak their oversight process with [*Sierra Club*]. . . .[W]ere the Reagan administration to have adopted the procedures that Judge Wald found acceptable in *Sierra Club* and adhered to them in both spirit and letter, much of the controversy that its oversight program has generated would have been avoided."). The *Sierra Club* court was reviewing an EPA record which included docketed summaries of *all* of the interexecutive meetings, save the presidential meeting, 657 F.2d at 404, and specifically noted that all contacts upon which the agency relied had been docketed, *id.* at 408 & n.529.

[398] *See supra* text accompanying notes 179-86 (arguing that executive privilege case law should be read to protect only interexecutive policy-oriented meetings at the very highest levels of government, e.g., President-EPA Administrator meetings).

[399] *Vermont Yankee* certainly does not speak against judicial insistence that agencies comply with the APA's fundamental requirement to make available to the public the comments it receives, to fully explain the basis of its regulatory decisions, and to supply the reviewing court with an adequate record of the agency decision. *See, e.g.*, Motor Vehicles Mfr's Ass'n v. State Farm Mutual Auto. Ins. Co., 103 S.Ct. 2857 (1983) (agency must explain fully the bases for regulatory decisions); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

[400] *See supra* text accompanying notes 140-59.

[401] *See supra* text accompanying notes 305-11.

docketed.[402]

Because of OMB's lack of technical sophistication and industry's influence on OMB decisionmakers, a reviewing court aware of extensive OMB-industry contacts during an agency rulemaking may wish to temper the traditional judicial deference to agency expertise.[403]

Docketing of ex parte communications is needed to preserve the agency's decisionmaking integrity.[404] Docketing enables non-parties to the communication to rebut its substance, resulting in more reasoned decisionmaking. This rationale is fundamental to the APA's informal rulemaking procedures.[405] Furthermore, docketing is necessary to convey to the reviewing court an accurate portrait of the facts and arguments before the agency during the rulemaking. Only in this way can the court take the "hard look" required to determine agency rationality. Finally, advocates of centralized review who argue that OMB rulemaking input is necessary to ensure bureaucratic accountability must recognize the need for disclosure of OMB's review process and contacts with outside parties. Only with such disclosure may OMB be held accountable for its decisions and for the forces influencing these decisions.

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[402] *Cf.* ACUS Recommendation 80-6, 1 C.F.R. § 305.80-6 (1984) (recommending docketing of all conduit contacts, and of material factual information transmitted by Executive Office of the President staff to agencies; the recommendation also urges agencies to "consider the importance" of allowing rebuttal of important new issues or data presented in intraexecutive communications).

[403] *See* Environmental Defense Fund v. Blum, 458 F.Supp. 650, 659 (D.D.C. 1978):

> The agency's technical expertise is normally given prevailing weight, because the procedures prescribed by the APA create a sense of confidence in the result by reason of the fact that they insure interested parties a full opportunity to make submissions and respond to comments already made. Such confidence, however, cannot result if this full opportunity is denied, as where pertinent communications are received in secret by the agency.

[404] In Oversight Subcomm. Report on Executive Privilege, *supra* note 79, at 17, a key House subcommittee with jurisdiction over EPA recommends that OMB and all federal agencies insure that all regulatory review communications under E.O. 12,291 be in writing and be docketed. The report further recommends that OMB maintain a public file identifying all contacts with outside parties about regulations subject to review under E.O. 12,291, and include in the file a written summary of each such contact. Finally, the report recommends that OMB maintain a public file containing all written material provided to OMB on regulations reviewed under E.O. 12,291.

[405] *See* Administrative Procedure Act, 5 U.S.C. § 553 (1982).

B. Statutory Remedies

1. Congressional Authorization of Executive Review

Remedial legislation would be the most effective solution to OMB encroachment on agency discretion. For example, Representative Sam Hall's regulatory reform bill in the 98th Congress would have codified OMB review of agency regulations, while making it clear that the OMB Director would not have been permitted to "participate in any way in deciding what regulatory action, if any, the agency will take."[406]

This legislation would be helpful. The careful student of E.O. 12,291 review would doubt, however, whether such a limitation on OMB's authority would be effective in light of the Office's broad powers over agencies, and the opportunity for *sub rosa* influence. Practically speaking, OMB "suggestions" often may become directives due to the Office's extensive powers.

