OMB Review of Environmental Regulations: Limitations on the Courts and Congress

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Office of Management and Budget (OMB) review of environmental regulations has come under increased scrutiny as environmental groups have charged OMB with using the regulatory review process to block and weaken environmental regulations. Arguing that OMB has acted in excess of its authority and in defiance of statutory directives, environmental groups have brought several lawsuits and promoted legislation designed to limit OMB involvement in the regulatory process. The groups claim that OMB's objective is simply to reduce industry costs and that OMB review has prevented the Environmental Protection Agency (EPA) from effectively carrying out its statutory mandate to protect the environment.

Regardless of one's views on the wisdom of OMB action, these efforts to sharply curtail OMB's powers of regulatory review are ill-advised. They intrude on executive branch powers and seek relief that courts should not and arguably cannot grant. Though environmental groups may dislike the policies of the Reagan Administration, their attempts to persuade the courts to interfere with OMB review of regulations should be rejected. The relief that environmental groups are seeking would prevent the various offices and agencies within the executive branch from consulting with each other, severely restrict such consultations, or force disclosure of agency deliberations that should be privileged. Any such measures will necessarily impair executive branch decisionmaking and make it difficult for the President to ensure that agency regulations are consistent with Administration policy, thereby seriously undercutting Presidential authority. In addition, jurisdictional and constitutional limitations on intrusion into executive branch prerogatives must lead the courts and Congress to view attempts to use the judicial system to restrict OMB review of regulatory action with suspicion.

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I. OMB's Role In Reviewing Environmental Regulations

OMB has long taken an active role in reviewing environmental and other regulations to ensure compliance with Administration policies. Beginning with the Nixon Administration's "Quality of Life Review," and extending through the Ford and Carter Administrations, Presidents have sought to expand and centralize review of federal regulation.


2. President Nixon initiated "Quality of Life Review," an OMB oversight procedure aimed at all health and safety regulations but focusing almost exclusively on EPA regulations. This controversial measure required that drafts of all EPA-proposed regulations be circulated among interested (and often hostile) agencies, with time allowed for comment; questions would be resolved at staff meetings. See G. Schultz, Memorandum for the Heads of Departments and Agencies from OMB Director (Oct. 5, 1971), quoted in Federal Regulation and Regulatory Reform: Report by the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess. 121-22 (1976); Bruff, supra note 1, at 464-65.

Some commentators regard the Johnson Administration as the first to engage in regulatory review. Olson, supra note 1, at 9. In that Administration, OMB's predecessor, the Bureau of the Budget, made independent attempts to oversee important agency regulations. For a more detailed discussion of the history of presidential review of regulations, see DeMuth & Ginsburg, supra note 1, at 1075-80.


5. Regulatory review prior to the Reagan Administration did not include review of all regulations, and rulemaking agencies were free to ignore the comments of the reviewing authorities. General Accounting Office, Improved Quality, Adequate Resources, and Consistent Oversight Needed if Regulatory Analysis is to Help Control Costs of Regulations 45 (1982).
President Reagan, however, has taken the strongest measures yet to ensure appropriate supervision of the regulatory process, giving OMB unprecedented power in its oversight of agency regulations. On February 17, 1982, President Reagan issued Executive Order 12,291, requiring executive agencies to submit all proposed and final rulemaking actions to OMB for review prior to publication and prohibiting issuance of the rule or proposal until a response has been made to OMB's comments. On January 4, 1985, the President issued Executive Order 12,498, requiring agencies to submit annually to OMB for review a "draft regulatory program" that describes all "significant regulatory actions" the agency intends to undertake during the next year. Through OMB review of specific rules and the regulatory agendas, President Reagan has sought to reduce regulatory burdens, provide for presidential oversight of the administrative process, and ensure well-reasoned regulations.

The need for oversight and coordination of the regulatory process has become more important with the growth of the federal government. It is no longer appropriate for an agency to pursue its own narrow regulatory goals single-mindedly, without taking into account competing social and economic policies and goals. If no individual or entity is permitted to unify the multitude of government policy objectives, agencies may adopt conflicting positions on particular problems, and regulatory goals may conflict hopelessly until none of them are fulfilled. For this reason, it is imperative that the President be permitted to supervise agency discretion through OMB and that agency heads be allowed to work together rather than in isolation from one another.

A. Executive Order 12,291

Executive Order 12,291 is designed to improve the regulatory process by requiring executive branch agencies to be more fully aware of the consequences of and alternatives to their proposed actions. It seeks to achieve this goal in two ways. First, it requires

8. The Office of Information and Regulatory Affairs (OIRA), created by the Paperwork Reduction Act of 1980 (44 U.S.C. §§ 3501-20 (1982)) to implement that statute's paperwork review requirements, has become a focal point for regulatory review. See generally Olson, supra note 1.
10. The Executive Order, by its terms, does not apply to so-called independent agencies (including, for instance, the General Accounting Office, the Securities and Ex-
that agencies, to the extent permitted by their enabling legislation, promulgate regulations that conform to the requirements set forth in the Order. The most important of these requirements are 1) that the potential benefits of the regulatory action outweigh the potential costs and 2) that the alternative with the "least net cost to society" be chosen.11

