Regulatory Analyses and Judicial Review of Informal Rulemaking
Notes

Regulatory Analyses and Judicial Review of Informal Rulemaking

In recent years, each branch of the federal government has attempted or considered attempts to force internal management standards upon administrative agencies in order to limit the agencies' rulemaking discretion. Congress is once again considering legislation to reiterate and extend the requirements of recent Executive Orders that establish such standards for the promulgation of major rules. Courts have remanded agency action that fails to comply with a similar management model. None of these attempts, however, has been wholly or even largely successful. This Note argues for a coordination of efforts through legislative endorsement of judicial review of agency internal management requirements. Scant attention has been paid to this idea; within the executive and legislative branches, it has been opposed because of fears of judicial incompetence and judicially caused delay. This Note suggests that objections to judicial review are based on a failure to perceive the similarities between standards of judicial review already applied and internal management standards enacted or being considered for enactment. It concludes that legislative endorsement of judicial review of internal management standards can help ensure that the internal management model is effectively implemented without creating substantial delay.

I. Checking Agency Discretion Through Internal Management Standards

Proposals for internal management standards are the product of recent reexaminations of the efficacy and legitimacy of federal administrative agencies. During the first six decades of this century, agencies were sub-

1. See infra pp. 748-52.
2. See infra pp. 746-49.
4. See infra pp. 761-63.
ject to few checks on their authority. The paucity of controls was justified initially on the basis that agencies did nothing more than follow the statutory mandates of Congress; that is, they had little discretion to check.

Confronted during the 1930’s with broad congressional mandates, this simple justification of agency independence gave way to the “expertise” justification, which held that the apparent discretion was strictly circumscribed by the rigors of professionalism. Congress had to give broad mandates to agencies because intelligent regulation required the development of expertise concerning the problem to be regulated and the flexibility to respond to resulting changes in the understanding of the problem. But administrators, being professionals, were constrained by their own expertise: professionalism would lead them ineluctably to the solutions that contemporaneous knowledge demonstrated were best.

Studies of agencies during the last twenty years have cast considerable doubt on this model of administrative behavior. Administrative agencies do not always act as expert implementers of given norms, adapting the method of implementation to changing circumstances, but often must balance competing values or choose among them. Furthermore, instead of being responsive to new fact, policy or value arguments, agencies have tended over time to become institutionally committed to particular viewpoints or regulatory approaches. They resist challenges to such entrenched positions by making outside participation in agency decisionmaking difficult, by failing to respond to new facts and policy arguments, and by us-

6. Only the judiciary provided a routine means of checking agencies, and its checks were very weak. See, e.g., Pacific States Box & Basket Co. v. White, 296 U.S. 176, 186 (1935) (presuming existence of facts necessary to justify regulation of containers of agricultural products and refusing to examine closely purported policy ends of the regulation); Superior Oil Co. v. Federal Power Comm’n, 322 F.2d 601, 619 (9th Cir. 1963), cert. denied, 377 U.S. 922 (1964) (upholding Federal Power Commission’s summary rejection of independent natural gas producer’s rate filings based upon commission expertise developed through studies and experience).


8. See, e.g., Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941) (“Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts . . . must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy. . . . [The National Labor Relations Act] entrusts to an expert agency the maintenance and promotion of industrial peace.”); J. Landis, The Administrative Process 10-17, 98-99 (1938); Freedman, Crisis and Legitimacy in the Administrative Process, 27 Stan. L. Rev. 1041, 1058 (1975); Stewart, supra note 5, at 1678.

9. See generally Stewart, supra note 5, at 1682-88, 1711-16.

Informal Rulemaking

ing the claim of expertise to shield their decisions from scrutiny.11

These descriptions of agency behavior suggest serious problems of legitimacy and efficacy. To the extent that public policy reflecting important value choices is made by unchecked officials with only minimal and perhaps one-sided public input, ideals of representative democracy are threatened.12 To the extent that agencies do not develop and utilize expertise, their efficacy is subject to doubt.13

The recognition of these problems has stimulated substantial thought concerning reform of the administrative process. One type of proposed reform would increase direct control over the substance of agency policies. Specific techniques that have been advocated include: increasing legislative control through revival of the non-delegation doctrine,14 or the use of legislative vetoes15 or sunset legislation;16 increasing presidential power to review, modify, and reverse agency policy;17 and increasing judicial scrutiny by removing presumptions of validity accorded agency determinations of fact and law.18 Several of these suggestions are of questionable constitutionality.19 All have been attacked as unworkable or ineffectual.20

11. One form of this theory suggests that agencies are "captured," through bribery, by the interests they regulate. Other forms of the theory emphasize the agency's limited sources of information and other resources, as well as the structure of risks and rewards facing the bureaucrat. See STUDY ON FEDERAL REGULATION, supra note 10, pt. 3, at 1-5; Freedman, supra note 8, at 1053-56; Stewart, supra note 5, at 1682, 1684-86.

12. See Freedman, supra note 8, at 1044, 1055-56; McGowan, Congress, Court and Control of Delegated Power, 77 COLUM. L. REV. 1119, 1130-31 (1977); Stewart, supra note 5, at 1672, 1676, 1684-87.


18. This proposal, commonly referred to as the "Bumpers Amendment" or the "Bumpers Proposal" after its chief proponent, Senator Bumpers, has been introduced into Congress in each of the last few Congresses. See, e.g., S. 1477, 96th Cong., 1st Sess., 125 CONG. REC. S12,145 (1979) (floor amendment offered by Senator Bumpers); S. 86, 95th Cong., 1st Sess., 123 CONG. REC. 639 (1977).

19. Substantial doubt exists as to the constitutionality of the legislative veto. See, e.g., President's Message to Congress on Legislative Vetoes, 14 WEEKLY COMP. PRES. DOC. 1146, 1147 (June 26,
A second type of proposed reform would restructure the process of agency rulemaking by requiring agencies to open themselves to public scrutiny, encourage public participation, and explain the bases of and reasoning behind their decisions. Openness and explication, it is contended, will inhibit irrationality and arbitrariness. Resulting oversight of the agency’s factual and normative determinations by Congress, experts in various disciplines, and the public will facilitate further testing of factual determinations, and intelligent public debate over value choices, and thus, perhaps, will diminish public cynicism and distrust of government. Increasing participation will create a surrogate political process, thus increasing the legitimacy of agency action. Furthermore, by increasing the information and value perspectives available to the agency, it will minimize the chance of unconscious policy bias. When combined with the requirement of explication, it may help limit conscious agency bias by permitting agencies to adopt only those policies for which they can give a reasoned response to objections raised by participants.

This second type of reform, the imposition of internal management standards, thus attacks the problems of rule by the so-called “fourth
Informal Rulemaking

branch" while allowing the broad delegation of authority that is necessary to regulate in areas of factual or normative complexity or uncertainty. Each branch of government has recently recognized the value of imposing internal management standards and has acted or is seriously considering acting to impose such standards upon agencies. Despite remarkable similarity among the actions or proposals of each branch, no attempt has been made to coordinate their efforts.

A. The Judicial Response

Over the past three decades, courts have struggled to remain within their sphere of competence and legitimacy, and yet to check and legitimate the discretion of administrative agencies in promulgating policy. The issue of judicial competence arises because judges often do not have the training necessary to resolve difficult factual questions or evaluate the legitimacy of inferences from the facts. Furthermore, courts are thought to lack the democratic legitimacy to supply norms that are missing from an agency statute.