A more effective approach to limiting unwarranted OMB influence would be to establish a more objective and open review authority wholly separate from the Office. Such an independent review board could be statutorily required to conduct its reviews on the record, to accept comments on the record from all persons, to avoid consideration of non-statutory criteria, to not displace agency authority, and to review only "major" rules of national importance.[407] Any disagreement between this board and an agency could be followed by notification of Congress and resolution on the public record by the President, in accord with the regulatory reform statute's procedures. Only with objective overseers of the regulatory process, full disclosure, and congressional notification of "appeal" to the President can the goals of regulatory reform—full accountability of the bureaucracy and improved, unbiased regulatory decisionmaking—be achieved.

Any generic regulatory reform package codifying some form of executive review of rules should make the terms of such review as clear as possible. Such legislation should make it clear that authority statutorily delegated to an agency may not be displaced by the review board, that only informal regulations and not settlement agreements or more formal proceedings may be reviewed, and that only statutorily enumerated factors may be considered during re-

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[406] H.R. 2327, 98th Cong., 1st Sess. § 101(b) (1983) (proposed new 5 U.S.C. § 624(a)).

[407] *Cf.* ABA Comm'n on Law and the Economy, *supra* note 2 (recommending procedurally limited presidential oversight of rulemaking).

view. Rules issued pursuant to statutory provisions precluding economic considerations or enumerating only non-economic bases for decision should not be reviewed.[408]

2. *Codification of Ex Parte Contacts Doctrine*

Although current judicial intepretation of the APA and the due process clause can be invoked by the court to require docketing of significant OMB-industry communications and most OMB-agency contacts of substance, this result is not assured. No court has ruled squarely on the requirements for docketing of significant OMB-industry or OMB-agency contacts.[409]

Therefore, to be certain that the public participation requirements and the judicial review provisions of the APA retain vitality, Congress should clarify the docketing requirements for OMB-industry and OMB-agency ex parte contacts. If Congress wishes to allow OMB rulemaking review to continue, it should at a minimum codify requirements that: (1) all written comments and all formal or informal drafts of rules passed between OMB and the agency be placed in the docket; (2) significant oral OMB-agency contacts addressing the merits of the rules be summarized and docketed; (3) all significant oral contacts between OMB and private parties be summarized and docketed, and all written OMB-private party contacts be docketed, at the rulemaking agency; and (4) post-comment-period contacts between OMB and outside parties on a rule's merits be forbidden, absent reasonable notice and opportunity for opposing interests to rebut. No recent regulatory reform bill would require such extensive "sunshine"; without it, however, we can only expect less accountable government and further erosion of the foundations of the APA.[410]

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[408] *See generally* Sunstein, *supra* note 2; *supra* notes 260-66 and accompanying text.

[409] *See supra* notes 160, 172 and accompanying text.

[410] Bills requiring docketing only of written interagency communications fail to recognize that the vast majority of substantial interagency contacts are oral, and fail to account for the conduit contact. *See, e.g.*, H.R. 2327, 98th Cong., 1st Sess. § 101(c) (1983) (proposed new 5 U.S.C. § 624(c)) (all *written* comments on rules by Director of OMB must be docketed); H.R. 3939, 98th Cong., 1st Sess. § 102 (1983) (proposed new 5 U.S.C. § 553(c)(2), (f)(1)(D) & (f)(1)(E)) (all written material from agency to OMB, and any "document" [presumably including OMB comments] containing "significant factual material of central relevance to the rulemaking," must be docketed; all changes in draft rules "which respond to" OMB comments must be explained on docket); S. 1080, 98th Cong., 1st Sess. § 3 (proposed new 5 U.S.C. § 553(d)(2), (f)(1)(B), (f)(1)(F), & (f)(1)(G)) (essentially the same as H.R. 3939's docketing provisions, but requiring docketing of "copies of *all* written comments") (emphasis added).