The second of these key requirements involves preparation of Regulatory Impact Analyses (RIAs) for all major rules, analyzing them in light of the requirements of E.O. 12,291.12 Agencies must send copies of their RIAs, along with all notices of proposed rulemaking and all final rules, to the Director of OMB prior to promulgation. The Director is given authority to review these documents, consult with agencies on preliminary analyses and notices of proposed rulemaking, and submit views on final analyses and final rules. Agencies must consult with OMB if OMB so requests, and

change Commission, the National Labor Relations Board, or the Federal Trade Commission. E.O. 12,291, supra note 6, at § 1(d), excluding agencies specified in 44 U.S.C. § 3502 (1976). Vice President Bush, however, in his capacity as head of the Presidential Task Force on Regulatory Relief, formally requested that seventeen independent agencies comply voluntarily with the Order. See Letter from Vice President Bush to independent agencies (Mar. 25, 1981), reprinted in Role of OMB in Regulation: Hearings of the Oversight and Investigations Subcomm. of the House Comm. on Energy and Commerce, 97th Cong., 1st Sess. 177-78 (1981).

11. E.O. 12,291 requires executive branch agencies to promulgate regulations in accordance with the following requirements:
   (a) Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action;
   (b) Regulatory action shall not be undertaken unless the potential benefits to society for 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.

E.O. 12,291, supra note 6, at § 2. The two most important requirements referred to in the text are (b) and (d).

12. A major rule is defined as a rule with an annual effect on the economy of $100 million or more, a rule which is expected to have certain adverse economic effects, or any rule OMB chooses to designate as "major." E.O. 12,291, supra note 6, at §§ 1(b), 3(b).

What information should be included in the RIAs is clearly specified. For example, § 3(d)(4) of E.O. 12,291 requires agencies to provide "[a] description of alternative approaches that could substantially achieve the same regulatory goal at a lower cost, together with an analysis of this potential benefit and costs and a brief explanation of the legal reasons why such alternatives, if proposed, could not be adopted . . . ."

Section 3(d) also provides that the RIA must contain a description of potential benefits of the rule and who would be likely to receive these benefits, potential costs of the rule and who would be likely to bear these costs, and a determination of the potential net benefits.
must respond to the Director's views. They must also defer rulemaking both during OMB's review and until they have responded to any views expressed by the Director.

In issuing E.O. 12,291, the President did not interfere with agencies' legal responsibilities. The President has only directed agencies to respond to OMB's views, not to conform to them. OMB has absolutely no authority under the Order to require conformance. In addition, the Order itself provides that its procedures do not apply to the extent that they conflict with a statutory or judicial deadline for rulemaking. Moreover, an agency head can at his or her discretion promulgate a regulation without subjecting it to OMB review, and the regulation will still have binding effect. The consequences to an agency head of not following the directives of E.O. 12,291 are not legal but political, and include possible removal by the President.

The limitations in the E.O., while safeguarding legislative and agency authority, do not make OMB's role in regulatory review ineffective. OMB carries out a very important function with respect to agency rulemaking by simply pointing out to agencies any inconsistencies between their provisional rules and the President's policies. In doing this, OMB causes agencies to focus more precisely on important issues, and provides them with the opportunity to recon-

13. Id. at § 8(a)(2). Section 3(c)(3) of E.O. 12,291 provides, inter alia, that "[f]or all rules other than major rules, agencies shall submit to the Director [of OMB], at least 10 days prior to publication, every notice of proposed rulemaking and final rule." However, § 8(a)(2) of the E.O. provides that the Order shall not apply to any regulation for which consideration or reconsideration under the terms of this Order would conflict with deadlines imposed by statute or by judicial order, provided that . . . the agency, in consultation with the Director, shall adhere to the requirements of this Order to the extent permitted by statutory or judicial deadlines.

On the other hand, where a statutory or judicial deadline has passed, OMB review under the Executive Order may still occur "to the extent permitted by law." E.O. 12,291, supra note 6, at § 2.

14. The President's removal power is not found in the text of the Constitution, but implicit authority for this power has been found in the so-called Removal Cases. The first of these was Myers v. United States, 272 U.S. 52 (1926). It addressed the power of the President to dismiss federal employees, holding that the Congress could not constitutionally restrict the power of the President to fire a postmaster, an executive officer appointed by the President with the advice and consent of the Senate. Later, in Humphrey's Executor v. United States, 295 U.S. 602 (1935), the President was held to lack power to remove an FTC Commissioner before his term expired because Congress clearly intended the FTC to be an independent agency. In Wiener v. United States, 357 U.S. 349 (1958), the Court reiterated the bright-line functional test of "purely executive" versus quasi-judicial and quasi-legislative agencies. In that case, the Court found that the President lacked power to remove a member of the War Claims Commission. See generally Bruff, supra note 1, at 475-83.
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consider their courses before those courses come into conflict with broader public goals.

B. Executive Order 12,498

At the beginning of his second term, President Reagan issued another executive order. This one, Executive Order 12,498, was designed to improve management of the government’s regulatory operations and to ensure that policy options are not narrowed prematurely and that each significant regulatory proposal will be considered in relation to other such proposals. E.O. 12,498 requires agency heads to prepare and to submit to OMB a regulatory overview statement and a description of any significant regulatory actions they are planning or conducting. OMB then reviews each draft regulatory program for consistency with the Administration’s regulatory policies and priorities and with the draft regulatory programs submitted by other agencies. Issues raised but not resolved by OMB and the agency are referred to an appropriate forum and, when necessary, to the President. Following this review, the agency statements of regulatory policies and significant regulatory actions are compiled and published in the Administration’s Regulatory Program. This process complements E.O. 12,291 review by providing agency heads and the President with a better opportunity to decide whether a regulatory activity is worth initiating before agency resources are committed to it.