In the last fifteen years, uneasiness over the increased pervasiveness of government has led courts and commentators to reexamine the previously accepted notion that judicial review of agency determinations ought to be highly deferential. While some decisions of the early 1970's retained the detailed instructions concerning how to correct the situation); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), enforced, 344 F. Supp. 373 (M.D. Ala. 1972) and 344 F. Supp. 387 (M.D. Ala. 1972), modified sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (holding that treatment of patients involuntarily confined in mental hospital violated patients' constitutional rights and defining, with great specificity, minimum standards).

28. Charges that agencies are a "headless fourth branch" of the government can be found at least as far back as 1937. See President's Committee on Administrative Management, Report with Special Studies 39-40 (1937).


31. See, e.g., Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 475 (D.C. Cir. 1974) (refusing to overturn basic policy determinations underlying OSHA asbestos dust standard, but remanding standard for clarification of reasons for certain determinations); Bazelon, supra note 10, at 822; Stewart, supra note 5, at 1786-87.

highly deferential standard of review,\textsuperscript{33} other courts have constrained agency discretion by reading vague statutory authority narrowly.\textsuperscript{34} Some judges and commentators have urged the elimination of broad discretion through revival of the non-delegation doctrine.\textsuperscript{35} Other courts and commentators seem to believe that vigorous substantive review that immerses the court in all data presented to it is the solution to agency discretion.\textsuperscript{36} By contrast, over the past decade many courts, led by the Court of Appeals for the District of Columbia, have chosen a weak form of structural review of the agency's rulemaking process as the primary means of checking agency discretion.\textsuperscript{37}

This form of review is designed to constrain agency discretion while recognizing the limits of judicial competence and legitimacy.\textsuperscript{38} It focuses on the rule-making process and defers to agency determinations of fact and law when either or both are unclear.\textsuperscript{39} Instead of a strict substantive

\textsuperscript{33} See, e.g., Camp v. Pitts, 411 U.S. 138 (1973) (per curiam) (upholding denial of bank charter despite minimal and conclusory explanation of rule); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 748-49 (1972) (employing, in upholding rule promulgated by ICC, highly deferential standard of review stated in Assigned Car Cases, 274 U.S. 564 (1927)); Angel v. Butz, 487 F.2d 260, 262-63 (10th Cir. 1973) (allowing Secretary of Agriculture to rely upon "expertise" and material outside of the record in determining fair and reasonable wages for sugar workers).

\textsuperscript{34} See, e.g., Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 639-46 (1980) (plurality opinion reading unclear Occupational Safety and Health statute to require finding of "significant" benefits from a standard issued pursuant thereto, prior to its issuance).

\textsuperscript{35} See supra note 14.


\textsuperscript{37} See DeLong, supra note 32, at 259, 262; McGowan, supra note 12, at 1167; Rodgers, A Hard Look At Vermont Yankee: Environmental Law Under Close Scrutiny, 67 GEO. L.J. 699, 704-08 (1975); Verkuil, Judicial Review of Informal Rulemaking, 60 VA. L. REV. 185, 207-08 (1974). Though internal management review has developed primarily in the last fifteen years, its doctrinal origins can be traced further back. See SEC v. Chenery Corp., 318 U.S. 80 (1943).

\textsuperscript{38} Indeed, the legitimacy and competence problems suggest that the only effective and legitimate tool that the courts have left is review of agency internal management. See DeLong, supra note 32, at 282-309.

\textsuperscript{39} See, e.g., American Pub. Gas Ass'n v. Federal Power Comm'n, 567 F.2d 1016, 1053 (D.C. Cir. 1977), cert. denied, 435 U.S. 907 (1978) (upholding Federal Power Commission gas rate order on basis that commission had employed "reasoned decisionmaking and fair procedure" and had responded to objections in promulgating orders); Environmental Defense Fund v. EPA, 548 F.2d 998 (D.C. Cir. 1976), cert. denied, 431 U.S. 925 (1977) (upholding various substantive determinations of EPA concerning suspension of registrations of several pesticides but striking down exemption of existing stocks of pesticides for failure to inquire into amount of such stocks left and problem of returning and disposing of them); Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976) (en banc) (upholding EPA order requiring reductions in lead content of gasoline); Industrial Union Dep't., AFL-CIO v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974) (holding that great deference should be accorded determinations when information is lacking or unclear, but remanding for failure to explain certain determinations); Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 787 (D.C. Cir. 1971) (per curiam) (dictum) (in reviewing environmental impact statements, court is not to rule on relative merits of competing scientific opinions but only to ensure that statement sets forth opposing scientific views).
Informal Rulemaking

review, it seeks to ensure that the agency's rule-making process is "openly informed, reasoned, and candid."

In an effort to ensure opportunities for meaningful public participation, the courts that have adopted this form of review have required timely notice that discloses the bases of a proposed rule. Demanding that the agency take a "hard look" at all the relevant factors, these courts have required coherent written demonstration that serious issues raised by participants in the rulemaking process were considered and evaluated. Indeed, in some instances courts have required discussion of issues that were not raised by participants. Though internal management review is deferential toward agency factual and policy determinations, it demands that the agency explain such determinations. Furthermore, it sometimes

40. Wright, supra note 30, at 379; see DeLong, supra note 32, at 265-72; Rogers, supra note 37, at 704-07.
41. See, e.g., Aqua Slide 'N' Dive Corp. v. CPSC, 569 F.2d 831, 842 (5th Cir. 1978) (setting aside safety standard for swimming pools for failure to give meaningful opportunity for public comment); United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240 (2d Cir. 1977) (holding FDA's failure to disclose scientific basis for proposed regulation concerning smoked whitefish was reversible error); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974) (remanding stationary source standard for cement plants for reasons including failure of EPA to disclose test results that were basis for proposed regulation).
42. See, e.g., Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971) (reversing lower courts' holdings allowing Secretary of Department of Transportation to authorize use of federal funds to construct highway through a public park and remanding to lower court for in-depth scrutiny of Secretary's decision); Asarco v. EPA, 616 F.2d 1153, 1161-62 (9th Cir. 1980) (vacating EPA order requiring installation of a sampling station in smokestack at copper smelter, because of inadequate consideration of relevant factors); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394-95 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974) (remanding stationary source standard for reasons including inadequate consideration of relevant factors).
43. See, e.g., Aqua Slide 'N' Dive Corp. v. CPSC, 569 F.2d 831, 837-38 (5th Cir. 1978) (dictum) (holding that substantial evidence did not support safety standard of swimming pool slides); Texas v. EPA, 499 F.2d 289, 297 (5th Cir. 1975), cert. denied, 427 U.S. 905 (1976) (dictum) (in part upholding legality of EPA determination that Texas' air quality implementation plan was inadequate); see also Wright, New Judicial Requisites for Informal Rulemaking: Implications for the Environmental Impact Statement Process, 29 AD. L. REV. 59 (1977) (suggesting that courts should and will summarily vacate agency action when record kept by agency is confused or otherwise inadequate).
44. E.g., Bunker Hill Co. v. EPA, 572 F.2d 1286, 1299-1301 (9th Cir. 1977) (remanding rejection of state implementation plan, in part due to failure to respond to criticism of key factual assumption); American Iron & Steel Inst. v. EPA, 568 F.2d 284, 299 (3d Cir. 1977) (holding that EPA must respond to contention that age of steel plant affects plants' pollution control costs); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 392-93 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974) (remanding stationary source standard for reasons including failure to respond to challenge to accuracy of test data relied upon).
45. See, e.g., Calvert Cliffs' Coordinating Comm'n. v. AEC, 449 F.2d 1109, 1119 (D.C. Cir. 1971) (holding that AEC must consider environmental values not raised by parties or staff); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 620 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966) (remanding FPC order granting license to construct hydroelectric project, in part due to FPC order to inquire beyond record). But see Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 551-54 (1978) (suggesting that agency need not ferret out alternatives unless a party makes a showing that is "sufficient to require reasonable minds to inquire further").
requires that the agency explain any inconsistency with previous determinations. 47

Courts have developed these internal management standards on a case-by-case basis. Though many courts seem to agree that internal management requirements must be imposed, there is little agreement on which requirements should be imposed and under what circumstances. 48

B. The Executive Branch Response

Executive branch attempts to constrain agency discretion began with President Ford’s Executive Order 11,821, 49 requiring executive branch agencies to prepare an “inflation impact statement” (IIS) 50 for each “major” 51 federal action. Each IIS was to contain a written analysis of the

47. See American Meat Inst. v. EPA., 526 F.2d 442, 459-60 (7th Cir. 1975) (striking down EPA TSS limitation for complex slaughterhouses because of EPA failure to explain deviation from normal practice of relying upon questionnaire data).

