CONGRESS, THE COURTS, AND REGULATORY OVERSIGHT AFTER *MEYER v. BUSH*: SHOULD THE EXECUTIVE OFFICE OF THE PRESIDENT BE SHIELDED FROM CONGRESSIONAL SUNSHINE?

"It's clear that how goes this case, goes the Council on Competitiveness."[1] Such was the opinion of David C. Vladeck, of the Public Citizen Litigation Group, co-counsel in the case of *Meyer v. Bush*.[2] However, John L. Howard, counsel for former Vice President Dan Quayle, disagreed.[3] "Although the court found that the Task Force . . . is an agency subject to FOIA, it reserved judgment on whether the office of the Vice President must be searched in response to a FOIA request."[4] After these opposing statements, the holding of the district court[5] was certified on interlocutory appeal to the United States Court of Appeals for the District of Columbia Circuit to resolve the question of whether the Task Force was an agency subject to FOIA.[6]

The potential impact of the appellate decision and the possible forces weighing upon the minds of the judges[7] deciding the case were highlighted by Mr. Vladeck. "There is a perception on the court this [sic] is a high-stakes litigation. No judge wants lightly to tell a president how he must organize his affairs, nor does the court want to erect a loophole in FOIA."[8] Congress tried to beat the court to the punch with both houses drafting legislation that would have enveloped regulatory oversight committees and required disclosure of nearly all oral or written communications,[9] but time ran out on their legislative session. While it is

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1. Andrew Blum, *Is Vice President's Council Subject to FOIA?*, NAT'L L.J., Oct. 19, 1992, at 8, 8.

2. Meyer v. Bush, Civ. A. No. 88-3112, 1991 WL 212215 (D.D.C. Sept. 30, 1991), *rev'd*, 981 F.2d 1288 (D.C. Cir. 1993).

3. Blum, *supra* note 1, at 8. While the litigation involved Vice President George Bush and the Task Force he chaired while serving under President Ronald Reagan, the kernel of the case was whether such executive office oversight committees are subject to the limits of FOIA.

4. Blum, *supra* note 1, at 8. FOIA is the acronym for the Freedom of Information Act, 5 U.S.C. § 552 (1988).

5. *Meyer*, 1991 WL 212215.

6. Meyer v. Bush, 981 F.2d 1288, 1289 (D.C. Cir. 1993).

7. Circuit Judges Patricia Wald, Laurence Silberman, and David Sentelle.

8. Blum, *supra* note 1, at 8.

9. S. 1942, 102d Cong., 1st Sess. (1991); H.R. 5702, 102d Cong., 2d Sess. (1992); *see also* S. REP. NO. 256, 102d Cong., 2d Sess. (1992); H.R. REP. NO. 965, 102d Cong., 2d Sess. (1992).

uncertain whether legislation will be reintroduced during the 103d Congress,[10] the more compelling issue is whether this situation should even be allowed to come to pass. The answer is bound up in a tightly wound package including administrative law issues, executive office prerogatives and regulatory oversight committees, former President Reagan's Task Force on Regulatory Relief, former President Bush's Council on Competitiveness, and the system of checks and balances inherent in our constitutional framework.

This note clarifies, via a discussion of *Meyer v. Bush*, whether and when FOIA can be applied to the Executive Office Oversight Committee, an animal of increasing power and possibilities, and concludes such committees should be excluded from FOIA compliance. Part I discusses the historical underpinnings of the Executive Office Oversight Committee, details the permutations that have occurred over the last twenty-five years, and exposes how refined and beneficial the role of Executive Office oversight of regulatory matters has become. Since the bulk of the FOIA requests involve communications between these oversight committees and some particular administrative agency, issues and theories of administrative law are included.

Part II outlines FOIA, its provisions, and how FOIA itself may help to resolve the inquiry. This part focuses on the reasons for FOIA's development, its basic structure, and demonstrates how faulty drafting has led to questions concerning FOIA's applicability. Part III discusses *Meyer,* focusing upon the judicial test employed by the majority. The facts of *Meyer* are supplied in order to illustrate the typical pre-litigation maneuvers that occur during FOIA litigation between an inquisitive citizen and a presidential oversight committee. Finally, part IV applies the *Meyer* test to the facts surrounding the Council on Competitiveness ("the Council"), the most fully developed version of the

10. With President Bill Clinton's issuance of Executive Order Number 12,866, it is unclear whether this, or other similar legislation, will be reintroduced during the remaining months of the 103d Congress. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993); *see also* 139 CONG. REC. S4114 (daily ed. Mar. 31, 1993) (statement of Sen. Glenn introducing the Paperwork Reduction Reauthorization Act of 1993, which includes a set of regulatory review sunshine procedures); 139 CONG. REC. E2318 (daily ed. Sept. 30, 1993) (statement of Rep. Clinger admonishing Congress to monitor the effects of the new regulatory review procedures); 139 CONG. REC. S12,872 (daily ed. Sept. 30, 1993) (statement of Sen. Roth indicating that he will introduce legislation to insulate regulatory review from congressional or judicial attack and enhance the role of the executive in such review); *see also infra* part I.C.2.

Executive Office Regulatory Review Committee, as a means of validating its activities and quelling the "public accountability" chorus. The note concludes with a discussion of proposed legislation aimed at filling the alleged loophole created by the *Meyer* decision, as well as a discussion of the more compelling wisdom of allowing Executive Office Oversight Committees to remain exempt from the dictates of FOIA or the mandates of a power hungry Congress.

I. REGULATORY OVERSIGHT: EXIGENCIES OF EXECUTIVE OFFICE EMPOWERMENT

A. Wellspring of the Power

In recent years, the rise in the number and size of administrative agencies and the mass of rules and regulations promulgated has expanded the need for executive branch oversight of these agencies.[11] The Executive Office of the President has a long and established history in the oversight of administrative agencies' regulatory powers. There is, however, another equally long and established history of doubt concerning whether the White House is operating within its bailiwick during the course of such oversight, and whether the public is entitled to know what transpires at every stage of the process.[12]

On Christmas Eve 1942, Congress enacted a piece of legislation that would result, decades later, in an epic drama between public interest groups and the executive branch.[13] The statute

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11. Between 1970 and 1979, the annual Federal Register nearly tripled in size, while the Code of Federal Regulations grew by almost two-thirds. Address Before a Joint Session of the Congress on the Program for Economic Recovery, PUB. PAPERS 108, 113 (1981); *see also* Comment, *Capitalizing on a Congressional Void: Executive Order No. 12,291*, 31 AM. U. L. REV. 613, 614 n.6 (1982).

12. *See infra* part IV.B. The true litigation firestorm did not begin until the environmentalists began to attack President Jimmy Carter's Regulatory Analysis Review Group. *See generally* Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981) (challenging the Environmental Protection Agency's ("EPA") use of an economic model to assess the impact of proposed regulations). The public accountability movement gathered steam as the Reagan revolution began to exercise its own version of presidential prerogative vis-a-vis regulatory oversight. The past has finally captured the present, and the Competitiveness Council, and the actions it took, are now the subject of increased public inquiry and congressional debate.

13. Federal Reports Act of 1942, Pub. L. No. 77-831, 56 Stat. 1078 (codified as amended at 44 U.S.C. §§ 3501-3511 (1988)) (granting the right and power to review agency decisions to the now defunct Bureau of the Budget).

responsible for this course of events is the Federal Reports Act of 1942.[14] The Bureau of the Budget, predecessor to the Office of Management and Budget ("OMB") was granted both the right and the power to review all administrative agency decisions.[15] Yet, it would take twenty-five years before executive oversight, through surrogate review groups, would begin to tackle the burgeoning regulatory rulemaking field.

B. Testing the Waters of Regulatory Oversight by the Executive Branch

1. Regulatory Oversight During the Nixon Years

Since the enactment of the Federal Reports Act, perhaps the most important presidential foray into the oversight process occurred during the first term of President Richard Nixon. In 1971, Nixon created the Quality of Life Review Committee to restrict regulatory agencies.[16] The committee was formed within OMB[17] and was charged with assessing the economic impacts of regulations affecting public health, safety, and the environment.[18]

Another Nixon creation, the National Industrial Pollution Control Council ("NIPCC"), was established on April 9, 1970 and functioned as an appendage of the Commerce Department.[19] The membership of NIPCC was drawn from the officers' ranks of

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14. *Id.*

15. *Id.*

16. ROBERT E. LITAN & WILLIAM D. NORDHAUS, REFORMING FEDERAL REGULATION 67 (1983); *see also* JOHN QUARLES, CLEANING UP AMERICA: AN INSIDER'S VIEW OF THE ENVIRONMENTAL PROTECTION AGENCY 117-42 (1976). While President Nixon did not use an Executive order to effectuate this plan, it still had much the same force as Reagan's Executive Order 12,291, 3 C.F.R. 127, *reprinted in* 5 U.S.C. § 601 (1982); *see* H.R. DOC. NO. 134, 94th Cong., 2d Sess. (1976); *see also infra* part I.C.1 (discussing Reagan and regulatory review).

17. OMB was itself a new creation, rising from the Nixon-induced ashes of the Bureau of the Budget. Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 LAW & CONTEMP. PROBS. 127, 133 (1991) (Nixon renamed the organization to reflect the new, more managerial role he wanted it to exercise over executive agencies); *see also* CONGRESSIONAL RESEARCH SERV., 99TH CONG., 2D SESS., OFFICE OF MANAGEMENT AND BUDGET: EVOLVING ROLES AND FUTURE ISSUES 188 (1986) (changes made during 1970 governmental reorganization plan of President Nixon).

18. MARC K. LANDY ET AL., THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS 37 (1990).

19. Exec. Order No. 11,523, 3 C.F.R. 915 (1966-1970).

various corporations, not the cabinet level secretaries and advisors that would later comprise the Competitiveness Council or its predecessor the Task Force on Regulatory Relief ("Task Force").[20]

As suggested by its very title, NIPCC was established primarily as a counterbalance to the newly created but already powerful EPA as a means of garnering the views of those institutions most affected by the increase in environmental regulations.[21] NIPCC served as a weather glass informing the OMB of what business leaders thought the new environmental rules would cost, both directly in terms of increased expense, and indirectly through changes in the way business was conducted.[22]

Nixon hoped NIPCC would perform five distinct functions: 1) to survey industry plans relating to environmental quality; 2) to identify problems of the environmental effects of industrial practices; 3) to act as a liaison among members of the business and industrial community on environmental quality matters; 4) to encourage business to improve the quality of the environment; and 5) to advise on the environmental policies of government agencies that affect industry when they are referred to it by the Secretary of Commerce or the Chairman of the Council on Environmental Quality.[23]

Nixon's Quality of Life program required agencies to provide OMB with all "significant" proposed rules thirty days prior to draft publication.[24] Once an agency had drafted a summary of a proposed rule and a listing of the possible alternatives, this compilation was then to be delivered to the reviewing agency.[25] The reviewing agency might take as long as four weeks to deliver its response in the form of comments, and this deadline was subject to extensions authorized by OMB.[26] And thus, the Executive Office of the President stuck its toe in the waters of regulatory oversight.

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20. The NIPCC membership included 63 of the nation's top corporate executives, all of whom were chosen by the Commerce Secretary. Percival, *supra* note 17, at 130.

21. Statement by the President on Establishing the National Industrial Pollution Control Council, 6 PUB. PAPERS 344, 344 (1970).

22. David Clarke, *Point of Darkness*, ENVTL. F., Jan.-Feb. 1992, at 28, 33.

23. Exec. Order No. 11,523, *supra* note 19.

24. *Office of Management and Budget Plays Critical Part in Environmental Policymaking, Faces Little External Review*, 7 Env't Rep. (BNA) 693 (1976).

25. H.R. DOC. NO. 134, 94th Cong., 2d Sess. 506 (1976).

26. *Id.*

2. President Ford and Regulatory Oversight

Following Nixon's lead, President Gerald Ford[27] continued the practice of Executive Office oversight of regulatory agencies and expanded both the quality of the review process and the quantity of agency regulations subject to regulatory analysis. Out of concern for the growing problem of inflation, Ford issued Executive Order 11,821 to ensure a thorough assessment of the inflationary impact of proposed agency rules.[28]

To spearhead the oversight process, Ford authorized the newly created Council on Wage and Price Stability ("CWPS")[29] to monitor administrative agency compliance with this new Executive order.[30] Whenever a "major" federal rule was proposed, an Inflationary Impact Statement ("IIS")[31] was to be submitted with it to the Wage and Price Council for review.[32] Under the dictates of Ford's Executive order, OMB was to develop procedures requisite to conducting the inflationary impact analysis.[33] Included in these procedures was an instruction to the agencies that the IIS should contain "an analysis of the principal cost or other inflationary effects of the action," a comparison of these effects with "the benefits to be derived from the proposed action," and a summary of the alternatives considered.[34] Such a framework served as the backbone from which President Ronald Reagan's Executive Orders 12,291 and 12,498 fleshed out the whole corpus.[35]

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27. President Gerald Ford took over the Executive Office mid-term, after the Watergate scandal forced Nixon to resign in August 1974; *see The Presidency, Nixon Resigns Effective Noon Fri - VP Ford Will Be Sworn In as 38th President*, N.Y. TIMES, Aug. 9, 1974, at A1.

28. Exec. Order No. 11,821, 3A C.F.R. 203 (1974), *reprinted as modified by* Exec. Order No. 11,949, 3 C.F.R. 161 (1976) *in* 12 U.S.C. § 1904 (1976).

29. Formed by the Council on Wage and Price Stability Act, Pub. L. No. 93-387, 88 Stat. 750 (1974) (codified as amended at 12 U.S.C. § 1904 (1988)).

30. Exec. Order No. 11,821, *supra* note 28, *reprinted in* 12 U.S.C. § 1904 (1976).

31. When Ford issued Executive Order 11,949, which effectively revised the dictates of Executive Order 11,821, the IIS was renamed the "Economic Impact Statement" ("EIS"). Exec. Order No. 11,949, 3 C.F.R. 161 (1976), *reprinted in* 12 U.S.C. § 1904 (1976).

32. Exec. Order No. 11,821, *supra* note 28, *reprinted in* 12 U.S.C. § 1904 (1976).

33. OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR NO. A-107, EVALUATION OF THE INFLATIONARY IMPACT OF MAJOR PROPOSALS FOR LEGISLATION AND THE PROMULGATION OF REGULATIONS AND RULES (1975).

34. *Id.*

35. As discussed in *infra* part I.C., when Reagan's Executive Orders 12,291 and 12,498 are viewed together, a similar pattern of agency requirements and analyses is observed.

Although both Nixon's Quality of Life program and Ford's CWPS acted in a reviewing capacity, these reviews occurred at different times along the rulemaking continuum. The CWPS intervened during the public comment period and issued written statements that were then incorporated into the rulemaking record.[36] Further, the CWPS did not attempt, nor was it empowered, to block specific agency rulemaking activities. Rather, the CWPS sought to achieve its goals through oral testimony at the agency hearings, subtly influencing the proceedings by preserving its concerns on the hearing record.[37] The wisdom of taking this outwardly softer route to agency oversight seems to have been confirmed by the express endorsement of the CWPS's activities by Congress with the amendments to CWPS's enabling act.[38] In passing the amendments, Congress proclaimed that the CWPS had the power to "intervene and otherwise participate on its own behalf in rulemaking, ratemaking, licensing and other proceedings before any of the departments and agencies of the United States, in order to present its views as to the inflationary impact that might result from the possible outcomes of such proceedings."[39] And so, the power shift continued under the approving eye of Congress.

3. Regulatory Oversight Committees and President Carter

Using the oversight efforts of Nixon and Ford as his backdrop, President Jimmy Carter placed his own imprimatur on the area of Executive Office oversight.[40] On March 23, 1978, he issued

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36. Exec. Order No. 11,821, 3 C.F.R. 926 (1971-1975), *reprinted in* 12 U.S.C. § 1904 app. at 592 (1976).

37. *Oversight Hearings into the Operations of the Council on Wage and Price Stability Before a Subcomm. of the House Comm. on Gov't Operations*, 94th Cong., 1st Sess. 53 (1975) (statement of Dr. Michael H. Moskow, Dir., Council on Wage and Price Stability).

38. Council on Wage and Price Stability Act Amendments of 1975, Pub. L. No. 94-78, 89 Stat. 411 (codified as amended at 12 U.S.C. § 1904 (1988)).

39. *Id.*

40. In explaining his reasons for continuing a program of regulatory oversight, Carter noted:

> Regulation has a large and increasing impact on the economy. Uncertainty about upcoming rules can reduce investment and productivity. Compliance with regulations absorbs large amounts of the capital investments of some industries, further restricting productivity. Inflexible rules and massive paperwork generate extra costs that are especially burdensome for small businesses, state and local governments, and non-profit groups. Regulations that impose needless costs add to inflation.

