PRESIDENTIAL REGULATORY OVERSIGHT AND THE SEPARATION OF POWERS: THE CONSTITUTIONALITY OF EXECUTIVE ORDER NO. 12,291

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Executive Order No. 12,291, "Federal Regulation,"[1] requires executive agencies, to the extent permitted by statute, to observe cost-benefit principles in implementing regulations. In order to assure agency compliance for regulations that have a significant effect on the economy, the order requires executive agencies also to evaluate proposed "major rules"[2] according to a prescribed "regulatory impact analysis."[3] The order is both a bold innovation and the obvious next step in the evolution of Presidential oversight of the regulatory process. Each of the four Presidents since Nixon has tried, in some measure, to impose some coordination of administrative rulemaking by executive branch agencies and to make at least a significant portion of such rulemaking more responsive to the policy concerns of the President.[4] Each attempt

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1. 46 Fed. Reg. 13,193 (1981) [hereinafter *Exec. Order No. 12,291*].

2. Under § 1(b) of *Exec. Order No.* 12,291:

"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.

3. *Exec. Order No. 12,291*, § 3.

4. Under President Nixon, the Office of Management and Budget instituted the "Quality of

has been further reaching and more formalized than the last until, with the Reagan order, the President has finally both articulated a set of overarching policy principles to guide the regulatory process and explicitly required his subordinates to be bound by those principles to the extent permitted by law.[5] The order is not a break with the past in that, through it, the President attempts to assert significant control over administrative rulemaking. Rather, the key innovations of Executive Order No. 12,291 are the mandatory character of the requirements it imposes and the comprehensive management system that the order creates to effect the President's goals.

An initiative as broad and far-reaching as Executive Order No. 12,291 was destined, of course, to fuel an already vigorous debate over regulatory policy.[6] Yet a more fundamental issue is the threshold question of the order's facial legality. No statute expressly authorizes the order, and the Constitution does not explicitly authorize the degree of Presidential control of his subordinates' administrative discretion that the order expressly contemplates. Upon issuing Executive Order No. 12,291, the President also released a Department of Justice memorandum[7] approving the order as to "form and legality"[8] which rests its analysis ultimately on the President's constitutional power to "take Care that the Laws be faithfully executed."[9] The order and this memorandum, however, provoked a lengthy critique from the Congressional Research Service ("the Rosenberg Report")[10] which concludes, albeit cautiously, that serious questions exist as to the legality of the order on its face.

In assessing the facial legality of Executive Order No. 12,291, I do

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Life" review, requiring interagency review of environmental regulations, focusing in practice almost entirely on Environmental Protection Agency regulations. *See generally* J. QUARLES, CLEANING UP AMERICA: AN INSIDER'S VIEW OF THE ENVIRONMENTAL PROTECTION AGENCY 117-42 (1976). By Executive order, President Ford required executive agencies generally to prepare Inflation Impact Statements in connection with "major proposals" for legislation or regulation. Exec. Order No. 11,821, 3 C.F.R. 926 (1971-75 Compilation). President Carter issued a more detailed Executive order requiring, among other things, that executive agencies prepare regulatory analyses of certain major regulations, publish a semiannual agenda of significant regulations, and review existing regulations under the policies of the order. Exec. Order No. 12,044, 3 C.F.R. 152 (1979). The review techniques required by the Reagan order are substantially similar to those required by the Carter order.

5. *Exec. Order No.* 12,291, §§ 2, 3(a).

6. *See, e.g.*, DeLong, *et al.*, *Defending Cost-Benefit Analysis: Replies to Steven Kelman*, REGULATION, Mar. – Apr., 1981 at 39; Kelman, *Cost-Benefit Analysis: An Ethical Critique*, REGULATION, Jan. – Feb., 1981 at 33.

7. Memorandum re: Proposed Executive Order entitled "Federal Regulation" (Feb. 13, 1981) (unpublished memorandum on file with Arizona Law Review) [hereinafter *Department of Justice Memorandum*].

8. Such Department of Justice review and approval is required by Exec. Order No. 11,030, 3 C.F.R. 610 (1959-63 Comp.), *reprinted in* 44 U.S.C. § 1505 (1976).

9. U.S. CONST. art. II, § 3.

10. M. Rosenberg, Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues That May Be Raised by Executive Order 12,291 (June 15, 1981) (unpublished manuscript on file with the Arizona Law Review) [hereinafter *Rosenberg Report*].

not mean, in any sense, to downplay the significant legal questions that may arise concerning the implementation of the order in particular cases. As to individual regulations, complex issues may arise concerning the extent to which an enabling statute permits the use of cost-benefit analysis,[11] and the proper exercise of managerial discretion under the order by the Director of the Office of Management and Budget (OMB). This discussion focuses only on whether the President has authority to implement Executive Order No. 12,291 as a general matter. The purposes of this article are to analyze the facial legality of Executive Order No. 12,291 and, more generally, the premises that led to different legal conclusions on that issue by the Department of Justice and the Congressional Research Service.

This article does not attempt to rebut in detail many of the arguments that appear in the Rosenberg Report because to do so would detract from the more significant thrust of my discussion, and because the rebuttal of at least some of the arguments is more or less implicit in the arguments themselves.[12] I am interested instead in using the two legal opinions as examples of fundamentally different approaches to interpreting the "separation of powers," an exercise which is facilitated considerably by the Rosenberg Report's format. The Report first sets forth the author's strongest "brief" for each side of the debate, and then attempts "a reasoned conclusion"[13] which, although ultimately negative, is rather more modest than his initial argument for the illegality of the order. What the more elaborate brief makes clear, however, are analytic premises that may have been critical even to the author's more modest conclusions. I believe these premises are misleading as to the substantive content of the theory of separation of powers and the appropriate role that the theory suggests for a court in deciding the facial legality of a presidential management initiative such as Executive Order No. 12,291.

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11. *See, e.g.*, EPA v. National Crushed Stone Ass'n, 449 U.S. 64, 69 (1980).

12. Mr. Rosenberg suggests, for example, that the general absence of constitutional protections for public participation in informal rulemaking helps to demonstrate the essentially legislative nature of rulemaking and the supposedly consequent inappropriateness of executive intervention. *Id.* at 65-66. He then states, however: "[T]he Order deprives interested persons . . . of their right to the most essential elements of fair treatment embodied in the notion of due process and is therefore unconstitutional." *Id.* at 96. It is difficult to understand how the President's failure to protect due process interests expressly in informal rulemaking can raise constitutional questions if, as the Rosenberg Report states, procedural due process is not a constraint on informal rulemaking. As it happens, I disagree with some of the implications of both of the Rosenberg Report's statements. On the limited relevance of potential *ex parte* contacts to the facial constitutionality of the order with respect to due process, *see* text section following note 123 *infra*. As to the essentially "legislative" nature of informal rulemaking, it seems to me that characterization of the rulemaking process as "legislation" only strengthens, not weakens the case for executive intervention, amounting even to a veto. *See* U.S. CONST. art. 1, § 7, cls. 2 & 3.

13. *Rosenberg Report*, *supra* note 10, at 3.

REGULATORY MANAGEMENT UNDER EXECUTIVE ORDER NO. 12,291

The essential scheme of Executive Order No. 12,291 is straightforward. Section 2 of the order requires executive agencies, to the extent permitted by statute, to base regulations on "adequate information" and, in promulgating rules, to maximize the aggregate net benefits to society from government action.[14] With respect to "major rules," defined according to their impact on the economy,[15] section 3 of the order requires executive agencies also to prepare and submit prescribed legal and policy analyses to the Director of the Office of Management and Budget that are designed to assure agency compliance with the general principles of the order. Sections 3, 6, and 8 vest the Director with a series of management responsibilities, also with the aim of securing agency compliance with the principles of the order.[16] Agencies are further required, under sections 4 and 5 respectively, to make prescribed determinations concerning the legal and factual bases for all final "major rules," as defined by the order, and to publish semiannual agendas of major regulatory activity.

Putting aside the definitional,[17] transitional,[18] and judicial review sections[19] of the order, the remaining operational provisions generally described above can be divided analytically into three categories: reportorial, substantive, and managerial. This analytic division is useful both in understanding more precisely how the order is intended to work and in highlighting the questions of Presidential authority that the order implicitly raises.