Judicial opinions concerning the issue of the importance of giving notice are an example of the disagreement that exists concerning the when and what of imposing internal management requirements. Compare Yassini v. Crosland, 618 F.2d 1356, 1360 (9th Cir. 1980) (per curiam) (exempting Immigration and Naturalization Service from notice requirement of Administrative Procedure Act despite absence of required express finding of “good cause”) and United States Steel Corp. v. EPA, 605 F.2d 283 (7th Cir. 1979), cert. denied, 444 U.S. 1035 (1980) (exempting EPA from notice and good cause requirements in designating areas that do not meet air quality standards) with Sharon Steel Corp. v. EPA, 597 F.2d 377 (3d Cir. 1979) (finding no good cause for EPA failure to give notice concerning rule designating areas not in compliance with ambient air quality standards, and remanding rule) and United States Steel Corp. v. EPA, 595 F.2d 207 (5th Cir. 1979) (same). Even assuming notice must be given, a disagreement exists concerning whether or not an agency that relied on empirical data in determining that a rule might be necessary must disclose that methodology in its notice of proposed rulemaking. Compare Ethyl Corp. v. EPA, 541 F.2d 1, 82-94 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976) (en banc) (upholding EPA order requiring reductions in lead content in gasoline despite failure to disclose scientific studies relied upon) with cases cited supra note 41.
50. It was later realized that the term “inflation impact statement” reflects poorly the nature of the required analysis; when the Order was extended in 1976, the analysis was called an “economic impact statement.” Exec. Order No. 11,949, 3 C.F.R. 161 (1977).
51. Originally agencies were left to develop their own criteria for determining what was a “major” proposal, though the criteria developed had to be submitted to OMB for approval. Office of Management and Budget, Circular No. A-107 (Jan. 28, 1975). Eventually the Council on Wage and Price Stability adopted a list of suggested criteria, which essentially defined “major” as entailing a cost of $100 million or more in one year, or $150 million or more in two years. See STAFF OF THE COUNCIL ON WAGE AND PRICE STABILITY & THE OFFICE OF MANAGEMENT AND BUDGET, AN EVALUATION OF THE INFLATION IMPACT STATEMENT PROGRAM PREPARED FOR THE ECONOMIC POLICY BOARD 15 (1976); Note, The Inflation Impact Statement Program: An Assessment of the First Two Years, 26 AM. U.L. REV. 1138, 1150 n.79 (1977). The criteria were adopted in large part by all covered agencies. Id.
expected costs and benefits of proposed federal action and a review of the alternatives that were considered.\textsuperscript{52} Though increased public participation in the regulatory process was also considered an essential element of the program, the only step taken to increase participation was to require publication of the IIS.\textsuperscript{53}

President Carter's Executive Order 12,044 implemented an internal management program that was both broader and more detailed than the IIS program.\textsuperscript{54} It required agencies to prepare a draft "regulatory analysis" before issuing public notice of proposed "major"\textsuperscript{55} rules, and to publish a final regulatory analysis concurrent with the issuance of such rules.\textsuperscript{56} Both analyses were required to give "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."\textsuperscript{57} In addition, Executive Order 12,044 sought to increase opportunities for meaningful public participation and scrutiny by requiring agencies to consider a variety of methods for giving more effective notice of proposed regulations,\textsuperscript{58} by increasing the time for public comment to sixty days where possible,\textsuperscript{59} and by making both the draft and final regulatory analyses easily available to the public.\textsuperscript{60}

President Reagan's Executive Order 12,291,\textsuperscript{61} though superseding Ex-
ecutive Order 12,044,\(^2\) retains many of its essential features. It requires agencies to perform, for "major"\(^3\) rules, preliminary and final "Regulatory Impact Analyses" (RIAs) that contain descriptions of the potential costs and benefits of a rule, including its nonquantifiable effects, and a determination of the rule's potential net benefits.\(^4\) RIAs must also describe any alternative approaches that could be more cost effective than the approach chosen, and explain the legal reasons for rejection of the most cost-effective approach.\(^5\) Like its predecessors, President Reagan's Order seeks to assure meaningful public participation in the regulatory process. In addition to making the RIAs available to the public,\(^6\) it requires the agency to include with its notice of proposed rulemaking "a brief statement setting forth the agency's initial determination whether the proposed rule is a major rule, together with the reasons underlying that determination,"\(^7\) and a "brief summary of the agency's preliminary Regulatory Impact Analysis."\(^8\) The agency is further ordered to pay "full attention to public comments in general and the comments of persons directly affected by the rule in particular"\(^9\) in assessing the validity of the factual conclusions upon which the rule is based.

Thus, not only the judiciary but each of the last three Presidents has imposed constraints on the rulemaking process to ensure that it is "openly informed, reasoned and candid."\(^10\) The Executive Orders may not, however, be motivated solely by the desire to improve the efficacy and legitimacy of agency action.\(^11\) In addition, the Executive may view them as means to further its own policy goals by increasing the accountability to

---

63. The term "major" is defined similarly to the definition in Executive Order 12,044:
   "Major rule" means any regulation that is likely to result in:
   (1) An annual effect on the economy of $100 million or more;
   (2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
   (3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.
Id. § 1(b), 46 Fed. Reg. at 13,193-94.
64. Id. § 3(d), 46 Fed. Reg. at 13,194.
65. Id.
66. Id. § 3(h), 46 Fed. Reg. at 13,195.
67. Id. § 3(g)(1), 46 Fed. Reg. at 13,195.
68. Id. § 3(g)(2), 46 Fed. Reg. at 13,195.
69. Id. § 4(b), 46 Fed. Reg. at 13,195.
70. See supra note 40.
Informal Rulemaking

its offices of administrative agencies.\textsuperscript{72}

C. \textit{The Congressional Response}

During the 96th Congress eight bills were introduced that basically reiterated the requirements of Executive Order 12,044 and extended it to agencies outside the executive branch.\textsuperscript{73} Two of the bills received substantial attention.\textsuperscript{74} During the 97th Congress eight similar bills\textsuperscript{75} have been

\textsuperscript{72} President Reagan's Executive Order enhances the ability of the President to control agency policy through selective enforcement of the requirements, going beyond its predecessors in two significant respects. First, it gives OMB vast oversight authority. See infra pp. 754-55. Second, it creates a substantive requirement that, to the extent permitted by law, agencies not undertake any regulatory action unless the action's benefits exceed its costs by more than any alternative approach:

In promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulation, all agencies, to the extent permitted by law, shall adhere to the following requirements:

(a) Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government actions;

(b) Regulatory action shall not be undertaken unless the potential benefits to society from the regulation outweigh the potential costs to society;

(c) Regulatory objectives shall be chosen to maximize the net benefits to society;

(d) Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen; and

(e) Agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future.