Like 12,291, E.O. 12,498 grants OMB authority to carry out its provisions only to the extent permitted by law. It also exempts regulations that are subject to statutory or judicial deadlines from its prohibition on rulemaking actions that have not been approved by OMB and incorporated into the Regulatory Program.

II. Challenges to OMB Review

Environmental groups have charged in the courts and in Congress that OMB has acted in excess of its authority under E.O.s

15. E.O. 12,498, supra note 7, at Preamble and §§ 1, 3.
16. Id. at § 3(c). Again, “significant” actions are economically defined.
17. The most appropriate forum for such disputes would be the Cabinet Council for Natural Resources and the Environment. This council was formed, together with other cabinet councils, at the beginning of the Reagan Administration, to set Administration policy and resolve interagency disputes. The Cabinet Councils consist of six to eight Cabinet members with expertise in a particular area, who meet on a regular basis both with and without the President.
18. E.O. 12,498, supra note 7, at § 1(d).
12,291 and 12,498. Noting that these orders allow OMB to play only an advisory role, these groups argue that OMB has used the regulatory review process to block and delay regulatory actions required by Congress, often in defiance of statutory deadlines, and to displace agency decisionmaking by dictating substantive changes in regulations.

A. Challenges in the Courts

1. OMB Involvement in Rulemaking

In *Environmental Defense Fund v. Thomas*, the Environmental Defense Fund (EDF) attempted to show that OMB had prevented EPA from publishing proposed standards for underground hazardous waste storage tanks after the statutory deadline for issuance of these standards had passed. EPA was required by the Resource Conservation and Recovery Act (RCRA) to promulgate these standards by March 1, 1985, but had not submitted a notice of proposed rulemaking to OMB for review under E.O. 12,291 until that date. EDF claimed that even though the statutory deadline had already expired, OMB waited six weeks before giving EPA any formal comments on the proposed regulations. According to EDF, OMB was deliberately delaying clearance to the proposed regulation until EPA agreed to make significant changes in it; EDF also claimed that only after it filed suit against EPA and OMB on May 30, 1985 did OMB allow EPA to publish the proposed standards.

EDF charged that this "blocking tactic" was not an isolated instance of such action by OMB, and that OMB completely ignored the procedures established by E.O. 12,291 to prevent OMB review from conflicting with statutory deadlines for many other regulations. The substance of EDF's charges was summarized in the organization's testimony before Congress:

OMB's current practice is to require its prepublication approval for all EPA regulations, regardless of statutory or judicial deadlines. In response to a discovery request in EDF's litigation, EPA identified a partial list of 169 proposed or final EPA regulations subject to statutory or judicial deadlines which EPA had been required to submit to OMB.

19. See Testimony of the Environmental Defense Fund before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Affairs, *The Role of OMB in Regulatory Review* (Jan. 28, 1986) [hereinafter referred to as EDF Testimony].


22. EDF Testimony, supra note 19, at 10-11.
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for pre-publication review under E.O. 12,291. . . . On eighty-six occasions, OMB extended its review beyond the time periods outlined in the executive order despite the deadlines. In many cases OMB review extended EPA’s promulgation of the regulations beyond the date of the deadline either because the regulations were submitted to OMB after the deadline had expired or because OMB extended its review beyond the deadline or vetoed the regulations prior to, or after, the deadline.25

EDF similarly accused OMB of delaying eleven new source performance standards required by the Clean Air Act.24 EPA had submitted these standards to OMB for review well before the statutory deadline had expired, yet OMB had not only extended its review beyond the statutory deadline but completed this review by vetoing the regulation and sending it back to EPA.

In defending itself against these charges, OMB maintained that it reviewed regulations efficiently and did not routinely delay the promulgation of regulations which were subject to statutory deadlines. The OMB official in charge of reviewing regulations said that:

Our average review time of sixteen days for all regulations, or in EPA’s case twenty days, is usually only a small part of the overall rulemaking time, often measured in years. Furthermore, our review time usually is not “dead” time for EPA. During our review, work on the draft at EPA does not stop. The Agency reviews and clearance continue, and the rulemaking record, supporting analysis, and other documents are put in order for publication.25

OMB admitted that it had engaged in E.O. 12,291 review after statutory or judicial deadlines had passed, but argued that such review was both legal and consistent with the Order. E.O. 12,291 makes it quite clear that the fact that a statutory deadline has been missed does not per se constitute a ground for the agency not to

23. Id. at 11.
24. Id.
25. The OMB official cited here is Robert P. Bedell, head of the Information and Regulatory Management Division of OMB’s Office of Information and Regulatory Affairs (OIRA). According to Bedell, between March of 1981 and September of 1985, his office reviewed approximately 11,716 draft regulations in an average of twenty-eight days; roughly 81 percent of all rules were reviewed in ten days and 91 percent within thirty days. During that same time period, OIRA reviewed approximately 1,872 draft rules from EPA; approximately 72.6 percent of all these rules were reviewed in ten days or less and 86.3 percent in thirty days. These figures come from the affidavit Bedell submitted to the United States District Court with Defendant’s Supplemental Motion for Summary Judgment on Dec. 12, 1985 [hereinafter referred to as Bedell Affidavit]. See also DeMuth & Ginsburg, supra note 1, who add that “a regulation that remains under review for many months is not languishing at the bottom of someone’s in-box. If the rule remains under review for such a time, it is typically because OMB has asked for additional information necessary to solve the cost-benefit issues and is waiting for the agency to supply such information.” Id. at 1088.
comply with the terms of the Order.\textsuperscript{26} Otherwise, agencies would be able to circumvent the President’s directive simply by not sending their regulations to OMB until after a statutory deadline has passed.