A. *Reportorial Provisions*

The reportorial provisions of the order are those provisions designed to secure information for the Executive Office of the President and, in most cases, for the public, that will be useful in assessing agency regulatory performance. Except in their specificity, they do not differ materially from the reporting requirements imposed by Executive Order No. 12,044,[20] issued by President Carter. The most notable of the

14. See text & notes 26-28 *supra*. The order defines "agency" by incorporating the definition of that term in the Paperwork Reduction Act of 1980, Pub. L. 96-511, 94 Stat. 2813 (1980), excluding those agencies defined in that Act as "independent regulatory agencies." The result is to apply the order solely to "executive" agencies, as commonly understood. *Exec. Order No.* 12,291 § 1(d).

15. *Id.* § 1(b).

16. *Id.* §§ 3(e), (f), (i), 6, 8(b).

17. *Id.* § 1.

18. *Id.* §§ 7, 10.

19. *Id.* § 9.

20. Executive Order No. 12,044, 3 C.F.R. 152 (1979). Section 2(a) of the Carter order required agencies to publish semiannual agendas of "significant regulations under development or review." Section 3 required agencies to prepare a "regulatory analysis" for "significant" regulations that, under agency criteria, are identified as having major economic consequences, as defined by the order.

new provisions are the requirements in section 3 of the order for agencies to issue preliminary and final Regulatory Impact Analyses (RIA's) in connection with "major rules." An RIA must include statements of the anticipated costs and benefits of the proposed major rule, the anticipated incidence of those costs and benefits, the net anticipated benefits of the regulation, and other potentially more cost-effective regulatory possibilities, with an explanation, if appropriate, of the legal reasons why the most cost-effective means of achieving the anticipated benefits cannot be adopted.[21] The cost-benefit analysis mandated by the order expressly requires the inclusion of beneficial or adverse regulatory effects that cannot be quantified in monetary terms.[22]

In addition to mandating RIA's, the order also requires agencies (1) to report their determinations whether proposed rules are "major rules;"[23] (2) to report on the legal and factual support for each final major rule;[24] and (3) to publish regular agendas of current and anticipated proposed regulations and of currently effective regulations under agency review pursuant to the order.[25] Standing alone, that is, considered apart from even those managerial provisions that set timetables for the reporting of such information as the order requires, these provisions pose virtually no constraints on agency policymaking. They require only the assembly and transmission of information.

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21. *Exec. Order No.* 12,291 § 3(d).

22. *Id.*

23. *Id.* § 3(g).

24. Section 4 of *Exec. Order No.* 12,291 requires agencies to determine, prior to promulgation, that final major rules are "clearly within authority delegated by law and consistent with congressional intent" and are based on factual conclusions that "have substantial support in the agency record, viewed as a whole, with full attention to public comments in general and the comments of persons directly affected by the rule in particular." In its memorandum, the Department of Justice stated:

> These requirements are meant to assure agency compliance with existing legal principles that rules must be authorized by law, and that they should be adequately supported by a factual basis. . . . In particular, they do not purport to change generally applicable statutory standards for judicial review of agency action, *see* 5 U.S.C. § 706, and could not have such an effect. They also do not purport to alter any specifically applicable standards, such as those concerning the evidentiary standard that must be met to uphold a given rule, appearing in statutes governing a particular agency.

Department of Justice Memorandum, *supra* note 7, at 11.

Assuming the accuracy of the Department's interpretation, which should not be controversial in the ordinary case, section 4 comprises only reporting requirements, *i.e.*, requirements that agencies report specifically their compliance with preexisting statutory standards. In some cases, however, the literal wording of section 4 may invite different interpretations. For example, section 4(a) requires an agency determination that a regulation is "clearly" within its legal authority. If, in a particular case, an agency could issue a regulation as within its authority, but not "clearly" so, any attempt by the Executive to block the implementation of such a regulation on that ground would amount to an attempted change in the substantive law. Such potential inconsistencies between the order and substantive statutes, even if of importance, are likely to arise only in isolated cases, and do not suggest the facial invalidity of section 4.

25. *Exec. Order No.* 12,291 § 5.

B. *Substantive Provisions*

A second category of requirements, appearing in section 2 of the order, is more clearly substantive in nature. As noted above, section 2 requires agencies, to the extent permitted by law, to "adhere" to five general principles "(i)n promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulation."[26] These principles require agencies to base administrative decisions on "adequate information concerning the need for and consequences of proposed government action" and to set regulatory objectives, order regulatory priorities, and undertake regulatory action in a way that will maximize the net benefits to society when costs and benefits are compared.

These provisions, as drafted, do not dictate particular regulatory decisions. Even in a particular context, they may do no more than set a range of permissible options, rather than pointing to a necessary result. The terms "cost" and "benefit" are not defined by the order, and the mandatory inclusion of even unquantifiable costs and benefits in the required calculus can afford agencies significant leeway in exercising their own policy judgment in identifying the beneficial or adverse effects of regulation.[27]

The section 2 principles are, however, expressly intended to require agencies to weigh competing values in a particular direction and to be prepared to justify regulatory decisions according to a generally prescribed form of analysis. In this sense, section 2 is not neutrally "procedural." Its requirements would obviously be of no effect if agencies did not treat them as foreclosing at least some regulatory possibilities, and the constraints may be made more significant by the promulgation of uniform standards for the RIA's by the Director of OMB, who is authorized to issue such standards by section 6 of the order.[28]

C. *Managerial Provisions*

In addition to the provisions already described, the order contains a variety of "managerial provisions" designed to implement both the reportorial and substantive provisions. The reportorial provisions, of

26. *Id.* § 2.

27. For an extremely useful discussion of the conceptual and practical problems of cost-benefit analysis and the variety of perspectives from which some form of such analysis may be employed, *see generally* Rodgers, *Benefits, Costs, and Risks: Oversight of Health and Environmental Decisionmaking*, 4 HARV. ENVT'L L. REV. 191 (1980).

28. On June 12, 1981, the Office of Management and Budget issued "Interim Regulatory Impact Analysis Guidance" that, in fact, does little to constrain agency definition or measurement of "costs" or "benefits." Executive Office of the President, Materials on President Reagan's Program of Regulatory Relief 30-35 (June 13, 1981).

course, could also be viewed as managerial in that they facilitate central supervision of the regulatory process and contribute to effective implementation of the order's substantive principles. It is useful, however, to distinguish the reportorial provisions from other managerial provisions (1) because of the close and obvious relationship of the reportorial provisions to an express Presidential prerogative under article II[29] and (2) because the reportorial provisions, unlike the other managerial provisions, cannot persuasively be deemed to confine agency discretion procedurally or substantively in any significant respect.

Other managerial provisions of the order, however, include prescribed timetables for the submission of required information,[30] authority for the Director of the Office of Management and Budget to review and respond to information submitted,[31] and requirements for agency consultation with the Director or with other agencies under prescribed circumstances.[32] For example, an agency must transmit each proposed major rule, together with a preliminary RIA, to the Director of OMB sixty days prior to the publication of any notice of proposed rulemaking. The Director then has sixty days to review such a submission, and may require the agency to consult with him concerning the preliminary RIA and notice of proposed rulemaking, and to refrain, subject to judicial or statutory deadlines, from publishing its proposal until the Director's review is concluded.

The order additionally vests a variety of broad functions in the Director to monitor and help effect agency compliance with the order. The Director may, in accordance with the order's definitional provisions, designate a proposed rule as a "major rule," with the consequent requirements for RIA's, in the face of a contrary determination by an agency.[33] He may "prepare and promulgate uniform standards" for identifying major rules and performing RIA's.[34] He may waive certain requirements of the order with respect to particular rules,[35] and any or all requirements of the order with respect to "any class or category of regulations."[36] Perhaps most important, he is to review notices of proposed rulemaking, preliminary RIA's, proposed final rules, and final

29. See text & notes 42-44 *infra*.
30. *Exec. Order No.* 12,291 § 3(c).
31. *Id.* § 3(e)-(f).
32. *Id.* § 3(f).
33. *Id.* § 3(b).
34. *Id.* § 6(a)(2).
35. *Id.* § 6(a)(4).
36. *Id.* § 8(b). This authority could have substantive implications if it permits the Director to exempt entirely from cost-benefit analysis regulations to which cost-benefit principles could lawfully be applied.