\textit{Id.} § 2.

This substantive prescription raises serious questions of constitutionality and legality. See M. \textsc{Rosenberg}, \textit{Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues That May Be Raised by Executive Order 12291} (1981); \textit{infra} p. 755.


\textsuperscript{74} H.R. 3263, 96th Cong., 1st Sess. (1979) went through hearings, see \textit{Regulation Reform Act of 1979: Hearings on H.R. 3263 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary}, 96th Cong., 1st Sess. (1979), was forwarded to the full committee, marked up, and on September 25, 1980, was placed on the Union Calendar. Hereinafter all references to H.R. 3263 will be to the bill's final version, \textit{reprinted in H. R. REP. No. 1393, 96th Cong., 2d Sess. 39 (1980)}. The Senate Governmental Affairs Committee held hearings on S. 755, 96th Cong., 1st Sess., 125 CONG. REC. S3339 (1979), which was identical to H.R. 3263, on S. 262, 96th Cong., 1st Sess., 125 CONG. REC. S861 (1979), and on other regulatory reform legislation, see \textit{Hearings Before the Senate Comm. on Government Affairs on S. 262, S. 755, S. 445, S. 93 and Other Regulatory Reform Legislation}, 96th Cong., 1st Sess. (1979) [hereinafter cited as \textit{Senate Hearings}]. The Governmental Affairs Committee referred both S. 755 and S. 262 to the Senate Judiciary Committee, which held hearings on them jointly with its Administrative Practice Subcommittee. See \textit{Regulatory Reform: Hearings Before the Committee on the Judiciary, 96th Cong., 1st Sess. (1979)}. S 262 was reported to the Senate and assigned number 850 on the Senate Legislative Calendar on May 29, 1980. Hereinafter all references to S. 262 will be to the version reprinted in \textit{Senate Hearings, supra}, pt. 2, at 668.

introduced, and rapid action has been taken on two of them.76 This Note will concentrate its discussion on four bills, the two in each Congress that have received the most attention.

The constraints placed on agencies by all four bills are similar both to each other and to the Executive Orders. The bills require agencies to issue a preliminary regulatory analysis77 concurrent with notice of a proposed major rule.78 The essential elements of this preliminary regulatory analy-
Informal Rulemaking

sis\textsuperscript{79} are: a statement of the need for and objectives of the rule,\textsuperscript{80} a description of alternatives to the rule, including the least costly alternative;\textsuperscript{81} an assessment of the effects of the rule on the country as a whole and on particular subgroups;\textsuperscript{82} and a description of agency methodology for resolving factual disputes.\textsuperscript{83} The bills also attempt to improve participation by making the preliminary regulatory analysis available to the public,\textsuperscript{84} by mandating the creation of a regulatory agenda and calendar,\textsuperscript{85} and by increasing the opportunity for public comment.\textsuperscript{86} Like the Executive Orders that would supersede, the bills require the agency to issue a final regulatory analysis when it issues a major rule. The requirements of the final regulatory analysis parallel those of the preliminary regulatory analysis.\textsuperscript{87}

\textsuperscript{79} See note 74, § 101(a) (proposed § 602(b)).

\textsuperscript{80} H.R. 746, supra note 76, at § 101(a) (proposed § 602(b)).

\textsuperscript{81} H.R. 746, supra note 76, § 101(b) (proposed § 602(b)(5)); H.R. 3263, supra note 74, § 101(a) (proposed § 602(b)(6)); S. 1080, supra note 76, § 4(a) (proposed § 622(c)(2)(C)(iii)). S. 1080 also requires the agency to find that the benefits “justify” the costs, unless the agency's enabling statute directs otherwise. Id. at § 4(a) (proposed § 622(d)(2)(B)).

\textsuperscript{82} H.R. 3263 requires the agency to estimate “the effect of the proposed rule on small businesses, small organizations, small governmental jurisdictions, and competition in interstate and foreign commerce.” H.R. 3263, supra note 74, § 101(a) (proposed § 602(b)(5)).

\textsuperscript{83} H.R. 746, supra note 76, § 101(b) (proposed § 602(b)(5)); H.R. 3263, supra note 74, § 101(a) (proposed § 602(b)(1)); S. 262, supra note 74, at § 102 (proposed § 602(b)(1), (2)).

\textsuperscript{84} H.R. 746, supra note 76, § 101(b) (proposed § 602(b)(2)). See S. 1080, supra note 76, § 4(a) (proposed § 622(c)(2)(C)); S. 262, supra note 74, § 102 (proposed § 602(b)(3), (4)); H.R. 3263, supra note 74, § 101(a) (proposed § 602(b)(2) and (4)).

\textsuperscript{85} S. 1080, supra note 76, § 4(a) (proposed § 622(c)(2)(A)-(B)); H.R. 746, supra note 76, § 101(b) (proposed § 622(b)(3)); H.R. 3263, supra note 74, § 101(a) (proposed § 602(b)(3), (5)). Cf. S. 262, supra note 74, § 102 (proposed § 602(b)) (not mentioning any specific subgroups).

\textsuperscript{86} H.R. 746, supra note 76, § 101(b) (proposed § 622(b)(6)). Cf. S. 1080, supra note 76, §§ 3, 4(a) (proposed §§ 553(b)(1)(F), 622(c)(2)(D)) (including, as well, requirement that agencies specify ranges of predictions and explain margins of errors for quantification method when relevant). H.R. 3263 and S. 262 contain no provision similar to this one.

\textsuperscript{87} S. 1080, supra note 76, § 3 (proposed § 553(f)(1)(E)); H.R. 746, supra note 76, § 101(b) (proposed § 622(e)(2)); H.R. 3263, supra note 74, § 102 (proposed § 602(c)) (requiring publication of the preliminary regulatory analysis in Federal Register and requiring agency to take additional unspecified steps to "ensure that interested members of the public receive notice of the initial regulatory analysis").

\textsuperscript{88} S. 1080, supra note 76, § 4(a) (proposed § 632); H.R. 746, supra note 76, § 101(b) (proposed §§ 631-632); S. 262, supra note 74, § 102 (proposed § 622); H.R. 3263, supra note 74, § 101(a) (proposed §§ 621-622).

\textsuperscript{89} The bills demand that interested persons be given at least sixty days to comment on the proposed rulemaking. See S. 1080, supra note 76, § 3 (proposed § 553(e)(1)); H.R. 746, supra note 76, § 101(b) (proposed § 622(g)); S. 262, supra note 74, § 102 (proposed § 602(c)); H.R. 3263, supra note 74, § 101(a) (proposed § 602(c)). H.R. 3263 also provides for twenty days to comment on the public comments received during the sixty day period. Id. S. 1080 also requires that the agency provide an opportunity for oral presentation of views and cross-examination of agency employees. S. 1080, supra note 76, § 3 (proposed § 553(e)(3)(A)).

