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# Regulatory Reform: Toward More Balanced and Flexible Federal Agency Regulation

DONALD T. BLISS\*

*The Reagan administration's desire to stimulate the national economy has resulted in a fundamental change in our federal regulatory scheme. By executive order No. 12,291, the regulatory process has been brought under the scrutiny and control of the President in order to insure the pursuit of rational economic objectives. This recent executive decree represents the latest attempt to meet the challenge of a decade long attack on federal regulation.*

*The author critically examines the scope of this order while prospectively analyzing the attendant problems this particular type of reform will encounter. Mr. Bliss ultimately suggests the Reagan administration's approach to agency regulation may cause purely economic factors to be weighed above other social concerns. This writing also presents a comprehensive discussion of other proposed reforms, including both the congressional veto and expanded judicial review. The author concludes by offering a novel approach to regulatory reform that would evenly balance both economic and social interests while establishing a regulatory scheme that would be administered in the most efficient and least burdensome way.*

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## I. INTRODUCTION

On January 22, 1981, President Reagan announced as expected that regulatory reform is a keystone in his "program to return the Nation to prosperity and to set loose again the ingenuity and energy of the American people."<sup>1</sup> The President summarized his attitude toward government regulations by stating that they, "impose an enormous burden on large and small businesses in America, discourage productivity, and contribute substantially to our current economic woes."<sup>2</sup> For these reasons, the President established a Task Force on Regulatory Relief (Task Force), chaired by the Vice President and composed of senior members of his cabinet and White House staff, "to coordinate an inter-agency effort to end excessive regulation."<sup>3</sup> Within one week thereafter, the President issued a memorandum postponing for sixty days, "to the extent permitted by law," all pending regulations of key federal agencies scheduled to become effective during the sixty-day period and the finalization of any proposed regulations during such period.<sup>4</sup> Within a month of his inauguration, the President issued a comprehensive Executive Order designed to strengthen presidential oversight of the administrative process, to require rigorous analysis of the costs and benefits of proposed regulations, to review existing major rules, and to minimize duplication and conflict among agency regulations.<sup>5</sup>

Thus, the decade-long attack on federal regulations<sup>6</sup> reached a

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1. 17 WEEKLY COMP. OF PRES. DOC. 33-34 (Jan. 22, 1981).

2. *Id.*

3. *Id.*; see also "Statement by Vice President George Bush Regarding the Membership and the Charter of the Presidential Task Force on Regulatory Relief," Office of the Press Secretary to the Vice President (January 22, 1981). The Task Force's charter is to review "major" regulatory proposals with "policy significance" or "overlapping jurisdiction among agencies," assess existing regulations that are "particularly burdensome to the national economy" or "key industrial sectors," and oversee development of legislative proposals. 17 WEEKLY COMP. OF PRES. DOC. 2 (Jan. 22, 1981). The Task Force is to be guided by the following principles: federal regulations should be initiated only when there is a "compelling need;" alternatives should be considered and selected which impose "the least possible burden on society consistent with the overall statutory and policy objectives;" and "regulatory priorities should be governed by an assessment of the benefits and costs" of proposed regulations. *Id.* at 2-3.

4. The presidential memorandum did not apply, *inter alia*, to regulations issued in accordance with the formal rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. §§ 556-57, to emergency regulations, to regulations relating to military or foreign affairs, government procurement, agency organization, management or personnel, or to Internal Revenue Service regulations. 17 WEEKLY COMP. OF PRES. DOC., 73-74 (Jan. 29, 1981).

5. See Exec. Order. No. 12,291, 46 Fed. Reg. 13193 (1981) discussed in section II *infra*.

6. See, e.g., SENATE COMM. ON GOVERNMENT OPERATIONS, 95TH CONG., 1ST SESS., STUDY ON FEDERAL REGULATIONS (1977) [hereinafter cited as STUDY ON FED-

crescendo in the opening days of the new administration—an administration elected with a mandate to restore balance to the regulatory system.<sup>7</sup> The recognition of the need for reform was not new; the federal regulatory system has been studied, analyzed, and subjected to myriad proposals for reform over the past decade.<sup>8</sup> A number of steps have been taken, and significant achievements made, in prior administrations.<sup>9</sup> Substantive regulatory reforms initiated by President Ford and signed into law by President Carter have begun to phase out certain economic regulatory authorities in aviation,<sup>10</sup> trucking,<sup>11</sup> rail<sup>12</sup> and other areas.<sup>13</sup> Pro-

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ERAL REGULATION] (six volume study exhaustively detailing the current status of the federal regulatory system).

7. White House Press Conference, Tr. at 1 (Remarks by Vice President Bush) (Jan. 22, 1981).

8. STUDY ON FEDERAL REGULATION, *supra* note 6. See also Note, *Delegation and Regulatory Reform: Letting the President Change the Rules*, 89 YALE L.J. 561 (1980); Ogden, *Analysis of Three Current Trends in Administrative Law: Reducing Administrative Delay, Expanding Public Participation, and Increasing Agency Accountability*, 7 PEPPERDINE L. REV. 553 (1980).

9. One of the first executive commissions organized to scrutinize administrative agencies was the Keep Commission. The commission had a five-year existence from 1905-09 under President Theodore Roosevelt during which efficiency reports of the agencies were submitted. See Kraines, *The President Versus Congress: The Keep Commission, 1905-09: First Comprehensive Presidential Inquiry into Administration*, 23 W. PUL. Q. 5 (1970). This commission was followed by the Brownlaw Committee of 1937. See THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, ADMINISTRATIVE MANAGEMENT OF THE UNITED STATES (1937). The next two significant executive commissions were the well known Hoover Commissions of 1949 and 1955. See THE COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, THE INDEPENDENT REGULATORY COMMISSIONS (1949) and THE COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, LEGAL SERVICES AND PROCEDURE (1955). The most recent commission was known as the Ash Council. It was organized under President Richard M. Nixon and determined that it was necessary to make sweeping reform of regulatory agencies. See THE PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, A NEW REGULATORY FRAMEWORK: REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES (1971).

10. See, e.g., Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) which involved reduction of regulatory authority with reliance placed on competitive market forces and on actual and potential competition.

11. See, e.g., Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980) which involved reduction of the Interstate Commerce Commission's power to set interstate trucking rates and an easing of certification requirements to allow more trucking companies into the market.

12. See, e.g., Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980) which involved reformation of federal regulatory policy regarding interstate railroads because of the recognition that government regulations affecting railroads have become unnecessary and inefficient.

13. See, e.g., Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (1978) (taxation rather than regulation of natural gas producers). See also Deposi-

cedural reforms, that require agencies to consider the effect of proposed regulatory action on inflation and to analyze the economic consequences of regulations, were implemented through Executive Orders promulgated by Presidents Ford and Carter.<sup>14</sup>

While expanding upon and incorporating some of the provisions of his predecessor's Executive Orders, President Reagan's Executive Order No. 12,291 represents a significant new departure in the establishment of substantive and procedural requirements applicable to agency regulations.<sup>15</sup> In addition, a number of proposed organizational reforms have been generated in Congress, by the bar, or in the academic community that would delegate additional regulatory responsibility and oversight to the President,<sup>16</sup> to Congress,<sup>17</sup> or to the courts,<sup>18</sup> thereby diffusing the regulatory power now vested in particular federal agencies and adding another layer of review and delay to the already cumbersome regulatory process.<sup>19</sup>

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tory Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (1980) which reverses the previous Federal Reserve Board rule and authorizes interest bearing checking accounts to individuals and non-profit organizations. This Act also phases out, over a ten-year period, interest ceilings on time and savings deposits.

14. Exec. Order No. 11,821, 3 C.F.R. 926 (1971-1975 Comp.) (inflation impact statements); Exec. Order No. 12,044, 3 C.F.R. 152 (1978 Comp.) (improving government regulations).

15. These new requirements are described and discussed at text accompanying notes 17-76, *infra*.

16. An example of the type of organizational proposal that would delegate enhanced regulatory power to the President and his Executive Office is a proposal by the American Bar Association adopted by the House of Delegates in 1979. AMERICAN BAR ASSOCIATION, SUMMARY OF ACTION OF THE HOUSE OF DELEGATES 11-12 (1979); see *House Endorses Controls on Regulatory Agencies*, 65 A.B.A.J. 1284 (1979) (discussing debate over Resolution A); the resolution was based on a recommendation by the ABA COMM. ON LAW AND ECONOMY, FEDERAL REGULATION: ROADS TO REFORM, 68-91 (Dec. 1979) [hereinafter cited as *ROADS TO REFORM*]; see also Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395 (1975); Byse, *Comments on a Structural Reform Proposal: Presidential Directives to Independent Agencies*, 29 AD. L. REV. 157 (1977). Resolution A recommends enactment of a statute authorizing the President to direct regulatory agencies to consider or reconsider the issuance of critical regulations and, within a specified period of time thereafter, to direct such agencies to modify or reverse their decisions concerning such regulations. The resolution would apply both to executive branch agencies and to independent regulatory agencies, which traditionally are more directly responsive to Congress. Resolution A would establish unprecedented presidential authority over agency rules or regulations, granting the President the power to initiate, modify or veto regulations which he defines as critical. See *ROADS TO REFORM* at 79-83.

17. The most common proposal is the one or two house veto of proposed regulations, discussed at notes 100-14 *infra*.

18. Legislation has been introduced to enhance the scope of judicial review of agency regulatory action, which is discussed at notes 115-26 *infra*.