Executive Order 12,044 entitled "Improving Government Regulations."[41] Carter proposed to improve government regulations by requiring each agency to submit detailed regulatory analyses ("RA's") of proposed agency rules and subject these proposed rules to independent review by the Executive Office of the President.[42] Whenever a "major"[43] regulation was proposed, the proposing agency was required to submit a detailed analysis which contained "a succinct statement of the problem; a description of the major alternative ways of dealing with the problem that were considered by the agency; an analysis of the economic consequences of each of these alternatives and a detailed explanation of the reasons for choosing one alternative over the others."[44] Under this framework, agencies evaluated substantive criteria, and then chose the alternative that achieved the desired result while imposing the least possible burden.[45]

Carter's Executive order also imposed other burdens upon agencies. Agencies were required to develop their RA's soon after the decision-making process began.[46] Additionally, the RA's were to be made available to the public for comment when the proposed rules were published by the agency in the Federal Register.[47] Once the final rule was published, the final RA was also to be published.[48] Finally, agencies were required to review

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> Our society's resources are vast, but they are not infinite. Americans are willing to spend a fair share of those resources to achieve social goals through regulation. Their support falls away, however, when they see needless rules, excessive costs, and duplicative paperwork. If we are to continue our progress, we must ensure that regulation gives Americans their money's worth.

President Carter's Regulatory Reform Message to the Congress, I PUB. PAPERS 491, 492 (1979); *see also* Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1980).

41. Exec. Order No. 12,044, 3 C.F.R. 152 (1979), *reprinted in* 5 U.S.C. § 553 (Supp. II 1978) (revoked by Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601, at 431-34 (1982) (revoked by Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993)).

42. *Id.* at 154-55, *reprinted in* 5 U.S.C. § 553 (Supp. II 1978).

43. *Id.* at 154, *reprinted in* 5 U.S.C. § 553 (Supp. II 1978). A "major" regulation is defined in the Executive order as those that may have major economic consequences, e.g., an annual economic impact of $100 million or more, or major increases in costs or prices relative to certain individual industries, levels of government, or geographic areas of the country. *Id.*

44. *Id.*

45. *Id.* at § 2(d)(3), *reprinted in* 5 U.S.C. § 553 (Supp. II 1978).

46. *Id.* at 154, *reprinted in* 5 U.S.C. § 553 (Supp. II 1978).

47. *Id.* at 155, *reprinted in* 5 U.S.C. § 553 (Supp. II 1978).

48. *Id.*

their existing regulations, deleting redundant or unnecessary regulations, while modifying others to comply with the current requirements.[49] Responsibility for the administration of the Executive order was retained by OMB, which was also responsible for providing guidance to agencies on how to perform the RA's.[50]

Although OMB policed, albeit unarmed, the agencies for compliance with the order, regulatory supervision of governmental agencies was delegated to a different organization. Carter assembled an interagency committee to handle this task, known as the Regulatory Analysis Review Group ("RARG").[51] RARG was composed of seventeen representatives from the major executive branch agencies and was presided over by the chairman of the Council of Economic Advisors ("CEA").[52] The two principal groups represented were the "economic agencies"[53] and the "regulatory agencies."[54] Ten to twenty major regulations were selected each year for intensive review, with the selection process governed by a four-member executive committee.[55] This executive committee was comprised of two permanent members from CEA and OMB, as well as two rotating members representing the economic and the regulatory groups, respectively.[56] Under the Executive order, CWPS analysts were employed as RARG staff

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49. *Id.*

50. *Id.* at 156, *reprinted in* 5 U.S.C. § 553 (Supp. II 1978). Although the order failed to provide OMB with the power to compel compliance with the outlined procedures, it did empower OMB to approve the review procedures adopted by each agency. *Id.* at 155, *reprinted in* 5 U.S.C. § 553 (Supp. II 1978). The methodology of compliance oversight was merely in the form of a semi-annual report to the President on agencies' compliance with the order. *Id.* at 156, *reprinted in* 5 U.S.C. § 553; *see also Oversight Agency Compliance with Executive Order 12,044 "Improving Government Regulations": Hearings Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs*, 96th Cong., 1st Sess. 4 (1979) (testimony of Wayne Grandquist, Associate Director of OMB).

51. GEORGE C. EADS & MICHAEL FIX, RELIEF OR REFORM?: REAGAN'S REGULATORY DILEMMA 55 (1984).

52. The membership was drawn from the ranks of the following: the CEA; OMB; the Departments of Commerce, Labor, and Treasury; EPA; Transportation; Agriculture; Interior; Energy; Housing and Urban Development; Health, Education and Welfare; Justice; Office of Science and Technology; Council on Wage and Price Stability; Council on Environmental Quality; and the President's domestic policy staff, with these last two serving as advisors to RARG. LITAN & NORDHAUS, *supra* note 16, at 69 n.18.

53. CEA; OMB; Commerce; Labor; and Treasury.

54. EPA; Transportation; Agriculture; Interior; Energy; Housing and Urban Development; Health, Education and Welfare; and Justice.

55. LITAN & NORDHAUS, *supra* note 16, at 69 n.18, 70.

56. *Id.* at 69 n.18.

reviewers, assisting in the production of RARG's final comments that were delivered to the agencies as part of the public rulemaking record.[57]

In addition to RARG, Carter established the Regulatory Council ("RC") which was comprised of the heads of various regulatory agencies.[58] Attempting to coordinate government regulatory efforts, the RC was a presidential oversight council which sought to assist the administrative regulators in producing regulations that were both cost-effective and consistent with presidential policy.[59] Principal to the success of its mission, the RC collected, analyzed, and synopsized 120 to 180 developing regulations that might result in substantial economic or public impact.[60] These synopses were published semi-annually in the Calendar of Federal Regulations and were used to identify redundant provisions of upcoming rules and to develop a mechanism to ameliorate inter-agency regulatory conflicts.[61]

RARG's extensive efforts provoked outrage among environ-

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57. *Cost of Government Regulations to the Consumer: Hearings Before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong., 2d Sess. 59 (1978). The entire RARG process has been characterized as follows:

> Once the Executive Committee votes to review a Regulatory Analysis, CWPS [the Council on Wage and Price Stability] prepares a draft statement of concerns which it submits to the Review Group for approval. After taking into account any agency suggestions, CWPS then submits the Review Group's statement of concerns to the agency's public record for this proceeding.
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> About two weeks before the rulemaking record closes, CWPS delivers a draft report that focuses on these concerns on [sic] the Review Group, which meets to discuss the report and any needed changes. CWPS has a week to revise this draft, incorporating written and oral comments submitted by Review Group members.
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> Generally a second Review Group meeting then is held to go over the revised draft. The Review Group decides whether to accept the revised draft. Any dissenting views of the members are either incorporated in the report or attached separately.
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> CWPS submits the final Review Group report into the rulemaking record on the last day of the public comment period.

Id.

58. Memorandum from President Jimmy Carter for the Heads of Executive Departments and Agencies, Subject: Strengthening Regulatory Management, II PUB. PAPERS 1905 (1978).

59. LAWRENCE J. WHITE, REFORMING REGULATION 21-22 (1981).

60. *See Regulation Reform Act of 1979: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Judiciary Comm.*, 96th Cong., 1st Sess. 3 (1979) (testimony of OMB Director James T. McIntyre, Jr., CEA Chairman Charles L. Schultze, and EPA Administrator Douglas Costle).

61. *Id.*

mentalists during the Carter years. Several environmental groups sued, challenging Carter's executive authority to influence the rulemaking process from outside the usual forum of public comment and record keeping.[62] This complaint parallels the charges that were, until recently, leveled at the Council on Competitiveness. However, the astute judicial scholar proceeds unfazed by the cries of the unlearned, comforted by Judge Wald's endorsement, albeit in dictum, of the legality, and moreover, the propriety of such regulatory review.[63] This note echoes Judge Wald's thesis—that it is desirable for the Executive Office of the President to have oversight of regulatory affairs[64] and that the President has the constitutional authority to supervise policymaking at the Executive level.[65]

The fact that environmentalists were displeased with Carter's review proposals demonstrates a nonpartisan effort to keep the Executive sufficiently distanced from the policies enacted under his tenure. The threat of tenacious litigation, however, did not halt the progress of presidential regulatory oversight and perhaps even accelerated it.

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62. Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981), *rev'd on other grounds sub nom.* Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983).

63. *Id.* at 406.

64. *Id.* Given this endorsement of presidential oversight of regulatory matters, it is disappointing to see Judge Wald as the lone dissenter in *Meyer v. Bush*, arguing that a presidential oversight committee is subject to FOIA. Meyer v. Bush, 981 F.2d 1288, 1298 (D.C. Cir. 1993) (Wald, J., dissenting).

65. *Costle*, 657 F.2d at 406. In particular, Judge Wald commented:

> The authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking . . . . Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. Single mission agencies do not always have the answers to complex regulatory problems. An overworked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policymakers in other agencies as well as in the White House.

Id.

C. Approaching the Waterfall

1. President Reagan and Regulatory Oversight Empowerment

Early in his first term President Reagan established the Task Force.[66] Chaired by the then Vice President George Bush, the Task Force was a cabinet-level organization which included the Attorney General, the Secretaries of the Treasury, Commerce, and Labor Departments, the Director of OMB, the Chairman of the CEA, and the President's Assistant for Policy Planning.[67] Once the Task Force was operational, Bush added the OIRA Administrator to serve as the Executive Director of the Task Force and a Special Assistant to the President to serve as the Deputy Director.[68] The Task Force was to spearhead Reagan's regulatory review program by "reduc[ing] the burdens of existing and future regulations, increas[ing] agency accountability for regulatory actions, provid[ing] for presidential oversight of the regulatory process, minimiz[ing] duplication and conflict of regulations, and insur[ing] well-reasoned regulations."[69]

On February 17, 1981, Reagan issued Executive Order 12,291 which authorized the Task Force, along with OMB, to effectuate his regulatory scheme.[70] The Reagan formula for regulatory oversight remained in effect for over twelve years, encompassing both terms of the Reagan Administration, the single term of the Bush Administration, and the first nine months of the Clinton Administration.[71] President Reagan's Executive order expanded the review authority of OMB to include all regulations.[72] Henceforth, executive agencies were required to submit both proposed and final rules to the OMB for review prior to publica-

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66. *See generally Role of OMB in Regulation, Hearings Before the Subcomm. on Oversight and Investigations of the House Energy & Commerce Comm.*, 97th Cong., 1st Sess. 43-48 (1981) (discussing why regulatory reform was necessary according to Reagan).

67. *Meyer*, 981 F.2d at 1289.

68. *Id.* at 1290.

69. Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601, at 431-34 (1982) (revoked by Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993)).

70. *Id.*

71. President Clinton issued Executive Order 12,866 which, although revoking Reagan's Executive Orders 12,291 and 12,498, continued the pattern of executive branch control of the regulatory agenda. *See infra* part I.C.2. (discussing Executive Order 12,866).

72. Exec. Order No. 12,291, *supra* note 69, *reprinted in* 5 U.S.C. at 431 (1982).

tion.[73] Additionally, rules that would have an annual economic impact in excess of $100 million[74] were required to include a Regulatory Impact Analysis ("RIA").[75] Furthermore, Executive Order 12,291 provided the requisite criteria to be applied during cost/benefit analysis.[76] In particular, "[r]egulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society."[77] These procedures were to be effectuated solely "to the extent permitted by law" so as not to tread upon contrary congressional activity in this area.[78]

Moving to further consolidate the power of regulatory review to include the regulatory planning process, Reagan issued Executive Order 12,498 whereby the authority of OMB was expanded to cover prerulemaking actions.[79] Executive Order 12,498 required all executive agencies to submit a "draft regulatory program"[80] to OMB that would highlight all of the noteworthy regulatory actions proposed for the upcoming year, as well as provide information concerning significant regulatory activity that was underway or scheduled to begin.[81] These proposals were required to conform to guidelines set out in Executive Order 12,291, especially the cost/benefit analysis requirement.[82] Once submitted, these draft proposals would then undergo an OMB evaluation to determine whether they were consistent with the

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73. *Id.* at 131, *reprinted in* 5 U.S.C. at 433 (1982).

74. These rules were denominated as "major" rules. *Id.* at 127, *reprinted in* 5 U.S.C. at 433 (1982); *see also supra* note 43 (definition of "major" rule under Carter order).

75. The RIA had to describe both the costs and benefits of the rule, the least costly alternative approaches to the problem, and the "legal reasons" for rejecting the less costly measures. Exec. Order No. 12,291, *supra* note 69, *reprinted in* 5 U.S.C. at 433 (1982).

76. *Id.*

77. *Id.* at 128, *reprinted in* 5 U.S.C. at 432 (1982).

78. *Id.* at 128-29, *reprinted in* 5 U.S.C. at 432 (1982).

79. Exec. Order No. 12,498, 3 C.F.R. 323 (1985), *reprinted in* 5 U.S.C. § 601 (Supp. IV 1986); *see generally* Ann Rosenfield, Note, *Presidential Policy Management of Agency Rules Under Reagan Order 12,498*, 38 ADMIN. L. REV. 63 (1986) (discussing Executive Order 12,498 and its requirements that Agency rulemaking be consistent with Reagan Administration policies and priorities).

80. Exec. Order No. 12,498, *supra* note 79, *reprinted in* 5 U.S.C. § 601 (Supp. IV 1986).

81. *Id.*

82. *Id.* at 107, *reprinted in* 5 U.S.C. § 601 (Supp. IV 1986). Similar to those duties under Executive Order 12,291, the Director of OMB was charged with ensuring agency compliance with the dictates of Executive Order 12,498. *Id.* at 108, *reprinted in* 5 U.S.C. § 601 (Supp. IV 1986).

policies and priorities of the Reagan administration.[83]

Through Reagan's regulatory oversight program, existing and proposed regulations were reviewed in an effort to eliminate rulemaking that was duplicative, conflicting, or unnecessarily burdensome while ensuring that the costs of the regulations did not exceed their benefit to society.[84] Like the Council after it and the RARG before it, this program was conducted in the absence of direct public oversight yet always with the overriding purpose of coordinating the overall federal regulatory program so as to be harmonious with the administration's domestic policy.

2. President Clinton and "Balanced" Regulatory Oversight[85]

Even though President Bill Clinton declared himself and his new administration the agents of "change,"[86] soon after the Inauguration it was immediately clear that the more things change, the more they stay the same. Although one of Clinton's first acts as President was to abolish the Council on Competitiveness,[87] it was uncertain whether this action signalled a contempt for the Council or executive branch oversight of regulatory matters.[88]

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83. *Id.* at 108, *reprinted in* 5 U.S.C. § 601 (Supp. IV 1986).

84. Laura B. Weiss, *Reagan, Congress Planning Regulatory Machinery Repair*, CONG. Q., Mar. 7, 1981, at 409, 409.

85. Although the oversight mechanism of the Bush Administration, the Council on Competitiveness, is chronologically located between those of the Reagan and Clinton Administrations, due to the structure of this note a thorough discussion of the Council is reserved until *infra* part IV.

86. Jonathan Schell, *Clinton's Campaign Lines, They Are a-Changin'*, NEWSDAY, Jan. 14, 1993, at 97; *see also* Anthony Lewis, *Change Is Hard*, N.Y. TIMES, June 18, 1993, at A27; Ellen Debenport, *Who Won the Debate? You Be the Judge*, ST. PETERSBURG TIMES, Oct. 20, 1992, at A1.

87. *Clinton Administration Orders Retraction of Dozens of Last-Minute Bush Regulations*, 23 Env't Rep. (BNA) No. 40, at 2571, 2572 (1993).

88. In a memorandum to the acting director of OMB, Clinton advised:

> Pending completion of a review, existing executive orders on regulatory management will continue to apply. You are directed to request the agencies described in section 1(d) of Executive Order 12291 to assure that in publishing regulations, and subject to such exceptions as the director or the acting director of the Office of Management and Budget determines to be appropriate, all regulations must first be approved by an agency head or the designee of an agency head who, in either case, is a person appointed by me and confirmed by the Senate.

White House Memorandum on Council on Competitiveness, U.S. Newswire, Jan. 22, 1993, *available in* LEXIS, News Library, U.S. Newswire File.

The answer arrived just over eight months later in Executive Order 12,866.[89] Touted as a balanced approach to regulatory oversight,[90] the order, in the President's words, attempts to "create a fair, open, streamlined system of regulatory review" while at the same time "provid[ing] a way to get rid of . . . regulations that are outdated, obsolete, expensive, and bad for business."[91] Whether these competing goals can be reconciled under the new regulatory review framework remains to be seen.[92]

On September 30, 1993, Clinton signed his Regulatory Planning and Review Order into law.[93] Under Executive Order

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89. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993).

90. Sally Katzen, OMB Office of Information and Regulatory Affairs Administrator, Remarks at OTR Regulatory Briefing (Sept. 30, 1993), *available in* 1993 WL 384488 [hereinafter OTR Regulatory Briefing]; *see also* David Lauter, *Clinton Order Lifts Regulatory Review Secrecy*, L.A. TIMES, Oct. 1, 1993, at A14.

91. Remarks on Signing the Executive Order on Regulatory Planning and Review and an Exchange with Reporters, 29 WEEKLY COMP. PRES. DOC. 1923 (Sept. 30, 1993).

92. Ironically, in light of the disparaging manner in which the Reagan and Bush programs had been characterized, the Clinton program maintains many of the same goals and structural formats of the regulatory review programs past. *See* Marcia Coyle et al., *Clinton Changes Rule-Making—or Does He?*, NAT'L L.J., Oct. 18, 1993, at 9; *see also* 139 CONG. REC. S12,872-73 (daily ed. Sept. 30, 1993) (statement of Sen. Roth noting similarities between the Bush and the Clinton regulatory review programs); 139 CONG. REC. E2318 (daily ed. Sept. 30, 1993) (statement of Rep. Clinger noting similarities between Clinton and Reagan Executive orders and indicating that the "back door" is still open, but special interest groups rather than the business community have the access); Bob Davis & Bruce Ingersoll, *Clinton's Team Moves to Extend Regulation in Variety of Industries*, WALL ST. J., Apr. 13, 1993, at A1, A10 (White House official commenting that role of Vice President's office in regulatory review is "just as before, but with a different orientation.").