\textsuperscript{90} See S. 1080, supra note 76, § 4(a) (proposed § 622(d) and (e)); H.R. 746, supra note 76, § 101(b) (proposed § 622(e)); S. 262, supra note 74, § 102 (proposed § 603(b)); H.R. 3263, supra note 74, § 101(a) (proposed § 602(d)).
Each branch of the federal government has sought to impose upon the agencies remarkably similar internal management requirements. The attempts are similar because each is based on three major precepts. First, they presume that agency decisionmaking will be improved by ensuring that agencies explore fully the consequences of major regulatory actions and examine alternative means of accomplishing the agency objectives. Second, they presume that it is desirable to force the agency to weigh costs and benefits explicitly. Third, they presume that it is valuable to encourage input into and public scrutiny of the weighing process. In short, the proposals are similar because each is a reflection of the belief that better and more legitimate agency decisionmaking will result from a process that is "openly informed, reasoned and candid." 9

II. The Failure to Enforce Internal Management Standards

Neither the executive nor the judicial attempts to impose an internal management model upon agencies have been successful. Because they fail to ensure agency compliance with their requirements, legislative attempts formulated during the 96th and 97th Congresses are not likely to be more successful.

A. The Judiciary

The existence of the Executive Orders and legislative proposals is testimony to the failure of the courts to impose adequate internal management standards upon the agencies. Judicial imposition of internal management standards faces two major obstacles. First, the legal basis for internal management review is unclear. As one commentator has noted, although at least seven different bases have been cited, none are convincing. Further...
Informal Rulemaking

thermore, most opinions are very vague about their source of authority, and those that do cite a source do not consistently associate particular requirements with a particular justification. The legitimacy of judicially imposed internal management standards thus remains open to question. Second, the specific contours of internal management review remain unclear. With no guidelines for which requirements should be imposed, courts adhering to internal management review have experimented to an extraordinary degree.

Given the substantiality of the shift in reviewing posture, the absence of a firm legal basis for that shift, and the lack of agreement on the specific elements of the new form of review, it is not surprising that judicial efforts have failed to yield a uniform and consistently enforced set of principles. Nevertheless, this failure leaves the courts in a difficult position vis-a-vis the agencies. Lacking a coherent model to apply and somewhat hesitant, because of the questions of legitimacy, the judiciary is incapable of applying an internal management model with sufficient consistency and clarity to check adequately agency discretion.

B. The Executive Branch

The executive branch has relied solely on itself to supervise the internal management requirements. President Ford’s “inflation impact statement” requirement was supervised by the Office of Management and Budget (OMB) and the Council on Wage and Price Stability (COWPS). President Carter’s regulatory analysis requirement was supervised by OMB, COWPS, and the Regulatory Analysis Review Group (RARG). Presi-

95. Id.
96. See supra pp. 745-46.
97. See K. DAVIS, supra note 48, § 6:1, at 450; DeLong supra note 32, at 283, 290-307; Verkuil, supra note 48, at 288-89; Verkuil, supra note 37, at 244.
98. It is possible that the passage of time will lessen legitimacy questions and allow courts to agree on a particular model. The magnitude of current problems, however, suggests that the amount of time necessary will be substantial. Furthermore, the Supreme Court’s recent denunciation, in Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, 435 U.S. 519 (1978), of judicial communication concerning the exact elements of the internal management model is likely to further inhibit judicial movement toward consensus.
100. The Office of Management and Budget (OMB) was charged with “assuring the effective implementation of [the Executive] Order.” See Exec. Order No. 12,044, § 5, 3 C.F.R. 152, 155-56 (1979). OMB, in turn, delegated this authority to the Council on Wage and Price Stability (COWPS), the Regulatory Analysis Review Group (RARG), and the Council of Economic Advisors (CEA). See M. ROSENBERG, supra note 72, at 11; DeMuth, supra note 20, at 16. RARG is an interagency review group, staffed with or advised by people from OMB, CEA, the Environmental Protection Agency, the Office of Science and Technology Policy, the Council on Environmental Quality, the Domestic Policy Staff, and every cabinet department except Defense, State, and Treasury, see DeMuth, supra note 20 at 16; Tolchin, Presidential Power and the Politics of RARG, REGULATION, July-Aug. 1979, at 44, 44-45, though the major forces are COWPS and the CEA. DeMuth, supra note 20, at 16; Tolchin, supra, at 45.
dent Reagan's Order relies upon OMB for enforcement. OMB's supervision, in turn, is supervised by the Presidential Task Force on Regulatory Relief, which was also created by Executive Order No. 12,291. Id. § 6, 46 Fed. Reg. at 13,196. The Task Force is chaired by Vice-President Bush and includes the Director of OMB, the Secretaries of Treasury, Commerce and Labor, the Attorney General, the Chairman of the CEA, and the Assistant to the President for Policy Development. M. ROSENBERG, supra note 72, at 16. OMB orders may be appealed to the Task Force, Exec. Order No. 12,291, §§ 3(e)(1), 6(a)(1), 46 Fed. Reg. 13,193, 13,194, 13,196, but OMB provides most of the staff support for the Task Force. M. ROSENBERG, supra note 72, at 16.

One possible cause of the failure of executive branch enforcement in the past was the weakness of the enforcement provisions. Under both President Ford's and President Carter's plans, enforcement efforts were essentially hortatory. President Reagan has made a dramatic attempt to overcome this problem by giving the OMB extensive enforcement powers, including the authority to order that a proposed or existing rule or set of rules be treated as "major," to order that an agency not publish a notice of proposed rulemaking or its preliminary regulatory impact analysis until

101. See Executive Order No. 12,291, §§ 3, 6, 46 Fed. Reg. 13,193, 13,194-96 (1981). OMB's supervision, in turn, is supervised by the Presidential Task Force on Regulatory Relief, which was also created by Executive Order No. 12,291. Id. § 6, 46 Fed. Reg. at 13,196. The Task Force is chaired by Vice-President Bush and includes the Director of OMB, the Secretaries of Treasury, Commerce and Labor, the Attorney General, the Chairman of the CEA, and the Assistant to the President for Policy Development. M. ROSENBERG, supra note 72, at 16. OMB orders may be appealed to the Task Force, Exec. Order No. 12,291, §§ 3(e)(1), 6(a)(1), 46 Fed. Reg. 13,193, 13,194, 13,196, but OMB provides most of the staff support for the Task Force. M. ROSENBERG, supra note 72, at 16.


103. COUNCIL ON WAGE AND PRICE STABILITY & OFFICE OF MANAGEMENT AND BUDGET, AN EVALUATION OF THE INFLATION IMPACT STATEMENT PROGRAM 79 (1976); see UNITED STATES REGULATORY COUNCIL, A SURVEY OF TEN AGENCIES' EXPERIENCE WITH REGULATORY ANALYSIS (1981) (working paper).

104. OFFICE OF MANAGEMENT AND BUDGET, IMPROVING GOVERNMENT REGULATIONS: A PROGRESS REPORT 18 (1980) [hereinafter cited as OMB REPORT]; see Miller, Lessons of the Economic Impact Statement Program, REGULATION, July-Aug. 1977, at 14, 16. OMB also found that no agency had a "departmentwide continuously successful effort in place." OMB REPORT, supra, at 18. It is interesting to note that this failure occurred despite President Carter's intense interest in the success of the program. Tolchin, supra note 100, at 45. Indeed, Carter demanded that he be given a progress report on the program fortnightly. Id.