RIA's,[37] and may require agencies to obtain and evaluate additional relevant data from any appropriate source in connection with any regulation.[38] Agencies are required, to the extent permitted by law, to refrain from publishing notices of proposed rulemaking, preliminary RIA's, final rules, and final RIA's until the Director has had the prescribed opportunity to review the agency submissions and, in the case of final rules and RIA's, to submit his views for the rulemaking file, to which the agency is required to respond before proceeding.[39]

More clearly than in the case of the substantive provisions, the managerial provisions I have outlined do not dictate the content of any regulatory decision. They would seem nevertheless to limit unavoidably the procedural flexibility in the regulatory process that an agency might otherwise enjoy. The prospects of protracted high-level "jawboning" and delay in the regulatory process may be effective sanctions to procure agency compliance with OMB regulatory policy. The potential exists, in particular cases, for the Director to abuse his discretion and overstep his legal authority despite the order's general provision that the Director's review powers shall not "be construed as displacing the agencies' responsibilities delegated by law."[40]

Executive Order No. 12,291 is drafted, however, to avoid any facial conflict between the ultimate policymaking authority of agency regulators and the vesting in the Director of OMB of managerial responsibilities that could, in a limited way, affect an agency's control over the timing of regulations. The order in this respect expresses its intention not to displace the agencies' legal authority, and also makes explicit provision for statutory and judicial deadlines to override what the order would otherwise require for the timing of submissions to the Director, or would otherwise permit for the duration of the Director's review.[41]

D. *Narrowing the Controversy*

With the foregoing taxonomy in mind, it will be helpful at this stage to identify precisely those aspects of the provisions of the order that are significantly controversial. As described above, a number of the order's provisions are merely reportorial. The President is expressly authorized by the Constitution to require "the Opinion in writing, of the principal Officer in each of the Executive Departments, upon

37. *Id.* § 3(e).
38. *Id.* § 6(a)(3).
39. *Id.* § 3(f).
40. *Id.* § 3(f)(3).
41. *Id.* § 8(a)(2).

any subject relating to the Duties of their respective Offices."[42] It hardly strains the import of this language to suggest that this provision squarely supports the President's authority to request information directly from the subordinates "of the principal Officer(s) in each of the Executive Departments," and to direct that this information be forwarded to one of his closest and most senior advisers. If there were any doubt on this point, the reportorial provisions would also appear justified given that such information is undeniably appropriate to permit the President to fulfill his function responsibly of recommending to Congress' "Consideration of such Measures as he shall judge necessary and expedient."[43] Notably, the President has directed that the information be forwarded to the Presidential adviser who is charged with coordinating the presentation of the President's legislative program.[44]

Similarly, the managerial provisions of the order, to the extent they merely permit coordination of the reportorial functions, likewise seem immune to serious challenge. Although they hypothetically could violate the express terms of various statutes, such as the substantive limitations on the use of agency appropriations, the President's statutory delegation authorities, or the managerial provisions of various regulatory statutes, they do not appear to do so and no such suggestion has been made. Rather, to the extent they are open to dispute, the managerial provisions are questionable only because they might be deemed to constrain policymaking discretion—in the sense of procedural flexibility—that Congress has vested initially in subordinate executive officers. With respect to these provisions, the legal issue is thus whether they impinge to an unlawful degree on such discretion. This is the same issue raised by the order's substantive provisions with respect to regulatory policymaking discretion in general, and it is to the issue of Presidential power to constrain agency discretion to which a legal analysis of the order must essentially be addressed.

THE LAWFULNESS OF EXECUTIVE ORDER NO. 12,291

A. *Separation of Powers Analysis Generally*

The Rosenberg Report questions the facial validity of Executive Order No. 12,291 first, because the President arguably has contravened Congress' intent (a) by establishing an unauthorized central regulatory management system,[45] and (b) by purporting to confine his subordi-

42. U.S. CONST. art. II, § 2, cl. 1.
43. *Id.* art. II, § 3.
44. Revised Office of Management and Budget Circular A-19 (Sept. 1979).
45. *Rosenberg Report*, *supra* note 10, at 126.

nates' exercise of policymaking discretion;[46] and second, because the order fails "to protect the integrity of the policymaking process in the interest of the public" from "secret, undisclosed, and unreviewable contacts" by Presidential advisers or private interests.[47] Putting aside for the moment the issue of procedural integrity, the threshold problem in assessing whether Executive Order No. 12,291 treads excessively on the policymaking discretion of subordinate executive officers is identifying the President's constitutional power to constrain such discretion at all. The issue presented is not one of the overall powers of the central government. There is no question, for example, that Congress could enact the system of policy coordination that the order envisions as a necessary and proper means for carrying into execution the government's regulatory powers. The issue instead, given the constitutional distribution of powers among legislative, executive, and judicial branches, is whether a policy coordination initiative is properly assertable by the President, in addition to or instead of Congress or, in a more limited way, by the judiciary.

In analyzing the distribution of powers between Congress and the Executive, a majority of the Supreme Court has repeatedly given express endorsement[48] to the view of the separation of powers articulated by Justice Jackson in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.[49] As concisely summarized in one much-noted commentary, Justice Jackson indicated that there exist zones of exclusive Executive power and of exclusive legislative power, which each branch may exercise without abridgement by the other, and:

> a twilight zone of concurrent power, (in which) either the President or Congress can act in the absence of initiative by the other. If both attempt to act in ways that bring their wills into conflict, the deadlock must be resolved in favor of congressional action through valid legislation, which includes legislation passed over a presidential veto.[50]

In the "twilight zone" of concurrent powers, the President still "can only rely upon his own independent powers."[51] If such independent powers exist, however, whether he has exceeded their proper limits will depend upon whether the Presidential exertion of power contradicts the expressed will of Congress.

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46. *Id.* at 126, 131.

47. *Id.* at 131.

48. Dames & Moore v. Regan, 101 S. Ct. 2972, (1981); Nixon v. Administrator of Gen. Serv., 433 U.S. 425, 443 (1977); Buckley v. Valeo, 424 U.S. 1, 122 (1976); United States v. Nixon, 418 U.S. 683, 707 (1974); National Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 273 n.5 (1974).

49. 343 U.S. 579, 634 (1952).

50. Pollak, *et al.*, *Indochina: The Constitutional Crisis* ("The Yale Paper"), Pt. II, 116 Cong. Rec. 16,478 (1970).

51. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

Using the Jackson analysis as a blueprint, it remains to be considered, first, whether the President has independent power to coordinate regulatory activity by executive agencies, and second, whether the President, in issuing Executive Order No. 12,291, has exceeded any limits on his power properly enacted by Congress.

B. *The President as Chief Administrative Coordinator*

In issuing Executive Order No. 12,291, President Reagan expressly articulated the purposes of the order: "to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, and minimize duplication and conflict of regulations, and insure well-reasoned regulations. . . ."[52] Construing these purposes in light of the order's mandatory provisions, the President's goals might more succinctly be characterized as follows: to coordinate agency compliance, within statutory limits, with a national policy goal of reducing regulatory cost; to enhance administrative rationality and accountability; and to minimize the duplication and conflict of regulations. At least if broadly stated, each of these goals is facially commensurate with policy goals underlying Congress' prior general enactments governing the regulatory process.[53]

A strong case has been made, however, for the desirability of stronger Executive management of the regulatory process to achieve the objectives of policy coordination and the avoidance of unnecessary cost, duplication, and regulatory conflict.[54] Foremost among contemporary studies, the 1979 Report of the Commission on Law and the Economy of the American Bar Association states:

> While Congress establishes the [national] goals, it cannot legislate the details of every action taken in pursuit of each goal, or make the balancing choices that each such decision requires. It has therefore delegated this task to the regulatory agencies. But we have given each of the regulatory agencies one set of primary goals, with only limited responsibility for balancing a proposed action in pursuit of its own goals against adverse impacts on the pursuit of other goals. For

52. *Exec. Order No. 12,291*, Preamble.