19. It may be argued that delay may defer or prevent the promulgation of burdensome regulations. Even if valid, however, this assumption overlooks the fact that new regulations may simplify, improve upon, or replace less efficient or out-

It is submitted that these proposed organizational reforms, which remain the subject of intense discussion in the new Congress and administration, sidestep the fundamental problem, *i.e.*, how to assure that regulatory power is exercised more responsibly in the first place. As will be shown, these proposals would not confer on federal agencies the authority, flexibility, and responsibility to regulate more efficiently and accountably. Rather, they would fragment governmental regulatory authority, remove ultimate decisionmaking from the source of agency expertise and analytical capacity, and create unfortunate opportunities to politicize, oversimplify, and distort the effect of federal regulations. While the *in terrorem* effect of possible reversal by the President, Congress or the courts may cause federal regulators to act more cautiously, the fundamental objective should be to ensure that the regulator has the proper statutory guidance and tools to regulate efficiently.<sup>20</sup>

Insufficient attention has been given to reforms that seek a redesign of the statutes that authorize the exercise of regulatory power<sup>21</sup> to ensure that regulations reflect a balanced consideration of the wide range of public interest values that government is obligated to uphold and that agencies have the flexibility to adopt the most efficient means of achieving the statute's overall objectives.<sup>22</sup>

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moded existing regulations. Regulatory reform requires the capacity to repeal and replace bad regulations expeditiously. Regulatory reform should prevent, not encourage and delay. Indeed, the general principle that regulatory activity should be timely is recognized in the Administrative Procedure Act, which requires agencies to act "within a reasonable time," 5 U.S.C. §§ 555(b), 558(c) (1976), and which provides for judicial expedition of "unreasonably delayed" agency action, § 706(1). Moreover, regulatory delay is itself a major source of demands for reform. See 4 Study on Federal Regulation, *supra* note 6, at 3 (full volume devoted to delay in the regulatory process); Ogden, *supra* note 8, at 3, and authorities cited therein, *id.* at 555 n.8.

20. The regulator also must have the capacity to identify innovative solutions in complex areas of science and technology, a capacity derived from specialized experience and expertise. The need for such capacity derives from the complexity of the factual situations to which effective regulation must be tailored. See, *e.g.*, Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 547, 553-60 (1979) which outlines instances of "classical market failure" that provide "[t]he most important justifications for government regulation of the economy."

21. See Thomas, *Politics, Structure, and Personnel in Administrative Regulation*, 57 VA. L. REV. 1033 (1971) (surveying historical methods of structural reform).

22. This approach assumes, of course, that there is a continuing federal responsibility to establish minimal standards in certain areas of interstate com-

This article first addresses President Reagan's Executive Order of February 17, 1981 which effectively broadens the scope of agency regulatory analysis; at the same time, however, it superimposes an additional layer of regulatory review.<sup>23</sup> Then, several widely debated proposed organizational reforms, congressional vetoes,<sup>24</sup> and expanded judicial review<sup>25</sup> are discussed and evaluated. Finally, an alternative approach to regulatory reform is explored.<sup>26</sup>

## II. THE REAGAN APPROACH: EXECUTIVE ORDER NO. 12,291

President Reagan issued Executive Order No. 12,291 on February 17, 1981, "to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations."<sup>27</sup> The Order applies to all new and existing federal agency regulations and legislative proposals concerning regulations, "to the extent permitted by law,"<sup>28</sup> except adjudicatory rules,<sup>29</sup> regulations relating to military or foreign affairs, and regulations concerning agency organization, management and personnel.<sup>30</sup>

The Order establishes substantive criteria that federal agencies must apply to regulatory decisionmaking. Agencies are required to base administrative decisions on adequate information about

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merce and to protect the public health and welfare. The objective thus is not the elimination of federal regulation *per se*, although that may be the effect in some areas of existing federal concern that could be self-regulated more effectively through the marketplace or regulated by state and local government. Rather, the objective is to eliminate duplicative and conflicting federal regulations, onerous and unnecessary federal requirements, confusing and ambiguous provisions, and narrowly gauged standards that pursue a single categorical interest, *e.g.*, clean air or motor vehicle safety, oblivious to the consequences of such requirements for other essential national values, *e.g.*, energy conservation, inflation control, employment. See ROADS TO REFORM, *supra* note 16, at 72-73.

23. See section II *infra*.

24. See section III, subsection A *infra*.

25. See section III, subsection B *infra*.

26. Under the author's suggested approach, the governing statute of each federal regulatory agency would be revised to require that agency to take into account and weigh various competing public interest considerations and to design federal regulations that will advance the overall public interest in the most efficient and least burdensome way. See section IV *infra*.

27. Exec. Order No. 12,291, 46 Fed. Reg. 13193 (1981).

28. *Id.* § 2, 46 Fed. Reg. 13193-94.

29. 5 U.S.C. §§ 556-57 (1976).

30. Exec. Order No. 12,291, § 1(a)(1) -1(a)(3), 46 Fed. Reg. 13193 (1981). The Order also does not apply to emergency rules or rules in which there is a conflict with deadlines imposed by court order or Congress or rules exempted by the Director of the Office of Management and Budget. *Id.* § 8(a) and 8(b), 46 Fed. Reg. 13198.

“the need for and consequences of proposed government action,”<sup>31</sup> to find that “the potential benefits to society [of proposed regulations] outweigh the potential costs to society,”<sup>32</sup> to “maximize the net benefits to society,”<sup>33</sup> to select “the alternative involving the least net cost to society,”<sup>34</sup> and to establish regulatory priorities to maximize the “aggregate net benefits to society, taking into account the condition of the particular industries affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future.”<sup>35</sup>

Special requirements<sup>36</sup> are applicable to “major rules,” which are defined as regulations having a tendency to affect the economy in a substantial way, or the costs of goods and services to American companies, individuals, and government departments, or such desired economic activities as investment, creativity, and productivity, or in a negative manner the capability of American companies to compete with the international market.<sup>37</sup> As stated in the order,

[e]ach agency shall initially determine whether a rule it intends to propose or to issue is a major rule, *provided that*, the Director<sup>38</sup> subject to the direction of the Task Force<sup>39</sup> shall have authority . . . to prescribe criteria for making such determinations, to order a rule to be treated as a major rule, and to require any set of related rules to be considered together as a major rule.<sup>40</sup>

31. *Id.* § 2(a), 46 Fed. Reg. 13193.

32. *Id.* § 2(b), 46 Fed. Reg. 13193.

33. *Id.* § 2(c), 46 Fed. Reg. 13193.

34. *Id.* § 2(d), 46 Fed. Reg. 13193.

35. *Id.* § 2(e), 46 Fed. Reg. 13193-94.

36. See notes 28-39 *infra* and accompanying text.

37. Exec. Order No. 12,291, § 1(b)(1)-1(b)(3), 46 Fed. Reg. 13193 (1981), which reads:

- (b) “Major rule” means any regulation that is likely to result in:
- (1) An annual effect on the economy of \$100 million or more;
  - (2) A major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or
  - (3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

38. Director refers to the Director of the Office of Management and Budget (OMB Director). *Id.* § 1, 46 Fed. Reg. 13193.

39. Section 1(e) defines “Task Force” as “the Presidential Task Force on Regulatory Relief.” *Id.* § 2, 46 Fed. Reg. 13193.

40. *Id.* § 3(b), 46 Fed. Reg. 13194 (emphasis in original). The OMB Director’s authority must be derived from §§ 1(b) and 2 of the order. *Id.* Section 1(b) defines “major rule.” See note 26 *supra* and accompanying text. Section 2 sets forth



Every time an agency proposes a "major rule" that agency must make ready and consider, "to the extent permitted by law," a Regulatory Impact Analysis (RIA).<sup>41</sup> Every preliminary and final RIA must describe the conceivable benefits and costs of the rule,<sup>42</sup> determine the rule's possible net benefits,<sup>43</sup> render an account of alternative approaches that could essentially accomplish the same regulatory aim at a lower cost,<sup>44</sup> and explain why any such alternative could not legally be adopted and any legal reasons why the Executive Order's general requirements cannot be satisfied.<sup>45</sup>

The Director of OMB may review the RIA,<sup>46</sup> direct the agency to withhold publication of the RIA until his review is complete,<sup>47</sup> and require the agency to incorporate his views and its response in the rulemaking file.<sup>48</sup> The Order requires agencies to make

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the general requirements the agencies must follow in creating and in reconsidering extant regulations. See text accompanying notes 21-25 *supra*.

41. *Id.* § 3(a), 46 Fed. Reg. 13194. The requirement of a RIA is necessary in order that § 2 agency demands may be fulfilled. *Id.* For a look at § 2 requirements, see text accompanying notes 21-25 *supra*. Exec. Order No. 12,291, § 3(d)(1)-3(d)(2), 46 Fed. Reg. 13194 (1981). Except for rules not subject to proposed rulemaking under 5 U.S.C. § 553 (1976), the agency is required to prepare and submit to the OMB Director at least 60 days prior to publication of a notice of proposed rulemaking, a preliminary RIA and, at least 30 days prior to the publication of a final major rule, a final RIA. Exec. Order No. 12,291, § 3(c)(2), 46 Fed. Reg. 13194 (1981). For other major rules, only a final RIA is required. *Id.* at § 3(c)(1), 46 Fed. Reg. 13194. For non-major rules, a notice of proposed rulemaking must be submitted to the OMB Director at least ten days prior to publication. *Id.* at § 3(c)(3), 46 Fed. Reg. 13194.

42. Additionally, such RIA's must include possible positive and negative effects of the rule "that cannot be quantified in monetary terms," as well as the disclosure of the identity of those expected to obtain the benefits and those expected to endure the cost. *Id.*

43. *Id.* § 3(d)(3), 46 Fed. Reg. 13194. Included in such RIA is "an evaluation of effects that cannot be quantified in monetary terms." *Id.*

44. *Id.* § 3(d)(4), 46 Fed. Reg. 13194.

45. *Id.* § 3(d)(4)-3(d)(5), 46 Fed. Reg. 13194. The Executive Order's general requirements can be found in § 2 of the Order. See text accompanying notes 21-25 *supra*.