When an agency subject to E.O. 12,291 has missed a statutory or judicial deadline, it is common practice for that agency to work out with OMB what review procedures could apply. The requirements for regulatory analysis may even be adjusted in order to expedite promulgation of the regulation, unless it would be impracticable for the agency to follow the procedures of the Order with respect to the regulation in question. As OMB agreed, “[i]n some cases OMB review is ‘impracticable’ altogether and agencies can, and have, published a proposed or final rule without submitting the draft for OMB review or without completing the analyses the Order calls for.”\textsuperscript{27} In addition, in most cases involving statutory deadlines the two responsibilities—the deadline and the E.O. 12,291 procedures—are accommodated through the consultation process between OMB and the agency.\textsuperscript{28} This accommodation is achieved, for example, by EPA officials initiating briefings for OMB well in advance of the rulemaking decision, or submitting draft rules to OMB before the senior staff and Administrator of EPA have completed their review of the rule.\textsuperscript{29}

While EDF and others dispute OMB’s claims about its review procedure, they have yet to marshal any evidence clearly showing that OMB has abused the regulatory review process by acting unilaterally to preclude agency heads from meeting statutory mandates. Additionally, while it is true that OMB has engaged in regulatory review after statutory and judicial deadlines have passed, such review is legally permissible. E.O. 12,291’s requirement that agencies allow OMB to engage in regulatory review under its provisions, even in cases where statutory or judicial deadlines have been missed, is fully consistent with judicial precedent. Courts have long recognized that statutory deadlines may be impossible for an agency acting in good faith to meet and have extended the time for compli-

\textsuperscript{26} See supra, note 13.
\textsuperscript{27} Bedell Affidavit at ¶ 12.
\textsuperscript{28} Id.
\textsuperscript{29} Bedell stated that OMB had on many occasions met with EPA officials “well in advance of the statutory deadline to plan the scheduling and allocations of resources necessary for expeditious completion involving review of what are too often lengthy and complicated rules.” Id. at ¶ 12.
ance with the congressionally-mandated time limits.\textsuperscript{30} If compliance with the procedures of the Order is not practicable, then the procedures of the Order do not apply to the extent of the impracticability. But where a statutory deadline has been missed, OMB review is fully legal as long as such review is reasonable and is not undertaken unilaterally by OMB. As noted in \textit{EDF v. Thomas}, EPA may not delay promulgation of a rule solely on account of withheld approval by OMB.\textsuperscript{31} Accordingly, OMB can engage in E.O. 12,291 review after a statutory deadline has passed, as long as the Administrator of EPA concurs in the need for OMB review. Environmental groups have not as yet shown that OMB has violated this standard.

Nor is there any compelling evidence that OMB has dictated substantive changes in regulations, displacing agency decisionmaking. Obviously, such proof would be extremely difficult to obtain in view of the fact that an agency head must sign the pertinent regulations before their publication, noting his or her approval. Only if a litigant could show that the agency head had fraudulently approved regulations, signing regulations dictated by OMB even though he or she did not agree with them, could a plausible charge of displaced agency decisionmaking be made.

2. Difficulties Encountered in Challenging OMB Review

\textbf{a. Standing}

Litigants seeking to prove that OMB has acted illegally in the regulatory review process face serious difficulties with respect to establishing standing to sue. This is mainly because of the near impossibility of proving an actual or threatened injury from the allegedly illegal actions of OMB.\textsuperscript{32} Because EPA is the decisionmaker both under its enabling statute and under E.O. 12,291, OMB cannot be considered the source of whatever injury is alleged by plaintiffs. In addition, to the extent that OMB review would conflict with a statutory or judicially imposed deadline, an agency head does have the discretion not to submit for OMB review the proposed rulemak-


\textsuperscript{32} Article III of the Constitution restricts the power of the federal judiciary to any "case or controversy"; this requires that the plaintiff show "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, ... and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1981) \textit{quoting} Simon v. Eastern Kentucky Welfare Rights Org. 426 U.S. 26, 38, 41 (1976).
ing and final rule. Accordingly, any injury alleged by plaintiffs would be caused by actions of EPA, not by actions of OMB.

Moreover, even if litigants could meet the constitutionally imposed requirements for standing, they might still be prevented from prosecuting their suit if certain prudential considerations dictate that the court stay its hand. Of particular concern in lawsuits charging OMB with illegal conduct in regulatory review are considerations of separation of powers. When the exercise of judicial power affects the relationship between the co-equal arms of the national government, there are compelling reasons to regard the standing concept as informed by separation of powers considerations. As noted by Justice Powell in his concurring opinion in United States v. Richardson, and quoted with approval by Justice Rehnquist in Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.:

[Re]peated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of other branches. We should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by the non-representative, and in large measure insulated, judicial branch.