53. *See, e.g.*, Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (1980) *to be codified at* 44 U.S.C. § 3501 *et seq.*; Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980), *to be codified at* 5 U.S.C. § 601 *et seq.*, 5 U.S.C. 551 *et seq.*

54. *See generally* S. COMM. ON GOVERNMENTAL AFFAIRS, STUDY ON FEDERAL REGULATION, VOL. 5: REGULATORY ORGANIZATION, 95th Cong., 1st Sess. (1977) (discussing problems of regulatory overlap and conflict in federal food, transportation, banking, antitrust, energy, and health and safety policy); *cf.*, *Proposed Plan for Department of Natural Resources: Hearings Before the Subcomms. on Conservation and Credit, Dept. Investigations, Oversight, and Research, and Forests of the House Comm. on Agriculture*, 96th Cong., 1st Sess. 21 (1979) (statement of Neil Sampson, citing conflicting federal regulatory programs on soil and water conservation) [hereinafter *Natural Resources Hearings*].

> most of these agencies, no effective mechanisms exist for coordinating the decisions of one agency with those of other agencies, or conforming them to the balancing judgments of elected generalists, such as the President and Congress.[55]

To illustrate the problem, the Commission noted that, as of 1979, at least 16 federal agencies bore regulatory responsibilities that directly affected the price and supply of energy.[56] This diffusion of policymaking authority persists despite the earlier consolidation of several energy-oriented agencies into a Department of Energy. Similar multiplicity problems present themselves with respect to antitrust, equal employment, industrial safety, and natural resources policymaking.[57] Continual congressional resort to regulatory agencies as tools to solve national problems suggests that the problems of potential regulatory conflict and duplication, now unprecedented in scope, will only become greater if unchecked.

With this set of practical problems in the background, the Justice Department asserted in its memorandum that the President's authority to issue Executive Order No. 12,291 rests on his constitutional power to "take Care that the Laws be faithfully executed."[58] The executive branch typically relies on this clause to justify independent Presidential initiatives in domestic affairs,[59] and one can readily perceive how this terse constitutional text could be facially construed to comprise some sort of supervisory power over the discretion of subordinate officers.

The Justice Department supports its interpretation of the "Take Care" clause by citing as authority the Supreme Court's decision in *Myers v. United States*.[60] *Myers* held unconstitutional a statutory provision that purported to limit the President's power to remove first class postmasters at will. In dicta, the Court said, through Chief Justice Taft, himself a former President:

> The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which article 2 of the Constitution evidently contemplated in vesting general executive power in the President alone. Laws are often passed with specific provision for the adoption of regulations by a

55. ABA COMM'N ON LAW AND THE ECONOMY, FEDERAL REGULATION: ROADS TO REFORM 99-100 (1979).

56. *Id.* at 105-08.

57. *Id.* at 105; *Natural Resources Hearings*, *supra* note 54, at 21.

58. *Department of Justice Memorandum*, *supra* note 7, at 2.

59. W.H. TAFT, THE PRESIDENT AND HIS POWERS 78-94 (1967 ed.)

60. 272 U.S. 52 (1926).

> department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider and supervise in his administrative control. . . . [If the President should fail to act when "the discretion regularly entrusted to (a subordinate) officer by statute has not been on the whole intelligently or wisely exercised," then] he does not discharge his own constitutional duty of seeing that the laws be faithfully executed.[61]

Thus, the *Myers* Court identified a Presidential authority to "supervise and guide" subordinates, a power the Court thought necessary to fulfill the President's duty to see to the faithful execution of the laws.

By any reasonable measure, however, the legal leap from the power actually upheld in *Myers*—the power to remove postmasters at will—and the assertion of power embodied in Executive Order No. 12,291 is a considerable one. Indeed, only nine years later, the Supreme Court limited the holding of *Myers* by upholding the constitutionality of legislative restrictions on Presidential removal of members of the Federal Trade Commission, adding to the dicta of *Myers* equally broad, and perhaps equally unhelpful, dicta confining the President's absolute removal powers "to purely executive officers,"[62] whoever they may be. In any event, to justify the comprehensive management scheme of the order based solely on the general sort of inference of Presidential supervisory power exemplified by a 1926 analysis of proper government administration seems conspicuously elliptical. It would be preferable to identify a more coherent basis on which to ascribe meaning to the generalized provisions of article II of the Constitution.

The threshold problem in construing article II is its extraordinary generality. In article I of the Constitution, the Framers vested in Congress its most important legislative authority by enumerating a series of express powers,[63] and providing additionally that Congress may "make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[64] The list of enumerated powers is, and was intended to be, sufficient to encompass all exercises of domestic power by Congress foreseeably related to the solution of national problems.[65] The

61. *Id.* at 135.
62. Humphrey's Executor v. United States, 295 U.S. 602, 631-32 (1935).
63. U.S. CONST. art. I, § 8.
64. *Id.* cl. 18.
65. See the discussion of the drafting of Article I, § 8 of the Constitution in Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1337-41 (1934).

"necessary and proper" clause significantly fills any incidental subject matter gap by articulating Congress' implied authority to execute its enumerated powers through any "reasonable" and "appropriate" means.[66]

The domestic powers of the President, by contrast, are vested with far less specificity. Despite compelling evidence that the Framers contemplated an efficient and effective executive branch, institutionally capable of "checking" and "balancing" the legislature and the judiciary,[67] only four clauses in article II seem to convey any affirmative domestic administrative power to the President: the initial vesting clause,[68] the opinions clause,[69] the appointments clause,[70] and the "Take Care" clause.[71] If one attributes to these clauses only their narrowest meaning, then it is difficult to conceive how the President could possibly have been foreseen as heading a branch co-equal in power and "dignity" to the legislature and the judiciary, much less as being capable of contributing to the efficient resolution of changing administrative problems in a sensible way. Conversely, if one attributes to these clauses their broadest plausible meaning, then the powers of the President would appear significantly and unjustifiably more expansive and unconstrained than those of the other branches.

Given this problem, it is not surprising that the Supreme Court, in interpreting the vague and ambiguous mandates of article II, has repeatedly delimited the President's powers according to primarily functional, not textual, concerns.[72] Thus, Chief Justice Marshall, in

66. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 356-59 (1819).
67. *See, e.g.*, THE FEDERALIST, Nos. 47-48 (A. Hamilton).
68. U.S. CONST. art. II, § 1, cl. 1.
69. *Id.* § 2, cl. 1.
70. *Id.* § 2, cl. 2.
71. *Id.* § 3.
72. The most sophisticated recent attempt to delimit a functional approach to assessing the President's powers relative to administrative decisionmaking is Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451 (1979). Professor Bruff argues that, at least in the absence of contrary legislation, courts should determine the permissible scope of the President's role in agency rulemaking not by attempting to characterize agency functions as "executive" or "legislative" per se, but rather according to "two general sets of boundaries—those set by the checks and balances of other branches of government, and those set by the demands of due process." *Id.* at 487. Although this analysis is helpful in assessing the legitimate scope of Presidential initiative in the "twilight" area, it may not fully explain the constitutional legitimacy of ascribing to the President a supervisory role in agency rulemaking in the first place, and it may understate the breadth of the President's independent powers in the face of express or implicit conflict with legislative policy.

In suggesting the existence of a core Presidential power of administrative coordination in the discussion that follows, I am intending to rely on a form of analysis more closely resembling the reasoning of McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). That is, although the Constitution does not vest the President, as it does Congress, with a definitive catalogue of enumerated powers, I would treat the broad phrasing of the President's authorities as comprising certain implied core powers, the individual exercise of which is limited by principles of rationality and constitutional appropriateness. Thus, I would subject assertions of Presidential authority under article II to the threshold questions *McCulloch* poses in construing congressional power under the necessary and proper clause of article I, before reaching the tests that Professor Bruff would then

Marbury v. Madison,[73] constitutionalized the traditional mandamus law distinction between ministerial and discretionary acts, and asserted the existence of a realm of "political acts" that the President's subordinates could perform and which "can never be examinable by the courts."[74] Marshall's opinion makes no reference to specific constitutional text, but appears instead to infer a need for the President to be able to carry out his constitutional "political powers, in the exercise of which he is to use his own discretion."[75] The Supreme Court, in *The Prize Cases*,[76] similarly interpreted the President's duties as Commander-in-chief and to take care that the laws be faithfully executed as authorizing the President to initiate national defense in the instance of civil war before a legislative declaration of war.[77] In *United States v. Nixon*,[78] the Court, for functional reasons and without textual support, implied a Presidential privilege of confidentiality that is extremely broad with respect to military, diplomatic, or sensitive national security matters.[79] These cases do not imply that article II authorizes any presidential power or privilege that might be thought expedient at some point to the efficient operation of the executive branch. They do, however, indicate the legitimacy of according considerable weight to functional concerns in assessing what article II of the Constitution permits.