46. Exec. Order No. 12,291, § 3(e)(1), 46 Fed. Reg. 13194. The OMB Director's authorization to review, however, is "subject to the direction of the Task Force, which shall resolve any issues raised under this Order or ensure that they are presented to the President." *Id.*

47. *Id.* § 3(f)(1)-3(f)(2), 46 Fed. Reg. 13195. Delay of publication of the RIA depends, then, on whether or not the Director makes such a request for the purpose of review. It is thus a matter of the OMB Director's discretion. *Id.*

48. *Id.* The OMB Director, therefore, has substantial power under the executive order. He may, subject to the direction of the Task Force and limited to the "extent permitted by law," specify that certain proposed or existing rules are "major rules." *Id.* § 6(a)(1), 46 Fed. Reg. 13196. He may require and comment on the RIA. *Id.* § 3(c)(1)-3(c)(2), 46 Fed. Reg. 13194. He may "prepare and promulgate uniform standards for the identification of major rules and the development of [the RIA]." *Id.* § 6(a)(2), 46 Fed. Reg. 13196. He may demand that an agency acquire and examine all information relevant to the regulation. *Id.* § 6(a)(3), 46 Fed. Reg. 13196. He may waive certain requirements of the Order, *id.* §§ 3, 4, and 7, 46 Fed. Reg. 13194-98 in regard to any major rule proposed or in existence. *Id.*

their preliminary and final RIA's public.<sup>49</sup> They also are required to prepare RIA's for currently effective major rules.<sup>50</sup> Moreover, the OMB Director may designate currently effective regulations as a major rule and establish a schedule for the agency's preparation of an RIA.<sup>51</sup>

Before approving a major rule, the Order also requires agencies to make two determinations: (1) that the regulation is "clearly within the authority delegated by law and consistent with congressional intent," which must be supported by a memorandum of law published in the *Federal Register*<sup>52</sup> and (2) that the factual conclusions have "substantial support in the agency record, viewed as a whole."<sup>53</sup> The Order does not create any right or benefit, substantive or procedural, enforceable at law by any private party against the United States government,<sup>54</sup> but the determina-

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§ 6(a)(4), 46 Fed. Reg. 13196. He may set apart disharmonious and repetitious rules that are incompatible with the policies of other agencies and this order and, at his discretion, require "appropriate interagency consultation" to reduce or end such overlapping. *Id.* § 6(a)(5), 46 Fed. Reg. 13196. He may establish methods for measuring regulations' costs and benefits placed on the economy, for the purpose of preparing a budget for the regulatory agencies. *Id.* § 6(a)(6), 46 Fed. Reg. 13196. He may offer advice to the President regarding alterations in the statutes of agencies. *Id.* § 6(a)(7), 46 Fed. Reg. 13196. Additionally, he may oversee the agencies in regard to their degree of conformity to the requirements of the order and report his findings to the President. *Id.* § 6(a)(8), 46 Fed. Reg. 13196.

49. *Id.* § 3(h), 46 Fed. Reg. 13195. This means that agencies are required to make their RIA's *available* to the public. *Id.*

50. *Id.* § 3(i), 46 Fed. Reg. 13195, which states that:

Agencies shall initiate reviews of currently effective rules in accordance with the purposes of this Order, and perform Regulatory Impact Analyses of currently effective major rules. The Director, subject to the direction of the Task Force, may designate currently effective rules for review in accordance with this Order, and establish schedules for reviews and Analyses under this Order.

51. *Id.*

52. *Id.* § 4(a), 46 Fed. Reg. 13195.

53. *Id.* § 4(b), 46 Fed. Reg. 13195. The support in the agency record must also give "[f]ull attention to public comments in general and the comments of persons directly affected by the rule in particular." *Id.*

54. *Id.* § 9, 46 Fed. Reg. 13198. No private action is available because the purpose of the order is "only to improve the internal management of the Federal government." *Id.* Section 9 is consistent with judicial decisions on the right of private action under the Ford and Carter Executive Orders on inflation impact and regulatory improvements. See *Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976). In *Independent Meat Packers*, a group of meat packers brought private action in order to obtain declaratory and injunctive relief against the utilization of beef regulations it deemed to be in violation of Executive Order No. 11821. *Id.* at 231. The court determined that "Executive Order No. 11821 was intended primarily as a managerial tool for implementing the President's personal economic policies and not as a legal framework enforcea-

tions made by agencies and the RIA's are made part of the agency record in a rulemaking proceeding, which is subject to judicial review.<sup>55</sup>

Executive Order No. 12,291 substantially enhances the President's power over the regulatory process by setting forth uniform substantive standards that each federal agency must apply in promulgating regulations, by establishing elaborate procedures to guide the review of existing rules and the formulation of proposed regulations, and by creating unprecedented oversight and supervisory powers in the Task Force and OMB.<sup>56</sup> The order expands upon some of the concepts contained in its immediate predecessor, which it revoked, Executive Order No. 12,044, promulgated by President Carter on March 23, 1978.<sup>57</sup> The Carter Order, for exam-

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ble by private civil action." *Id.* at 236. If a private action was presumed, the door would be open for many frivolous lawsuits, which would thus have the effect of greatly hindering the functioning of federal agencies. *Id.* See National Renderers Ass'n v. EPA, 541 F.2d 1281, 1291-92 (8th Cir. 1976) (petitioners brought private suit against the Environmental Protection Agency for not conforming to an executive order, but the court found no private action available); Hiatt Grain & Feed, Inc. v. Bergland, 446 F. Supp. 457, 501-02 (D. Kan. 1978), *cert. denied*, 444 U.S. 1073 (1980).

55. Exec. Order No. 12,291, § 9, 46 Fed. Reg. 13198 (1981).

56. Regulatory reform legislation that would enact certain of the requirements contained in the executive order is currently being prepared in the Senate. Among the issues being considered for inclusion in such legislation are whether (1) to require that agencies conduct a cost-benefit analysis, (2) to grant OMB the power to revoke rules, (3) to permit courts to overturn rules that do not satisfy an OMB-approved cost-benefit analysis, and (4) to terminate regulations automatically after five years unless they are reviewed and renewed. BUREAU OF NAT'L AFF., DAILY EXECUTIVE REPORT (REGULATORY & LEGAL DEVELOPMENTS) (BNA Report) A-7—A-10 (1981).

57. Exec. Order No. 12,044, 3 C.F.R. 152 (1978 Comp.) (Improving Government Regulations.) The pertinent sections of President Carter's Executive Order No. 12,044 are presented:

SECTION 1. *Policy.* Regulations shall be as simple and clear as possible. They shall achieve legislative goals effectively and efficiently. They shall not impose unnecessary burdens on the economy, on individuals, on public or private organizations, or on State and local governments.

To achieve these objectives, regulations shall be developed through a process which ensures that:

- (a) the need for and purposes of the regulation are clearly established;
- (b) heads of agencies and policy officials exercise effective oversight;
- (c) opportunity exists for early participation and comment by other Federal agencies, State and local governments, businesses, organizations and individual members of the public;
- (d) meaningful alternatives are considered and analyzed before the regulation is issued; and
- (e) compliance costs, paperwork and other burdens on the public are minimized.

SEC. 2. *Reform of the Process for Developing Significant Regulations.* Agencies shall review and revise their procedures for developing regulations to be consistent with the policies of this Order and in a manner that minimizes paperwork.

Agencies' procedures should fit their own needs but, at a minimum, these procedures shall include the following:

- (a) Semiannual Agenda of Regulations. To give the public adequate

ple, required agencies to perform a regulatory analysis for "significant" regulations, but, unlike the Reagan Order, the Carter Order did not require the agency to determine that the proposed regulatory action, *inter alia*, maximizes the net benefits to society and involves the least net costs.<sup>58</sup> The Reagan Order translates the procedural touchstones of the Carter Order, for example, analysis

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notice, agencies shall publish at least semiannually an agenda of significant regulations under development or review. On the first Monday in October, each agency shall publish in the FEDERAL REGISTER a schedule showing the times during the coming fiscal year when the agency's semiannual agenda will be published. Supplements to the agenda may be published at other times during the year if necessary, but the semiannual agendas shall be as complete as possible. The head of each agency shall approve the agenda before it is published.

At a minimum, each published agenda shall describe the regulations being considered by the agency, the need for and the legal basis for the action being taken, and the status of regulations previously listed on the agenda.

Each item on the agenda shall also include the name and telephone number of a knowledgeable agency official and, if possible, state whether or not a regulatory analysis will be required. The agenda shall also include existing regulations scheduled to be reviewed in accordance with Section 4 of this Order.

- (d) *Approval of Significant Regulations.* The head of each agency, or the designated official with statutory responsibility, shall approve significant regulations before they are published for public comment in the FEDERAL REGISTER. At a minimum, this official should determine that
- (1) The proposed regulation is needed;
  - (2) the direct and indirect effects of the regulation have been adequately considered;
  - (3) alternative approaches have been considered and the least burdensome of the acceptable alternatives has been chosen;
  - (4) public comments have been considered and an adequate response has been prepared;
  - (5) the regulation is written in plain English and is understandable to those who must comply with it;
  - (6) an estimate has been made of the new reporting burdens or recordkeeping requirements necessary for compliance with the regulations;
  - (7) the name, address and telephone number of a knowledgeable agency official is included in the publication; and
  - (8) a plan for evaluating the regulation after its issuance has been developed.

SEC. 4. *Review of Existing Regulations.* Agencies shall periodically review their existing regulations to determine whether they are achieving the policy goals of this Order. This review will follow the same procedural steps outlined for the development of new regulations.

Executive Order No. 12,044 is revoked by Executive Order No. 12,291, § 10, 46 Fed. Reg. 13198 (1981).

58. Exec. Order No. 12,291, § 2(c)-2(d), 46 Fed. Reg. 1981.

of regulatory consequences, into substantive commands and creates a more formal and persistent, albeit advisory, oversight role for OMB in prodding agencies to apply these commands to the full extent permitted by their governing statutes.<sup>59</sup>

Executive Order No. 12,291 thus raises fundamental questions about the power of the President to impose these substantive and procedural requirements on agency officials,<sup>60</sup> the effectiveness of these requirements in improving the quality of federal regulations, and the meaning and applicability of various new standards contained in the Executive Order in different regulatory contexts. Each of these questions will be discussed in turn.

The Executive Order carefully avoids expanding presidential power in areas where it risks direct confrontation with the powers explicitly delegated by Congress to federal agencies. First, the Order does not affect the agency head's statutory responsibility to conduct the rulemaking process, weigh the relevant factors, and make the ultimate decision.<sup>61</sup> The President, the Task Force and the OMB Director cannot promulgate regulations directly or override regulations promulgated by the agency head.<sup>62</sup> OMB may, however, require an agency to perform a RIA, provide comments on the RIA, and insist that the RIA and OMB's comments be made part of the public record, but it cannot require the agency to adhere to its advice.<sup>63</sup> Second, the Order applies only "to the extent permitted by law."<sup>64</sup> If provisions of the Order are inconsis-

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59. *Id.* §§ 3(f)(1), 3(f)(2), and 6, 46 Fed. Reg. 13195-6. See notes 31-32 *supra* and accompanying text. See N.Y. Times, Feb. 14, 1981, at 36, col. 6: "Many companies complained that the [Carter] Order was not followed up with a tough enough review and oversight structure, with the result that the Government agencies largely ignored it."