The remedy a litigant would request in a case against OMB, an injunction limiting OMB's participation in review of the regulation,

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33. See Tax Analysts and Advocates v. Blumenthal, 566 F.2d 130, 137 n.37 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1977) ("The Supreme Court has announced these prudential limitations in its supervisory capacity over the federal judiciary and . . . we believe there is a nondiscretionary duty to apply the limitations.")

34. See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1981). In a series of cases involving the standing of a member of Congress to bring a lawsuit in federal court, however, panels of the District of Columbia Circuit have concluded that separation of powers concerns have no bearing on standing analysis. Moore v. House of Representatives, 733 F.2d 946 (D.C. Cir. 1984); Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. 1983), cert. denied, 464 U.S. 823 (1983); Riegle v. Federal Open Market Comm. 656 F.2d 873 (D.C. Cir. 1981), cert. denied, 454 U.S. 1082 (1981). In some of these cases, well-reasoned objections to this trend have been made. Moore, 733 F.2d at 956 (Scalia, J., concurring); Vander Jagt, 699 F.2d at 1177 (Bork, J., concurring). Members of the court have argued that separation of powers considerations are properly addressed as part of the standing requirement. In Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983), Judge Bork, in a concurring opinion, concluded that he was not bound by the panel decisions in Riegle and Vander Jagt because prior to those cases the circuit had worked out a "fairly definite formula to relate separation-of-power concerns to the problem of legislator standing" and, under the established practice of the circuit, a panel could not change the law of legislative standing without submitting the issue to the full court. Id. at 1357.

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would require an extraordinary intrusion into the internal workings of a coordinate branch of the federal government. Granting such relief would very likely result in frequent, repeated and essentially head-on confrontations between the executive and the federal courts, exactly the type of confrontation which the Supreme Court has warned will damage the legitimacy of court decisions and risk the vitality of our democratic government. Accordingly, there are compelling reasons, based on considerations of separation of power and of the proper role of the courts in relation to the political branches of government, to deny would-be litigants standing to sue OMB for its participation in the rulemaking process.

b. Subject Matter Jurisdiction

In those environmental statutes in which Congress has set agency deadlines, the citizens' suit provision gives a court authority to issue orders directed to the Administrator of EPA.36 Under these statutes, courts are not given any jurisdiction over OMB. Moreover, the Administrative Procedure Act (APA)37 would not provide a basis of jurisdiction over OMB's review of an agency regulation because such review would not constitute final agency action. Under Section 704 of the APA only final agency action for which there is no other adequate remedy is subject to judicial review,38 and OMB clearly does not take any final action in merely reviewing a proposed rule. The agency head retains responsibility and authority for the substantive rulemaking. The fact that changes occur in the draft rule after it is submitted to OMB for review, and after the advice of and consultation with OMB, does not mean that the agency authority

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38. 5 U.S.C. § 704 (1982). The Supreme Court has ruled that an agency action is final if it imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process. Chicago & Southern Airlines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 112-13 (1948); see also Nevada Airlines v. Bond, 622 F.2d 1017, 1020 n.5 (9th Cir. 1980). In applying this standard to determine finality, the Court has looked to a number of factors, including 1) was the alleged action a definitive "statement of position" or only a threshold determination that further inquiry is warranted; 2) did the alleged action have the "status of law" or legal force compared to that of a regulation; and 3) would judicial review interfere with the proper function of the agency and burden the courts in those cases where the legal challenge is intended to "speed enforcement of a regulatory scheme." See, e.g., FTC v. Standard Oil of California, 449 U.S. 232, 239-40 (1980); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Air California v. United States Dep't of Transportation, 654 F.2d 616, 620-22 (9th Cir. 1981). See also Puget Sound Traffic Ass'n v. Civil Aeronautics Board, 536 F.2d 437, 439-40 (D.C. Cir. 1976).
has been displaced. Such OMB review is in fact a prime illustration of non-final action, consisting only of providing advice and analysis in a matter on which no final decision has yet been made by the rulemaking agency.

Courts have long held that such action is not reviewable under the APA. Furthermore, OMB review cannot be considered final agency action for purposes of the APA judicial review provision because it does not have the "status of law." OMB has no authority under the Executive Order to require agencies to conform to its view, nor would an agency regulation lack binding legal effect if the agency did not submit a regulation for review under the Executive Order.

Even if the APA allowed review of a nonfinal agency action such as OMB review of regulations, a federal court would still not have jurisdiction to review OMB's actions because the citizen suit provisions in environmental statutes typically confer jurisdiction on federal courts only to issue orders directed to the Administrator of EPA. Thus, under the Resource Conservation and Recovery Act and other environmental statutes that give a district court jurisdiction only to order the Administrator of EPA to perform nondiscretionary acts, a district court has no authority to issue any order against OMB and is even limited in any order against EPA. In most instances, a court may only set a date by which EPA is to issue a final decision. It has no authority to control discretionary deliberations in which the agency may engage prior to that date.