Viewed in this light, the dicta of *Myers* are of great significance, less for their characterization of the President's supervisory powers than because of the Court's mode of reasoning. The Court made the connection in *Myers* between a Presidential power to "supervise and guide" his subordinates and his constitutional duty of faithful execution of the laws by construing the President's duty in light of the Constitution's vesting of executive power in a unitary executive. Such a deduction, however, was not compelled by formal logic or constitutional text. Consequently, the Court's analysis can be read as tacitly recognizing what the Court took to be a fact concerning the functional administration of the Federal Government, namely that, if the laws are to be faithfully executed, only the President as the primary elected official with a national constituency is institutionally capable of coordinat-

pose. For an apparently similar approach in the Supreme Court's analysis of executive privilege, *see* United States v. Nixon, 418 U.S. 683, 705 n.16 (1974). The Court's reference to *McCulloch* in the *Nixon* case is strongly criticized on formal grounds in Van Alstyne, *A Political and Constitutional Review of United States v. Nixon*, 22 U.C.L.A. L. REV. 116, 118-19 (1974).

73. 5 U.S. (1 Cranch) 137 (1803).

74. *Id.* at 165-66.

75. *Id.*

76. 67 U.S. (2 Black) 635 (1863).

77. *Id.* at 668-71.

78. 418 U.S. 683 (1974).

79. *Id.* at 703-07.

ing the simultaneous execution of a wide range of federal statutes.[80] It is thus proper to construe the "Take Care" clause in functional terms, and to examine the functional justifications for extending that clause on a case-by-case basis.

This functional approach would seem to legitimate a core power of Presidential supervision that may justly be inferred from the "Take Care" clause without risk of usurping the powers of other branches. That power is a power of interstitial administrative coordination, of rationalizing the execution of a variety of statutes so that, within congressionally set limits, the President can require regulators to adapt each agency's decisionmaking to the exigencies of the national economy, and to fulfill each agency's statutory responsibilities in a manner that will least jeopardize the accomplishment of other agencies' legislative mandates.[81] Indeed, if we do not ascribe such power to the "Take Care" clause, we may be foregoing a crucial practical constitutional means for the Executive independently to foster values of efficient and accountable government on which the contemporary regulatory system depends and with which the framers were surely concerned.[82]

Without pretermitting the question whether Executive Order No. 12,291 properly implements this Presidential authority, the nature of the interstitial power I have identified is in fact clearly suggested by the precise ways in which Executive Order No. 12,291 purports to exercise Presidential authority. The order first attempts to coordinate agency regulations by rationalizing "major rules" in accord with a common policy aim of cost-saving, which is relevant to all regulations. Second, the order seeks "to the extent permitted by law"[83] to minimize conflicts among different agencies' regulations so that the decisions of one agency do not unnecessarily frustrate the congressionally authorized, perhaps even mandated, goals of another agency.[84] Finally, the order

80. Myers v. United States, 272 U.S. 52, 135 (1926). *See also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 702 (1952) (Vinson, C.J., dissenting): "Unlike an administrative commission confined to the enforcement of the statute under which it was created, or the head of a department when administering a particular statute, the President is a constitutional officer charged with taking care that a 'mass of legislation' be executed." *Id.*

81. Not the least guarantee of the interstitial nature of the President's initiative are the practical constraints upon lodging a full-blown regulatory oversight apparatus in the Executive Office of the President. *See* Eads, *Harnessing Regulation: The Evolving Role of White House Oversight*, REGULATION, May-June, 1981 at 19. It would be implausible, for example, for OMB to reanalyze in detail all of the complex technical questions addressed by EPA in promulgating its "scrubber" rule. *See* Sierra Club v. Costle, 657 F.2d 298, 322-52 (D.C. Cir. 1981). Given the institutional capabilities of OMB and the impetus behind Exec. Order No. 12,291, there is thus reason to believe OMB will stick to a more general policing role, pressing consultation and analysis on the President's primary concern with cost-effectiveness. Thus, if the system works well, Presidential Policy oversight need not compromise the value of specialized agency expertise in the drafting of regulations.

82. *See generally* Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981).

83. *Exec. Order No.* 12,291, §§ 2, 3(a) & (f)(3), 5(b), 6(a), 8(a)(2).

84. In theory, agencies could, while acting within their individual mandates, adopt consulta-

attempts to foster increased agency accountability for major regulatory decisions to all of the agencies' governmental and private sector constituencies by requiring a clearer articulation of the bases for regulatory decisionmaking and a more precise identification of the reasons for and anticipated effects of such decisions.

Looking at these purposes generally, it readily appears that the Presidential goals, although ambitious, share one outstanding feature: their scope is conspicuously limited by the acts of Congress. They dictate no fundamental policy choice to any agency. They predetermine no regulatory decision. They are only interstitial in character. The order is designed to operate within congressionally set limits to fill the lacunae in national policy that necessarily result from piecemeal legislative activity, and to reconcile potentially conflicting regulatory decisions in accordance with some generally applicable and congressionally recognized economic objective. To be sure, the power on which the order thus tacitly rests implies some significant Presidential discretion, but it is discretion that is, in essence, necessarily and concededly limited by Congress' assertion of its own policymaking powers. It is not the power of fundamental policy choice, but a power to coordinate the exercise of administrative discretion to achieve national goals, and to enhance the efficiency and coherence of the executive branch in the implementation of legislative policy.

Myers may be cited as general authority for the existence of such an interstitial power. Construed, as I suggest, as an interstitial or residuary power, this authority indeed is not inconsistent with any other Supreme Court decision. The legitimacy of such constitutional interpretation is buttressed, however, by three additional considerations: contemporary necessity, constitutional history, and the Supreme Court's past approach to the resolution of separation of powers questions.

I have already described above[85] the problems of regulatory duplication, conflict, and lack of coordination that have led to recommendations for an initiative such as Executive Order No. 12,291.[86] It is true, of course, that attributing some power of administrative coordination to the President is not the only conceivable response to these problems.[87] The President could leave agencies unchecked in the im-

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tion procedures to minimize conflict and duplication among one another. Their separate missions and, perhaps more important, their separate constituencies and legislative oversight committees make such efforts unlikely. On the problems that would hamper Congress in the coordination of regulatory policy, see Bruff, *supra* note 72, at 456-59.

85. See text & notes 54-57 *supra*.

86. ABA COMM'N ON LAW AND THE ECONOMY, *supra* note 55, at 137-46.

87. It is likewise true that, even if the President possesses some power of administrative coordination, he could exercise that power more modestly than does Exec. Order No. 12,291. In addi-

plementation of their independent mandates, allowing Congress, as the need arises, to resolve policy conflicts or to meet new exigencies or fill decisionmaking gaps through new legislation. Alternatively, potential conflicts among statutes, as written or as implemented, could be treated as questions of law to be resolved, absent further legislative action, by the courts.[88]

It is difficult to perceive any practical advantage to the first alternative given that Presidential exercise of the kind of interstitial coordination power I have described enhances the possibility of coherent government action, but does not in any way preclude congressional action in response to clear, or even not so clear, need. Whatever our concern for preserving the priority of the legislative branch, limited Presidential oversight does not deprive Congress of any power, and it is difficult to identify any other way that, in the abstract, the exercise of Presidential oversight would likely be disfunctional for the regulatory process. One could defend a "leave it to Congress" approach on a strict separation of powers basis, but there is no practical reason to do so and, as described below, no persuasive historical reason either.