60. The power of the President to make these requirements has been pondered before: "[t]he President needs enough power to execute the laws effectively; yet he must not destroy the essential balance of power among the branches of the government." Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 452 (1979).

61. See, e.g., Exec. Order No. 12,291 § 3(f)(3), 46 Fed. Reg. 13195 (1981), which states that "[n]othing in this subsection shall be construed as displacing the agencies' responsibilities delegated by [the particular agency's enabling statute]."

62. Executive Order No. 12,291 often calls for consultation between the agencies and the OMB Director. *Id.* § 6(a)(7), 46 Fed. Reg. 13196. Unlike Resolution A, as recommended by the AMERICAN BAR ASSOCIATION, *supra* note 11, at 5, the President cannot reverse or modify an agency's final decision. Of course, Congress is considering legislation that would give OMB the power to veto regulations that do not pass an OBM-approved cost-benefit test. See note 56 *supra*, at 14-15.

63. *Id.* §§ 3(f)(2), 6(a)(3), 46 Fed. Reg. 13195-96. See 5 U.S.C.A. § 301 (West 1977), which states: "The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property."

64. See Exec. Order No. 12,291 § 2, 46 Fed. Reg. 13193-94 (1981) (general requirements apply "to the extent permitted by law"); *Id.* § 3(f)(3), 46 Fed. Reg.

tent with the express procedural or substantive commands of an agency's governing statute, then they are not applicable.

Given these constraints, the President bases his authority to issue the Executive Order in his constitutional power to "take Care that the Laws be faithfully executed."<sup>65</sup> In the exercise of this power, the President may "supervise and guide" Executive Branch agencies in "their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone."<sup>66</sup> As long as this power is exercised consistently with the agency's statutory mandate,<sup>67</sup> as the Executive Order requires, the President may maintain that the substantive commands in his Order do not contravene any statute.<sup>68</sup> Essentially, he is seeking the advice of his appointees<sup>69</sup> in the form of a RIA and rendering advice to his appointees on the broader public interest concerns

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13195 ("Nothing in this subsection shall be construed as displacing the agencies' responsibilities as delegated by law."); *Id.* § 6, 46 Fed. Reg. 13196 (Director's powers limited "to the extent permitted by law."). See also *id.* § 7(a), 7(b)(2), 7(e), and 8(2), 46 Fed. Reg. 13197-98.

65. U.S. CONST. art. II, § 3.

66. *Myers v. United States*, 272 U.S. 52, 135 (1926). In *Myers*, the court held that an 1876 law, "by which the unrestricted power of removal of first class postmasters [was] denied to the President, [was] in violation of the Constitution, and invalid." *Id.* at 176. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 702 (1952) (Vinson, C.J. dissenting): Unlike "the head of a department when administering a particular statute, the President is a constitutional officer charged with taking care that a 'mass of legislation' be executed." See also *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) ("we hold that most of the powers conferred by the Act upon the Federal Election Commission can be exercised only by 'Officers of the United States,' appointed in conformity with Art. II, § 2, cl. 2, of the Constitution. . .").

67. For example, there "may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance." *Myers v. United States*, 272 U.S. at 135. See generally *Bruff*, *supra* note 60, at 451 (1979).

68. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). *Youngstown* dealt with the threat of a possible steel workers strike in April of 1952, and President Truman, in order to avoid such a strike, ordered the Secretary of Commerce to take over and operate the steel mills. *Id.* at 582-83. President Truman maintained that his order:

was necessary to avert a national catastrophe which would inevitably result from a stoppage of steel production, and that in meeting this grave emergency the President was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States.

*Id.* at 582.

69. See U.S. CONST. art. II, § 2. The President may "require the Opinion, in

and policies that he is elected to advance.<sup>70</sup> Because the advice the President or the OMB renders is on the public record,<sup>71</sup> as are the other determinations required by the Executive Order,<sup>72</sup> the President may assert that the Executive Order does not appear to run afoul of the procedural requirements of the Administrative Procedure Act.<sup>73</sup>

While the Executive Order establishes express criteria and procedures, it is not unlike other indirect powers that the president has always exercised over the regulatory process. He has the power to appoint and dismiss non-independent agency heads and to appoint the members of independent commissions and agencies,<sup>74</sup> to veto legislation establishing, modifying, or repealing the regulatory power of the agency,<sup>75</sup> to propose budgetary authorizations and appropriations,<sup>76</sup> and to decide whether to defend agency regulations in court.<sup>77</sup> He has the power to cajole and per-

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writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.”

70. *Myers v. United States*, 272 U.S. at 135 (1926). See note 49 and accompanying text *supra*.

71. Exec. Order No. 12,291, § 3(f)(2), 46 Fed. Reg. 13195 (1981). According to § 3(f)(2), an agency must refrain from publication of its final RIA until the OMB Director has issued his views on the proposed regulation. These views together with the agency's response are then incorporated into the rulemaking file.

72. *Id.* § 4, 46 Fed. Reg. 13195. Section 4 requires a memorandum of law to be published in the *Federal Register* supporting the determination that the regulation is clearly within the authority of the agency as delegated by law.

73. Administrative Procedure Act, 5 U.S.C. §§ 500-76 (1976). See, e.g., *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966) (congressional intrusion in agency adjudication prohibited); *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959), *cert. denied*, 376 U.S. 915 (1964) (when the proceeding is rulemaking, *ex parte* attempts to sway agency officials invalidates the proceeding); *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977) (rulemaking invalid because of *ex parte* contacts).

74. U.S. CONST. art. II, § 2, cl. 2 which states the President shall have the power to “nominate and by and with the Aid and Consent of the Senate, shall appoint Ambassadors, of the public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States, whose Appointments are not herein otherwise provided for.” Cf. *Myers* (power to remove executive officers) and *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (limits on President's power to remove independent agency commissioner); see Robinson, *On Reorganizing the Independent Regulatory Agencies*, 57 VA. L. REV. 947, 951 n.14 (1971).

75. U.S. CONST. art. I, § 7, cl. 2. This establishes the veto power of the President subject to Congressional override. Within statutory limits and subject to legislative veto, the President may also transfer or abolish agency functions through government reorganization, see Bruff, *supra* note 67, at 492-94. See also Reorganization Act of 1977, 5 USC §§ 901-12 (1976).

76. U.S. CONST. art. II, § 3, cl. 1. The President “shall from time to time give to the Congress Information of the State of the Union and recommend to their consideration such measures as he shall judge necessary and expedient. . . .” See Lazarus & Onek, *The Regulators and the People*, 57 VA. L. REV. 1069, 1085-87 (1971) (detailing OMB control over agency budgets). The President also has limited authority to impound appropriated agency funds, see Bruff, *supra* note 67, at 492.

77. See Lazarus & Onek, *supra* note 76, at 1085. Since the Justice Department

suade agency heads publicly or privately and to invoke the tremendous media exposure of the "bully pulpit" against recalcitrant regulators.<sup>78</sup>

The Executive Order accomplishes many of the objectives of regulatory reform. First, it provides a means by which the President, through the Task Force and OMB Director, can coordinate duplicative and conflicting agency regulations, subordinate duplicative and conflicting agency regulations, subordinate narrow categorical interests,<sup>79</sup> to the overall national interest in the review of regulations, and make regulations more accountable to elected officials.<sup>80</sup> Second, it broadens the public interest values that an agency regulator must evaluate to the maximum extent possible under the governing statutory mandate. Unless prohibited by statute, the agency must consider costs and benefits, effects on inflation, employment, industries, regions, international competitiveness, and other national interests.<sup>81</sup> Third, the development of uniform criteria for analyzing the costs and benefits of regulatory action will establish a standardized basis for achieving greater consistency among various federal agencies in the exercise of their regulatory powers.<sup>82</sup>

In accomplishing these desirable objectives, however, the Executive Order exacts a price, it creates paperwork burdens, bureaucratic layering, and numerous ambiguities that may handicap the successful achievement of its purpose.

controls agency access to courts, it may refuse to enforce agency subpoenas. See e.g., *FTC v. Guignon*, 390 F.2d 323 (8th Cir. 1968).

78. See, e.g., Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 211-12 (1978). The substantial effect of the personal and direct persuasion of the President upon agency commissioners is noteworthy; however, meetings between agency heads are shown to have much greater effect.

79. Such categorical interest would be items such as clean air, motor vehicle safety, occupational health and safety.

80. See *ROADS TO REFORM*, *supra* note 16, at 68-74: The Commission notes that "[t]he President's immediate staff approaches critical regulatory issues in light of the President's statutory responsibility and political accountability for making balancing choices among competing national goals, rather than with the primary emphasis that agency officials place on the goal entrusted to their single-mission agency." *Id.* at 83.

81. Exec. Order No. 12,291 §§ 1-4, 46 Fed. Reg. 13193-95 (1981).

82. *Id.* at §§ 2(b)-2(e), 6(a)(6), 46 Fed. Reg. 13193-96. Section 2(b)(e) provides for a utilitarian analysis that will maximize the general welfare of society. Section 6(a)(b) provides for a development of "procedures for estimating the annual benefits and costs of agency regulations, on both an aggregate economic or industrial sector basis, for purposes of compiling a regulatory budget."



First, the involvement of the President, the Task Force and OMB more deeply into the regulatory process may not result in better regulations. There is no evidence that the staff of the Vice President or of the OMB are sufficiently expert in many of the complex areas of regulation to make analytically sound balancing judgments. Recommendations are likely to be made on the basis of overly simplified assumptions and executive summaries. Moreover, occupation of a position on the White House staff or OMB does not guarantee analytical neutrality or fundamental objectivity in fostering the national interest. Staff members bring their own biases to the job or quickly learn the biases of the particular White House-oriented interests that they are charged with advancing.<sup>83</sup> Finally, the intensely political nature of much of the work of White House staff members, and constraints on access to these members, may increase the likelihood of political interference with substantive decisionmaking and create inequities in the access that people have to the decisionmaking process.<sup>84</sup>

Second, the Executive Order creates substantial additional paperwork requirements<sup>85</sup> and builds in a significant delay factor. While the RIA is a useful analytical tool, its utility will vary substantially from one type of regulation to another.<sup>86</sup> Review by the Task Force and the OMB could slow down the process of regula-

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83. Such White House interests may be controlling inflation, reducing federal spending, reelecting the President or promoting effective congressional relations.