Informal Rulemaking

OMB's review of the proposed rule is completed,\textsuperscript{106} to order that an agency not publish a final rule or its regulatory impact analysis until the agency has responded to OMB's view concerning the rule or analysis,\textsuperscript{107} and to require an agency to obtain and evaluate additional data.\textsuperscript{108}

The Reagan attempt suffers from several defects, however. First, Reagan's assumption, through the OMB, of authority over agency rulemaking appears to be illegitimate. The power assumed allows the White House to exert substantial direct control over agency policy.\textsuperscript{109} This displacement of the discretion vested by Congress in executive branch agencies may violate the Administrative Procedure Act, the statutes granting discretion to agencies, and the separation of powers.\textsuperscript{110} Furthermore, by establishing OMB as a clearinghouse for all regulations, Executive Order 12,291 encourages informal contacts between OMB and the agencies and creates a critical access point to agency decisionmaking.\textsuperscript{111} It thereby creates an environment that may violate strictures concerning \textit{ex parte} comments in two ways: by allowing \textit{ex parte} comments by the White House,\textsuperscript{112} and by allowing interest groups to influence agency action by communicating through OMB.\textsuperscript{113}

\begin{itemize}
  \item 107. \textit{Id.} § 3(f)(2), 46 Fed. Reg. at 13,195. The agency need not obey OMB's order to refrain from publishing either a notice of proposed rulemaking and preliminary regulatory impact analysis or a final rule and final regulatory impact analysis if obeying the order would conflict with statutorily or judicially imposed deadlines. \textit{Id.} § 8(a)(2), 46 Fed. Reg. at 13,198; \textit{cf. id.} § 8(a)(1), 46 Fed. Reg. at 13,198 (no procedure of Executive Order need be followed for regulation responding to emergency situation).
  \item 109. The illegitimacy of Presidential attempts to guide agency policy has been discussed by many leading judicial figures and commentators. See, e.g., H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES 147-63 (1962); J. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT ELECT 207-09 (1960); Verkuil, Jawboning Administrative Agencies: Ex Parte Contacts by the White House, 80 COLUM. L. REV. 943 (1980).
  \item 111. See M. ROSENBERG, supra note 72, at 48-80; Bruff, \textit{Presidential Power and Administrative Rulemaking}, 88 YALE L.J. 451, 466-67 (1979); Tolchin, supra note 100, at 46; Verkuil, supra note 109, at 948-52 (citing R. NEUSTADT, \textit{REGULATORY REFORM—THE PRESIDENT'S PROGRAM} (1979)).
  \item 112. See M. ROSENBERG, supra note 72, at 49-80, 96-111; Bruff, supra note 111, at 466-67. The scope or, indeed, existence of strictures on \textit{ex parte} comments by the President is as yet unclear. Nevertheless, it has been persuasively argued that \textit{ex parte} contacts such as those that are encouraged by the Reagan Executive Order would be illegal, as frustrating congressional purposes behind the Administrative Procedure Act or congressional statutes delegating authority to agencies, and perhaps unconstitutional, as violative of the separation of powers. See M. ROSENBERG, supra note 72, at 49-80, 96-111; Verkuil, supra note 109, at 949-50. \textit{But see} Bruff, supra note 111 (agreeing that certain presidential \textit{ex parte} comments are illegal or unconstitutional but arguing for a reading of statute and Constitution that arguably might uphold Executive Order 12,291).
  \item 113. M. ROSENBERG, supra note 72, at 49-80, 96-111; Bliss, \textit{Regulatory Reform: Toward More Balanced and Flexible Federal Agency Regulation}, 8 PEPPERDINE L. REV. 619, 634, 657-38 (1981); Bruff, supra note 111, at 466-67; Verkuil, supra note 109, at 950; \textit{see also} H. FRIENDLY, supra note 109.
\end{itemize}
Second, it is not clear that the executive branch is capable of supervising all regulations for compliance. One problem is personnel shortages. Even under the previous Executive Orders staff levels were inadequate;\textsuperscript{114} under President Reagan's Order the staff has been cut\textsuperscript{115} and the responsibilities increased.\textsuperscript{116} Moreover, there are political problems inherent in executive branch self-review. The White House operates in a highly political and public arena.\textsuperscript{117} Because its actions are often viewed as motivated by policy or political concerns,\textsuperscript{118} substantial political pressure is exerted prior to White House actions, and substantial criticisms leveled subsequently.\textsuperscript{119} Because presidential actions are so public, the pressures and criticism are most severe when the President intervenes directly.\textsuperscript{120} The lack of insulation from, indeed, the immersion in, political pressures and criticism makes it likely that the White House also will view its actions in political terms, in terms of how they fit with its major policy objectives or political goals.\textsuperscript{121} The White House will thus tend to stress the political uses of internal management requirements rather than their use in ensuring that agency action is "openly informed, reasoned and candid."

There are additional tendencies for executive branch self-review to become politicized. Agencies that are displeased with OMB review may seek to bring pressure upon OMB to change its actions, either by politicking within the executive branch or by appealing to political supporters outside the executive branch.\textsuperscript{122} The latter course obviously further politicizes the process of review. The former course also has a tendency to politicize, by necessitating presidential intervention to put an end to intrigue and fighting within the executive branch.

Thus, even setting aside the legal and constitutional concerns over the

\textsuperscript{109}, at 153-57 (suggesting that presidency is unlikely to be able to withstand political pressures).

\textsuperscript{114}. See Note, supra note 51, at 1151 (discussing shortage of personnel reviewing President Ford's program); cf. Regulatory Action Network: Washington Watch, Sept. 1981, at S-1, col. 1 (discussing inadequacies of current staff).


\textsuperscript{117}. See H. FRIENDLY, supra note 109, at 153-54; Bliss, supra note 113, at 634; DeMuth, supra note 20, at 25; Tolchin, supra note 100, at 49.


\textsuperscript{119}. See DeMuth, supra note 20, at 18-20 (examining operation of Exec. Orders 11,821 and 12,044); Tolchin, supra note 100, at 49.

\textsuperscript{120}. See R. NEUSTADT, PRESIDENTIAL POWER 10, 25-32 (1960); Tolchin, supra note 100, at 45, 49.

\textsuperscript{121}. See Bliss, supra note 113, at 623, 634-37; Tolchin, supra note 100, at 47, 49.

\textsuperscript{122}. See DeMuth, supra note 20, at 18; Verkuil, supra note 109, at 943, 951-52.
Informal Rulemaking

Executive’s use of internal management review as a political weapon, it is not clear that the executive branch can effectively enforce internal management standards. Even with the best intentions, OMB is likely to be forced into a reviewing posture in which the political desirability of regulations is more important than whether the agency process that promulgated the rule was “openly informed, reasoned and candid.”

C. The Legislative Proposals

The enforcement provisions of the legislative proposals are varied. Of the two proposals that received the most attention in the 96th Congress, one relied upon OMB supervision combined with a legislative veto provision, while the other merely required the Director of the Congressional Budget Office to monitor compliance. Of the two proposals receiving the most attention from the 97th Congress, one calls for monitoring by OMB, and the other authorizes the President to establish procedures for agency compliance with the requirements.

None of these proposals mandate judicial review of the internal management requirements. One major proposal from the 96th Congress, S. 262, flatly precluded judicial review. The other major proposal of the 96th Congress, H.R. 3263, precluded judicial review but called for inclusion of the regulatory analysis in the record, allowing the courts to “consider” it in determining the validity of the rule. The committee report

123. See Eads, supra note 118, at 19 (suggesting that OMB will be “sharpshooter” taking aim only at politically undesirable regulation); Washington Post, May 4, 1981, § A, at 5, col. 1 (suggesting that enforcement will embody a “one-sided extension of Republican sympathy for business”).

124. See supra note 74.

125. H.R. 3263, supra note 74, § 101(a) (proposed § 606) (instructing the Director of OMB to “monitor and review” compliance and to “establish such procedures as may be necessary to ensure compliance”). In addition, the Comptroller General of the United States was to monitor compliance and report to Congress. Id. (proposed § 607).