Similarly, there is even less practical attractiveness to the idea of leaving significant regulatory conflicts that are unresolved by Congress to be addressed initially by the courts. Some policy conflicts assuredly may arise because of conflicting agency interpretations of a single statute[89] or because Congress enacts two or more statutes that are impossible to reconcile in practice.[90] The questions presented in such cases must ultimately be treated as questions of law, and the judiciary is experienced in resolving them. However, the potential for regulatory policy conflict exists far more often not because Congress has "intended" such conflict, but because the authority delegated to different officials is broad enough to encompass the possibility that their applications of

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tion to *ad hoc* jawboning, the President could, for example, more systematically participate, as do other "interested persons," in informal rulemaking "through submission of written data, views, or arguments." 5 U.S.C. § 553(c) (1976). As a constitutional matter, however, the choice among those forms of Presidential oversight within the President's constitutional and statutory powers is a policy choice for the President. He might well decide that *ad hoc*, post-notice, or exclusively public participation in informal rulemaking would be insufficiently effective in coordinating regulatory policy.

88. *Regulatory Reform Legislation, Pt. 2, Hearings Before the Senate Comm. on Governmental Affairs*, 96th Cong., 1st Sess. 137-39 (1979) (statement of Alan B. Morrison) [hereinafter *Morrison Statement*].

89. *See* TVA v. Hill, 437 U.S. 153, 172-74 (1978).

90. As a practical matter, it is nearly impossible to imagine the enactment of two general regulatory statutes that would so completely conflict as to overcome the ordinary presumption against implied repeals. If Congress were, however, to enact two regulatory laws that could not be given effect simultaneously by any reasonable construction of the statutes, then the latter in time would prevail by law and no problem of regulatory policy coordination would be presented. *See generally* 1A C. SAND, SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION § 23.09 (1972).

different but related statutes will undermine or frustrate one another. In such cases, a conflict may arise even if no administrator oversteps the bounds of his or her legal authority. The conflict cannot be resolved by interpreting anything the legislature has said; to treat the conflict as posing a question of legal interpretation would plainly be wrong. Such situations present questions purely of policy choice, and deference to the fortuitous invocation of judicial process would be quixotic, if not simply irresponsible.

There is also historical warrant for interpreting the President's power to "take Care that the Laws be faithfully executed," and indeed, the separation of powers generally, in a way that will facilitate efficient government administration. As recently observed by the Ninth Circuit, two principal purposes underlay the Framers' adoption of a system of partially separated powers for the national government: to protect against dangerous concentrations of governmental power, and to foster governmental efficiency, that is, "as a practical measure to facilitate administration of a large nation by the assignment of numerous labors to designated authorities."[91] The latter point, which is amply supportable by reference to the views of Washington, Jay, Jefferson, Madison, and John Adams[92] has been much overlooked by scholars and by courts. By the time of the 1787 Convention, however, the Framers' views were no longer shaped singly by the distrust of arbitrary Executive action, but significantly also by the administrative inaptitude of the Continental Congress under the Articles of Confederation and by distrust of the arbitrariness of popular majorities acting through elected legislatures.[93] Jefferson scornfully decried the legislature's institutional unsuitability for detailed execution of the laws.[94] It is true, of course, that the Framers could not have had in mind the kind of Presidential oversight role in regulatory policymaking that Executive Order No. 12,291 creates. That fact, however, reflects only the limited scope of national government in the late 18th century and the consequent relative simplicity of national administration, not any historical unconcern with the values of efficiency and effectiveness that purportedly animate the current order.[95] In this light, ascribing a Presidential role of administrative coor-

91. Chadha v. Immigration & Naturalization Serv., 634 F.2d 408, 422 (9th Cir. 1980), *consideration of juris. postponed to hearing on merits*, 50 U.S.L.W. 3,244 (Oct. 6, 1981).

92. *See generally* Fisher, *The Efficiency Side of Separated Powers*, 5 J. AM. STUD. 113 (1971).

93. G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, 393-467 (1969).

94. Letter from Th. Jefferson to Edw. Carrington, 11 PAPERS OF THOMAS JEFFERSON 679 (J. Boyd, ed. 1955).

95. In urging a restrictive interpretation of article II generally, the Rosenberg Report's "brief" against Exec. Order No. 12,291 starts with the following premise:

> It is well understood that, notwithstanding their experience under the Articles of Confederation, the Framers of the Constitution did not intend the presidency to be an

dination to the "Take Care" clause can justly be said to give contemporary effect to values that guided the Framers originally.

The congruence of contemporary need, historic values, and the Supreme Court's functional analysis of separation of powers concerns establishes that, at least in a limited way, article II authorizes the President to coordinate administrative policymaking by his subordinates, even if such coordination imposes some constraints on what otherwise would be his subordinates' policymaking discretion. It remains for inquiry whether Executive Order No. 12,291 is a proper assertion of such authority. That inquiry invites two subsidiary questions. Is the order reasonably calculated on its face to effect the legitimate purposes of the President's exercise of supervisory power? Further, does it transgress any legal limitation on the President's power?

That the order is reasonably adapted to accomplish the legitimate objectives of Presidential oversight is plain. The reportorial and managerial aspects of the order are clearly tailored to those purposes and do not on their face overstep them. The substantive provisions are at least facially designed to facilitate the coordination of related regulatory decisions, and help to harmonize government policy, where the law permits, by requiring the consistent exercise of policymaking discretion in a generally applicable, cost-saving direction. As noted above, cost-benefit analysis will not likely dictate a single outcome for any regulatory problem. It will, however, require agencies to assess their rationales for regulatory decisions according to generally applicable economic criteria that should be useful in assessing the merits of major regulatory initiatives. The order is thus facially calculated to effect goals of administrative rationality and efficiency, without overstepping congressio-

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institutional competitor to the Congress. The constitutional role of the Executive, at least in domestic matters, was to be ancillary to that of the legislature.

Rosenberg Report, *supra* note 10, at 49. I rather disagree with this generalization, so stated, *see* notes 67 & 93 *supra*, and find it intriguing in this regard that the Rosenberg Report cites as authority for this generalization Professor Tribe's constitutional law treatise. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 161, 181 (1978). Despite his modest view of the Framers' intentions, Professor Tribe would apparently construe article II based on a different premise:

> To be reminded that . . . the Framers envisioned a vastly more modest chief magistrate—is only to recall that, had the blueprint been incapable of expanding beyond the Framers' designs, the Nation could not have persisted through two centuries of turmoil.
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> * * *
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> As new patterns of interaction between the Executive and Congress are put forward, their validity should therefore be assessed less in terms of their congruence with the Framers' assumptions about how power could be shared than in terms of their tendency, in actual operation, either to swell total federal power in politically unaccountable or unfair ways or to leave either Congress or the Executive with unacceptably diminished flexibility and independence.

Id. at 157, 163. Under the light in which Tribe would suggest that we assess the validity of the order in its effect on executive-legislative "interaction," the order would thus appear wholly unobjectionable.

nally set limits, and these are goals legitimately addressed by the President's implicit power of administrative coordination.

C. *Congressional Limitations on Presidential Administrative Coordination*

If we conclude that Executive Order No. 12,291, on its face, rationally implements a constitutionally based Presidential power of administrative coordination, it nonetheless remains to be considered whether the order transgresses any legal limitation on that power. As discussed below, no plausible suggestion is possible that the order facially violates any constitutional guarantee of individual rights.[96] Nor can the order be viewed facially as a breach of the constitutional separation of powers; the order is based on authority conferred by article II, and does not formally or practically deprive any other branch of constitutional authority or abdicate any authority that the Executive is required to exercise.

Nonetheless, the President might exceed the limits of his power if, in issuing a directive such as Executive Order No. 12,291, he were to contravene any law, as enacted by Congress, that governs the structure of regulatory decisionmaking. Coordinating administrative procedure is not an exclusive Executive power. Congress' authority over the process, exercised through its appropriations and necessary and proper clause powers, exists beyond peradventure. In issuing Executive Order No. 12,291, the President has thus acted in the twilight zone of concurrent power, identified by Justice Jackson, in which validly enacted legislation ordinarily circumscribes Presidential initiatives even if the initiatives are plausibly based on some independent source of Executive power.