Although litigants would have difficulty establishing jurisdiction for a lawsuit against OMB, they might succeed in establishing jurisdiction over the agency charged with the statutory responsibility of issuing a regulation. If so, they might then be able to obtain a court


40. See, e.g., 33 U.S.C. § 1369 (Water Pollution Control Act); 42 U.S.C. § 6976 (Resource Conservation and Recovery Act). The RCRA citizen suit provision, which served as the basis for jurisdiction in EDF v. Thomas, is a prime example of a statute which does not confer jurisdiction over OMB on federal courts. The relevant portion of the RCRA provision reads as follows:

Any person may commence a civil action on his own behalf against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator. Any action brought under ... this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such regulation or order, or to order the Administrator to perform such act or duty as the case may be.

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order against EPA which 'implicated' OMB. In *EDF v. Thomas*, Judge Flannery reasoned that because he had the power to order the Administrator of EPA to perform his nondiscretionary duty and because he found that EPA was not fulfilling its duty under some misapprehension that OMB was entitled to delay promulgation of regulations, he could issue declaratory relief setting forth the parameters of OMB's powers under Executive Order 12,291. In this way, while not directly addressing the issue of jurisdiction over OMB, the court 'implicated' OMB in an order issued to the agency with responsibility to promulgate a regulation.

c. Discovery

To prove illegal conduct by OMB in its review of agency regulations, a litigant has to acquire evidence showing that OMB has prevented an agency from fulfilling its statutory mandate or has acted in excess of its authority under E.O. 12,291. OMB's actions, however, take place in the course of deliberations by and between OMB and the agency regarding the development of a regulation. OMB documents and information will necessarily contain advice, recommendations, and deliberations customarily privileged from disclosure under the deliberative process privilege and, in some cases, the qualified executive privilege. The litigant may find it difficult to convince a court to compel the disclosure of such communications, absent a showing of illegal conduct. It is a bedrock principle of administrative law that, in order to promote the efficient functioning of government, private parties are not entitled to discover the thoughts and impressions of government decisionmakers.


42. The compelling need for confidentiality in exchanges between executive agencies and OMB has been recognized:

OMB's review of [notices of] proposed regulations [is] undertaken pursuant to Executive Order 12,291 to coordinate burdensome regulations. Such communications between an agency and the President (and his delegates) is perfectly legal . . . [and is] exempt under the deliberative process privilege. National Tank Truck Carriers, Inc. v. Office of Management and Budget, No. 82-0093, slip op. (D.D.C. May 23, 1982), citing *Sierra Club v. Costle*, 657 F.2d 298, 406 (D.C. Cir. 1981).

43. *United States v. Morgan*, 304 U.S. 1 (1937). "Just as a judge cannot be subjected to such scrutiny, so the integrity of the administrative process must be equally respected." United States v. Morgan, 313 U.S. 408, 422 (1941). An agency head's privilege to keep confidential his own and his subordinates' thought processes and deliberations serves a "policy of frank and open discussion" among those upon whom rests the responsibility of decisionmaking. *Carl Zeiss*, 40 F.R.D. 318, 324 (D.D.C. 1966), aff'd, 384 F.2d 979 (D.C. Cir. 1967), cert. denied, 389 U.S. 952 (1967). The privilege protects "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinion of the writer rather than the policy of the agency," *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980), or are "part of a process by which governmental decisions and policies are
A litigant will encounter even more difficulty with regard to obtaining disclosure of communications to and between officials in OMB undertaken to facilitate the efficient discharge of the President's Article II responsibilities. In such instances, the information sought must be shown to be "essential." The court must then determine after in camera inspection that each piece of information sought is both relevant and admissible. This protection is necessary, because interference by the courts in a preliminary stage of development of a regulation would improperly entangle the judiciary in the executive's attempt to carry out its duty to promulgate responsible regulations.

Executive Order 12,291 thus provides for a necessary, privileged exchange of views between OMB and executive agencies. The Order sets forth a procedure for the cooperative consideration of notices of proposed rulemaking issued by executive agencies, encouraging the agencies to allow themselves to be guided by policies outlined by the President and overseen by OMB. The Executive Order is, however, careful not to deprive agencies of the flexibility, discretion, and independence delegated them by Congress.

d. *Available Remedies*

Apart from the discovery problems a litigant would face in pursuing a claim of illegal conduct by OMB, he or she must carefully consider limitations on available remedies. Again, most environmental statutes only confer jurisdiction on a district court to order the Ad-
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Ministrator of EPA to perform nondiscretionary duties. Such provisions do not give the court any authority to issue an order with respect to OMB, or to intrude into matters requiring exercise of EPA's discretion.

Where an environmental statute commits review of the content of a regulation to the court of appeals, any lawsuit seeking review of the "content" of agency action, as opposed to the timing of agency action, is subject to the exclusive jurisdiction of the court of appeals. A district court would in such instances have no authority to address the appropriate scope or content of regulations. Nor would a district court have authority to review the reasonableness of delayed agency action.

In short, under a statutory scheme which bifurcates jurisdiction, giving district courts authority to order the Administrator of EPA to perform nondiscretionary acts and courts of appeals authority to review final agency action, the district court has virtually no power other than to order EPA to meet the statutory deadline. In these cases, district courts can neither review the reasonableness of actions by EPA and OMB nor limit EPA's authority to engage in discretionary acts such as consultation with OMB. District courts only have authority to set deadlines; while they are allowed to issue any additional relief they deem appropriate to ensure that the deadline is met, in doing so they must not interfere with executive branch prerogatives.