93. Exec. Order No. 12,866, *supra* note 89, 58 Fed. Reg. 51,735. In the preamble to the order, President Clinton gave his reasons for issuing the order, indicating:

> The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and the private markets are the best engine for economic growth; regulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a regulatory system today.
>
> With this Executive order, the Federal Government begins a program to reform and make more efficient the regulatory process. The objectives of this Executive order are to enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public.

12,866, only regulations that "are required by law, are necessary to interpret the law, or are made necessary by compelling public need" should be promulgated.[94] Although the cost/benefit analysis of Executive Order 12,291 is maintained,[95] that analysis "shall be understood to include both quantifiable measures . . . and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider."[96] In order to assist the agencies in maintaining the President's regulatory philosophy, twelve principles of regulation are enumerated,[97] ranging from identification of the problem sought to be addressed by the new regulation[98] to an admonishment that the regulation be drafted in a simple and understandable manner.[99]

The regulatory planning and review process is coordinated among the agencies, OMB, and the Vice President.[100] Although the Vice President convenes an annual meeting between the advisors[101] and the heads of agencies to "seek a common

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Id.

94. *Id.* § 1(a), 58 Fed. Reg. at 51,735.

95. Exec. Order No. 12,291, *supra* note 72, § 2(b), *reprinted in* 5 U.S.C. at 432 (1982).

96. Exec. Order No. 12,866, *supra* note 89, § 1(a), 58 Fed. Reg. at 51,735. The new Executive order on regulatory oversight expressly revokes both Executive Order 12,291 and 12,498. *Id.* § 11, 58 Fed. Reg. at 51,744.

97. *Id.* § 1(b)(1)-(12), 58 Fed. Reg. at 51,735-36.

98. *Id.* § 1(b)(1), 58 Fed. Reg. at 51,735.

99. *Id.* § 1(b)(12), 58 Fed. Reg. at 51,736.

100. *Id.* § 2, 58 Fed. Reg. at 51,736. The Vice President, as the principle advisor to the President, "shall coordinate the development and presentation of recommendations concerning regulatory policy, planning, and review." *Id.* § 2(c), 58 Fed. Reg. at 51,737. Under this order, apparently, the Vice President becomes the de facto Chief Operating Officer of the Executive Branch, a situation sure to raise constitutional inquiry.

101. Advisors are defined in the order as:

> [S]uch regulatory policy advisors to the President as the President and Vice President may from time to time consult, including, among others: (1) the Director of OMB; (2) the Chair (or another member) of the Council of Economic Advisers; (3) the Assistant to the President for Economic Policy; (4) the Assistant to the President for Domestic Policy; (5) the Assistant to the President for National Security Affairs; (6) the Assistant to the President for Science and Technology; (7) the Assistant to the President for Intergovernmental Affairs; (8) the Assistant to the President and Staff Secretary; (9) the Assistant to the President and Chief of Staff to the Vice President; (10) the Assistant to the President and Counsel to the President; (11) the Deputy Assistant to the President and Director of the White House Office on Environmental Policy; and (12) the Administrator of OIRA, who also shall coordinate communications relating to this Executive order among the agencies, OMB, the other Advisors, and the Office of the Vice President.

Id. § 3(a), 58 Fed. Reg. at 51,737.

understanding of priorities and to coordinate regulatory efforts to be accomplished in the upcoming year,"[102] the Regulatory Working Group ("RWG") implements the regulatory oversight agenda.[103]

Chaired by the Administrator of OIRA, the RWG consists of the Vice President, the advisors, and the representatives of the heads of each agency determined by the OIRA Administrator to have significant domestic regulatory responsibility.[104] The RWG is mandated to meet at least quarterly, where they will assist agencies in identifying and analyzing "important" regulatory issues.[105]

Beginning in 1994, each agency is required to produce a Regulatory Plan ("Plan") indicating the "significant regulatory actions"[106] to be introduced during the year.[107] The Plan must, among other directives,[108] state the agency's objectives and priorities and their relation to the President's objectives and priorities.[109] If the OIRA Administrator believes that a proposed regulatory action is in conflict with the President's priorities, the Administrator is to "notify, in writing, the affected agencies, the [a]dvisors, and the Vice President."[110]

In providing oversight and guidance to the agencies, OIRA is constrained by a ninety-day limitation in reviewing proposed rules.[111] If a rule is returned to the agency for further consideration, the OIRA Administrator must provide the agency with a written explanation for the return, indicating the pertinent portion of the Executive order.[112] The OIRA Administrator

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102. *Id.* § 4(a), 58 Fed. Reg. at 51,738.

103. *Id.* § 4(d), 58 Fed. Reg. at 51,739.

104. *Id.*

105. *Id.* Such "important" regulatory issues include, "(1) the development of innovative regulatory techniques, (2) the methods, efficacy, and utility of comparative risk assessment in regulatory decision-making, and (3) the development of short forms and other streamlined regulatory approaches for small businesses and other entities[]." *Id.*

106. The definition of "significant regulatory action" is substantially similar to the benchmark set in the Carter order and continued under Reagan and Bush. *See id.* § 3(f), 58 Fed. Reg. at 51,738. Most significantly, the definition retains the $100 million threshold. *Id.* § 3(f)(1), 58 Fed. Reg. at 51,738.

107. *Id.* § 4(c)(1), 58 Fed. Reg. at 51,738.

108. *Id.* § 4(c)(1)(A)-(F), 58 Fed. Reg. at 51,738-39.

109. *Id.* § 4(c)(1)(A), 58 Fed. Reg. at 51,738.

110. *Id.* § 4(c)(5), 58 Fed. Reg. at 51,739.

111. *Id.* § 6(b)(2)(B), 58 Fed. Reg. at 51,742.

112. *Id.* § 6(b)(3), 58 Fed. Reg. at 51,742.

resolves any disagreement or conflict among agency heads or between OMB and any agency.[113] If the OIRA Administrator cannot resolve the differences, the matter will be resolved by either the President or the Vice President acting at the President's request.[114] Such avenue of appeal may only be initiated by: the Director of OMB, the head of an issuing agency, or the head of an agency that has "a significant interest in the regulatory action at issue."[115] Recommendations developed by the Vice President inform the appellate resolution,[116] but must be completed within a sixty-day limit.[117]

Throughout the process, Executive Order 12,866 imposes ostensibly strict disclosure requirements on OIRA.[118] Only the

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113. *Id.* § 7, 58 Fed. Reg. at 51,743.

114. *Id.*

115. *Id.*

116. In forming his recommendations, the Vice President may consult with the advisors and any other executive branch official whose responsibilities to the President are affected by the proposed rule. *Id.*

117. *Id.*

118. *Id.* § 6(b)(4), 58 Fed. Reg. at 51,742. The disclosure requirements are imposed on OIRA but not on the RWG. Consider the following exchange between the press; Jack Quinn, Chief of Staff for the Vice President; and Sally Katzen, OIRA Administrator:

> MR. QUINN: You asked a question about meetings with Cabinet department heads.
>
> Q: Or sub-Cabinet or whoever is involved over there—will we have a way of knowing that?
>
> MR. QUINN: Let me distinguish the Cabinet department, sub-Cabinet people, and the White House people, okay? This order governs the activities of people in the Executive Office of the President. It does not, by its terms, address the conduct of Cabinet department members or sub-Cabinet people. The rules of their agencies govern their rule-making activities. This order makes clear that if people working in the White House or otherwise in the Executive Office of the President are to receive information from outsiders that will be used in the regulatory process, they have to receive it in writing and they have to transmit it in writing to the agency so that it's included, so that you will know.
>
> ***
>
> Q: Does that include the Vice President? If the Vice President meet[s] with Red Poling about something; and Poling starts complaining about some regulation that's in process that's going to stick it to his auto company or all of them, the Vice President is then to stand up and say, stop, I've go to take that in writing, must write all that down, I've got to add it to the docket over here?
>
> MR. QUINN: The order governs — the order does not restrict the activities of either the President or the Vice President personally, but it governs all of —
>
> Q: Would it affect you?
>
> MR. QUINN: Yes, it would. Every employee of the President and the Vice President here.
>
> ***

OIRA Administrator can receive oral communication from non-executive branch personnel regarding rules undergoing OIRA review.[119] In addition to inviting a representative from an affected agency to all meetings between OIRA personnel and a third-party, OIRA must forward to the agency all written communications received concerning rules undergoing review.[120] Finally, OIRA must maintain a publicly available log containing the status of all regulatory actions,[121] a notation of all written communications forwarded to affected agencies,[122] and the dates and names of individuals involved in substantive oral conversations, whether in person or by telephone.[123]

Although the Clinton regulatory reform plan has attempted to provide for greater public accountability in the field of regulatory oversight,[124] Executive Order 12,866 maintains many of the

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> Q: Can I ask one other—so I'm clear. Once [an appeal] gets popped up to the Veep's level, as I understood what you were saying, and [the appellant] thought of [the OIRA Administrator] first, probably, and so it's put on the record, but the Veep can still have meetings with whomever, a company or an enviro group on this issue? And, secondly, if the Vice President's staff makes recommendations to OIRA for certain changes suggest[] this rule is wrong in certain ways, will that be noted so we can tell the difference between OIRA and the Vice President?
>
> MR. QUINN: I think the answer to the latter question is yes.
>
> MS. KATZEN: Both the President and the Vice President are elected officials. And to restrict the people who can talk to them is something which has never been really an issue, never been on the table, never been suggested by those who have called for reform in this area.
>
> With respect to communications within the White House, what the President may talk to me about, or what the Vice President may talk to me about is also something which has traditionally and legitimately been something which is not documented on the record.
>
> If, as a result of that conversation, a change is made in the regulation, that fact will be known, and the fact will be known that it came as a result of a suggestion or a recommendation from OIRA. *But whether I got it from the President or the Vice President is not going to be something which would be publicly disclosed.*

OTR Regulatory Briefing, *supra* note 90, *available in* 1993 WL 384488, at *8, *9, *14 (emphasis added).

119. Exec. Order No. 12,866, *supra* note 89, § 6(b)(4)(A), 58 Fed. Reg. at 51,742.

120. *Id.* § 6(b)(4)(B)(i)-(ii), 58 Fed. Reg. at 51,742.

121. *Id.* § 6(b)(4)(C)(i), 58 Fed. Reg. at 51,743.

122. *Id.* § 6(b)(4)(C)(ii), 58 Fed. Reg. at 51,743.

123. *Id.* § 6(b)(4)(C)(iii), 58 Fed. Reg. at 51,743.

124. As of November 23, 1993, OIRA Administrator Katzen had 10 meetings with outside parties concerning regulatory matters. The telephone log, however, is blank. *Meetings on Pending EPA Regulations Detailed by OIRA Under Executive Order*, 24 Env't Rep. (BNA) 1478, 1478 (Dec. 3, 1993).

substantive goals of the five previous administrations. Whether the new program is comprehensive enough to satisfy Congress is a matter that remains to be seen.[125]

II. THE FREEDOM OF INFORMATION ACT: JUDICIAL INTERPRETATION OF CONGRESSIONAL INTENT

A. Prelude to "Open Government"

As the 1960s waned into the 1970s, administrative agencies became increasingly more involved in the governing process.[126] While the Executive Office Oversight Committee was one mechanism by which the regulatory power of such agencies could be reined in, Congress developed other vehicles. Between 1966 and 1976, Congress passed four acts aimed at giving American citizens greater access to governmentally held information.[127]

The first of these "open government"[128] statutes was FOIA enacted in 1966.[129] Congress passed three other statutes during the ensuing decade, each aimed at increasing the public's opportunity to discover what its government was doing behind the

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125. *See infra* part IV.B. (discussing Regulatory Review Sunshine Act); *see also supra* note 10 (indicating congressional reaction to Executive Order 12,866).

126. *See* JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 3-7 (3d ed. 1992) (highlighting the federal government's drift from a limited executive model to that of national administrative policymaking).

127. Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (1988)); Federal Advisory Committee Act ("FACA"), Pub. L. No. 92-463, 86 Stat. 770 (1966) (codified as amended at 5 U.S.C. app. I (1988)); Federal Privacy Act, Pub. L. No. 93-579, 88 Stat. 1896 (1974) (codified as amended at 5 U.S.C. § 552(a) (1988)); Government in Sunshine Act, Pub. L. No. 94-409, 390 Stat. 1241 (1976) (codified as amended at 5 U.S.C. § 552(b) (1988)); *see generally* Public Citizen v. United States Dep't of Justice, 491 U.S. 440 (1989) (discussing FACA); Association of Am. Physicians and Surgeons v. Clinton, 997 F.2d 898 (D.C. Cir. 1993); Hunt v. Nuclear Regulatory Comm'n, 468 F. Supp. 817 (N.D. Okla. 1979) (giving an overview of the Government in Sunshine Act).

128. *The Federal Advisory Committee Act and the President's AIDS Comm.: Hearings Before the Senate Comm. on Governmental Affairs*, 100th Cong., 1st Sess. 1 (1987) (opening statement of Sen. John Glenn (D-Ohio), Comm. Chairman, referring to FOIA, FACA, the Administrative Procedures Act, and the Sunshine Act as the "four pillars of open government").

129. Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (1988)).

office doors.[130]

FOIA, the statute at issue for the purposes of this note, has been amended several times over the past twenty-eight years.[131] While congressional preoccupation with FOIA has waned,[132] the law still maintains its power to compel disclosure. That power, however, is constrained within certain statutory limits and judicial recasting. In the next part, this note analyzes how FOIA works and discusses the provisions and definitions that form the basis of the *Meyer v. Bush* dispute.

B. FOIA: Structure, Procedure, and Provisions

FOIA consists of five subsections.[133] The first two subsections provide the mechanisms by which the public can gain access to agency information.[134] Subsection (a)(1) pertains to matters requiring Federal Register publication.[135] Subsection (a)(2)

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130. The first of such statutes was the Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1966) (codified as amended at 5 U.S.C. app. I (1988)). Pertaining to boards of experts and advisors that are sometimes utilized by administrative agencies during their rulemaking deliberations, this Act provides, in the least, for public notice of advisory board meetings, as well as public admittance. Since the board is engaged in resolving public matters, the Act also seeks to populate the board with individuals who possess a broad, cross-sectional representation of interests. ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW § 17.1, at 615 (1993). In 1974, Congress passed the Federal Privacy Act, Pub. L. No. 93-579, 88 Stat. 1896 (1974) (codified as amended at 5 U.S.C. § 552(a) (1988)). The focus of this Act is on individuals who might be directly affected by the information gathered by the government, rather than the processes and policies of administrative procedure. AMAN & MAYTON, *supra*, § 17.1, at 615-16. Principally, the Act is designed to accomplish three purposes: 1) to enable individuals to determine what records pertaining to them are being collected, maintained, and used by federal agencies; 2) to prevent the use of records collected for one purpose to be alternatively used for a uniquely different purpose absent informed consent by the individual; and 3) to enable individuals to gain access to information pertaining to them, and then either correct or amend incorrect records. 5 U.S.C. § 552(a)(2)(A). Finally, 1976 saw the enactment of the Government in Sunshine Act, Pub. L. No. 94-409, 390 Stat. 1241 (1976) (codified as amended at 5 U.S.C. § 552(b) (1988)). The Sunshine Act established the norm of openness for agency deliberations. Like FACA, the Sunshine Act called for advance public notice and public admission to the meetings of most multi-member commissions. AMAN & MAYTON, *supra*, § 17.1, at 615.

131. Amended in 1974, 1976, and 1986.

132. *See* Antonin Scalia, *The FOIA Has No Clothes*, REG., Mar.-Apr. 1982, at 16.

133. Freedom of Information Act, 5 U.S.C. § 552 (1988).

134. *See* Welch v. United States, 750 F.2d 1101, 1111 (1st Cir. 1985) (purposes of subsections (a)(1) and (a)(2) are to provide public notice and guidance).

135. 5 U.S.C. § 552(a)(1). All descriptions of agency organization, agency function, and agency procedures, as well as statements of general policy and substantive rules must be automatically published in the Federal Register. *Id.*

applies to all materials not immediately accessible to the public.[136] Policy statements and interpretations not published in the Federal Register must be "made available for public inspection and copying."[137] An agency can avoid having the public come to its offices and physically open up its staff manuals and instructions if the "materials are promptly published and copies offered for sale."[138]

Central to FOIA is subsection (a)(3), which provides that each agency shall release identifiable records in its possession to "any person" who requests them, so long as the request "reasonably describes such records" and the request is made in accordance with the agency's published procedures.[139] No agency shall be required to release records available pursuant to subsections (a)(1) and (a)(2), nor shall an agency be required to release material that falls within the provisions of § 552(b), the exemptions section.[140]

Subsection (a)(4) pertains to citizens' remedies when a FOIA request is denied.[141] In addition to providing a framework for citizen remedies for denied requests, the law outlines a timetable for agency compliance with a FOIA request.[142] When a citizen's request for a selected document has been denied by an agency, that citizen may obtain de novo review[143] of that agency's decision in a federal district court.[144] During such a review, the court may decide to view the documents in camera before ruling whether the requested documents should be released.[145] If the

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136. 5 U.S.C. § 552(a)(2). In order to facilitate public access to the materials designated in this subsection, the agencies must maintain and publish indices for the various documents. *Id.*

137. *Id.* Other materials that must be made available for public review are materials comprising the final opinions of adjudicated cases, as well as administrative staff manuals or instructions that affect an individual's rights. *Id.*

138. *Id.*

139. 5 U.S.C. § 552(a)(3).