By its very terms, however, the order avoids facial conflict with any statute. Its substantive principles apply, and the Director is authorized to exercise his managerial role, only "to the extent permitted by law." Thus, section 2(b) of the order, which provides that, to the extent permitted by law, "Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society,"[97] requires cost-benefit analysis only if the governing statute permits it. It does not direct agencies to decline to enforce mandatory statutes on the ground that no implementing regulation is possible under the statute for which benefits exceed costs. If

96. See text & notes 125-27 *infra*.

97. *Id.* § 2(b). Congress has already incorporated into one regulatory statute an express exemption from administrative compliance with Exec. Order No. 12,291. Marine Mammal Protection Act of 1972 Amendments, § 4(d)(2), Pub. L. No. 97-58, 95 Stat. 984 (1981).

the law, as enacted by Congress, precludes regulation based on full-blown cost-benefit analysis, then implementing the remaining principles of section 2, to the extent permitted by law, would require agencies only to adopt the most cost-efficient regulation, that is, the "alternative involving the least net cost to society."[98] If Congress commanded executive agencies to be insensitive to regulatory cost entirely, then even this provision would be applied only "to the extent permitted by law," that is, not at all. The result in every case would be to give full play to Congress' fundamental policy judgments.

Similarly, although the Director's review power with respect to proposed rules and RIA's undeniably creates the potential for regulatory delay, the order expressly provides that the vesting of review power in the Director "shall (not) be construed as displacing the agencies' responsibilities delegated by law."[99] Thus, if, in a particular case, an aggrieved party could demonstrate that the Director had used the review authority and delay to usurp a final decision over regulatory policy that Congress had vested in an agency, such a usurpation would also violate the terms of Executive Order No. 12,291. There can thus be no facial inconsistency between the Executive order and any agency statute.

It should be added that, in expressly confining the operation of the order with the limiting provision "to the extent permitted by law," the President has in no way undercut the order or rendered its effect trivial. There is no general statute that disallows this Presidential initiative. Nor are the procedural requirements of the Executive order in any way inconsistent, facially or in fact, with the procedural requirements of the Administrative Procedure Act[100] or any other procedural statute of general applicability. The facial validity of the order is thus manifest not only in its express savings clauses, but also in the absence of any enacted statute that generally renders what the order requires either unlawful or impracticable.

The Rosenberg Report nonetheless does suggest that the order on its face presents two "serious" potential problems of inconsistency with federal statutory law. First, the Report states, "The Order . . . appears to establish a formal, comprehensive, centralized, and substantively oriented system of control of informal rulemaking," the "inevitable effect [of which] could be the displacement of ultimate agency discretion in contravention of any statute vesting discretionary rulemaking authority in an agency official."[101] Second, the order assertedly "conflicts

98. *Exec. Order No.* 12,291, § 2(d).
99. *Id.* § 3(f)(3).
100. See text & notes 109-14 *infra*.
101. *Rosenberg Report*, *supra* note 10, at 126. The juxtaposition of the words "inevitable" and

with the intent of Congress in enacting the Administrative Procedure Act,"[102] which purportedly was "to create a novel form of rulemaking that in its flexibility and informality could be tailored to meet the individualized situations that are encountered by agencies with markedly different missions."[103] In sum, the Rosenberg Report purports to find serious legal problems on the face of Executive Order No. 12,291 because of the order's supposed conflict with policies underlying Congress' decision to vest certain administrative decisionmaking authority in subordinate executive officers, and because the order assertedly impairs the administrative flexibility that Congress intended to achieve through the APA. The Report thus implies that, in determining the legality of Executive Order No. 12,291, certain tacit policies underlying enacted legislation should themselves be construed as binding expressions of legislative will.

Postponing for the moment the issue of whether so attenuated expressions of Congress' "implied will" should ordinarily be construed to limit the President's independent powers of administrative supervision, there is simply no telling across-the-board conclusion concerning Congress' desires for the working of the administrative process to be drawn from its decisions, standing alone, to vest certain administrative decisionmaking authority in Presidential subordinates rather than in the President directly. Congress has also chosen, for example, to preserve those subordinates' vulnerability to discretionary Presidential removal, to forego procedural restrictions on *ex parte* White House contacts with those subordinates in the informal rulemaking process,[104] and to subject those subordinates expressly to a major degree of budget and policy coordination by the Executive Office of the President.[105] The picture that emerges from all these decisions is hardly a considered legislative intention to fractionalize Executive power. One could suggest, perhaps more confidently, that Congress has vested decisionmaking authority in individual agencies in recognition that individual agencies

"could" in the same sentence suggests the difficulty inherent in arguing the existence of *facial* illegality based on the possibility of overreaching in a particular case.

102. *Id.* at 130-31.

103. *Id.* at 126.

104. Pub. L. No. 94-904, § 4, 90 Stat. 1241 (1976), *amended* 5 U.S.C. § 557 (1976) to prohibit ex parte communications in formal rulemaking and adjudication. Congress did not so amend the provisions for informal rulemaking.

105. Congress has conferred on the President extensive powers for coordinating the Executive budget, 31 U.S.C. §§ 11, 16 (1976), and proposing agency reorganization, Reorganization Act of 1977, Pub. L. No. 95-17, 91 Stat. 29 (lapsed Apr. 6, 1981), and has vested significant control in OMB over agency regulatory proposals that involve requests for information, Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (1980). This last authority exists even as to "independent" agencies, although such agencies may, by a majority vote of their members, override any disapproval by the Director of OMB of a proposed information request. Legislation to re-extend the President's reorganization authority has passed the Senate and is pending in the House of Representatives. S. 893, 97th Cong., 1st Sess. (1981).

ordinarily possess the key regulatory expertise, and in order to foster decisionmaking accountability by placing final regulatory authority in those officials directly charged with program administration.

On its face, Executive Order No. 12,291 is not inconsistent with these congressional considerations. The order does not purport to vest authority in OMB to usurp the technical analytic functions of individual agencies; nor would OMB likely have the capacity to do so.[106] OMB's evaluation of agency analysis is confined to the limited question whether the agency has sufficiently accounted for cost-benefit principles in the adoption of a regulatory strategy, and indeed, even on this point, any final decisionmaking authority vested by Congress in an agency remains there. For this reason, it is also unlikely that the Executive order initiative will sufficiently centralize regulatory policymaking as to displace agency accountability noticeably for regulatory decisions. Politically, OMB has every incentive to insure that public and legislative pressure focuses on regulatory decisionmaking at the agency level, and if anything, the required publication of RIA's and regulatory agendas should help to concentrate that attention.

More difficult questions would surely be posed if the President were to extend all the provisions of Executive Order No. 12,291 to agencies, the heads of which are not removable at his discretion.[107] It might more plausibly be assumed that, at least in particular cases, such statutory tenure provisions were animated by a legislative purpose to restrain the degree of coercion that a President could employ in constraining the exercise of policymaking discretion by the so-called "independent agencies." The degree to which this is Congress' purpose, and the breadth of Congress' power to limit the President's oversight powers in informal rulemaking by "independent agencies" have never, however, been tested. The functional justifications for limited Presidential oversight are no less compelling for "independent" than for "purely Executive" agencies,[108] and the constitutional objections to

106. See note 81 *supra*.

107. Professor Bruff argues that courts should uphold essentially procedural Presidential directives to independent agencies. Bruff, *supra* note 72, at 498-99. On July 27, 1981, the Legal Times of Washington published a previously unreleased Department of Justice memorandum asserting that the President could require independent agencies at least to prepare RIA's under OMB prescribed criteria. *DOJ Memo on Jurisdiction Over Independent Agencies*, Legal Times of Washington 24 (July 27, 1981).

On March 25, 1981, the Vice President sent a letter to the "independent" regulatory agencies asking their voluntary compliance with sections 2 and 3 of Exec. Order No. 12,291. According to OMB, as of June 13, 1981, seven such agencies "agreed to abide by the spirit and principles of the Executive Order." Executive Office of the President, Materials on President Reagan's Program of Regulatory Relief 12, 94-95 (June 13, 1981).