A federal court also has only limited jurisdiction to interfere with the executive prerogative to supervise subordinates. Principles of separation of powers mandate that a federal court not meddle in the internal affairs of another branch of government. In view of separation of powers concerns, courts have not hesitated, under the doctrine of remedial discretion, to refuse to issue any relief that would result in intrusion into the prerogatives of a coordinate branch. Because a party cannot have a right of action without a remedy, courts in these cases have exercised their remedial discretion to dismiss such lawsuits.

46. See supra, note 41.
47. See Telecommunications Research and Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984).
50. See, e.g., Moore v. House of Representatives, 733 F.2d at 956.
B. Challenges in Congress

Environmental groups also have helped to initiate legislation in Congress designed to limit and weaken OMB's role in review of regulations. Such legislation would greatly impair OMB's ability to conduct the necessary review of regulations under E.O. 12,291.

In 1984, a bill was introduced into the Senate which would have subjected the Office of Information and Regulatory Affairs to greater oversight by Congress and the public. Proponents of the bill sought to establish the position of Administrator of OIRA as one requiring Senate confirmation, grant OIRA a four year authorization of appropriations and, most importantly, require the Director of OMB to make available to the public "any written material pertaining" to a rule or regulation submitted to OIRA by a rulemaking agency. The bill also required that written deliberative exchanges between OMB and a rulemaking agency generated in the regulatory review process be placed in the public record.

After this bill failed to pass, another bill was introduced which would also have disrupted OMB's review of regulations. This bill, entitled the Rulemaking Information Act of 1986, required the establishment of a rulemaking file whenever an agency took "any action to consider whether to initiate a rulemaking." The file was to include all written material sent by the agency to OMB and a description of substantive changes made in response to any written or oral comments from OMB. If an OMB employee based the comments he or she made to the agency on written or oral contacts with a person outside the government, the bill required that he or she provide the agency with a written summary for the file. The file would be made available to the public when the agency published a notice of proposed rulemaking. Agencies would also have to publish in the Federal Register a list of all proposed and final rules that had been submitted to OMB, and a list of the dates on which those rules were submitted to OMB for review. OMB review would be limited to thirty days, with a possible extension of no more than

51. Legislative interest in the OMB regulatory review cases has been high. In Public Citizen Health Research Group v. Rowland, Nos. 84-1252, 84-1392, 85-1014 (D.C. Cir. argued Jan. 22, 1986), the chairmen of five congressional committees filed an amicus brief, and in EDF the lead counsel for the Environmental Defense Fund testified on the case before the Subcommittee on Intergovernmental Relations of the Senate Committee on Governmental Affairs on the same day Judge Flannery issued his decision. See supra, note 19.


53. Id. at §§ 3, 4.

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thirty days, and that only for good cause shown. Finally, the bill required agencies to make draft and final regulations available to the public within fifteen days of submission to OMB.\(^5\)

The provisions of these bills are a sharp departure from traditional administrative practice within the executive branch, and would have seriously undermined the President's ability to supervise subordinates, as well as the ability of those subordinates to carry out Administration policies. To fulfill his responsibilities under Article II of the Constitution, the President must be able to consult with his subordinates freely and supervise them closely. The President's power to remove appointees, while certainly a power which gives him overall control of his subordinates, is not a power which is frequently or easily invoked. To ensure that subordinates are implementing his policies properly, a President must have the ability to discuss matters with them, free from any concern that an exchange of remarks and suggestions will be made part of the public record. Such discussions should also be conducted without fear of interference from coordinate branches of government.\(^6\)

Separation of powers concerns limit not only the federal courts' authority to issue relief restraining the ability of OMB and other agencies to consult, but also the authority of Congress. Obviously, Congress can and does enact laws that limit executive power. However, Congress impermissibly intrudes upon executive power when it unreasonably limits the time or the nature of consideration of a matter by the executive, or requires disclosure of predecisional, deliberative executive branch communications.\(^7\) Certainly, Congress may set deadlines for executive action or require that a regulation be promulgated by a certain agency. But if Congress limits consultation within the executive, or requires disclosure of privileged executive branch communications, the principle of separation of powers is violated and the legislation is constitutionally suspect.


\(^7\) See NRDC v. Train, 510 F.2d 692 (D.C. Cir. 1975).
While Congress may compel an agency of the executive to issue a regulation, it may not prevent other offices of the executive from conferring with that agency or influencing its decisionmaking. As noted by Judge Wald in *Sierra Club v. Costle*:

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. Regulations such as those involved here demand a careful weighing of cost, environmental, and energy considerations. They also have broad implications for national economic policy. 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.58

Moreover, as the Supreme Court made clear in *Vermont Yankee Nuclear Power Corp. v. NRDC*, an executive branch agency is in a better position than Congress or the courts to develop a regulation adjusted to meet the peculiarities of a particular industry:

> [T]his Court has for more than four decades emphasized that the formulation of procedures was basically left within the discretion of agencies to which Congress had confided the responsibility for substantive judgments. In *FCC v. Schreiber*, 381 U.S. 279, 290 (1965), the Court explicated this principle, describing it as “an outgrowth of the congressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than the federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved.60

In short, the courts have recognized that the executive branch has broad latitude to determine in what order and using what procedures it will tackle a complex subject matter.61 Congress should not limit the internal decisionmaking of the executive branch by precluding executive agencies and offices from conferring. Nor should Congress circumscribe executive discretion through imposing time limits for regulatory review. Certainly, Congress can set deadlines for issuance of regulations, but these deadlines are not and cannot

60. *Id.* at 524-25.
be fixed in stone. Beginning with *NRDC v. Train*, federal courts have allowed to the executive branch the discretion to extend deadlines set by Congress as long as the executive has been proceeding in good faith. After a deadline is missed, the executive can take all reasonable measures to ensure that the regulation which is later issued will not be overturned as arbitrary and capricious.