140. *See infra* notes 152-54 and accompanying text (discussing § 552(b)).

141. 5 U.S.C. § 552(a)(4)(B)-(G).

142. 5 U.S.C. § 552(a)(6)(A)-(B).

143. While the general rule in FOIA litigation is that all administrative remedies must be exhausted prior to turning the issue over to the courts, limited exceptions exist. Weisberg v. United States Dep't of Justice, 745 F.2d 1476, 1497 (D.C. Cir. 1984). FOIA does allow immediate judicial review of a denied request when the agency does not respond to a properly made request within the statutory time limits. 5 U.S.C. § 552(a)(6)(C). Absent unusual circumstances, the time limit is 10 days. 5 U.S.C. § 552(a)(6)(A)(i).

144. 5 U.S.C. § 552(a)(4)(B).

145. *Id.*

court concludes that only a portion of the document should be withheld, it will order the release of the remaining portion.[146]

In addition to providing a judicial means of redress for denied requests, subsection (a)(6)(A)(i) also presents agencies with a strict deadline for responding to citizen requests.[147] Generally, all requests must be responded to within ten days.[148] Appeals resulting from denied requests must be answered within twenty days.[149] When a court finds that a request has been improperly denied, FOIA contains conditional provisions for the recovery of attorney's fees,[150] as well as the possibility of disciplinary action against the agency.[151]

Each of the nine categories of information exempt from FOIA are defined in subsection (b).[152] While each of these exemptions are further refined as they pass through litigation,[153] the starting points from which an agency may claim a FOIA exemption are quite broad.[154] In *Meyer*, at both the district court and appeals

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146. *See id.*

147. 5 U.S.C. § 552(a)(6)(A)(i).

148. *Id.*

149. 5 U.S.C. § 552(a)(6)(A)(ii). In the event of "unusual circumstances," these two deadlines may be extended by no more than 10 additional days. 5 U.S.C. § 552(a)(6)(B).

150. 5 U.S.C. § 552(a)(4)(E). The statute has empowered the courts with the ability to award a requester, who has "substantially prevailed," with reasonable attorney's fees and other costs resulting from litigating their FOIA complaint. See *Weisberg*, 745 F.2d at 1494-1500 (whether requester has "substantially prevailed" is a question of fact that involves both causation and equities).

151. 5 U.S.C. § 552 (a)(4)(F)-(G). This kind of reproach almost never occurs. To invoke the disciplinary mechanism provided for in the statute, a court must find: 1) records were improperly withheld and disclosure is required; 2) reasonable attorney's fees and costs against the government should be assessed; and 3) a written finding that an agency employee may have acted arbitrarily or capriciously. Upon such a finding, the Special Counsel of the Merit System Protection Board must institute an investigation and take whatever action is necessary. 5 U.S.C. § 552(a)(4)(F). To date no court has ever issued the required written finding. *See, e.g.*, Perry v. Block, 684 F.2d 121, 122 (D.C. Cir. 1982). Even with a two year delay in disclosure, the court would not issue the written finding, partly due to the precise nature of the court order. *Id.*

152. 5 U.S.C. § 552(b).

153. Current listings of FOIA case law and issues are produced annually by several organizations. *E.g.*, U.S. DEP'T OF JUSTICE, OFFICE OF INFO. AND PRIVACY, FREEDOM OF INFORMATION ACT GUIDE OF PRIVACY ACT OVERVIEW (YEAR); LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS (Allan Robert Adler ed., 1993); GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS (annual supplement) (Franklin & Bouchard eds.).

154. Section 552(b) provides:

(b) This section does not apply to matters that are:

(1) [National Security Information] (A) specifically authorized under criteria

court levels, the Government's attorneys made two alternative arguments. Their first argument was that the Task Force was not an agency.[155] In their second argument, the Government contended that the documents sought by Katherine Meyer were protected by exemption (b)(5).[156] The district court, ruling that

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established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
(2) [Internal Rules and Practices] related solely to the internal personnel rules and practices of an agency;
(3) [Exemption by Statute] specifically exempted from disclosure by statute (other than section 552 of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
(4) [Trade Secrets] trade secrets and commercial or financial information obtained from a person [which is] privileged or confidential;
(5) [Intra and Inter Agency Memoranda] inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency;
(6) [Privacy Protection] personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
(7) [Law Enforcement Purposes] records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;
(8) [Records of Financial Institutions] contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
(9) [Records of Oil Exploration] geological and geophysical information and data, including maps, concerning wells.

5 U.S.C § 552(b).

155. *See infra* notes 159-67 and accompanying text (discussing definition of agency); *see also infra* part III (analyzing the decisions of both the district court and the court of appeals).

156. *See supra* note 154 (providing text of exemption (b)(5)).

the Task Force was an agency subject to FOIA, rejected the use of this exemption.[157] The appeals court, however, ruled on the threshold question that the Task Force was not an agency subject to FOIA, and thus did not reach the alternative issue presented regarding exemption (b)(5)'s applicability.[158]

Subsection (f), the final subsection of FOIA,[159] defines the term "agency."[160] It provides, "[f]or purposes of this section, the term agency as defined in § 551(1)[161] of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency."[162] Both the courts and Congress, however, are express-

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157. Meyer v. Bush, Civ. A. No. 88-3112, 1991 WL 212215 (D.D.C. Sept. 30, 1991), *rev'd*, 981 F.2d 1288 (D.C. Cir. 1993).

158. Meyer v. Bush, 981 F.2d 1288, 1298 (D.C. Cir. 1993).

159. Subsections (d) and (e) outline an agency's responsibilities and duties with respect to Congress. 5 U.S.C. § 552(d)-(e). Subsection (d) informs an agency that it is not authorized to withhold documents from Congress, when it is Congress that is requesting the documents. 5 U.S.C. § 552(d) (1988). Status as a member of Congress, however, does not grant a member more rights than an ordinary citizen in gaining access to agency documents. When a member of Congress requests documents as an individual American citizen, the member's right of access is limited to the "any person" provision of subsection (a)(3). *See* H.R. REP. NO. 1497, 89th Cong., 2d Sess. 11-12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2426. Subsection (e) requires an annual accounting to Congress from agencies and the Attorney General concerning FOIA. 5 U.S.C. § 552(e). Each agency must provide Congress with an annual report detailing all of its FOIA activities. *Id.* The Attorney General's report to Congress is two-fold. First, the Attorney General must compile a list of all litigation pursued over the course of the year in an effort to enforce compliance with FOIA. *Id.* Second, the Attorney General is required to give a status report to Congress detailing the Department of Justice's efforts at encouraging greater agency compliance with the dictates of FOIA. *Id.*

160. The placement of the definition of agency at this point in the statute is curious, since a FOIA suit cannot proceed unless the threshold inquiry of agency status is satisfied. *See infra* part III.A.3.a. (discussing the three prong test for determining agency status). If the Regulatory Review Sunshine Act is passed, however, this inquiry would no longer be required, within the context of litigation involving regulatory oversight boards, due to the broad drafting of coverage provisions. *See infra* part IV.B. (discussing Regulatory Review Sunshine Act).

161. Administrative Procedure Act, 5 U.S.C. § 551(1) (1988). Section 551(1) defines the term "agency" to mean "each authority of the Government of the United States, whether or not it is within or subject to review by another agency . . . [with certain limited exceptions]." *Id.*

162. 5 U.S.C. § 552(f). This definition has proved to be unwieldy in actual practice, concomitant with the rise in quasi-governmental advisory boards and advisory councils. *See generally* Rushforth v. Council of Economic Advisors, 762 F.2d 1038 (D.C. Cir. 1985) (discussing the application of the *Soucie* test to the Council of Economic Advisors); *Meyer*, 981 F.2d at 1298 (deciding that the Task Force on Regulatory Relief is not an agency, thus

ly excluded from the Act's requirements.[163]

In 1974 FOIA was amended to expand the definition of agency to include organizations which "may not be considered agencies under [5 U.S.C. § 551(1)], but which perform governmental functions and control information of interest to the public."[164] It is clear from the legislative history of these amendments that the term "agency," as it is used in FOIA, does not include "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President."[165] Thus, the Executive Office exemption only applies to specified advisory staff or units within the Executive Office of the President and does not permeate the Office generally.[166] As demonstrated in part III a judicial litmus test assists the courts in determining the threshold agency question. Typically, the courts consider a variety of determinants including, but not limited to, the origin of the organization, whether the organization has independent rulemaking authority, whether the organization's members are identified as federal employees, the manner in which the members are selected, and how much of the organization's day-to-day operations are supervised by another governmental entity.[167]

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not subject to FOIA); *see also* part III (discussing the importance of the resolution of the threshold question of whether or not an organization is an agency).

163. 5 U.S.C. § 551(1)(A)-(B); *see also* Goland v. CIA, 607 F.2d 339, 348 (D.C. Cir. 1978), *vacated in part and reh'g denied*, 607 F.2d 367 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 927 (1980) (confirming FOIA exemption for Congress); Warth v. United States Dep't of Justice, 595 F.2d 521, 523 (9th Cir. 1979) (confirming FOIA exemption for the courts).

164. H.R. REP. NO. 876, 93rd Cong., 2d Sess. 8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6274.

165. H.R. REP. NO. 1380, 93rd Cong., 2d Sess. 15 (1974).

166. *See generally* Crooker v. Office of the Pardon Attorney, 614 F.2d 825 (2d Cir. 1980) (sole function test is one of limitation and cannot be applied throughout the executive branch).

167. *See, e.g.*, National Sec. Archive v. Archivist of United States, 909 F.2d 541 (D.C. Cir. 1990); Ehm v. National R.R. Passenger Corp., 732 F.2d 1250, 1254, 1255 (5th Cir.), *cert. denied*, 469 U.S. 982 (1984); Illinois Inst. for Continuing Legal Educ. v. United States Dep't of Labor, 545 F. Supp. 1229 (N.D. Ill. 1982); Nixon v. Sampson, 389 F. Supp. 107 (D.D.C. 1975); Wolfe v. Weinberger, 403 F. Supp. 238 (D.D.C. 1975); Washington Res. Project, Inc. v. Department of Health, Educ. & Welfare, 504 F.2d 238 (D.C. Cir.), *cert. denied*, 421 U.S. 963 (1974); Gates v. Schlesinger, 366 F. Supp. 797 (D.D.C. 1973); Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971).

III. *MEYER V. BUSH*: ASK, BUT YOU MAY NOT RECEIVE

A. How Did We Get Here?

On June 29, 1988, Katherine Meyer[168] submitted a FOIA request for certain documents held by "the Task Force on Regulatory Relief,[169] Vice President Bush, who Chairs the Task Force, or any other member of the Task Force."[170] Meyer was seeking three particular types of documents:

> (1) [a]ll reports, which have been issued since February, 1981, concerning the accomplishments of the Task Force; (2) [a]ll reports, which have been issued since February, 1981, which list or identify the regulations that the Task Force has reviewed; and (3) all reports, memoranda, correspondence, or other written documents transmitted to or from the Task Force or any of its members since January 1, 1985, concerning the Task Force's review of or involvement in regulations that were or still are under consideration by the Environmental Protection Agency, the Food and Drug Administration, or the Occupational Safety and Health Administration.[171]

1. Prelude to a Case

On July 1, 1988, in a letter written by John P. Schmitz, Deputy Counsel to the Vice President, Meyer was advised that neither the Vice President, nor his personal staff whose sole function was to advise and assist the Vice President and the

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168. Meyer is a former attorney for the Public Citizen Litigation Group ("PCLG"), the legal branch of Ralph Nader's Public Citizen. At the time of her FOIA request, Meyer was on leave from PCLG and was seeking the documents in an effort to study Bush's role at the Task Force, and to use this information to assist the 1988 Dukakis presidential campaign. Meyer v. Bush, Civ. A. No. 88-3112, 1991 WL 212215, at *2 n.10; *see also* Blum, *supra* note 1, at 8. Meyer is presently a partner in the Washington D.C. firm of Meyer & Glitzenstein. LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS at iv (Allan Robert Adler ed., 1993).

169. *See supra* part I.C.1 (discussing in detail the Task Force on Regulatory Relief and the regulatory scheme it was charged with reviewing).

170. Meyer v. Bush, 981 F.2d 1288, 1290 (D.C. Cir. 1993).

171. *Id.* at 1290-91.

President, were subject to the requirements of FOIA.[172] Meyer wrote again to the Deputy Counsel ten days later, appealing his original decision and reiterating her request.[173] While Meyer's renewed request was denied, a woman who identified herself as an attorney[174] at the Vice President's office[175] referred Meyer[176] to the OIRA[177] Administrator,[178] whose additional duties included serving as Executive Director of the Task Force.[179]

Meyer wrote to OMB on August 11, 1988, still seeking the documents which formed the substance of her June 29, 1988 request.[180] On the force of this renewed request, an OMB official[181] searched both the presidential Task Force files which were located at OMB as well as the OMB files applicable to Meyer's request,[182] but refused to search the Vice President's files, which the government had denominated as FOIA exempt.[183]

OMB presented the results of its search to the Public Citizen Litigation Group ("PCLG") on September 15, 1988.[184] OMB had located nineteen documents[185] that would satisfy all three of

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172. Meyer v. Bush, Civ. A. No. 88-3112, 1991 WL 212215, at *2, (D.D.C. Sept. 30, 1991), *rev'd*, 981 F.2d 1288 (D.C. Cir. 1993).

173. *Id.* In this letter, Meyer attempted to clarify her intentions. According to Meyer, she was not requesting the records of George Bush in his role as advisor to the President, but rather "documents that were received or generated by the Task Force *which he chairs*." *Id.* (emphasis added).

174. *Id.* This caller assured Meyer that whatever documents she desired were within the physical confines of OMB. *Id.*

175. The legal office of the Vice President is also the legal office of the Task Force. *Id.*

176. Via a telephone conversation in August 1988. *Id.*

177. The Office of Information and Regulatory Affairs, a sub-department of OMB, was created by the Paperwork Reduction Act of 1980. 44 U.S.C. §§ 3501-3520 (1988).

178. The OIRA Administrator and Executive Director of the Task Force at that time was Jay Plager. *Meyer*, 1991 WL 212215, at *2.

179. Meyer v. Bush, 981 F.2d 1288, 1290 (D.C. Cir. 1993).

180. *Meyer*, 1991 WL 212215, at *2.

181. Plager assigned OMB employee Don Arbuckle to attend to this task. *Id.*

182. *Id.*

183. *Meyer*, 981 F.2d at 1291. The search at OMB included all publicly available reports and press releases, as well as copies of Task Force documents which were located at OMB, and OMB's own files of records related to the Task Force. *Id.*

184. *Meyer*, 1991 WL 212215, at *2. Specifically, Arbuckle provided Rebecca Lemov of PCLG with 11 documents addressing the particulars of the first two request categories. *Id.*

185. Eleven documents addressed the parameters of Meyer's first two categories; eight others applied to the third category. *Id.*

Meyer's requests, but only released publicly available records pertaining to the first two requests.[186] Thereafter, Darrell A. Johnson, Assistant Director for Administration at OMB, formally responded to Meyer's letter of August 11, 1988.[187] Johnson provided Meyer with some relevant information,[188] but indicated that although additional responsive information was located,[189] these documents were being withheld under exemption (b)(5): the intra- and inter-agency memo exemption.[190]

Meyer again wrote to Johnson on September 27, 1988,[191] appealing his decision to withhold the information sought under category three.[192] OMB did not communicate again with Meyer until December 5, 1988.[193] Responding to the September 27, 1988 letter, OMB General Counsel Alan Charles Raul denied Meyer's appeal.[194] Although Raul identified the eight documents that were being withheld,[195] he stated two

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186. The initial portion of the June 29, 1988 FOIA request sought "(1) [a]ll reports, which have been issued since February, 1981, concerning the accomplishments of the Task Force; [a]nd (2) [a]ll reports, which have been issued since February, 1981, which list or identify the regulations the Task Force has reviewed." *Id.* at 1290.

187. *Meyer*, 1991 WL 212215, at *2.

188. A report generated in April 1981. *Id.*

189. *Id.*

190. *See supra* note 154 (providing text of exemption (b)(5)); *Meyer*, 1991 WL 212215, at *2; *see also* Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L. J. 845, 886-90 (1990) (discussing the deliberative process privilege).

191. At the time of this communication, Meyer was no longer working for the Dukakis campaign, and had returned to the PCLG. *Meyer*, 1991 WL 212215, at *3 n.15.

192. *Id.* at *3. The basis for this appeal was that OMB had not indicated the number or the nature of the responsive documents they were retaining. *Id.*

193. In the interim, Meyer filed a FOIA suit on October 27, 1988. *Id.*

194. *Id.* Although Raul declined to provide Meyer with the eight documents responsive to category three that OMB was retaining, he did include with his letter an additional document which had been part of a Food and Drug Administration ("FDA") presentation at a Task Force meeting of July 29, 1988, and had already been publicly released by the FDA. *Id.* at *2 n.16.