84. See *ROADS TO REFORM*, *supra* note 16, at 167-68 (Karpatkin dissenting notes the drawbacks of vesting such great power in the office of the executive); SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94TH CONG., 2D SESS., *FEDERAL REGULATION AND REGULATORY REFORM*, 533 (Subcomm. Print 1976) [hereinafter cited as *FEDERAL REGULATION AND REGULATORY REFORM*].

Moreover, on a day-to-day basis, most of the influence of the Task Force and OMB would be performed by staff. In effect, anonymous, appointed White House or OMB officials would be empowered to influence the decisions of presidentially appointed officials in the agencies, who usually are subject to Senate confirmation, who face rigorous scrutiny by the press and constituent groups, and who must defend their decisions at congressional hearings and seek congressional authorizations and appropriations to operate their agencies' programs. *ROADS TO REFORM*, *supra* note 16, at 56 (Coleman dissenting). See also J. Quarles, *Cleaning Up America: An Insider's View of the Environmental Protection Agency*, 117-42 (1976), 7 ENV'TL REP. 693 (1976) which shows the involvement of OMB and White House staff in environmental regulation as part of Nixon administration's quality of life review. This problem would be even more pronounced if legislation is enacted granting OMB veto authority over agency regulations. See note 56, *supra*, at 14.

85. Exec. Order No. 12,291 § 3, 46 Fed. Reg. 13,194 (1981). The Regulatory Impact Analysis is a detailed and cumbersome procedure. According to Congressman Danielson, Chairman of the House Committee on Administrative Law and Governmental Relations, the cost-benefit requirements could be "very detailed and very expensive." It could "create a tremendous burden on the regulatory process." BNA Report, *supra* note 56, at A-10.

86. See *ROADS TO REFORM*, *supra* note 16, at 168 (Karpatkin dissenting). These measures "would bypass Congress and ignore its capacity to deal with diverse

tory reform.<sup>87</sup> The OMB appears to have unlimited power to delay and defer regulatory decisionmaking,<sup>88</sup> yet regulatory reform often requires that burdensome and outmoded regulations be modified and modernized as expeditiously as possible.

Third, the Executive Order emphasizes the importance of economic considerations,<sup>89</sup> but these are not the only considerations that must be taken into account in balancing public values in search of the elusive overall national interest.<sup>90</sup> Given the exigencies of today's economic picture,<sup>91</sup> it is perhaps understandable that economic concerns should dominate the rulemaking process. Over the long term, however, it may not be healthy to tilt too heavily toward these objectives. The Executive Order fails to provide guidance as to whether agency regulators should consider the effect of a proposed rule on the conservation of energy, national security, civil rights, the welfare of the poor, the deterioration of urban areas, the protection of the environment, or other governmental concerns.<sup>92</sup> If such values are to be considered, even though they are expressly required by the government statute, the Order provides no guidance as to how they are to be

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agency policies or policy making procedures that require reconciliation in the national interest." *Id.*

87. *Id.* at 167. The order "would increase delay in regulatory proceedings, when such delay is one of the problems" they were intended to address. *Id.*

88. Exec. Order No. 12,291 § 3(f)(2), 46 Fed. Reg. 13,195 (1981)

Upon receiving notice that the [OMB] Director intends to submit views with respect to any final Regulatory Impact Analysis or final rule, the agency shall . . . refrain from publishing its final Regulatory Impact Analysis or final rule *until* the agency has responded to the Director's views, incorporated those views and the agency's response in the rulemaking file.

*Id.* (emphasis added). By issuing a notification of an intention to submit views and then withholding those views, it appears the OMB Director may hold up the RIA for an indeterminate amount of time.

89. *Id.* at § 1(b), 46 Fed. Reg. 13193. Section 1(b) defines any rule effecting costs, competition, investment, or employment as a major rule which requires a RIA.

90. According to House Committee Chairman Danielson, "cost is certainly an important consideration but I don't think it should be the exclusive consideration." BNA Report, *supra* note 56, at A-9. Because benefits may be difficult to quantify, they may be ignored, *e.g.*, sprinkler systems in hotels, toxic waste disposal. *Id.* Not all national concerns can be measured in economic terms. See note 71 *supra* and accompanying text.

91. President Reagan's Economic Address to the Nation, February 18, 1981, noted the problematic economic conditions with which the country is faced.

92. Of course, some of these public interest concerns are protected by federal statutes, which apply generally to all public programs. See, *e.g.*, National Environmental Policy Act, 42 U.S.C. §§ 4321, 4331-35, 4341-47 (1976); Civil Rights Act of 1964, 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975a-75d, 2000a-2000b (1976).

weighed, balanced, and reconciled with the economic criteria.<sup>93</sup>

Finally, the Executive Order creates numerous legal and substantive ambiguities that may prove confusing and complex in their application to myriad regulatory contexts. It is not clear, for example, that a proposed regulation that maximizes the "net benefits to society" will always be the alternative that involves "the least net cost" after considering its effect on particular industries.<sup>94</sup> Indeed, the Order may escalate the evolving art of cost-benefit analysis into an exact science that it cannot be.<sup>95</sup> Also unclear is the extent to which an agency may consider and apply these standards, where its governing statute neither permits nor excludes such considerations, but does specify applicable criteria.<sup>96</sup> The extent to which the Order may be applied to independent regulatory agencies is particularly unclear in light of judicial and congressional restraints on Presidential supervision of their activities.<sup>97</sup> While the Order does not create any private cause of

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93. The focus of the executive order solely on economic factors further illustrates the Reagan administration's emphasis on the economy above all other matters. See ROAD TO REFORM, *supra* note 16, at 168-69. Karpatin fears for the progress of civil rights under such a regulatory system.

94. Exec. Order No. 12,291, § 2b-c, 46 Fed. Reg. 13193 (1981). The executive order attempts to put forth the classical tenets of utilitarianism. Utilitarianism can, however, fall into an "ends justifies the means" type theory. Although net social cost may be low, small groups of individuals may suffer greatly. This does not seem to be supported by American concepts of equal justice. For a thorough exposition of the shortcomings of utilitarian philosophy as a political structure see J. RAWLS, A THEORY OF JUSTICE (1971); see also A.K. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE (1970); K.J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963).

95. FEDERAL REGULATION AND REGULATORY REFORM, *supra* note 65, at 503-15. The study notes that cost-benefit analysis is often inaccurate, tends to reflect the prejudice of its sponsor, and "may institutionalize a bias against the public interest." See also Green, *The Risk-Benefit Calculus In Safety Determinations*, 43 GEO. WASH. L. REV. 791, 798 n.26 (1975).

Professor Green points out that in order to effectively make calculations of maximized societal benefits and net societal costs, it is necessary to quantify the value of human life. Green suggests that such quantification merely evolves into a "numbers game" with the current political regime affecting policies as it sees fit by merely re-quantifying to fit its derived ends. Quantification such as this is too arbitrary and potentially inequitable to withstand constitutional scrutiny. *Benefit Analysis: An Inadequate Basis for Health, Safety, and Environmental Regulatory Decisionmaking*, 8 ECOLOGY L.Q. 473 (1980). The author notes that cost-benefit analysis has significant methodological weaknesses, and can improperly determine agency ends as well as means.

96. See, e.g., the Federal Aviation Act, 49 U.S.C. § 1431d (1976), which specifies that the Federal Aviation Administration, in prescribing aircraft noise standards, shall consider whether a proposed standard is consistent with the highest degree of safety and is economically reasonable and technologically practicable. It is unclear whether the Executive Order adds on additional criteria, offers substantive content to the tests of economic reasonableness and practicability, or merely establishes a procedure with which the agency must comply.

97. See note 59 *supra*. See Bruff, *supra* note 67, at 498-99. Professor Bruff suggests that "there seems to be no bar to the view that the President's constitutional

action, the required analyses and determinations are part of the record, and thus presumably subject to judicial review. The weight the courts will attach to these documents remain to be seen, as does the court's construction of the agency's determination that the facts have substantial support in the record.<sup>98</sup>

In sum, Executive Order No. 12,291 makes rapid strides toward a more balanced regulatory system, but it cannot remove statutory impediments to efficient regulatory decisionmaking and it creates certain new impediments to the achievement of its purpose. Some of these impediments could be alleviated if more attention was focused on the proper construction of the governing statutes under which agency regulators operate. The OMB staff alone is not a unique repository of a balanced perspective of the national interest.<sup>99</sup> Given a properly constructed congressional mandate, agency heads are capable of rendering balanced regulatory decisions and reconciling diverse national interests. Additionally they are in a better position to apply the analytical tools and professional expertise required to accomplish this objective in the most efficient way.<sup>100</sup> To the extent that agencies approach their responsibilities with this perspective and have the tools with which to apply the most efficient means, the need for rigorous

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powers over the executive branch are not plenary, and instead should follow [a] functional analysis. . . ." Courts should adopt approaches that are not fixed but can vary as the circumstances demand. *See, e.g., United States v. Nixon*, 418 U.S. 683 (1974). "The Court should seek to determine whether a particular rulemaking program has been placed in an independent agency because *its nature* renders presidential intervention inappropriate, or whether the placement reflects only a tradition of placing similar programs in that particular agency." Bruff, *supra* note 67, at 499 (emphasis added).

98. Exec. Order No. 12,291, § 4b, 46 Fed. Reg. at 13,195 (1981);  
Before approving any final major rule, each agency shall:

[b] Make a determination that the factual conclusions upon which the rule is based have substantial support in the agency record, viewed as a whole, with full attention to public comments in general and the comments of persons affected by the rule in particular.

99. It would seem the OMB is as susceptible to the political process as any other agency where the President may freely appoint its management. This is supported by Professor Robinson's notations of the effect of incoming political regimes on agency makeup. *See Robinson, supra* note 74, at 951 n.14.

100. *See Bruff, supra* note 67, at 498. Professor Bruff notes "independent agencies have been granted protection from presidential involvement in order to insure two goals: insulation of adjudication from outside influence and development of expertise and stability." *Id.* Constant intervention by the executive branch would seem to circumvent these two goals.

OMB review along with the inherent delays and layering of that process, is obviated.

### III. PROPOSED ORGANIZATIONAL REFORMS

In addition to reforms that would enhance the President's power to review agency rulemaking, there are pending before Congress numerous proposals to inject Congress and the courts more deeply into the federal regulatory process. The two most significant of these proposals are the congressional veto<sup>101</sup> and the expanded scope of judicial review.