126. Id. § 201(b)(1) (proposed § 553(h)(3)).

127. S. 262, supra note 74, § 102 (proposed § 606).

128. See supra pp. 749-50.

129. H.R. 746, supra note 76, § 101(b) (proposed § 624) (requiring that agency submit copy of rule together with description of agency compliance with provisions of the bill to OMB, and that OMB report to President and Congress on degree of compliance with bill by agencies). The Comptroller General is to monitor compliance as well. Id. (proposed § 625). In addition, the President or a designee of the President within the executive branch may designate a rule as a “major rule.” Id. (proposed § 621(3)). See infra note 78.

130. S. 1080, supra note 76, § 4(a) (proposed § 624). The President may delegate the authority to an officer within the Executive Office appointed with the advice and consent of the Senate. Id. (proposed § 624). The President or the person selected under proposed § 624 may designate a rule as a major rule. Id. (proposed § 622). See supra note 78.

131. See S. 262, supra note 74, § 102 (proposed § 607).

132. H.R. 3263, supra note 74, § 101(a) (proposed § 604) states:

(a) Except as otherwise provided in this chapter, any determination by an agency concerning the applicability of any of the provisions of this chapter to any action of the agency, including any determination that a rule is not a major rule, shall not be subject to judicial review.

(b) Any regulatory analysis prepared pursuant to section 602 and the compliance or non-
explained that this preclusion-yet-inclusion mandate was designed to allow the court to read the analysis for background information, but to prohibit review of the performance and conclusions of the analysis. The adequacy of the regulatory analysis was to be, in itself, irrelevant to the determination of whether a court should uphold the rule.133

Both of the proposals that have received substantial attention during the 97th Congress follow H.R. 3263 and contain preclusion-yet-inclusion provisions. The relevant language of H.R. 746 is virtually identical to the language of H.R. 3263.134 The language of S. 1080 differs slightly, and is somewhat easier to construe as mandating judicial review.135 But the far

compliance of the agency with the provisions of this chapter in preparing and adopting the analysis shall not be subject to judicial review, except that the contents of the regulatory analysis shall, to the extent relevant, be considered by a court when determining the validity of the rule which is the subject of the regulatory analysis. When an action for judicial review of a rule is instituted, any regulatory analysis prepared with respect to such rule shall constitute part of the whole rulemaking record of agency action in connection with such review.

(c) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise provided by law.

133. [Section 604 prohibits judicial review of the regulatory analysis itself. This includes the designation of a rule as a major rule or not as a major rule; an agency decision to perform or not to perform a regulatory analysis; the nature or contents of such analysis; or the sufficiency of conclusions of the analysis. The section expressly precludes a court from second-guessing either the process or the conclusions of the analysis.

H.R. REP. NO. 1393, supra note 88, at 43. The inclusion of the regulatory analysis in the record is mandated solely because it may be helpful to the court in understanding the context and nature of the agency's actions. 134. See H.R. 746, supra note 76, § 101(b) (proposed § 623). Cf. supra note 132 (relevant language of H.R. 3263).

135. Judicial review

(a) Compliance or noncompliance by an agency with the provisions of this subchapter shall not be subject to judicial review except according to the provisions of this section.

(b) Any determination by the President or by the officer selected under section 624 of this title that a rule is a major rule within the meaning of section 621(4)(A) of this title, and any designation by the President or the officer selected under section 624 of this title that a rule is a
Informal Rulemaking

greater explicitness of several provisions of S. 1080 that clearly intend judicial review—one allowing a court to strike down an agency determination that a proposed rule is not "major," one allowing review of compliance with certain procedures concerning participation, and one requiring the agency to maintain a rulemaking file—argues against that construction.136

Without explicit provision for judicial review, congressional efforts will face the same enforcement difficulties that executive attempts have faced.137 The addition of a legislative veto provision, given its possible unconstitutionality and the inability of an overburdened Congress to monitor more than a few rules, is not likely to cure the problem.138

III. A Proposed Solution: Legislative Endorsement of Judicial Imposition of the Internal Management Model

The analysis above suggests that each branch, acting by itself, is likely to encounter substantial difficulty in imposing internal management standards upon agencies. This Note suggests one possible means of coordinating efforts: legislative endorsement of judicial review of the internal management requirements.

136. The provision concerning review of determinations that a rule is or is not "major" states:

The determination of an agency of whether a rule is or is not a major rule within the meaning of section 621(4)(A) of this title shall be set aside by a reviewing court only upon a clear and convincing showing that the determination is erroneous in light of the information available to the agency at the time it made the determination. Any designation by an agency that a rule is a major rule under section 621(4)(B) of this title shall not be subject to judicial review in any manner.

S. 1080, supra note 76, § 4(a) (proposed § 623).

137. See supra pp. 754-57.

138. See supra notes 19-20.
A. The Benefits of Legislatively-Endorsed Judicial Review of Internal Management Requirements

The similarities between the purposes and most of the specific requirements of the Executive Orders and legislative proposals, on the one hand, and the evolving judicial response to the problem of administrative discretion, on the other, suggest that review of the internal management requirements is a task for which courts have ample competence and experience. Thus, judicial review can be a powerful force in ensuring that legislatively imposed internal management requirements are fulfilled. Viewed from another perspective, legislative endorsement of judicial review, by defining a set of requirements that the judiciary would legitimately impose upon agencies, would eliminate the problems of legitimacy and consistency that have thus far hindered judicial efforts to control agency discretion through internal management review.

This second perspective also suggests significant "spill-over" benefits from legislative endorsement. In detailing a set of requirements for "major" rules, the legislative proposals also set the starting place for agency and court consideration of non-major rules. They thus increase the possibility that judicially imposed requirements for non-major rules will be reasonably consistent among courts, and that agencies will be able to anticipate those requirements.

It therefore appears that significant benefits can result from judicial review of legislatively specified internal management requirements. It should be noted, however, that some of the requirements of legislative proposals are not internal management requirements but rather are substantive mandates to agencies. As was noted above, the proposals require a determination of whether a proposed rule is major.139 In addition, both President Reagan's Executive Order and proposed S. 1080 require that an agency, before it issues a rule, determine that the benefits of a proposed rule outweigh its costs and that the proposal is the most cost-effective alternative legally available to the agency.140 Judicial review of these provisions thus cannot be endorsed based on the above analysis alone. Direct review of these provisions would entail substantive determinations rather than the validation of procedural propriety for which courts are most competent and experienced.141

139. See supra note 78.
141. See supra pp. 743-45.

While this Note's analysis thus cannot be viewed as suggesting the desirability of judicial review of substantive determinations, other arguments in favor of such review can be made. The problems associated with judicial review of substantive requirements can be partially alleviated, perhaps, through creative judicial action. For example, the courts may be able to limit delay, see infra note 142, by

760
Informal Rulemaking

B. Objections to Judicial Review

Two main objections to judicial enforcement of the internal management requirements have been raised. One is that judicial review would substantially delay the promulgation of rules. The rules that are subject to challenge under the proposals would, however, be subject to judicial review in any case. No relaxation of standing requirements need accompany a provision for judicial review of internal management requirements. Nor would such a provision create an entirely new cause of action; the analysis above suggests that judicial review of the legislative requirements would simply invigorate an existing cause of action and make its application more consistent.