195. The eight documents comprised the following:

1. Two pages of the briefing book of January 20, 1987 concerning regulatory actions associated with the Regulatory Program. This material contains analysis of rulemaking schedules related to EPA, FDA, and the Occupational Safety and Health Administration ("OSHA").
2. Three pages of the briefing book of March 10, 1987 concerning investigational new drug ("IND") regulations. This is an issues and options paper for consideration by the Task Force.
3. One page of the briefing book of May 14, 1987 containing comments and recommendations concerning the status of the IND issue.
4. One page of the briefing book of July 14, 1987 containing comments and

alternative reasons for denying their release.[196] Seven of the documents were vice presidential records, rather than agency records, and thus not subject to FOIA.[197] These documents included pages from the briefing books prepared for the Vice President and other Task Force members used for Task Force deliberations.[198] Included within these documents were discussions pertaining to agency regulations, Task Force comments addressing said regulations, and the policy recommendations considered.[199] The Office of the OIRA Administrator, also the Executive Director of the Task Force, was the repository for the briefing book copies.[200] Despite being stored in the same office, the Task Force files were kept separate and apart from the OMB files.[201] Again, OMB declined to provide Meyer with these documents on the grounds that neither the Vice President nor the Task Force were considered agencies under FOIA.[202]

Alternatively, Raul concluded that all eight documents could be withheld because they were exempt from disclosure under the provisions of exemption (b)(5).[203] The basis for such an assess-

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recommendations related to the status of the IND issue.

5. Twenty-two pages of the briefing book of March 22, 1988 concerning agency schedules for rulemaking as described in the Regulatory Program. These documents contain analysis and recommendations concerning various rulemakings of EPA and OSHA.

6. One page of the briefing book of March 22, 1988 containing comments and recommendations related to the status of the IND issue.

7. Two pages of the briefing book of July 29, 1988 containing comment and analysis concerning the IND issue.

8. A two page letter from Jay Plager [OIRA Administrator and Executive Director of the Task Force] to Otis Bowen dated August 12, 1988 conveying the Vice President's guidance to the Secretary of the Department of Health and Human Services concerning IND rulemaking.

Id. at *2.

196. *Id.*

197. *Id.*

198. *Meyer*, 981 F.2d at 1288.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *See supra* note 154 (providing text of exemption (b)(5)). In the final analysis, the district court was correct in rejecting this argument. *Meyer*, 1991 WL 212215, at *9. Because the court of appeals deemed that the Task Force was not an agency, logic would not allow the Task Force to claim a (b)(5) exemption protecting inter- and intra-*agency* memoranda. *Meyer*, 981 F.2d at 1297-98.

ment arose from the content of the eighth document. Although the eighth document was merely a letter from OIRA Administrator Jay Plager to the Secretary of Health and Human Services Otis Bowen,[204] OMB declined to provide Meyer with the letter based on its contents. In sum, the letter amounted to little more than "recommendations and guidance to be incorporated in future administrative and legislative proposals to improve the [FDA's investigational new drug] approval process."[205] Although the Government initially claimed that the letter fell within the (b)(5) exemption category, it later conceded that retention of the letter was inappropriate.[206] Since the letter was an OMB, not a Task Force, document and OMB is an agency within the FOIA provisions, the letter should have been released. The Government, however, contested the potential forced disclosure of the other seven documents.[207]

2. Procedural Disposition

On October 27, 1988, after not receiving a reply from her appeal of September 27, 1988, Katherine Meyer filed her FOIA suit,[208] consisting of challenges to: 1) the adequacy of the Government's document search; 2) the specific refusal to search the Vice President's files; and 3) the Government's decision to withhold the eight documents responsive to Meyer's FOIA request.[209] In its motion for summary judgment, the Government responded that: 1) the first seven documents were withheld due to their characterization as non-agency documents; 2) document eight was exempt per FOIA exemption (b)(5); and 3) the search was "adequate" under FOIA definitions.[210]

In the memorandum opinion filed denying the Government's motion,[211] the district court held that the documents requested were *Task Force* documents, not the Vice President's.[212] More

204. *Meyer*, 1991 WL 212215, at *3.
205. *Meyer*, 981 F.2d at 1291 (quoting OMB officials).
206. *Id.*
207. *Id.*
208. *Meyer*, 1991 WL 212215, at *3.
209. *Meyer*, 981 F.2d at 1291.
210. *Id.*
211. *Meyer*, 1991 WL 212215, at *1.
212. *Id.* at *6; *see also Meyer*, 981 F.2d at 1291.

importantly, however, the court concluded that the Task Force was an agency within the purview of FOIA.[213] In reaching this conclusion, the court explained that "the Task Force was not formed simply to advise and assist the president,"[214] but rather "had substantial, independent, directorial authority."[215] The court reserved judgment on whether the Government was required to search the Vice President's files,[216] but did point out that the files were not protected by the Presidential Records Act.[217] Upon the Government's motion for interlocutory appeal, the district court certified as appropriate the threshold question of whether the Task Force is an agency under FOIA.[218] A divided court of appeals reversed the lower court's decision.[219]

3. Is There an Agency in There?

The court of appeals began its majority opinion by announcing that the district court correctly applied the governing law when confronting the issue of whether an organization within the Executive Office of the President is a FOIA agency.[220] Taking the definition of agency from the 1974 amendments to FOIA,[221] the court found that the legislative history of the amendments demonstrated congressional intent to codify the result reached in

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213. *Meyer*, 1991 WL 212215, at *6.

214. *Id.* This would have made it, per congressional directives, FOIA exempt. *See supra* notes 164-66 and accompanying text.

215. *Meyer*, 1991 WL 212215, at *6; *see also Meyer*, 981 F.2d at 1291.

216. "Until defendants provide the Court with more information concerning the collection and storage of Task Force records at the Office of the Vice President, the Court cannot evaluate the propriety of defendants' decision not to search the Vice President's office." *Meyer*, 1991 WL 212215, at *9.

217. 44 U.S.C. § 2207 (1978). Agency records are not covered by the Presidential Records Act. Presidential Records Act of 1978, 44 U.S.C. § 2201(2)(B) (1988). Even if they were, however, there would be little controversy over whether the records in question were agency records. *Meyer*, 1991 WL 212215, at *9 n.44. To qualify as an agency record, an agency must be in control of the records at the time of the FOIA request. *Id.* Since the document transfer took place after receipt of the FOIA request, the Office of the Vice President would be liable for such an improper transfer. *Id.*

218. *Meyer*, 981 F.2d at 1291.

219. *Id.* at 1298.

220. *Id.* at 1291.

221. The amended Act defines "agency" as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. § 552(f) (1988); *see also supra* notes 160-67 and accompanying text (discussing the definition of "agency").

Soucie v. David,[222] concerning the question of what "Executive Office of the President" means.[223]

In *Soucie v. David*,[224] the court determined that the Office of Science and Technology ("OST"), a separate entity within the Executive Office of the President, was a FOIA agency.[225] OST did in fact advise and assist the President, which would ostensibly allow the FOIA exemption to protect their records. However, OST also inherited "substantial independent authority"[226] from its predecessor, the National Science Foundation,[227] and was thus empowered to evaluate federal programs, initiate and support research, and award scholarships.[228] Thus, the court concluded, "[b]y virtue of its independent function of evaluating federal programs, the OST must be regarded as an agency subject to the APA and the Freedom of Information Act."[229]

Reiterating the *Soucie* test, the *Meyer* court emphasized that OST was a FOIA agency for the precise reason that it could act directly and independently, not merely advising and assisting the President.[230] This "advise and assist" language had been adopted by the Supreme Court in *Kissinger v. Reporters Commission for Freedom of the Press*.[231] The Court concluded that FOIA could not be applied to "'the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.'"[232] Although the *Meyer* court cited other

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222. Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971).

223. *Meyer*, 981 F.2d at 1291. "With respect to the meaning of the term 'Executive Office of the President' the conferees intend the result reached in Soucie v. David. The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." *Id.* at 1291-92 n.1 (quoting H.R. REP. NO. 1380, 93rd Cong., 2d Sess. 14 (1974)).

224. *Soucie*, 448 F.2d at 1067.

225. *Id.* at 1073.

226. *Id.* at 1074.

227. National Science Foundation Act of 1950, 42 U.S.C. § 1862(a)(1), (6) (1988); *see* Exec. Order No. 10,521, 3 C.F.R. 183 (1954-1958), *reprinted as modified by* Exec. Order No. 10,807, § 6(b), 3 C.F.R. 329, 331 (1959-1963) *in* 42 U.S.C. § 1862 (1964).

228. *Soucie*, 448 F.2d at 1073-75.

229. *Id.* at 1075.

230. *Meyer*, 981 F.2d at 1292.

231. *Id.* at 1292 (quoting Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980)).

232. *Kissinger*, 445 U.S. at 156; *see also supra* note 162.

cases involving FOIA and Executive Office agencies,[233] the center of the present dispute concerned the extent of the Task Force's independence from the President when it interacted with other entities within the executive branch.[234]

a. The Meyer *Test*

The determination of whether the Task Force[235] was a FOIA agency depended upon the resolution of the following question: "Was the Task Force, in *Soucie's* words, 'substantially independent,' or was its function 'solely to advise and assist' the President?"[236] When answering this question, the *Meyer* court suggests a three part inquiry: (1) how close, operationally, is the organization to the President; (2) what is the nature of delegated authority from the President; and (3) is the organization a self-contained group?[237]

i. Operational Nexus Between President and Organization?

Operational proximity to the President,[238] absent a close functional examination, is partly the type of situation Congress envisioned when it set out to exempt the President's immediate personal staff from FOIA.[239] Other units in the Executive Office

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233. *Meyer*, 981 F. 2d at 1292 (citing Pacific Legal Found. v. Council on Envt'l Quality, 636 F.2d 1259 (D.C. Cir. 1980) (deciding that CEQ, although an entity within the Executive Office of the President, was a FOIA agency)); Rushforth v. Council of Economic Advisors, 762 F.2d 1038 (D.C. Cir. 1985) (distinguishing CEA from CEQ and exempting CEA from FOIA).

234. *Meyer*, 981 F.2d at 1293.

235. The framework of this question is not, as the court illustrated, limited to the Task Force. *Id.* When faced with a FOIA situation, the court indicated that the *Soucie* test should be applied "to those who help the President supervise others in the executive branch." *Id.* This same test would be applicable to a FOIA request aimed at the Council on Competitiveness, or any subsequent President's regulatory oversight committee. In part IV, the *Soucie* test, coupled with the *Meyer* tripartite inquiry, will be applied to the Council to demonstrate how it, and by extension subsequent organizations like it, would be exempt from any FOIA requests.

236. *Meyer*, 981 F.2d at 1293.

237. *Id.*

238. *Id.* (characterizing it as "the sense of continuing interaction").

239. *Id.*; *see* H.R. REP. NO. 1380, 93rd Cong., 2d Sess. 14-15 (1974). The court assumed that the President's immediate personal staff would include the nearly 400 persons employed by the White House Office. *Meyer*, 981 F.2d at 1293 n.3; *see also* H.R. DOC. NO. 185, 95th Cong., 1st Sess. 6 (1977).

of the President, must survive the sole function test in order to avoid FOIA.[240] Those units that merely "advise and assist" the President, and thus withstand the sole function test, are characteristically similar to the White House Staff in one very important aspect—proximity to the President.[241]

ii. Nature of the Delegation?

The scope of the delegated authority will often resolve the issue of proximity.[242] As the court illustrated, when the scope of delegated authority widens, the amount of "continuing interaction" with the President decreases and the result is an entity with the capability of exercising a greater amount of independence.[243]

To examine the Task Force's realm of authority, the court looked at Executive Order 12,291,[244] the enabling document which created the Task Force.[245] The court found that the document empowered neither the Vice President nor the Task Force to direct the executive branch.[246] Rather, the authority to give directions to the executive branch was reserved to the province of the OMB Director. When regulatory authority was to be exercised,[247] it was within the authority of the OMB Director to designate major rules "subject to the direction of the Task

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240. *Meyer*, 981 F.2d at 1293 n.3.

241. *Id.* at 1293.

242. *Id.*

243. *Id.* (referring to the decision obtained in Rushforth v. Council of Economic Advisors, 762 F. 2d 1038 (D.C. Cir. 1985)). In *Rushforth*, the Council of Economic Advisors was held not to be a FOIA agency because it did not possess any delegated *regulatory* authority by which it could supervise agencies. *Meyer*, 981 F.2d at 1293 (citing *Rushforth*, 762 F.2d at 1038); *see also* National Sec. Archive v. Archivist of the United States, 909 F.2d 541, 545 (D.C. Cir. 1990) (determining White House Counsel's Office not to be a FOIA agency).

244. *See supra* part I.C.1.

245. *Meyer*, 981 F.2d at 1294.

246. *Id.* Conversely, and perhaps imprudently, President Clinton's model for regulatory review vests considerable authority in the Vice President to direct the executive branch. *See* Exec. Order No. 12,866, *supra* note 89, § 2(c), 58 Fed. Reg. 51,735 (1993) (Vice President to develop and present regulatory policy, planning, and review recommendations); *id.* § 4(a), 58 Fed. Reg. 51,735 (Vice President to convene meeting to coordinate regulatory priorities and efforts); *id.* § 5(c), 58 Fed. Reg. 51,735 (Vice President may identify other regulations for review or legislative mandates for congressional reconsideration); *see also* Stephen Barr, *White House Shifts Role in Rule-Making: Clinton Seeks to End Closed-Door Process*, WASH. POST, Oct. 1, 1993, at A1.

247. For the purposes of the present discussion, the designation of rules subject to review is encompassed within the exercise of regulatory authority.

Force."[248] In the absence of this exercise of regulatory authority the OMB Director's other powers of review are merely "subject to the direction of the Task Force."[249]

Although the Executive Director of the Task Force also served as the Associate Director of OMB for OIRA, the Government was not trying to protect his written instructions to agencies or claim that these documents would be Task Force materials.[250] Moreover, the Government maintained, and the court agreed, that although regulatory oversight via Executive Order 12,291 did create an agency subject to FOIA, that agency is OMB, not the Task Force.[251] Thus, whatever broad authority the President delegated in issuing Executive Order 12,291, it vested in OMB, not the Task Force.

The court then embarked upon an analysis of the "Task Force's role[] vis-a-vis the OMB Director and cabinet or agency heads."[252] Examining the Executive order,[253] the court visualized the Task Force somewhere between the OMB Director and the President in a theoretical organizational chart of the executive branch.[254] Executive Order 12,291 engendered the Task Force with responsibility for providing the OMB Director with "guidance" and "direction."[255] Moreover, the Task Force was empowered with the authority to resolve disputes between agencies and OMB "or [to] ensure that they are presented to the President."[256] Noting that the OMB Director is the cabinet officer functionally, if not actually, closest to the President,[257]

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248. *Meyer*, 981 F.2d at 1294 (quoting Exec. Order No. 12,291, § 3(b), 58 Fed. Reg. 51,735).

249. *Id.* (quoting Exec. Order No. 12,291, §§ 3(e)(1), 3(e)(3)(i), 5(b), 6(a), 6(b), 58 Fed. Reg. 51,735).

250. *Id.*

251. *Id.* These written policy instructions, like the letter from Plager to Bowen, *supra* note 195, were generated by OMB, and as OMB records, subject to FOIA. Aside from its broadly delegated powers, OMB suffers other infirmities, in terms of FOIA accountability, which render it subject to FOIA, not the least of which are its permanent agency status and significant independent staff. *Id.*

252. *Id.*

253. Prudently, the court always looked to the enabling document whenever questions of authority or structure arose. Here, the court deemed the Executive order the "most important indication of the Task Force's role." *Id.*

254. *Id.*

255. *Id.* (citing Exec. Order No. 12,291, § 3(e)(1), 58 Fed. Reg. 51,735).

256. *Id.*

257. *Id.* Additionally, the duties of the OMB Director include aiding the President in managing the entire executive branch. *Id.*

the court analogized that the cabinet officers serving as Task Force members were acting more as assistants to the President than as the heads of their respective departments.[258] An "assistant to the President," according to this court, qualifies as a member of the President's "immediate personal staff," and is thus exempt from FOIA coverage.[259] Finally, citing section 1(d) of Executive Order 12,498,[260] the court noted that when the Task Force wanted instructions to be given to the executive branch, it sought to advise the President to include the instructions in an Executive order.[261] There was nothing in the record[262] to indicate that the Task Force, acting as the Task Force, instructed anyone in the executive branch, OMB included, to do anything.[263]

Despite the incorporation of a dispute resolution mechanism into the Executive order, wherein the Task Force, at its option, could either resolve a dispute on its own or convey the dispute to the President, the court found the availability of this option an insufficient indicator of independent Task Force authority.[264] Expressing doubt, the court found it difficult to imagine "that the OMB Director, or any other head of a department or agency who *reports directly* to the President, would acquiesce in a Task Force decision that was thought not to represent directly and precisely the President's opinion."[265] The court further concluded that the

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258. *Id.*

259. *Id.* The immediate personal staff exemption is drawn from *Kissinger*, 448 U.S. at 156 (quoting H.R. REP. NO. 1380, 93rd Cong., 2d Sess. 14 (1974)).