#### A. *Congressional Veto*

Over the past decade, Congress has enacted legislation containing congressional veto provisions and to certain programs of the Federal Election Commission,<sup>102</sup> National Highway Traffic Safety Administration,<sup>103</sup> Department of Housing and Urban Development,<sup>104</sup> Department of Education,<sup>105</sup> and other agencies.<sup>106</sup> These bills have involved numerous variations on the same theme: express congressional review prior to promulgation of a rule, one house veto of agency rules, two house veto, committee approval, or joint resolution requiring presidential approval over-

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101. "A legislative veto refers to a statutory provision that delays an announced administrative action, usually for a specified number of days, during which time Congress may vote to approve or disapprove the action without further presidential involvement." HOUSE COMM. ON RULES, 96TH CONG., 2D SESS., STUDIES ON LEGISLATIVE VETO 1 (1980).

102. See 2 U.S.C. § 438(c)(2)-(c)(3) (1976) (legislative veto over rules promulgated under the Federal Election Campaign Act Amendments of 1974 Pub. L. No. 93-443, 88 Stat. 1263 (1974)); 26 U.S.C. §§ 9009-39 (1976) (rules promulgated under the Presidential Election Campaign Fund Act Pub. L. No. 92-178, 88 Stat. 563 (1971)).

103. See 15 U.S.C. § 1410b (1976) (legislative veto overrules concerning motor vehicle occupant restraint systems).

104. See 42 U.S.C. § 3535 (1976) (which requires the submission of pending regulations to House and Senate Banking Committees, which may delay promulgation pending legislation to overrule).

105. See 20 U.S.C. § 1070a(a)(3)(A)(ii) (1976) (allows legislative review of Basic Educational Opportunity Grants).

106. See Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1371 (1977). The authors embark on an analysis that explores the effect of legislative vetoes on five different situations: the Office of Education's establishment of family contribution schedules for the basic educational grant program; the Department of Health, Education and Welfare's rules issued pursuant to the General Education Provisions Act; the Federal Energy Administration's exemptions from price and allocation controls on oil products; the General Services Administration's regulations regarding public access to the papers and tapes of the Nixon presidency; and the total of the Federal Election Commission's rules governing the conduct and financing of campaigns.

riding an agency rule.<sup>107</sup>

A recent variation on this familiar theme was introduced in the 97th Congress as House Resolution 1 (Jan. 5, 1981).<sup>108</sup> House Resolution 1 would establish a select House Committee on Regulatory Affairs that could review any federal agency rule or set of related or conflicting rules. If this select Committee objects to a rule<sup>109</sup> on policy grounds, it would present its views to the House committee with substantive responsibility for the agency, which would have the sole authority to act.<sup>110</sup> If the select Committee finds the rule beyond the authority of the agency or inconsistent with clear legislative intent, it could vote to nullify the regulation through a joint resolution requiring the President's signature, or it could present a simple resolution to the House.<sup>111</sup> If the House passed such a resolution, the agency would enjoy no presumption

107. Over 30 bills to institute legislative veto procedures applicable to all agency rules were introduced in the 96th Congress. At least 13 have been introduced in the 97th Congress as of this writing. See, e.g., H.R. 1776, 97th Cong., 1st Sess. (1981).

108. H.R. 1, 97th Cong., 1st Sess. (1981). For Representative Moakley's introductory remarks, see 127 Cong. Rec. H81 (daily ed. Jan. 9, 1981).

109. The Select Committee could object to the rule because it (1) is arbitrary, capricious, and unreasonable, (2) duplicates, overlaps, or conflicts with other federal rules or statutes, (3) imposes a significant cost burden not adequately offset by the public benefit, (4) is procedurally defective, or (5) is beyond the authority of the agency. H.R. 1, 97th Cong., 1st Sess. (1981). See also HOUSE COMM. ON RULES, STUDIES ON THE LEGISLATIVE VETO, H.R. DOC. NO. 682-2, 96th Cong., 2d Sess. (1980). The report presents several case studies involving the legislative veto and the results of compromise between the legislative and executive branch. Thereby, the reader is able to draw conclusions from a historical and practical approach rather than reason from an abstract or theoretical plane. The studies present a broad range of positions on both the legality and practicality of legislative vetoes. 2 SENATE COMM. ON GOVERNMENT OPERATIONS, 95TH CONG., 1ST SESS., STUDY ON FEDERAL REGULATION 115-17 (Comm. Print 1977). The report reviews the opportunities of congressional oversight of regulatory agencies. Included as one method of improvement is the legislative veto. McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1133-62 (1977). Justice McGowan discusses the role of the congressional veto and efforts to retain a balanced effective separation of powers. Bruff & Gelhorn, *supra* note 106, at 1423. Professor Bruff and Dean Gelhorn suggest that a general legislative veto will not increase the overall efficiency of the administrative or regulatory process and will encumber the results of well reasoned decisionmaking based upon a record. The veto would also encourage the destruction of the separation of powers doctrine, the doctrine which limits the delegation of congressional authority, and this could encourage the advent of new concepts of due process in administrative law. Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975).

110. 127 Cong. Rec. H82 (daily ed. Jan. 9, 1981) (remark of Rep. Moakley).

111. *Id.* H83.

of validity in any subsequent judicial challenge and the select Committee would have legal standing to file suit to overturn the regulation.<sup>112</sup>

House Resolution 1 illustrates the extremes to which a creative congressional mind will go in seeking ways to fragment and diffuse federal agency regulatory power. Apart from the questionable constitutionality of such an approach,<sup>113</sup> these legislative solutions simply avoid the basic issue, of improving regulatory authority at its source, an issue that must be addressed by Congress. This issue arises because of the narrow focus with which Congress initially enacted the agency's enabling charter. By broadening the mandate of each federal regulator and requiring him to consider and balance various public policy concerns, Congress could remedy the defect to which these legislative solutions are addressed.<sup>114</sup> It could address the cause rather than tinker with the symptoms of narrow, conflicting federal regulation.

### *B. Enhanced Judicial Review of Federal Regulatory Action*

Congress also has sought to deter arbitrary federal regulatory action by enhancing the role of judicial review. The most notorious example of this approach to regulatory reform is the Bumpers Amendment, named after its sponsor, Senator Bumpers, who introduced an amendment to the Federal Courts Improvements Act of 1979, where, without the benefit of hearings or much debate, it passed the Senate in 1979.<sup>115</sup> The amendment did not pass the

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112. *Id.*

113. See Stewart, *Constitutionality of the Legislative Veto*, 13 HARV. J. LEGIS. 593 (1976). A single House veto on the grounds of illegality would frustrate the constitutional policy underlying the establishment of a bicameral Congress as a check against the political power of either House. See THE FEDERALIST NO. 49, at 315-16 (J. Madison). It further intrudes upon the constitutionally prescribed judicial function. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-77 (1803): the Constitution vests the judicial power in the courts, and "[i]t is emphatically the province and duty of the judicial department to say what the law is." See, e.g., *Chadha v. Immigration and Naturalization Service*, 634 F.2d 408 (9th Cir. 1980). "It is the Judiciary's prerogative, after a showing that the source of a claimant's appeal is not textually committed to another branch by the Constitution, to adjudicate a claimed excess by a coordinate branch of its constitutional power." *Id.*

114. The tendency of the legislative veto to impinge upon the Constitution's checks on government power and the potential abuse of discretion where members of Congress may exercise national power without procedural restraints on the assertion of local or personal interests should be considered contrary to constitutional principles. Kaiser, *Congressional Action to Overturn Agency Rules: Alternatives to the "Legislative Veto"*, 32 AD. L. REV. 667 (1980). The author analyzes alternatives to the legislative veto as a tool to control agency regulation. Both statutory and non-statutory techniques are discussed in order to escape the constitutional conflicts brought on by the legislative veto.

115. The Bumpers Amendment, as passed by the Senate, would have amended

House, however, and was not enacted.<sup>116</sup> Had it been enacted, the Bumpers Amendment would have greatly increased the power of the courts to overrule federal regulation by replacing the present presumption that an agency's regulations are valid with the requirement that the agency establish that validity by a preponderance of the evidence.<sup>117</sup> Instead of placing the burden on private parties to show why a regulation is invalid, the amendment would have imposed the burden on government to demonstrate that its action is lawful.<sup>118</sup> Reversing longstanding judicial precedent, the provision would have terminated the courts' traditional deference to an agency's interpretation of its authorizing statute and invited substantially broadened and independent judicial review of the lawfulness of agency action.<sup>119</sup>

Various reincarnations of the Bumpers Amendment have recently reappeared. On January 6, 1981, Senator Bumpers introduced Senate Bill 67<sup>120</sup> which would amend the Administrative Procedure Act (APA), to require the reviewing court to "independently decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."<sup>121</sup> While the effect

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§ 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706 (1976), to provide in part as follows:

There shall be no presumption that any rule or regulation of any agency is valid, and whenever the validity of any such rule or regulation is drawn in question in any court of the United States or of any State, the court shall not uphold the validity of such challenged rule or regulation unless such validity is established by a preponderance of the evidence shown.

125 Cong. Rec. S12145 (daily ed. Sept. 7, 1979).

116. A weakened version of the amendment was attached by the House Judiciary Committee to its omnibus regulatory reform bill, H.R. 3263, but this bill never reached the floor. See 38 Cong. Q. Weekly Rep. 3576 (1980).

117. 125 Cong. Rec. S12146 (daily ed. Sept. 7, 1979).

118. See Woodward & Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 AD. L. REV. 329, 343 (1979) which argued that "[i]n effect, S. 111 [the Bumpers amendment] creates a strong presumption of invalidity" governing review of regulations.

119. *Id.* at 333, 335; see, e.g., *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1945), the agency's constructions of its statute "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." See also note 125 *infra*.

120. S. 67, 97th Cong., 1st Sess. (1981). Section 104(a) of the bill (quoted in the text) uses the term "independently" in place of "de novo" as employed in the amendment attached to S. 1477 in 1979. Section 104(b) requires the reviewing court to consider the agency record in the light of the "rule of prejudicial error." Section 104(c) substantially repeats the 1979 amendment's ban on attaching any presumption of validity to agency action.