Indeed, legislative endorsement of judicial review may actually reduce court-induced delay. Agencies will no longer fail to comply based on a lack of knowledge concerning the requirements, or a belief that they will not be enforced. Greater consistency in judicial review of agency rulemaking should thus result in fewer successful challenges to agency action. Moreover, greater success in the courts will not necessarily be restricted to "major" rules; the beneficial effects of the mechanisms that agencies establish rejection of all but the strongest challenges to agency determinations of whether a bill is "major." They might also seek to convert review of the substantive questions into a more familiar form by asking whether the agency has set up an internal management system to determine the substantive questions in a way that is "openly informed, reasoned and candid," instead of whether the determination itself is correct. Furthermore, the alternatives to judicial review have their flaws as well. Review by the executive branch may tend to become politicized, see supra p. 756, while no review may lead to agency inaction, see supra note 92.

On the other hand, strong arguments can be made for OMB review. OMB has more expertise than the courts to deal with the questions that will arise in review of these issues. See supra p. 743. Less delay would be occasioned by OMB review as OMB could be given a limited time in which to approve or disapprove the agency's decision. Indeed, OMB has demonstrated its ability to move quickly. See MATERIALS, supra note 71, at 11 (estimating that OMB review of agency determinations of whether rule was major took, on average, eight days). Most importantly, perhaps, given judicial review of the management requirements, the bulk of the opportunity and hence temptation for illegitimate use of the power to declare rules "major" will be eliminated.

To weigh the relative merits of these arguments would require investigations that are beyond the scope of this Note.

142. The concern may be motivated by a perception of the deleterious effects of delay caused by judicial review of the environmental impact statement (EIS). This Note does not consider whether judicial review of the EIS is desirable; the analogy is inappropriate in relevant parts. First of all, the Act that required the filing of an EIS also substantially lowered the requirements for standing to sue, thus resulting in a substantial expansion of the class of potential plaintiffs. Furthermore, the EIS requirement created an entirely new cause of action. The analysis above suggests, however, that a challenge concerning whether an agency has fulfilled the regulatory analysis requirements does not create an entirely new cause of action, but rather invigorates and makes more consistent an existing cause of action. Finally, the enforcement of the EIS suffers from the same defect that this Note suggests will be cured by judicial review of the requirements, that is, ambiguity concerning the legitimacy of, and proper type and degree of, judicial enforcement.

143. In contrast, judicial review of the substantive provisions would create entirely new causes of action, thus engendering delay. For example, judicial review of agency determinations that a proposed rule is not "major" would give litigants opposing the regulation a new way to challenge the rule and hence delay its promulgation.
lish to ensure compliance with the internal management standards will undoubtedly spill over to rules not subject to the regulatory analysis requirements. That has, indeed, been the experience of the Environmental Protection Agency (EPA), one of the few agencies to make more than a half-hearted attempt to comply with Executive Order 12,044 and its predecessor.  

EPA reports that its attempts to comply with the Executive Orders have resulted in greater court success against challenges to both major and non-major rules.

The second major objection to judicial review of the legislatively mandated internal management requirements is that courts would be a distorting force, demanding something other than what is intended by the regulatory analysis requirements: courts would cause the agency to “write regulatory analyses as legal briefs instead of candid assessments of hard questions on which the data is often shaky,” thus hindering the internal management function of regulatory analysis and creating unnecessary delay. This failure to understand that internal management review is feasible and prevalent is perhaps best illustrated by one critic's expression of his understanding of the function of judicial review. Charles Schultz, the then-Chairman of the Council of Economic Advisors that wrote S. 755, expressed his opposition to judicial review of regulatory analysis as follows:

The key function of the federal courts in reviewing administrative action is to evaluate the substantive validity of decisions and to assure that individual rights have been respected in the decision process. The court's function is not to second-guess internal management arrangements or processes.

Charles Schultz, the then-Chairman of the Council of Economic Advisors that wrote S. 755, expressed his opposition to judicial review of regulatory analysis as follows: The key function of the federal courts in reviewing administrative action is to evaluate the substantive validity of decisions and to assure that individual rights have been respected in the decision process. The court’s function is not to second-guess internal management arrangements or processes.

Schultze is far from alone in failing to perceive the changes in the form of judicial review over the last decade. See DeLong, supra note 32, at 338-39.
Informal Rulemaking

the requirements may result in an attempt to strike down the rule. Thus, though internal management review has been developed, not as an end in itself, but as a means of ensuring that agencies be “openly informed, reasoned and candid,” pressure will be brought upon courts to demand a formalistic touching of all bases instead of compliance with the purposes of the requirements. Though plausible, this argument only points out the need for judicial interpretation sensitive to intent rather than form, and for careful drafting of the legislative authorization of judicial review. It does not justify the preclusion of review.

C. Implications for Legislative Drafting and Judicial Interpretation

Legislatively endorsed judicial review of legislatively prescribed internal management requirements can yield significant benefits, then, if implemented by the legislature and the judiciary with proper care and attention to the pitfalls. The legislature must recognize that court review of internal management requirements is desirable, but distinguish those aspects of regulatory analysis that do not fit the internal management pattern. Specifically, judicial review of agency determinations that a rule is major and that the benefits of the rule exceed its costs must be justified, if at all, on a different basis than judicial review of internal management requirements for adequate notice, opportunity to participate, and explication.148

In addition, the legislature must endorse judicial review in a way that is sufficiently unambiguous to avoid doubt that the courts will enforce the requirements and that such enforcement is legitimate. The courts should be clearly empowered to strike down rules that do not comply with the internal management requirements.149 At the same time, however, the legislature must avoid encouraging formalistic review.150

There is a tension between the last two requirements, a tension that makes drafting the judicial review provision of the proposed statutes difficult. Any provision that clearly orders courts to review the requirements opens the door for formalistic review; contrapositively, a provision that is designed to avoid formalistic review will leave some ambiguity concerning the extent and legitimacy of court review. The need for a clear signal to agencies that the requirements will be enforced, along with the importance of legitimating the judicial role, suggests that the legislature should err on the side of a clear mandate for judicial review. However the balance is struck, courts should interpret their mandate in a way that is consonant with the purposes of the requirements and that avoids undue em-

148. See supra note 141.
149. Without this mandate it will be difficult for courts to avoid the problems they are currently facing. See supra pp. 752-53.
150. See supra pp. 762-63.

763
phasis on form.

From this perspective, the judicial review provisions of the major proposals of the 96th and 97th Congresses seem to be far from optimal. The flat preclusion of judicial review contained in S. 262 is obviously inadequate. The provisions of H.R. 3263 and H.R. 746 that preclude review and yet call for inclusion of the regulatory analyses in the record contain undesirable ambiguity, especially when read in conjunction with the associated committee documents. The provisions of S. 1080 are perhaps most subject to attack. S. 1080 clearly mandates direct review of the determination that a bill is not major, a type of review for which courts are less competent and which is far more likely to occasion delay than review of the internal management requirements, and yet leaves ambiguous the courts' role in reviewing the internal management requirements.

If an ambiguous provision is enacted into law, the weight will fall upon the courts to secure the benefits of proper judicial review. Courts can and should interpret the ambiguous provisions as allowing them to strike down a rule for failure to comply substantially with the internal management requirements of the statute.151 The more desirable alternative, however, is a clear legislative mandate to that effect.

Conclusion

Legislative endorsement of judicial review of internal management requirements can be a powerful force in creating agency action that is more "openly informed, reasoned and candid." By making the agency-court relationship more understandable and consistent, it can ameliorate distrust and illegitimacy on the part of both parties. Achieving these benefits, however, requires proper drafting and proper judicial interpretation of the authorizing statute. Current proposals should be amended clearly to authorize the courts to strike down rules for failure to comply with the internal management requirements. With such authorization, courts should measure compliance against the purposes of regulatory analysis and withstand the demands of private litigants for formalistic review. If ambiguous provisions are enacted, the courts should interpret them as permitting judicial review for substantial compliance.