260. *Meyer*, 981 F.2d at 1294. Section 1(d) of Executive Order 12,498 provides:

> To assure consistency with the goals of the Administration, the head of each agency subject to this Order shall adhere to the regulatory principles stated in section 2 of Executive Order No. 12291, including those elaborated by the regulatory policy guidelines set forth in the August 11, 1983, Report of the Presidential Task Force on Regulatory Relief, "Reagan Administration Regulatory Achievements."

Exec. Order No. 12,498, *supra* note 79, *reprinted in* 5 U.S.C. § 601 (Supp. IV 1986).

261. *Meyer*, 981 F.2d at 1294 (citing Exec. Order No. 12,498, § 1(d), *supra* note 79, *reprinted in* 5 U.S.C § 601 (Supp. IV 1986)).

262. That is, aside from the appellee's proffer of unreliable press releases as evidence. *Id.*

263. *Id.* Moreover, the court noted that if the Task Force had exercised all of the authority and power which the dissent attributed to it then it seems curious that the Task Force would have generated only seven documents which applied to Meyer's FOIA request. *Id.*

264. *Id.* at 1294-95.

265. *Id.* at 1295.

Task Force was implicitly obliged to present a dispute to the President for his consideration and resolution, unless the Task Force already had knowledge of the President's view regarding the issue in dispute.[266] In support of this contention, the court noted that no documented[267] agency appeal existed referring an OMB decision to further review by the Task Force.[268]

The fact that the Vice President chaired the Task Force did not impress the court as giving the Task Force any "added clout or independent authority."[269] In actuality, the effect was exactly the opposite. To begin, the Vice President has a constitutionally protected role and, in that capacity, he is the only senior executive branch official who is entirely excluded from the President's removal power.[270] Because of this constitutional barrier to removal, the court surmised that any actual executive branch supervisory authority is hesitatingly delegated by the President to the Vice President.[271] This institutional tension results in a Vice President who avoids directing others in the executive branch absent an acknowledgment that his own views are in sympathy with the President's.[272] Owing to this deference, the vice presidential chairmanship of the Task Force actually operates against the argument of added clout and independent authority.[273]

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266. *Id.* This implies that since the Task Force was not expected to resolve a dispute sua sponte unless it knew the President's exact views, "the Task Force was *not* expected to act with significant independence." *Id.* (emphasis added).

267. Documented is the key term here. Although there appears to be a single reported instance of the Task Force exercising some influence in a dispute between OMB and OSHA, see Erik D. Olson, *The Quiet Shift of Power: Office of Management and Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NATURAL RESOURCES L. 1, 44 & n.210 (1984), the source of the report (i.e., the only place this event was reported was in a law review article) casts doubt on its actual occurrence. *Meyer*, 981 F.2d at 1295 n.6.

268. *Meyer*, 981 F.2d at 1295.

269. *Id.*

270. *Id.*

271. *Id.; see also* Bowsher v. Synar, 478 U.S. 714, 721-27 (1986) (President's power of removal is critical to control of executive branch). *But see supra* note 100 (for broad grant of review and control to the Vice President).

272. *Meyer*, 981 F.2d at 1295.

273. *Id.* at 1295-96. The court made it clear, however, that this line of reasoning does not imply that the Vice President could never be the head of a FOIA agency. *Id.* at 1295 n.7; *see also* Armstrong v. Bush, 924 F.2d 282, 286 n.2 (D.C. Cir. 1991) (Vice President subject to Presidential Records Act, not Federal Records Act). That precise FOIA issue, however, did not have to be resolved in order to decide the present controversy over whether the Task Force qualified as a FOIA agency. *Meyer*, 981 F.2d at 1295 n.7.

iii. Self-Contained Structure?

The final determinants of agency status for the purposes of FOIA turn on two questions: (1) whether the Task Force, or any successor oversight unit such as the Council on Competitiveness, operated as an isolated structure, buoyed by an independent staff and inherent authority; and (2) whether the President "established" that oversight body?[274]

Absence of independent authority can be inferred when the governmental unit lacks a separate staff. The implication in *Soucie*, the court noted, was that structure and function are to be considered in tandem when attempting to define an agency.[275] If the OST merely existed to "advise and assist" the President, the *Soucie* court asserted that such a framework "might be taken as an indication that the OST is a part of the President's staff and not a separate agency."[276] Additionally, FOIA indicates that a definite structure is a prerequisite to a finding of agency status. FOIA coverage extends only to those entities that are "establishments in the executive branch."[277] Drawing on their previous conclusion about the relevance of proximity to the President, the court concluded that based on this "establishment" language structure is also important.[278] However, structure is not so important as is a *lack* of structure. Characteristics of the President's immediate personal staff include proximity to the President *and* the lack of an independent structure. Since these two characteristics embody the nature of the "immediate personal staff" exemption, executive branch units that exhibit these characteristics will be presumed to be FOIA exempt.[279]

The court noted that the President may have "established" the Task Force[280] first by an "informal presidential direction"

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274. All of the court's previous analysis notwithstanding, if the Task Force were an executive branch establishment, then it would have fit neatly into the FOIA definition of agency, and the case would have been decided the other way. *See* 5 U.S.C. § 552(f) (1988) (agency defined to include executive branch establishments).

275. *Meyer*, 981 F.2d at 1296.

276. *Id.* (quoting Soucie v. David, 448 F.2d 1067, 1075 (D.C. Cir. 1971)).

277. *Id.* (quoting 5 U.S.C. § 552(e) (1988)).

278. *Id.*

279. *Meyer*, 981 F.2d at 1296.

280. The mechanics of "establishing" an entity within the executive branch are not altogether clear. The court, however, read FOIA to require definitive structure as an agency prerequisite. *Id.* (citing 5 U.S.C. § 552(f)).

followed by a subsequent delegation of certain functions by way of the Executive order. This analysis, however, collapsed under the weight of reality when the court concluded that the Task Force was "simply a partial cabinet group."[281] According to the court, an "establishment" for the purposes of FOIA was not created whenever the President gathered a group of senior staff or departmental heads to work on the government's troubles.[282] Moreover, doubting that any group within the Office of the President that operated without a separate staff could be viewed as an "establishment," replete with independent authority, the court found it significant that the Task Force "operated out of the Vice President's office without a separate staff, borrowing OMB personnel as needed."[283] The fact that the Task Force was without a separate staff was most compelling to the court, taking this fact as a "strong indicator" that the Task Force was "neither an 'establishment' nor an independent actor in the executive branch."[284]

The court expressly rejected the distinction that instruction via Executive order creates a FOIA agency, but instruction via internal memoranda does not.[285] More compelling to the court was the structure of the group, not necessarily the formality of the document delegating authority.[286] Whether the President[287] personally devotes his time to the oversight of regulatory agencies or organizes an oversight group composed of cabinet officers and White House staff to review the regulatory issues should be immaterial to the question of whether an agency has been created.[288] Otherwise, the "assist" language of *Soucie* is empty

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281. *Id.*

282. *Id.*

283. *Id.* The notion here is that once a governmental unit gains a separate staff, the unit then becomes self-contained and begins to operate independently, with presidential influence becoming less and less significant. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* Inherent in the structure of the group is the degree of relative presidential independence. The greater the degree of independence, the more likely the group will be subject to FOIA. *Id.*

287. The President's constitutional duty to see that the laws are faithfully executed encompasses the duty to oversee the regulatory policies generated by executive branch agencies and departments. *See* Sierra Club v. Costle, 657 F.2d 298, 405-06 (D.C. Cir. 1981); Public Citizen v. Burke, 843 F.2d 1473, 1477-78 (D.C. Cir. 1988).

288. *Meyer*, 981 F.2d at 1297.

rhetoric.[289]

Although some Task Force members were also members of the President's cabinet, there is nothing in the record that demonstrated that their authority as heads of their respective departments imputed the same independent authority when they operated as the Task Force.[290] Resolving the case in the Task Force's favor, the court noted that the group lacked the "substantial independent authority" requisite to the direction of executive branch officials.[291] More significantly, the court characterized the Task Force as "merely a committee which convened periodically both to bring together the views of various cabinet department heads concerning significant proposed regulations, and to shape for the President's decision intra-agency disputes which . . . only he can resolve."[292] Since the Task Force, under this analysis, was embraced by the *Soucie* "advise and assist" test, the court held that the Task Force was not an agency under FOIA.[293]

IV. BLOOD FROM A STONE: FOIA REQUESTS AFTER *MEYER*

A. President Bush and Contemporary Regulatory Oversight

1. Whence the Council?

President Bush's Council on Competitiveness was the latest generation in a long line of Executive Office regulatory oversight boards.[294] *Meyer* delineated the framework within which a President can organize a lawful, FOIA exempt, oversight committee. In subsection two the Council is examined through the *Meyer* three-prong test. Because the Council was the most powerful

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289. *Id.*

290. *Id.*

291. *Id.* To this court, the cabinet officers, qua Task Force members, were simply acting as senior White House staffers would. *Id.*

292. *Id.* at 1298.

293. *Id.* Because this question was brought to the court on interlocutory appeal, the case was remanded back to the district court. *Id.* Nothing further has yet been announced by the district court.

294. *See supra* part I.B. and accompanying text (discussing history of executive branch regulatory oversight committees). The Council on Competitiveness was abolished by Clinton shortly after he took office. Martin Tolchin, *Last-Minute Bush Proposals Rescinded*, N.Y. TIMES, Jan. 23, 1993, at A10. Eight months later Clinton issued Executive Order 12,866. *See supra* note 88 (discussing Clinton's vision of regulatory relief and continuance of the pattern of Executive branch oversight of regulatory matters).

presidential regulatory oversight board to date, if it would have passed the *Meyer* test it should serve as the outermost boundary for the exertion of presidential privilege within this area of the Executive Office. The question then becomes, is this palatable to the nation's notions of fundamental fairness as well as presidential prerogatives, or should Congress be allowed to step in, with legislation such as the Regulatory Review Sunshine Act ("Review Act")[295] and effectively stop such oversight in its tracks?[296]

2. Application of the *Meyer* Test to the Council

a. Operational Proximity to the President

Based on the analysis employed by the *Meyer* court, as well as the following history of the Council and its activities, it will be shown that the Council enjoyed the same degree of operational proximity to the President as did its predecessor, the Task Force. If any oversight unit is going to survive the *Meyer* three-prong test, it must first satisfy the proximity requirement. As the *Meyer* court noted, operational proximity and the extent of the delegation are often intertwined.[297] The greater the delegation of authority, the further from the President the committee will be on an operational level. However, the Council was to serve as a conduit between the President and the agencies,[298] with final

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295. S. 1942, 102d Cong., 1st Sess. (1991).

296. The argument here is really about whether the President can structure the oversight of regulatory matters in a manner unfettered by the predilections of Congress. *See infra* part IV.C.2. (arguing that congressional interference with Executive matters violates Article II of the United States Constitution). Cloaking the argument in terms of public accountability compels a similar result. Public accountability occurs at the ballot box. The President, as Chief Executive, is, and should be, permitted to structure the executive branch in a manner that best effectuates his policy choices. The election of President Clinton and the changes wrought by Executive Order 12,866 bear witness to this proposition.

297. Meyer v. Bush, 981 F.2d 1288, 1293 (D.C. Cir. 1993); *see also* Association of Am. Physicians & Surgeons v. Clinton, 997 F.2d 898, 910 (D.C. Cir. 1993) (operational proximity implicates executive powers).

298. As Allan B. Hubbard explained, in a letter to Senator John Glenn, Chairman, Committee on Government Operations:

> The Council's regulatory review activities involve working closely with the OMB in carrying out OMB's regulatory review under E.O. 12291 and its development of the Regulatory Program under E.O. 12498. The Council determines which items it will review based on the views of its members and staff; normally the items it takes up are those that present difficult issues under E.O. 12291 that require Cabinet-level attention, particularly where there

decisions remaining purely within the province of the President, in a manner consistent with his overall regulatory policy.[299] Filling a role similar to that of the Task Force, the Council was convened merely to "advise and assist" the President in his dealing with the multifarious administrative agencies,[300] since he cannot do this entirely alone—nor would it be rational to entertain that any President ever could.

b. Nature of Presidential Delegation

During the Council's tenure, the regulatory review process was guided by Executive Orders 12,291[301] and 12,498.[302] The first official mention of the Council appeared in Bush's State of the Union Address on February 9, 1989.[303] Although formed on April 4, 1989,[304] the Council achieved official regulatory oversight status on June 15, 1990, when Bush authorized the Council on Competitiveness to champion regulatory review in a manner consistent with its predecessor group, the Task Force on Regulatory Relief.[305] At the same time, Bush named the Council as the

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is a policy disagreement among agencies.

Letter from Allan B. Hubbard, Executive Director, Council on Competitiveness to Senator John Glenn, Chairman, Committee on Government Operations, (Oct. 22, 1991), *reprinted in* S. REP. NO. 256, 102d Cong., 2d Sess. 79 (1992) [hereinafter Letter from Hubbard].

299. *See* Exec. Order No. 12,498, § 3(a), *supra* note 79, *reprinted in* 5 U.S.C. § 601 (Supp. IV 1986).

300. In order to best effectuate this "advise and assist" function, the Council was comprised of the following members: the Vice President, who served the chairman, the Attorney General, the Secretary of the Treasury, the Director of OMB, the Chairman of the Council of Economic Advisors, the Secretary of Commerce, and the Chief of Staff to the President (ex officio). OFFICE OF THE VICE PRESIDENT, Fact Sheet, (Apr. 12, 1989), *reprinted in* S. REP. NO. 256, *supra* note 9, at 20. Additionally, the Chief of Staff to the Vice President was responsible for coordinating the Council's activities. *Id.* The Administrator of OIRA was to serve as the Executive Director of the Council. *Id.*

301. Exec. Order No. 12,291, *supra* note 72, *reprinted in* 5 U.S.C. § 601 (1982).

302. Exec. Order No. 12,498, *supra* note 79, *reprinted in* 5 U.S.C. § 601 (Supp. IV 1986).

303. S. REP. NO. 256, 102d Cong., 2d Sess. 20 (1992). In that address, President Bush announced "I've asked Vice President Quayle to chair a new Task Force on Competitiveness." *Id.*

304. Marlin Fitzwater, White House Briefing (Apr. 4, 1989), *available in* LEXIS, News Library, Federal News File.

305. Statement issued by Press Secretary Fitzwater on the Review of Regulatory Issues by the Council on Competitiveness, 26 WEEKLY COMP. PRES. DOC. 959 (June 18, 1990). The statement announced:

> The President today designated the Council on Competitiveness, chaired by Vice President Quayle, as the appropriate council to review issues raised in

appropriate organization to review issues raised in accordance with the regulatory oversight framework created by Executive Order 12,291.[306]

Specifically, Executive Orders 12,291[307] and 12,498[308] empowered the Director of OMB to ensure their implementation. Executive Order 12,291 called for the Task Force to review the OMB Director's implementation of the Orders. That role was subsequently reserved to the Council.[309] OIRA reviewed the regulations under the orders, and the OIRA staff kept the Council abreast of the regulatory review process, as well as the status of particular issues highlighted for review.[310] The Chief Financial Officers Act of 1990, which provides that the OMB's Deputy Director for Management is to "[p]erform all functions of the Director, including all functions delegated by the President to the Director . . . relating to regulatory affairs,"[311] is echoed in one of the *Meyer* court's conclusions, that whatever authority was delegated by the President under the Executive orders was delegated to the Director of OMB, not the Task Force.[312] Thus, by an Act of Congress, OMB is reaffirmed as the President's comprehensive regulatory clearinghouse within the executive branch.

On March 22, 1991, Vice President Quayle issued a memorandum to the heads of the executive departments and agencies, maintaining that the Council was vested with the authority to review:

> conjunction with the regulatory program under Executive Order 12498. The President has also directed the Council on Competitiveness to exercise the same authority over regulatory issues as did the Presidential Task Force on Regulatory Relief under Executive Order 12291, which established the Administration's regulatory review process.

Id.

306. *Id.*

307. Exec. Order No. 12,291, § 6(a), *supra* note 72, *reprinted in* 5 U.S.C. § 601 (1982). "To the extent permitted by law, . . . the Director shall have authority, subject to the direction of the Task Force, to . . . (8) Monitor agency compliance with the requirements of this Order and advise the President with respect to such compliance." *Id.*

308. Exec. Order No. 12,498, § 3(a), *supra* note 79, *reprinted in* 5 U.S.C. § 601 (Supp. IV 1986). "In the event of disagreement over the content of the agency's draft regulatory program, . . . the Director may raise issues for further review by the President or by such appropriate Cabinet Council or other forum as the President may designate." *Id.*

309. Letter from Hubbard, *supra* note 298.

310. *Id.*

311. Chief Financial Officers Act of 1990, 31 U.S.C. § 503(b)(2) (Supp. IV 1992).

312. *Meyer*, 981 F.2d at 1294.