121. *Id.* § 104(a).



of these and other modifications on the traditional APA standard of review is far from clear, it is apparent that such provisions are intended to encourage the courts to defer less to an agency's interpretation of its own statute.<sup>122</sup>

There are a number of problems with enhancing the role of judicial review as a Bumpers-type amendment would propose to do. First, the types of issues that arise during a review of agency action are of infinite variety and are presented in numerous forms ranging from agency orders and press releases to informal rulemaking. Often these issues present mixed questions of law and fact<sup>123</sup> involving complex areas of science or technology. The governing statute may provide broad general guidance to the agency or may require that explicit procedures and criteria be followed. It is therefore difficult to establish simple, general standards governing how the judiciary should weigh an agency's interpretation of its statutory authority.<sup>124</sup> Over the years, judicial deference has evolved on a case-by-case basis that properly evaluates the degree to which agency expertise should be relevant in interpreting a statute, applying congressional intent, making findings of fact, and sorting through mixed questions of law and fact.<sup>125</sup>

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122. 127 Cong. Rec. H79 (daily ed. Jan. 9, 1981). As Mr. McClory stated, introducing an identical bill (H. 807, 97th Cong., 1st Sess. (1981)) in the House of Representatives on January 9, 1981, "the courts are encouraged to take a hard, and independent, look at the agency's exercise of jurisdiction and authority" and "does not create new powers or a new role for the Federal courts" and would not "alter the burden of proof with respect to regulations adopted through the informal rulemaking process." *Id.* (daily ed. Jan. 9, 1981).

123. Woodward & Levin, *supra* note 118, at 337.

124. See Woodward & Levin, *supra* note 118, at 329.

125. Thus, amendments to the APA to broaden the standard of review would erode over a hundred and fifty years of judicial precedent in which the courts have attempted to articulate the appropriate standard of judicial deference to be accorded an agency's interpretation of its authorizing statute. See *United States v. Vowell*, 9 U.S. (5 Cranch) 368, 372 (1809) (Marshall, C.J.). From such precedent, a complex set of rules of statutory interpretation has evolved under which some administrative constructions are entitled to greater weight than others. See *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261 (1968) which found that the agency's construction of the statute that it is charged with administering is entitled to deference by the courts and will be affirmed if it has "reasonable basis in law." See also *NLRB v. Hearst Publications*, 322 U.S. 111, 131 (1944); *Unemployment Comm'n v. Aragon*, 329 U.S. 143, 153-54 (1946); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965) which held that courts are the final authority on issues of statutory construction and "are not obliged to stand aside and rubber stamp their affirmance of administrative decisions" that are inconsistent with statutory mandate or frustrate congressional policy. See also *NLRB v. Brown*, 380 U.S. 278, 291 (1965); *United States v. National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694, 719 (1975) (longstanding, continuous construction entitled to great deference); *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953) ("[c]umulative experience begets understanding and insight"); *Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 152-54 (1960) (deference due to agency construction followed since governing stat-

Substitution of a Bumpers-type amendment for the existing case law would replace a fine-tuned set of practicable criteria that the courts may apply in reviewing the validity of regulatory action with an ambiguous standard that has not received the test of experience. The effect of enacting such a new standard would be to subject federal rulemaking to a wide assortment of different standards of review as individual courts and judges place their own interpretation on the meaning and implications of the new amendment rather than on existing case law.<sup>126</sup>

Heavy reliance on the judicial system simply avoids the basic issue: how to improve the exercise of regulatory authority at its source. Reliance on the judicial system also gives Congress an excuse *not* to go back to the more difficult and complex question of modifying the statutory instructions under which federal regulators operate.

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ute was adopted); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933); *Shapiro v. United States*, 335 U.S. 1, 12 n.13 (1948) (agency participation in drafting of legislation entitled to deference); *Morton v. Ruiz*, 415 U.S. 199 (1974) (new statutory construction that departs from earlier agency view entitled to less deference); *Alaska S.S. Co. v. United States*, 290 U.S. 256, 261-64 (1933) (agency not entitled to deference in interpretation of statute other than one it is charged with administering); *General Electric Co. v. Gilbert*, 429 U.S. 125, 144-45 (1976) (no deference where two agencies disagree about proper statutory interpretation); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969) (implicit or explicit congressional endorsement of agency construction entitled to great deference); *E.I. DuPont de Nemours & Co. v. Train*, 430 U.S. 112, 134 n.25 (1977) (in highly technical areas, deference is greatest); *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 565-66 (1979) which found that deference to agency's longstanding interpretation of statute rests in awareness of practical expertise and willingness to accord flexibility to an agency as it encounters new and unforeseen problems over time, but deference is constrained by court's obligations to honor clear meaning of the statute as revealed in its language, purpose and history.

126. Equally as important, the courts are not equipped to address systematic problems in federal regulation. Courts cannot balance and coordinate public interest values if the governing statute does not permit the agency to perform such a role. Nor are courts qualified or authorized to undertake cost benefit analyses, to compare inconsistent regulatory requirements, to make choices between public interest values, or to substitute their judgment for that of Congress or the agency in formulating sound regulatory policies. Courts are confined by the limits of judicial review, even as these limits are broadened by proposals such as the Bumpers Amendment; courts must sustain a lawful regulation if there is a rational basis in the record to support it and if the agency has considered all relevant factors, explained its decision and not made a clear error of judgment. *See, e.g.*, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *see also Wright, The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375 (1974).

#### IV. STATUTORY REFORMS DESIGNED TO IMPROVE THE REGULATORY PROCESS AND THE EFFICIENCY OF FEDERAL REGULATIONS

While Executive Order No. 12,291 broadens the regulators' mandate to consider economic issues to the extent permitted by the governing statute, it cannot amend statutes that narrowly prescribe the relevant criteria. Rather than fragmenting regulatory power by layering additional oversight authority on other institutions such as the OMB, Congress and the courts, Congress should seek to broaden the statutory basis upon which regulatory power is exercised and to expand agencies' flexibility in designing cost-efficient means of achieving various public policy objectives. Regulatory reforms should not be designed to make it more complicated for the federal government to regulate, but to ensure that federal agencies have the authority, the capacity, and the responsibility to regulate efficiently and to consider and weigh diverse public interest values in regulatory decisionmaking.

Often, the narrow, categorical view that is attributed to a federal agency is merely a function of its congressional mandate. Congressional committees and subcommittees are often single issue-oriented. In its eagerness to pursue a particular legislative objective, Congress constrains the regulator's power to the attainment of specific categorical objectives under tight deadlines. The Environmental Protection Agency (EPA), for example, asserts that, under the Clean Air Act, it is not permitted to consider costs and energy consequences in setting national air quality standards.<sup>127</sup> In *Union Electric Co. v. EPA*,<sup>128</sup> the Supreme Court similarly concluded that EPA cannot take costs and technical feasibility into account in reviewing and approving state air quality plans.<sup>129</sup> Indeed, the courts generally have invalidated regulatory decisions that take into account factors not specified in the legislation. Similarly, courts have rebuffed attempts to require regulatory agencies to consider national public policy goals not specifically enumerated in the legislation.<sup>130</sup>

With restrictive congressional charters and judicial constraints, it is no wonder that agencies pursue narrow categorical objectives

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127. See 44 Fed. Reg. 8202-03 (1979) (ozone standard).

128. 427 U.S. 246, 256 (1976).

129. See *EPA v. National Crushed Stone Ass'n*, 101 S. Ct. 295, 301-02 (1980) (statute does not allow consideration of economic capability in granting variance from water pollution control standard); see also *Pacific Legal Foundation v. DOT*, 593 F.2d 1338, 1343 (D.C. Cir. (1979)), cert. denied, 444 U.S. 830 (1979) (review of a safety standard is limited to whether it is "consistent with its statutory mandate, rational and not arbitrary"); *D.C. Federation of Civic Assn's v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972).

130. See *Richmond Power & Light v. FERC*, 574 F.2d 610, 616 (D.C. Cir. 1978).

and ignore other public policy consequences of their decisionmaking. More attention must be devoted to broadening the agency's governing statute to require the consideration and balancing of relevant countervailing public interest values, and to expanding the agency's flexibility to devise innovative and cost-effective alternatives. Accomplishment of this objective is a complex process, involving many statutes and congressional committees as well as organizational issues and personnel considerations. While far from exhaustive, the following sections illustrate the types of steps that can be taken to establish a balanced basis for responsible regulation at its administrative source.

#### *A. Broadening the Statutory Charter*

Recognizing the dangers inherent in a narrowly focused approach to federal regulation, Congress has begun to experiment with ways of broadening the range of public interest considerations that a federal agency must take into account in regulatory decisionmaking. A number of approaches have been tried, and others should be considered.

##### 1. Government-wide Single Issue Concerns

The National Environmental Policy Act<sup>131</sup> represents one approach. It requires that each federal agency, before undertaking a significant federal action that would have a major impact on the environment, complete an environmental analysis that takes into consideration alternatives and their consequences for the environment.<sup>132</sup> This approach could be expanded to require the consideration and analysis of other important public policy consequences of major federal actions: energy conservation, employment, inflation.

##### 2. Statutory Requirements to Consult and Defer to Other Agencies

In certain cases, Congress has amended a statute to require an agency to consult with other federal agencies on the consequences of proposed actions. Congress, for example, authorized the Federal Energy Administration (FEA) to require utilities to burn coal but directed FEA to consult with and defer to EPA on

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131. 42 U.S.C. §§ 4321, 4331-35, 4341-47 (1976).

132. 42 U.S.C. § 4332 (1976).

permissible power plan emission levels.<sup>133</sup> For certain kinds of regulatory decisionmaking, balance could be achieved by requiring a regulatory agency to accept advice on the consequences of its action from another agency with responsibility for those consequences. For example, EPA could be required to seek the Department of Transportation's advice on the effect of auto emissions controls on fuel economy.

### 3. Establishment of Agency Advocacy Roles

Congress has devised other approaches to broadening the perspective of agency regulation. With congressional encouragement, the Justice Department's antitrust division appears before the Federal Communications Commission, the Interstate Commerce Commission and the Civil Aeronautics Board to raise antitrust issues that may be affected by the actions these agencies are considering.<sup>134</sup> The Department of Transportation is directed to promote "fast, safe, efficient, and convenient transportation" and to foster a sound rational transportation policy.<sup>135</sup> In fulfilling this charge, it regularly appears before other federal agencies to describe the implication of their proposed actions for the nation's transportation system. This concept could be applied to other areas of regulatory responsibility. As an example, the Department of Labor could appear before EPA to describe the effect on employment of proposed alternatives; the Department of Energy could advise the Department of Transportation on energy consequences of proposed highway projects.