Attempts by Congress to mandate that OMB review occur only within a maximum of sixty days of the issuance of regulations also constitute an unconstitutional interference with the President’s authority to control and direct the executive branch. While it is difficult to state with precision the circumstances under which the time limit would impermissibly intrude upon executive prerogatives, one can easily imagine a sixty day period being insufficient to allow for proper review and discussion of a rule. Recognizing that deadlines may be impossible to meet, the courts have readily granted long extensions for the completion of regulations. As noted in *NRDC v. Train*, the courts 

... cannot responsibly mandate flat guidelines when the Administrator demonstrates that additional time is necessary to insure that the guidelines are rooted in an understanding of the relative merits of available control technologies. The delay required to give meaningful consideration to the technical intricacies of promising control mechanisms may well speed achievement of the goal of pollution abatement by obviating the need for time-consuming corrective measures at a later date.

Given the courts’ willingness to give executive agencies the time they need to develop a regulation, it would be strange indeed if OIRA, the office designated by the President to supervise development of regulations, should not be permitted any reasonable time extension past the sixty day limit set in the proposed legislation.

Nor is there any need for such legislation. Congress can conduct oversight hearings if it believes an agency is failing to execute the law properly, and it can request specific, unprivileged documents

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64. *NRDC v. Train*, 510 F.2d at 712 (footnote omitted).
65. Professor Bruff has noted some problems with the congressional oversight process. Bruff, *supra* note 1, at 456-59. These include the complex and unwieldy committee structure, which hampers congressional efforts to coordinate policy; the fact that committees are not representative in the way that the Congress as a whole, or each House, is; that a committee may be dominated by a single powerful chairman or member, or by members sympathetic to the agency or its regulated industry. Bruff also points out the sporadic nature of oversight hearings in the past, and suggests that instead of oversight hearings, Congress may wish to use appropriations, or the Senate power of advice and consent on presidential appointments, to oversee executive review of the rulemaking
from the agency or OMB if it suspects that a problem has arisen. Factual information on which rulemakers rely is, of course, subject to requests for disclosure. And existing law already provides mechanisms by which the public can review agency decisionmaking in connection with rulemaking. The agency's decision must be sufficiently supported by the public record, or it will likely be overturned by a court as arbitrary and capricious under the APA. As far as privileged communications are concerned, the executive branch has shared such communications with Congress where it believes that doing so will not compromise the need to protect the candid and frank discussion of policy. Moreover, it appears that OMB will change its internal procedures to make public all original versions of draft and final rules sent by agencies to OMB, along with OMB's suggested changes and the reasons for them. Lists of phone calls and meetings, as well as written material received from industry and other parties, may also be disclosed under the revised procedures. In view of these disclosures, as well as information already on the public record upon which an agency must base its decision, there is no justification for further publicizing preliminary, intra-executive branch policy discussions, particularly when such disclosure could harm the quality of government regulation.

III. Conclusion

Although the executive branch must be permitted to exercise its prerogatives for the system of separation of powers to work effectively, the courts and Congress must also have authority to check potential abuses by the executive branch in the exercise of its authority. While there are a number of limitations that prevent the courts and Congress from interfering with executive prerogatives, they nonetheless have sufficient authority to oversee executive actions in the regulatory review process.

It is also clear that federal courts have the power to restrain OMB from forcing an agency to adopt a position which is not supported by the administrative record, and to prevent OMB from reviewing a

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66. For example, in EDF v. Thomas, Congressman Dingell asked EPA for documents that had been requested by EDF. EPA supplied the Congressman with these documents even though they were exempt from disclosure under the deliberative process privilege, simply requesting that he keep them confidential.


68. Id.
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regulation after a statutory deadline has passed without the consent of the head of the agency responsible for that rulemaking. After a regulation has been issued, a federal court has jurisdiction to review whether the agency decision is consistent with the administrative record; if the decision is inconsistent with this record, it is arbitrary and may be overturned.

Congress also has the ability to oversee and control OMB review of agency regulations. Congress has set up oversight committees to review the conduct of agencies created through congressional delegation of powers, as well as the conduct of OMB. When controversies arise, Congress has not hesitated to hold oversight hearings.

Congress can always attempt to limit OMB involvement in regulatory review. Congress may set regulatory deadlines that preclude extensive OMB review, or may even prohibit in an agency's enabling statute the use of cost-benefit analysis in that agency's decisionmaking process. However, Congress would be ill-advised to so limit the internal decisionmaking processes of the executive branch. While Congress may set some criteria for executive decisionmaking, Congress should not preclude consultation within the executive branch or set time deadlines for enactment which may prevent promulgation of responsible regulations. Maintaining the integrity of executive branch decisionmaking, including OMB review under Executive Order 12,291, is imperative if the executive branch is to remain strong and carry out its intended role under our system of separation of powers.