> all agency policy guidance that affects the public . . . not only regulations that are published for notice and comment, but also strategy statements, guidelines, policy manuals, grant and loan procedures, Advance Notices of Proposed Rule Making [in limited instances], press releases, and other documents announcing or implementing regulatory policy that affects the public.[313]

The impetus for the memorandum was a desire to respond to questions raised by various agencies concerning the scope of Executive Order 12,291, as well as which agency actions must be submitted to OMB for review.[314]

In actuality it served to clarify the definition of "regulation" or "rule" under Executive Order 12,291,[315] rather than depict an expansion of the Council's delegated authority, or a contraction of OMB's. To be sure, if the Council had been really interested in reviewing all of the aforementioned information, it would have found it necessary to meet on a structured timetable, rather than in the ad hoc manner which characterized its first year of official regulatory oversight.[316] Moreover, the infrequency of the meetings echoes the similar infrequency of Task Force meetings.[317] Because the delegation of authority to the Council was instituted under the rubric of the same Executive order which empowered the Task Force, and because that delegation has been deemed insufficient to surpass the "advise and assist" threshold,[318] the Council was likewise charged with the *Soucie* "advise

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313. Memorandum for Heads of Executive Departments and Agencies from the Vice President (Mar. 22, 1991), *quoted in* Clarke, *supra* note 22, at 31; *see also* Letter from Hubbard, *supra* note 298 (explaining the Vice President's memorandum).

314. Letter from Hubbard, *supra* note 298.

315. "'Regulation' or 'rule' means [with certain exceptions] an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the procedure or practice requirements of an agency . . . . " Exec. Order 12,291, § 1(a), *supra* note 72, *reprinted in* 5 U.S.C § 601 (1982).

316. The Council held nine meetings between the formal announcement by the President on June 15, 1990 and July 1991. Letter from Hubbard, *supra* note 298. Three meetings were held in 1990: on June 28, September 27, and December 19. *Id.* Six meetings were held in 1991: on February 11, May 6, May 14, June 27, July 22, and July 29. *Id.* No other information is available for the remainder of 1991, or all of 1992, but there is no reason to indicate that the process did not continue in a like fashion.

317. *Id.* (Task Force met only 9 times in 12 months).

318. *See supra* note 293 and accompanying text (*Meyer* court holding delegation of authority to Task Force did not do violence to the "advise and assist" standard).

and assist" duties to the President, rather than their own independent authority.[319]

c. Self-Contained Structure

On this matter, the *Meyer* court raised the question of whether President Reagan created an establishment within the executive branch when he created the Task Force.[320] Concluding that the "President does not create an 'establishment' subject to FOIA every time he convenes a group of senior staff or departmental heads to work on a problem," the court found the lack of a separate staff to be a "strong indicator" of whether a unit within the executive branch is either an "establishment" or an independent body.[321]

This is the one area of the *Meyer* test where the Council would have encountered some difficulty yet would still pass through the test unharmed. Much like the Task Force,[322] the Council was comprised of the following members: the Vice President, who served as the chairman, the Attorney General, the Secretaries of the Treasury and Commerce Departments, the Director of OMB, the Chairman of the Council of Economic Advisors, and the Chief of Staff to the President (ex officio).[323] Additionally, the Chief of Staff to the Vice President coordinated

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319. Letter from Hubbard, *supra* note 298.

> It is important to keep in mind the key distinction between the role of the Council in coordinating with OMB to implement the review of regulations pursuant to the Executive Order and the role of an agency in issuing regulations. The Council serves as a deliberative forum where senior agency officials can gather to discuss and resolve policy issues that affect major regulatory proposals often involving several agencies.

Id. As one Senator characterized the relationship, "[i]n using the Council to ensure that the totality of agency regulations is effective, efficient, and rational, the President is only fulfilling his constitutional duty to be responsible and accountable for the actions of his administration." 138 CONG. REC. S13,433 (daily ed. Sept. 14, 1992) (statement of Sen. Seymour).

320. Meyer v. Bush, 981 F.2d 1288, 1296 (D.C. Cir. 1993).

321. *Id.*

322. The Cabinet-level Task Force included the Vice President, as chairman, the Attorney General, the Secretaries of the Treasury, Commerce, and Labor Departments, the Director of OMB, the Chairman of the Council of Economic Advisors, and the President's Assistant for Policy Planning. *Id.* at 1288. Additionally, Vice President Bush named the OIRA Administrator as the Executive Director of the Task Force and a Special Assistant to the President served as the Associate Director. *Id.* at 1290.

323. OFFICE OF THE VICE PRESIDENT, Fact Sheet, (Apr. 12, 1989), *reprinted in* S. REP. NO. 256, *supra* note 9, at 20.

the Council's activities and the Administrator of OIRA served as the Executive Director of the Council.[324]

Another characteristic of the Council was that it operated, as did the Task Force,[325] out of the Office of the Vice President.[326] When the inquiry turns to the staffing of the Council, however, there is some cause for concern. Initially, the Council had no staff of its own, relying entirely, as did the Task Force, on the good will of other units within the executive branch to lend their employees to the Council when necessary.[327] The total amount of money requested by the President to fund the Council and its activities was only $86,000, an amount that was approved by Congress in the Treasury, Postal Service, and General Government Appropriations Act.[328] The bulk of the Council's work, moreover, was still accomplished by staff members loaned to the Council from other agencies or departments within the executive branch, and whose salaries were paid by those other executive branch units.[329]

When addressing this prong of the test, the *Meyer* court commented that implicit in the reasoning of the *Soucie* court is the notion that structure and function are to be concurrently considered when determining agency status.[330] Moreover, the *Meyer* court noted that it is not so much the structure as the *lack* of structure that is important.[331] The presence of a few paid staffers among the larger population of loaned staffers did not

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324. *Id.*

325. "[T]he Task Force operated from the Office of the Vice President." *Meyer*, 981 F.2d at 1290.

326. *Government Operations, Senate, House Members Seek to Pressure Bush into Placing Quayle Council into Sun*, Daily Rep. for Executives (BNA) No. 153, at D-33 (Aug. 7, 1992).

327. *See supra* note 300 (indicating that the Council had a staff based on what was available from its various members, but not a new staff of its own); *see also Government Operations, Bush to Place Quayle in Charge of Interagency Council on Competitiveness*, Daily Rep. for Executives (BNA) No. 26 (Feb. 9, 1989); Ann Devroy, *Quayle Panel Takes First Step with Murky Mandate*, WASH. POST, June 21, 1989, at A21.

328. *Government Operations, Bush Rejects Lawmakers' Wishes on Regulatory Review Disclosure*, Daily Rep. for Executives (BNA) No. 197, at D-12 (Oct. 9, 1992) [hereinafter *Government Operations*]. The approval of this miserly sum, however, was not without its own drama. *See* Daily Rep. for Executives (BNA) No. 189, at A-7 (Sept. 29, 1992) (regulatory sunshine procedures report language included in House Bill 5488 after Democratic efforts failed to achieve defunding of Council on Competitiveness).

329. *Government Operations*, *supra* note 328, at D-12.

330. *Meyer*, 981 F.2d at 1296.

331. *Id.*

transmute the Council into a group with "substantial independent authority," nor did it change the reality that the Council was really another Cabinet-level body assembled to "advise and assist" the President as he attempted to navigate through the regulatory sea. When the *Meyer* court characterized the Task Force as "merely a committee which convened periodically both to bring together the views of various cabinet department heads concerning significant proposed regulations, and to shape for the President's decision intra-agency disputes which . . . only he can resolve,"[332] they could just as plausibly have been talking about the Council on Competitiveness and former President Bush. To hold otherwise would understate the dictates of *Meyer* and overstate the former functions of the Council.

B. Congress Eyes Regulatory Review: The Future?

Late in 1991, Senator John Glenn presented Senate bill 1942, an eight section bill that attempts to resolve the question of public accountability for executive branch review of regulatory matters.[333] In February 1992, his Committee on Governmental Affairs ("Committee") filed a report which substantially amplified the legislative intent of that bill.[334] Based on these two documents, it is quite clear that if enacted, the legislation would effectively slam the door on the threshold question of whether such committees are agencies under FOIA.[335] Although there are infirmities inherent in the Senate bill, a brief discussion of the sectional provisions of the bill is necessary in order to inform the debate.

The report of the Committee blandly announces that the purpose of Senate Bill 1942 is to "establish procedures to provide public accountability for regulatory review of federal agency rulemaking activity by presidentially designated offices."[336]

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332. *Id.* at 1298.

333. S. 1942, 102d Cong., 1st Sess. (1991).

334. S. REP. NO. 256, *supra* note 9; *see also* H.R. REP. NO. 965, *supra* note 9.

335. *See supra* part IV.A.2.c.

336. S. REP. NO. 256, *supra* note 9, at 1. The actual extent of the bill, however, is more complex than this simple claim:

> S. 1942 establishes basic procedures for any regulatory review process created by the President. The bill requires a reviewing entity to disclose information about rulemaking activities under review to the public and to rulemaking agencies. The bill also requires a reviewing entity to make regulatory review

Although only eight sections in sum, the bill both manages to tread on the President's Article II powers and to hinder rather than further the rulemaking process.

Section one introduces the legislation by its short title: the Regulatory Review Sunshine Act of 1991.[337] Section two is the definitions section,[338] and takes the muscle out of any type of presidentially created regulatory oversight board. Although the term "agency" is not altered,[339] the definition of every other term is broadly drawn. To encompass any regulatory review process which the President may create, the bill defines "reviewing entity" so as to include "any agency, or other establishment in the executive branch of the Federal Government established by the President, which engages in, in whole or in part in regulatory review."[340]

Similar broad and sweeping language can be found in the Committee explanations of the "regulatory review"[341] and

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> decisions within time limits. Rulemaking agencies must place materials received from the reviewing entity in a rulemaking record, give public notice of rulemaking activities under review, and explain significant changes made to a rule as a result of regulatory review.

Id. at 2. To avoid being "unduly restrictive," the bill would exempt the "substance of *oral* communications of the President, Vice President, the heads of cabinet departments, Director of the Office of Management and Budget, and the Administrator of the Environmental Protection Agency" from forced disclosure. *Id.* (emphasis added).

337. According to the Committee, this title is to be reflective of the "legislation's basic purpose of opening up regulatory review to ensure that the Federal rulemaking process be open, fair, and balanced, and fully consistent with the letter and spirit of the Administrative Procedure Act (5 U.S.C. § 551 et seq.)." S. REP. NO. 256, *supra* note 9, at 37.

338. S. 1942, 102d Cong., 1st Sess. § 2 (1991).

339. The definition of agency is unchanged from the language of the 1974 amendments to FOIA. *See supra* note 221 (providing actual language from FOIA).

340. S. 1942, 102d Cong., 1st Sess. § 2(3) (1991). The Committee explained the scope of this definition to

> include any agency, as defined in the section, or any other executive branch office or entity created by the President which undertakes or participates in regulatory review as the reviewer of any agency rulemaking activity. This would include, but not be limited to, OMB, OMB's Office of Information and Regulatory Affairs (OIRA), the Council on Competitiveness, and any working group of the Council.

S. REP. NO. 256, *supra* note 9, at 38.

341. S. REP. NO. 256, *supra* note 9, at 38. As defined, regulatory review sweeps broadly

> to include *any review of agency rulemaking that is conducted pursuant to the direction of the President or his designee.* Given the development and presumed continued use of a centralized process for the review of executive branch regulatory decisions, the term is not meant to apply to ad hoc or informal review or to intra-agency review. It is meant to apply to *any ongoing,*

"rulemaking activity" definitions.[342] The Senate has gone to great lengths to indicate the specific tenor of its intent. In no uncertain terms, Congress's intent is: nothing within the executive branch, no matter how closely or distantly related to regulatory review, can escape the requirement of public access to all documents and communications.[343]

The general framework for what information must be made available to the public, as well as the procedures for making this information available, is outlined in section three of the bill.[344] The bill requires: (1) the disclosure of all written communications between the reviewing entity and the rulemaking agency or any nongovernmental party; (2) a summary of substantive oral communications between the reviewing entity and the rulemaking agency or any non-governmental party; (3) a written explanation of any significant review action (as required under section 4); (4) notice of any extension of regulatory review; and (5) a register of rulemaking activities under review.[345] These disclosures are to be placed, within a week of creation or receipt of the information by the reviewing entity, in a public reading room.[346] Additionally, the reviewing entity must provide public access to the information as required by FOIA[347] to ensure that the public, even those people who cannot visit the reading room, have access to the materials.[348]

The reviewing entity must disclose the substance of its regulatory review information both to the public and to the rulemaking agency.[349] Section four of the bill requires the

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organized or systematic inter-agency process of presidential regulatory review. *Id.* (emphasis added).

342. *Id.* The broad definition of rulemaking activity "include[s] any activity involved in or that does, will or might lead to rulemaking, as defined in the Administrative Procedure Act (5 U.S.C. 551(5))." *Id.* The Committee opted for the enlarged rulemaking activity definition over the APA definition of rulemaking because "through the course of the development of regulatory review, it has become clear that agency actions that might in some way contribute to, affect, or lead to rulemaking decisions have been explicitly included in review." *Id.*

343. *See infra* notes 365-67 and accompanying text (discussing the limited category of exceptions to this rule).

344. S. 1942, 102d Cong., 1st Sess. § 3 (1991).

345. *Id.* § 3(a)(1)-(6).

346. *Id.* § 3(b)(3).

347. *See supra* notes 134-40 and accompanying text.

348. S. 1942, 102d Cong., 1st Sess. § 3(b)(1)-(2) (1991).

349. *Id.* § 4.

reviewing entity to provide the rulemaking agency with "copies of any written communications between the reviewing entity" and any nongovernmental party;[350] a description of oral communications with any nongovernmental party and an invitation to attend meetings with any nongovernmental party;[351] and an explanation of significant review actions."[352] This section aims at insuring that the rulemaking agency has a full and complete opportunity to consider all relevant information prior to reaching a rulemaking decision.

Section five provides both the vehicle and the rationale for public disclosure of the rulemaking record by the rulemaking agency.[353] In order "to insure proper consideration of all relevant information and the compilation of a full and complete rulemaking record that can be viewed by both the public and the courts,"[354] the rulemaking agency is required to place all materials received from the reviewing entity, under section four of the bill, in the rulemaking record.[355] Additionally, any significant changes to a rule occasioned by the regulatory review process must be explained in all rulemaking notices.[356] The rationale for this section is based on the underlying premise of rulemaking: the effect of any significant review action on the rulemaking activity must be demonstrated by the "considered

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350. *Id.* § 4(a).

351. *Id.* § 4(b).

352. *Id.* § 4(c). According to the Committee, "explanation" means:

> a description that should include, but is not limited to a discussion of the ways in which the review action might lead to a provision or proposal different from that proposed by the rulemaking agency; the analytical, scientific, technical, or statistical reasons for the review action; and the basis for and findings of the review action in relation to the statutory mission underlying the proposed rulemaking action.

S. REP. NO. 256, *supra* note 9, at 39. The term "significant" is defined to mean "any substantive review action that affects or relates to the content of an agency rulemaking activity." *Id.* This does not include "stylistic, clerical, or grammatical matters . . . [but] does include, [although] not limited to, modifications of agency cost/benefit analyses; suggested changes to or criticisms of a rulemaking activity . . . or suggestions about or criticisms of a milestone, schedule, or date for undertaking a rulemaking activity." *Id.*

353. S. 1942, 102d Cong., 1st Sess. § 5 (1991).

354. S. REP. NO. 256, *supra* note 9, at 39.

355. S. 1942, 102d Cong., 1st Sess. § 5(b) (1991).

356. *Id.* § 5(a).

reflection and explanation of the rulemaking agency."[357]

Section six pertains to the time limits constraining regulatory review.[358] So that regulatory review is not used as a means of causing undue delay in rulemaking,[359] the review process must conclude within sixty days, subject to two limited exceptions.[360] The first exception is in the form of a thirty day extension granted to the reviewing entity, so long as it provides an explanation of good cause to the rulemaking agency.[361] The second exception is controlled by the President.[362] The ninety day time limit may be extended indefinitely when the President[363] reviews an issue arising out of the regulatory review process, and this issue requires additional time for its resolution.[364] That is, the President should endeavor, but will not be pressured, to resolve the issue as soon as practicable.

In order to assist the public in its understanding of regulatory review, as well as to facilitate its participation in the rulemaking process, section seven requires OMB to "prepare and make available to the public a monthly and an annual accounting of regulatory review conducted by any and all reviewing entities."[365] Included in this accounting should be a listing of all rulemaking activities, during the relevant reporting period, that have been submitted for review, that were under review, or that have engendered a review action.[366] Nothing in this section is intended to require OMB to report on every rulemaking activity that is undergoing regulatory review, since that responsibility is

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357. S. REP. NO. 256, *supra* note 9, at 40. More to the point, since one of the basic requirements of the APA, 5 U.S.C. § 551 (1988), is that rulemaking decisions must be based on a rational record, the APA requirements would not be met if "the rulemaking agency cannot fully explain and justify the reason for any significant change made to a rule on the basis of or as a consequence of regulatory review." *Id.*

358. S. 1942, 102d Cong., 1st Sess. § 6 (1991).

359. S. REP. NO. 256, *supra* note 9, at 40.

360. S. 1942, 102d Cong., 1st Sess. § 6 (1991).

361. *Id.* § 6(a). The rulemaking agency is required to publicly notice the reviewing entity's explanation in support of extension. *Id.* § 6(c).

362. *Id.* § 6(b).

363. The bill would also allow for the President to designate someone, however this option would be allowed only on a case by case basis. *Id.*; *see also* S. REP. NO. 256, *supra* note 9, at 40.

364. S. 1942, 102d Cong., 1st Sess. § 6(b)(1) (1991).

365. *Id.* § 7(a) (1991); *see also* S. REP. NO. 256, *supra* note 9, at 40.