### 4. Incorporation in the Governing Statute of Additional Public Policy Interests to be Considered

The 1979 Amendments to the National Health Planning and Resources Development Act of 1974 established the requirement that health planning agencies consider the effect of their actions on competition in the health care field.<sup>136</sup> Similarly in 1978, Congress amended the Federal Aviation Act of 1958 to require the Civil Aeronautics Board to consider as being in the public interest

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133. See Section 2(b) of the Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. § 792(b) (1976); see also *ROADS TO REFORM*, *supra* note 16, at 72.

134. The Supreme Court has held that competition considerations are relevant to a broad range of administrative proceedings. See, e.g., *Gulf States Utilities Co. v. FPC*, 411 U.S. 747 (1973); *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968).

135. Department of Transportation Act, 49 U.S.C. § 1651 (1976).

136. Health Planning and Resources Development Amendments of 1979, Pub. L. No. 96-79, 93 Stat. 592 (1979); see Havighurst & Hackbarth, *Competition and Health Care*, Regulation, May/June 1980, at 39.

“the placement of maximum reliance on competitive market forces” and “[t]he encouragement of entry into air transportation markets by new air carriers.”<sup>137</sup> Congress should amend statutes establishing regulatory authority to require that agencies consider the effect of proposed actions on competition and other public policy concerns such as energy conservation and productivity, revitalization of city centers, encouragement of technological innovation, etc.

### 5. Lead Agency Concept

OMB is not peculiarly equipped to coordinate conflicting policy choices. A federal agency can perform the coordinating function effectively if express statutory criteria and procedures are established by statute. The Deepwater Port Act of 1974 provides an interesting example.<sup>138</sup> Under this Act, the Secretary of Transportation is authorized to license the development and operation of deep water ports, ports constructed off the coast of the United States to service supertankers, which cannot access the natural harbors of the United States.<sup>139</sup> Congress established specific procedural guidance and deadlines that ensured action on a license application within approximately one year and that required the Secretary to consult with and, in some instances follow, the advice of other federal agencies.<sup>140</sup> The EPA, the Department of the Interior, the Army Corps of Engineers, and the National Oceanic and Atmospheric Administration were consulted on environmental issues and other areas in which they have statutory expertise.<sup>141</sup> The Departments of State and Defense were consulted on issues relating to their respective jurisdictions.<sup>142</sup> The antitrust division of the Department of Justice and the Federal Trade Commission were consulted on competitive issues.<sup>143</sup> The public also was invited to participate through hearings and comment periods,<sup>144</sup> and approval was required by

137. Federal Aviation Act, § 102(a)(4), § 102(a)(10), 49 U.S.C. § 1302(a)(4), 1032(a)(10), as amended by Pub. L. 95-504, 92 Stat. 1705 (1978).

138. 33 U.S.C. §§ 1501-24 (1976); 43 U.S.C. § 1333 (1976).

139. 33 U.S.C. § 1503(b) (1976).

140. *Id.* §§ 1503-09.

141. *Id.* §§ 1503(c), 1503(c)(6), 1503(c)(8), 1504(e), 1505, 1509.

142. *Id.* §§ 1503(c)(8), 1510.

143. *Id.* § 1506.

144. *Id.* § 1504.

the governors of the adjacent coastal states.<sup>145</sup> The Secretary of Transportation was charged with coordinating these various interests and issuing licenses with appropriate conditions reflecting the regulatory interests of various federal agencies and the overall public interest as these competing values were balanced and weighed.<sup>146</sup>

The Deepwater Port Act illustrates how broadening the public interest considerations that an agency must take into account in regulatory decisionmaking does not necessarily require that the agency be given a blank check, a broad charter with unlimited discretion to choose among competing public interest concerns. The process of reconciliation and the criteria to be applied can be established precisely in federal legislation.<sup>147</sup> The lead agency, unlike OMB, can apply specialized expertise and experience to the balancing of conflicting public interests, and the statutory procedures ensure that conflicts will be resolved and the license issued in a reasonable period of time.

### *B. Providing More Flexible Means of Achieving Statutory Objectives*

Regulatory reform also requires that federal agencies have the flexibility to adopt the most efficient means of achieving their statutory objectives. Instead of prescribing specific standards and deadlines, Congress should permit, and in some instances, require, agencies to examine alternative approaches. Among the alternatives that could be authorized are the following.

#### 1. Self-Regulation In The Marketplace

Congress should require agencies to analyze and determine whether their statutory objectives can be achieved effectively through the competitive marketplace.<sup>148</sup> If so, in lieu of regula-

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145. *Id.* § 1503(c)(9).

146. *Id.* § 1503.

147. Though it ultimately failed to be enacted, the Energy Mobilization Board is another example of a lead agency intended to reduce bureaucratic singlemindedness and delay. Priority Energy Project Act of 1979, H.R. 4985, S. 1308, 96th Cong., 1st Sess. (1979). *See also* Trans-Alaska Pipeline Authorization Act of 1973, 43 U.S.C. §§ 1651-55 (1976); Alaska Natural Gas Transportation Act of 1976, 15 U.S.C. §§ 719-719o (1976). *See also*, Public Utilities Regulatory Policy Act of 1978, 43 U.S.C. §§ 2001-12 (Supp. II 1978) (west to east crude oil pipeline).

148. *See, e.g.*, Recommendation 1 of the Commission on Law and the Economy of the American Bar Association, which suggested that:

[i]n lieu of governmental intervention in the economy, reliance should be placed when feasible upon the competitive market as regulator supported by antitrust laws. Where governmental regulation is required, consideration should be given to disclosure or to incentive-based modes of regulation before turning to the classical command and control modes.

tions, Congress should permit agencies to publish a determination to that effect and establish a monitoring and evaluation system to ascertain whether the governing statute's objectives are being achieved through the marketplace. Such a provision would enable the National Highway and Traffic Safety Administration, for example, to consider whether fuel efficiency standards will be met with the collective response of consumers to rising gas prices in the marketplace, or would enable the Coast Guard to consider whether vessel safety requirements will be met by owners who wish to prevent an increase in insurance premiums.

## 2. More Flexibility in Standard-Setting

Congress can amend authorizing statutes to provide regulatory agencies with greater flexibility in selecting the means by which their objectives are achieved and by directing them to choose the most cost-efficient means.<sup>149</sup> Congress, for example, could direct an agency, in regulating for reasons of safety, occupational health, or environmental protection, to apply broad performance standards rather than precisely specifying the *means* of compliance or establishing design standards, *e.g.*, detailed equipment or facilities specifications. Congress could authorize agencies to permit companies to make trade-offs among various standards in order to meet the overall statutory objectives in the most cost-efficient way. The agency could defer compliance with a particular standard, for example, if a company agrees to invest in expensive technology to meet or exceed the requirements of another standard.<sup>150</sup> Congress could permit agencies to exempt small business or to establish small business tiering.<sup>151</sup>

In addition, Congress could authorize an agency to employ economic incentives or charges as an effective substitute for stan-

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ROADS TO REFORM, *supra* note 16, at 25.

149. See UNITED STATES REGULATORY COUNCIL, REGULATING WITH COMMON SENSE: A PROGRESS REPORT ON INNOVATIVE REGULATORY TECHNIQUES (1980).

150. See Maloney & Yandle, *Bubbles and Efficiency: Cleaner Air at Lower Cost*, Regulation, May/June, 1980, at 49.

151. The Regulatory Flexibility Act of 1980, 5 U.S.C. § 601 *et seq.* (1976 & Supp. IV 1980), established a procedure for analyzing the impact of proposed and existing regulations on small businesses. It requires agencies to prepare and submit to the Small Business Administration a regulatory flexibility analysis, which discusses alternatives for small businesses, including relaxed timetables and compliance requirements, simplified reports, use of performance rather than design standards, and straight exemptions. The Act, however, does not provide the authority to implement these alternatives.



dard-setting.<sup>152</sup> Under the Clean Air Act, for example, polluting facilities may be required to pay a noncompliance penalty that is generally equivalent to the capital investment plus interest that would be required to install the pollution control technology necessary to meet the emissions standards.<sup>153</sup>

### 3. Delegation to Private Parties or State and Local Governments

Congress could also direct agencies to establish a framework for negotiation and bargaining between groups affected by health or safety standards as a sensible alternative to regulation. An agency can balance the competing choices and interests without subjective intervention of federal officials if the agency obtains a consensus about what standards are desirable and are acceptable through negotiations among the various affected parties.<sup>154</sup>

In most instances, changes in the law of product liability or insurance contracts may work more effectively in encouraging the production of safer products and the greater use of pollution-free processes than does federal regulation.<sup>155</sup> Finally, statutes might encourage federal agencies to delegate certain standard-setting authority to state and local governments on professional associations.

## V. CONCLUSION

Effective reform of the federal regulatory system requires that regulatory agencies have a more balanced statutory mandate and substantially greater flexibility in selecting the means by which federal objectives shall be advanced. Congress should permit agencies to design solutions, particularly nonregulatory solutions, that most efficiently meet the overall regulatory objective while minimizing its adverse consequences. Such reform must begin with the source of regulatory power. It will require amendments to the governing statute. In addition, it may require organizational changes, bringing fragmented power centers together under one organizational umbrella that can deal with problem areas

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152. See Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives and Reform*, 92 HARV. L. REV. 549, 582 (1979).

153. Clean Air Act, § 120, 42 U.S.C. § 7420 (1976 & Supp. II 1978).

154. See S. Breyer, *supra* note 125, at 582 (major advantage of bargaining is that it achieves consensus while avoiding distortions of formal regulatory adversary mode).

155. *Id.* at 583; Calabresi & Melamed, *Proper Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); see Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 107, 42 U.S.C. § 9607 (1976 & Supp. IV 1980) (establishing strict liability for hazardous substance spills).

comprehensively.<sup>156</sup> It also will require the appointment of agency officials who have a balanced perspective on federal regulation rather than single-issue advocates. While this statute-by-statute, agency-by-agency approach requires persistent effort, it offers more meaningful regulatory reform than grafting on additional requirements and oversight by other institutions, such as Congress, the courts, or OMB, which will complicate and extend a process that should be simplified and brought into balance from its inception.

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156. See Robinson, *On Reorganizing The Independent Regulatory Agencies*, 57 VA. L. REV. 947 (1971).