V. Conclusion

The twin goals of an executive regulatory oversight process should be to increase the accountability to the public of a sometimes unresponsive bureaucracy, and to ensure better, more impartial reasoning in rulemaking. Measured by these yardsticks, OMB review under E.O. 12,291 has been a failure. While OMB review has sometimes succeeded in encouraging agencies to bring their policies into line with the thinking of the Office's staff, OMB has not, for the most part, increased the accountability or rigor of analysis of the rulemaking process.[411]

The Office's propensity for secrecy and insistence on keeping its critiques of rules oral undermine the accountability of the regulatory decisionmakers. OMB's anti-regulatory bias, and the preferential access to Office staff enjoyed by industry, further erode the values of accountability to the public and reasoned government decisionmaking on the merits. The APA's public participation and judicial review provisions are hampered by off-the-record OMB review, and the rationale for the judicial doctrine granting expert agencies substantial deference is severely undercut by secret OMB pressure. Furthermore, congressional delegations of power to specific repositories of expertise—such as EPA—are violated by OMB influence on or control of rulemaking.

If some form of executive oversight of the rulemaking process is desired, oversight authority should be delegated to a body other than OMB. Congress and the courts should ensure that the review is above board, unbiased, on the merits, and observant of the letter and spirit of all relevant statutory requirements; OMB to date has not demonstrated that it can fulfill these goals.

Editor's Note:

On January 4, 1985, President Reagan signed Executive Order 12,498[412] which, by its terms, will increase significantly OMB authority over agency regulatory activity. Under E.O. 12,498, all heads of executive agencies subject to the Order "shall ensure that all regulatory actions are consistent with the goals of the agency

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[411] *But see* GAO Report on Cost-Benefit Analysis, *supra* note 248 (concluding that despite the limitations of cost-benefit analysis, some major rules which were accompanied by an RIA were improved by the E.O. 12,291 requirements; noticeably absent from the GAO report, however, is any praise for OMB review of EPA rules). *Cf.* GAO Report on 12,291, *supra* note 24 (criticizing OMB E.O. 12,291 review).

[412] 46 Fed. Reg. 1036 (1985) [hereinafter cited as E.O. 12,498].

and of the Administration."[413] The Order is aimed, *inter alia*, at thwarting regulatory actions contrary to administration policies before they even are initiated by the agencies. OMB is authorized to implement the Order,[414] and likely will attempt to structure agencies' regulatory priorities, much as it structures their budgetary priorities,[415] only here without congressional or public review.[416]

Under E.O. 12,498, each agency subject to E.O. 12,291 must develop a "Regulatory Program" laying out "all significant regulatory actions . . . planned or underway, including . . . the development of documents that may influence, anticipate, or could lead to the commencement of rulemaking proceedings."[417] OMB determines whether the Program is consistent with the "Administration's policies and priorities,"[418] and may include further regulatory or deregulatory actions.[419] A regulatory action absent from the Regulatory Program, or materially different from an action described therein, shall not go forward without OMB approval, unless an emergency exists or a statutory or judicial deadline applies.[420] OMB may, "to the extent permitted by law, return for reconsideration" any such rule.[421]

E.O. 12,498 is less restrained in its grant of power to OMB than is E.O. 12,291. OMB is authorized to implement the Order only "to the extent permitted by law,"[422] but this is a vague limitation given OMB's authority to review and revise agency Regulatory Programs[423] and delay agency action on rules absent from the Regulatory Program or materially different from an action described therein.[424] The requirement of agency heads that all regulatory actions be consistent with administration policies is not expressly delimited by existing law.[425]

Furthermore, unlike E.O. 12,291, E.O. 12,498 fails to require that

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[413] *Id.* § 1(b) (emphasis added).
[414] *Id.* § 4.
[415] *See supra* note 7 and accompanying text.
[416] *See supra* note 225 (noting that OMB was likely to seek such power)
[417] E.O. 12,498, *supra* note 412, § 2(a).
[418] *Id.* § 3(a)(i).
[419] *Id.* § 3(a)(ii).
[420] *Id.* § 3(c).
[421] *Id.* § 3(d).
[422] *Id.* § 4.
[423] *Id.* § 3(a), (b).
[424] *Id.* § 3(c).
[425] *See id.* § 1(b).

even formal OMB "vetoes" of potential regulatory activities be divulged to the public.[426] Again unlike E.O. 12,291,[427] the Order fails to stipulate that its provisions shall not be construed as displacing discretion vested by law in an agency other than OMB. The broad provisions of E.O. 12,498, and the noticeable lack of limits placed on OMB authority, likely will expand OMB's power to supervise, off the public record, virtually all agency activity, however tenuously related to future regulation.

[426] *Compare id.* § 3(d) *with* E.O. 12,291, *supra* note 1, § 3(f)(2).
[427] *Supra* note 1, § 3(f)(3).