366. S. REP. NO. 256, *supra* note 9, at 40.

to be borne by the rulemaking agency.[367] A monthly listing, describing the rulemaking activities of the preceding month that have undergone regulatory review, must be published in the Federal Register so as to provide the public the opportunity to become involved in the rulemaking process.[368]

Section eight describes what and whose communications are exempt from the disclosure requirements.[369] The record keeping and disclosure requirements would not pertain to "oral communications with the President, the Vice President, and the heads of Cabinet agencies, specifically, the Administrator of EPA, the Director of the OMB, and the heads of executive departments."[370] If any "advise or assistance" is reduced to a writing, it seems, the exemption would not apply.[371] As the next subsection will demonstrate, this is not the only infirmity that weakens the legislation.

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367. *Id.* at 40-41. Rulemaking agencies can accomplish this task by publishing a monthly tally in the Federal Register of all rulemaking activities that have undergone regulatory review during the previous month. The listing must be sufficiently descriptive so that the public will be able to decide, on the basis of the listing, whether they want to seek additional information or comment on the rulemaking activity. *Id.* at 41.

368. S. 1942, 102d Cong., 1st Sess. § 7(c) (1991).

369. *Id.* § 8. Before deciding on what communications would be exempted, the Committee rejected the notion that regulatory review "is an immediate adjunct of the President," favoring the interpretation that the process could be better characterized as "an operational part of the rulemaking process." S. REP. NO. 256, *supra* note 9, at 41.

370. S. 1942, 102d Cong., 1st Sess. § 8 (1991). The language of this exemption is intended to demonstrate the sensitivity the Committee exhibited to "the practical need of the President and his top officials to be able to deliberate freely without the worry that all discussions and all decisions will be made part of an agency rulemaking record." S. REP. NO. 256, *supra* note 9, at 41. However, the Committee went on to conclude that "[b]y far and away most all regulatory review discussions and decisions do not personally involve the President or his top officials." *Id.*

371. This limitation appears contrary to the result reached in Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980) (telephone notes, i.e., written material, of assistant to the President not subject to FOIA disclosure). Whether the Committee actually concerned itself with this inconsistency is unclear. Regardless, the Committee assured that they "will watch the effect of this exemption closely." S. REP. NO. 256, *supra* note 9, at 41.

C. Are We Trading More than Night for Day?

1. Impracticality of S. 1942

As drafted, Senate bill 1942 is unworkable. The practical implications of the "reviewing entity" definition,[372] and the Committee expansion,[373] are indicative of this impracticality. When anyone in the White House[374] is called upon to review a proposed rule, the requirements of the bill would attach. Forced disclosure would effectively "chill" the possibility for any meaningful discourse between the President and other members of his senior staff who were called upon, by the President, to review a proposed rule. For obvious reasons, candid assessments or opinions are fostered when protected by the veil of confidentiality. To require a President to suffer the ills of this poorly drafted legislation would be an insult to his position within our system of government[375] and an invitation to an exercise of his veto power.

The executive branch's interests in confidentiality are at their highest when the discourse occurs between a President and his advisors. The President, under the rubric of the executive privilege doctrine, in effectuating the "responsibilities" of his office, is entitled to confidentiality "in the process of shaping policies and making decisions."[376] A corollary to this consultative confidentiality is "the flexibility to organize his advisors and seek advice from them as he wishes."[377] This right to confidential conversations extends likewise to discussions between the President's senior advisors, between Department secretaries, and between White House aides.[378] Compulsory disclosure of these communications would restrict the range of options presented to

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372. S. 1942, 102d Cong., 1st. Sess. § 2(3) (1991).

373. S. REP. NO. 256, *supra* note 9, at 38.

374. That is, anyone outside of the limited oral communication exclusion found in § 8. *Id.* at 41.

375. *See infra* part IV.C.2. Note, members of Congress are not implicated by this bill, or by FOIA for that matter. *See supra* note 163 and accompanying text; *see also* H.R. REP. NO. 965, *supra* note 9, at 21 (indicating House committee specifically rejected a proposed amendment to H.R. 5702 requiring every member of Congress to document every form of communication received concerning legislation).

376. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 449 (1977) (quoting United States v. Nixon, 418 U.S. 683, 708 (1974)).

377. Association of Am. Physicians & Surgeons v. Clinton, 997 F.2d 898, 909 (D.C. Cir. 1993) (citing Meyer v. Bush, 981 F.2d 1288, 1293-97 (D.C. Cir. 1993)).

378. *Id.*

the President for his consideration, and would compromise the President's exercise of his constitutional role.[379]

In addition to inhibiting candor, the reporting requirements would create an enormous, unnecessary burden to be borne by the organizations involved during the regulatory review process. This would serve to further delay and complicate the review process and would also result in an increased expenditure of resources. At a time when the size of government is trying to be constrained and everyone is taking part in "shared sacrifice,"[380] an oversight framework that increases the need for either personnel or money, or both, is particularly imprudent.

Finally, with respect to the limited exclusions provided within the bill, an arbitrary distinction is drawn between *oral* communications among the President, his Vice President, and the sixteen top department heads, on the one hand, and *written* communications among the same people on the other. Why should the executive privilege doctrine be satisfied if the communication involves the spoken word, but disregarded when the same thoughts are expressed with paper and ink? Moreover, the general infirmity inherent throughout the bill touches on notions of candor within the regulatory process. As written, the bill would affect the degree of candor expressed throughout the process, effectively inhibiting review staff recommendations. Such a result seems to be at odds with the conclusion drawn by the Supreme Court when it recognized "the public interest in candid, objective, and even blunt or harsh opinions in presidential decisionmaking."[381] Congress would be wise to reacquaint itself with the *Sierra Club* decision which stressed the confidential nature of deliberative communications during the process of presidential oversight of rulemaking.[382] As will be discussed

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379. As the Court remarked in *United States v. Nixon*, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *Nixon*, 418 U.S. at 705.

380. *The 103rd Congress; Unfinished Business*, ARIZ. REPUBLIC, Dec. 1, 1993, at B8; *see also* James Risen & David Lauter, *White House Grapples with Reality of Sticking to Budget*, L.A. TIMES, Dec. 11, 1993, at A23.

381. *Nixon*, 418 U.S. at 705. Interestingly, the Court noted "the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion." *Id.* (footnote omitted).

382. Sierra Club v. Costle, 657 F.2d 298, 405 (D.C. Cir. 1981); *see supra* notes 62-65 and accompanying text.

further, the court noted that "[t]o ensure the President's control and supervision over the executive branch, the Constitution . . . vests him with . . . the right to invoke executive privilege to protect consultative privacy."[383] Perhaps the time has come to remind Congress that in addition to itself there are other constitutionally created coordinate branches within our system of government.

2. Unconstitutionality of S. 1942

Senate bill 1942, in operating to limit the President's exercise of his constitutional authority to supervise and guide executive branch officials in their administration of regulatory statutes, effectively amounts to an impermissible infringement on the President's Article II authority. The President's executive obligations are outlined in Article II of the Constitution, whereby he must "take Care that the Laws be faithfully executed."[384] Currently, the process by which the President has chosen to exercise supervisory control over agency rulemaking is provided in Executive Order 12,866.[385]

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383. *Sierra Club*, 657 F.2d at 405.

384. U.S. CONST. art. II, § 3.

385. Exec. Order No. 12,866, *supra* note 89, 58 Fed. Reg. 51,735. Previously, the process by which the President had chosen to exercise this supervisory control was provided in Executive Order 12,291. Exec. Order No. 12,291, *supra* note 72, *reprinted in* 5 U.S.C. § 601. Additional delegated authority and supervision of regulatory oversight was provided in Executive Order 12,498. Exec. Order No. 12,498, *supra* note 79, *reprinted in* 5 U.S.C. § 601 (Supp. IV 1986); *see supra* part I.C.1. (discussing Executive Orders 12,291 and 12,498). The position of the American Bar Association ("ABA") on the subject of presidential supervisory control is quite illuminating. In 1986, the House of Delegates of the ABA resolved, in part, that:

> 1. The Constitution's choice of a unitary executive *justifies presidential involvement in rulemaking activities of federal agencies.* In particular, insofar as Executive Order 12291 and 12498 implement the President's constitutional authority to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices," those orders are appropriate exercises of presidential power.
>
> 2. The Constitutional principles that justify presidential involvement in rulemaking activities are applicable to both the executive and independent agencies and, thus, the executive order should be extended to the independent agencies.

Report of the House of Delegates, 1986 A.B.A. SEC, ADMIN L. (resolution 100, passed Feb. 10, 1986) (emphasis added) (quoting U.S. CONST. art. I, § 2, cl. 1); *see also Federal Regulation: Roads to Reform*, 1979 A.B.A. COMMISSION ON L. ECON. 78 (President has constitutional power to supervise executive branch officers in the exercise of their statutory

As several commentators have noted, a review of history demonstrates that the founders of our nation intended to create a unitary executive, solely accountable for the execution of the laws and the administration of his branch.[386] James Madison's comments on this subject are particularly instructive: "The Constitution affirms, that the Executive power shall be vested in the President. . . . If the Constitution has invested *all Executive power in the President*, I venture to assert that the Legislature has no right to diminish or modify his Executive authority."[387]

More recent commentary echoes a similar intent:

> The Constitution sets distinct boundaries. All of the legislative power . . . is delegated only to the legislative branch. Presidents can veto and courts can declare unconstitutional, but neither can write laws. At the same time, Congress . . . is given absolutely no power to execute law. The executive power is assigned *to the president and the executive branch that he directs.*[388]

In stressing congressional limitation, the Supreme Court has noted that "[t]he Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts."[389] Under this construction, the President is constitutionally authorized to "supervise and guide" executive branch officials in "their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article 2 of the Constitution evidently contemplated in vesting general executive power in the President alone."[390]

So long as the President's supervision is consistent with the current substantive regulatory statute, the courts have emphati-

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discretion).

386. *See generally* CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY 1775-1789, at 122-23 (1923); JAMES HART, THE AMERICAN PRESIDENCY IN ACTION—1789, at 134 (1948); Lee S. Lieberman, Morrison v. Olson: *A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 316 (1989); Frank B. Cross, *The Surviving Significance of the Unitary Executive*, 27 HOUS. L. REV. 599, 616 (1990).

387. 1 ANNALS OF CONGRESS 463 (Joseph Gales ed., 1789) (emphasis added).

388. GORDON S. JONES & JOHN MARINI, THE IMPERIAL CONGRESS 3 (1988) (emphasis added).

389. Bowsher v. Synar, 478 U.S. 714, 722 (1986).

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

cally upheld the President's authority to oversee agency rulemaking processes.[391] As *Sierra Club* confirms:

> [t]he court recognizes the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy. He and his White House staff advisors surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. The executive power under our Constitution, after all, is not shared—it rests exclusively with the President.[392]

It is clear then that the provisions of S. 1942, as written, would do violence to the notion of separation of powers within our governmental framework. On this matter, the Supreme Court instructs that "[when] determining whether the [bill] disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the executive branch from accomplishing its constitutionally assigned functions."[393]

When Congress attempts to intrude upon a power that the Constitution has vested in explicit terms in the President, that intrusion, regardless of its extent, is unconstitutional.[394] As Justice Kennedy indicated in his *Public Citizen* concurrence, "where the Constitution by explicit text commits the power at issue to the exclusive control of the President, [the Supreme Court

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391. *See Sierra Club*, 657 F.2d at 405; Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984) (agency with congressionally delegated policymaking responsibilities may properly rely on incumbent administration's policy views when making judgments); National Fed'n of Fed. Employees v. Brown, 645 F.2d 1017, 1022 (D.C. Cir. 1981) (President, within statutorily permissible range, may direct subordinates's choices); Public Citizen v. Burke, 843 F.2d 1473, 1477-78 (D.C. Cir. 1988) (judicial refusal of agency deference upon showing of presidential pressure on reluctant subordinates creates "anomalous" result).

392. *Sierra Club*, 657 F.2d at 405.

393. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977) (quoting United States v. Nixon, 418 U.S. 683, 711-12 (1984)). Vigorously dissenting in Morrison v. Olson, 487 U.S. 654 (1988), Justice Scalia noted that "as the text of the Constitution seems to require, as the Founders seemed to expect, and as our past cases have uniformly assumed—*all purely executive power must be under the control of the President.*" *Id.* at 733-34 (Scalia, J., dissenting) (emphasis added).

394. Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 485 (1989) (Kennedy, J., concurring).

has] refused to tolerate *any* intrusion by the Legislative Branch."[395] Moreover, because the President's authority stems from the Constitution alone it "cannot be modified, abridged, or diminished by the Congress."[396]

Executive branch oversight of regulatory review has been the vehicle by which the past five presidents have sought to ensure a consistent implementation of their general policy views and principles.[397] Confidentiality is the fuel which most efficiently drives this vehicle. In the past, such confidentiality has been protected by the deliberative process privilege, a convention which allows "the President and those who assist him [to] be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately."[398] Moreover, the Court went on to describe the deliberative process privilege as "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."[399] Senate bill 1942 seeks to uproot these traditional notions.

Nothing written, and only a highly restricted set of oral communications, escapes the disclosure requirements of S. 1942. As a result, the main mechanism by which the President effectuates his constitutional obligation to "take Care that the Laws be faithfully executed"[400] is substantially burdened, if not totally disabled. Although the bill, through section eight, exempts certain very high-level communications between the President and others, a curious line is drawn between oral communications and written ones. Congress should not rest their determination of confidentiality on the mode of expression, or on the bureaucratic position of the speaker.

A final constitutional infirmity of S. 1942 is that although

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395. *Id.*

396. Schick v. Reed, 419 U.S. 256, 266 (1974); *see also Morrison*, 487 U.S. at 705 (Scalia, J., dissenting) ("To repeat, Article II, § 1, cl. 1, of the Constitution provides: 'The executive Power shall be vested in a President of the United States'. . . . [T]his does not mean *some of* the executive power, but *all of* the executive power.") (quoting U.S. CONST. art II, § 1, cl. 1).

397. *See supra* part I.B. (discussing regulatory review during the past 25 years).

398. *Nixon*, 418 U.S. at 708. One year after *Nixon*, the Supreme Court reaffirmed the scope of the deliberative process privilege, noting that it protects advice, recommendations, and opinions that form part of the decision making processes of government. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 148 (1975).

399. *Nixon*, 418 U.S. at 708 (footnote omitted).

400. U.S. CONST. art. II, § 3.

Congress does have the ability to limit the President's authority, the Court will uphold an otherwise restricted activity only when it is "justified by an overriding need to promote objectives within the constitutional authority of Congress."[401] It is difficult to imagine what "overriding need" Congress may have which could justify its intrusion into the President's constitutional authority to supervise and guide the executive branch during its oversight of agency rulemaking. Any "overriding need" is diminished by the fact that every rule which is eventually adopted by an agency must be publicly announced; whereafter the rule will then be subjected to the forces of public comment as well as judicial review and congressional oversight.

Senate bill 1942 not only chills public willingness to provide insight with regard to regulatory matters,[402] but also the Executive's ability to receive it. Where, as here, the President's authority to create a framework for regulatory review would be undercut by an act of Congress, it is the congressional action which must fail as unconstitutional.[403] In seeing to the faithful execution of the laws, it is the President who bears the responsibility for the effects of agency regulations on his national constituency. As the only official both institutionally capable and constitutionally empowered to coordinate the execution of agency rulemaking, the President should be free to "supervise and guide" his subordinates unfettered by congressional meddling.[404] More than two centuries ago, a constitutional balance was struck between the Executive and the Legislature. Senate bill 1942, therefore, will give the American people more government than they need; or deserve.

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401. *Nixon*, 433 U.S. at 443 (citation omitted).

402. *See supra* note 379 (noting effect of confidentiality on human nature).

403. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 702 (1952) (Vinson, C.J., dissenting). "Unlike an administrative commission confined to the enforcement of the statute under which it was created, or 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." *Id.*

404. Myers v. United States, 272 U.S. 52, 134 (1926) (suggesting that the President held the ultimate authority to direct administrative rulemaking, and noting that "the discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it").

CONCLUSION

The Executive Office Oversight Committee is a creature that has been within our government for over half a century. Stamina, at least in American politics, may be viewed as the better part of valor. Although the oversight of regulatory affairs has become more visible within the past twenty-five years, this rise can be seen as concomitant with the recent explosion of federal regulations.[405] As the government grows, the President is faced with the impossible task of being in a thousand different places at the same time, and of being uniquely informed about all aspects of how his branch of the government is operating, while ever required to "take Care that the Laws be faithfully executed."[406] To think that one person can achieve this is more than naive, it is ludicrous.

The Regulatory Review Oversight Committee is the answer to the President's quandary; for he can delegate a certain amount of authority so that the issues can be streamlined, yet retain enough so that his views are the ones being expressed in the final tally. After all, the President is elected, ostensibly with a popular mandate, by the people of America based on a particular overall policy view of how the government and the people for whom it exists should interact.

Congress has an answer to the supposed problem of Executive Oversight Committee accountability, yet its answer is always the same: to reserve more power unto itself. The judiciary has the next best answer, articulated through the *Meyer* test, which ensures that only those executive branch units that operate to "advise and assist" the President shall be free from public scrutiny. In the end, however, the answer to public accountability does not lie in any enactment of Congress or judicial decree, for it has been with the people of America for over two hundred years. We exercise it every four years.

Matthew J. Matule

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405. *See supra* note 11 and accompanying text.

406. U.S. CONST. art. II, § 3.