108. In congressional testimony critical of Presidential involvement in administrative rulemaking, Alan B. Morrison, director of the Public Citizen Litigation Group, stated:

> [I]f it is desirable for the President to intervene in a proceeding, it makes no difference whether the proceeding is conducted by a person who is clearly part of the executive

"fractionalizing" Executive power would be no less pressing.[109] It can only be observed at this point that the President has not yet flung down the gauntlet with respect to "independent agencies," about which it might more justly be presumed that some rule of immunity from full-blown Presidential oversight was intended to be binding on the Executive.

Similarly, it is difficult to discern any significant conflict between the limited oversight established by Executive Order No. 12,291 and the policy of administrative flexibility embodied in the Administrative Procedure Act. The President's requirements do not foreclose any procedural option that the APA affords to an agency. Whatever APA authority an agency has to implement a statute by adjudication or by some form of rulemaking,[110] or, if engaged in some form of rulemaking, to publish or not to publish a notice of proposed rulemaking or to publish or not to publish a final rule in advance of its effective date[111] remains untouched. As indicated earlier in this discussion, the order may as a practical matter affect the timing with which an agency proceeds with a proposed or formal rule. No such result, however, would have any necessary bearing, for example, on the APA's 30-day publication requirement for certain substantive rules and, to the extent the order would conflict with this or any other statutory time requirement, the order expressly requires compliance with its provisions only to the extent legally and practically possible.[112] There is thus no conflict between the requirements of Executive Order No. 12,291 and any provision of the APA, and no facial conflict with any procedural flexibility or "informality" that the APA contemplates. The APA was intended to be, and the Supreme Court has emphatically construed it to be, a set of minimum procedural requirements designed to foster fairness and rationality in the regulatory process.[113] Agencies are free to follow additional procedures;[114] indeed, Congress created the Administrative Conference of the United States in part to recommend to agencies improvements in administrative procedures that agencies can adopt over

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branch or one who is a member of an independent regulatory commission. Thus, in my view, the propriety of Presidential intervention in proceedings involving the safety of consumer products does not depend on whether the product is a television set, which is under the jurisdiction of the independent CPSC, or an automobile, which is regulated by the Department of Transportation, a purely executive agency.

Morrison Statement, *supra* note 88, at 136. It would surely be surprising if regulatory policymakers in the current Administration took a contrary view.

109. Van Alstyne, *supra* note 72, at 136-37.

110. 5 U.S.C. §§ 553-54 (1977).

111. *Id.* § 553.

112. *Exec. Order No.* 12,291, § 8(a)(2).

113. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 524, 543-46 (1978).

114. *Id.* at 543-44.

and above the APA requirements.[115]

If there is inconsistency, as a matter of policy, between the APA and Executive Order No. 12,291, it would only be because Congress, in enacting the APA, likely contemplated that procedural innovations going beyond APA requirements would likely be adopted by the agencies, not by the President. There is, however, no necessary conflict between Congress' presumed underlying intention and Executive Order No. 12,291. The purpose of permitting agencies leeway to adopt new procedures for regulatory decisionmaking was to permit them to discharge their duties most fairly and effectively given the agencies' different mandates and the lessons of their regulatory experience. The purpose of Executive Order No. 12,291 is not to override this sort of finely tuned implementation of regulatory expertise. Instead, the order focuses on the policy coordination of federal regulation, for the limited purposes of encouraging sensitivity to national economic needs and preventing unnecessary duplication and conflict of regulations. These goals are goals that agencies are unlikely, given their individual missions and separate constituencies, to respond to adequately through independent procedural reforms.[116] They are, however, fundamental concerns for the central management of the executive branch. The order does not deprive agencies of their independent authority for procedural reform, and there is no necessary incompatibility between individualized agency reform and limited Presidential oversight.[117]

In sum, I would conclude that the asserted conflicts between Executive Order No. 12,291 and policies underlying the APA or agency statutes do not exist. A more fundamental objection might be made, however, to this mode of analysis in the Rosenberg Report: there exists no justification for treating broad, unstated policy concerns, at most implicit in the enactments of Congress, as binding expressions of legislative will limiting the President's powers of administrative supervision.

This point appears most clearly if the debate over Executive Order No. 12,291 is contrasted with *Youngstown Sheet & Tube Co. v. Sawyer*.[118] Most of the Justices voting in *Youngstown* to invalidate President Truman's steel mill seizure relied in part on Congress' express

115. 5 U.S.C. §§ 571 *et seq.* (1977).

116. See note 84 *supra*.

117. Given Congress' concededly predominant constitutional role in fundamental domestic policymaking, it may also be argued that the President should decline to exercise his administrative prerogatives too strenuously because, in a general sense, Congress undoubtedly desires to protect its political as well as legal leverage over fundamental government policy choices. However important the political ramifications of that observation may be, so long as Congress can preserve its proper oversight role, Congress' general putative desire to "get its way" in regulatory policy disputes does not, standing alone, constitute a legal limit on the President's supervisory powers.

118. 343 U.S. 579 (1952).

rejection, five years before the Truman order, of an amendment to the Taft-Hartley Act that would have authorized such seizures explicitly. Despite the ambiguities that would ordinarily plague judicial efforts to read legislative intent into "non-acts" of Congress, Justice Frankfurter stated: "[N]othing can be plainer that Congress made a conscious choice of policy in a field full of perplexity and peculiarly within legislative responsibility for choice. In formulating legislation for dealing with industrial conflicts, Congress could not more clearly and emphatically have withheld authority than it did in 1947."[119] The Court was sure to be institutionally sensitive in *Youngstown* to permitting the Executive to overstep the bounds of legislative power given the expansive nature of the President's assertion of military authority and the premise, stated by Justice Jackson:

> [N]o doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.[120]

In short, in giving binding effect to the implied will of Congress, the Court was recognizing Congress' recent rejection of precisely the authority for which the Executive contended, in an area of primary legislative responsibility,[121] and under circumstances in which the dangers of Executive usurpation might, as a practical matter, appear to be greatest.

In the current situation, Congress' will, if such a thing exists, has not been recently stated in the express rejection of the power for which the President contends. To the extent Congress was aware, when it enacted the APA in 1946, of arguments for and against presidential oversight of the regulatory process, it did not consider those arguments against the background of an administrative bureaucracy as large, complex, and varied as the one that currently exists. Nor, in exercising powers of supervision and guidance is the President, as a general matter, asserting doubtful Executive powers. To the extent Congress is concerned with preserving its policy prerogatives in the regulatory process, it is institutionally capable of doing so through an oversight system more extensive than the President's, through annual

119. *Id.* at 602 (Frankfurter, J., concurring).
120. *Id.* at 642 (Jackson, J., concurring).
121. The Government conceded, indeed urged, in *Youngstown* that the remedy for the seizure of the steel mills was a legal suit for just compensation in the Court of Claims. *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1402-04 (1973). Only Congress could appropriate funds for this purpose. U.S. CONST. art. I, § 9, cl. 7.

appropriations and authorization battles and through new substantive legislation. Indeed, the risk of Executive usurpation seems all the slighter in this context because the courts are available also, as they might not be in military or foreign affairs disputes, to police fully Executive compliance with Congress' commands.

Given, then, that the President is asserting a rationally inferrable Executive power, the order is rationally related to legitimate purposes, the President is respecting fundamental policy choices mandated by the legislature, and effective checks on the President's exercise of power are available to the other branches of government, I would accord the order, and believe that courts would accord the order, a significant presumption of validity if challenged only on the basis of the "implied will" of Congress.[122] Only by denying such a presumption would the arguments of the Rosenberg Report merit judicial weight. The Rosenberg Report avoids such a presumption only by unjustifiably minimizing the legitimacy of the President's exercise of supervisory power under the "Take Care" clause.[123] In sum, the order is soundly based on article II of the Constitution and does not contravene any congressional limitation on the President's involvement in the administrative process.

D. *The Integrity of Regulatory Process*

As noted above, the Rosenberg Report, in addition to objecting to Executive Order No. 12,291 on separation of powers grounds, suggests also that the order is facially invalid because it fails "to protect the integrity of the policymaking process" from "secret, undisclosed, and unreviewable" *ex parte* contacts by Presidential advisers or private interests.[124] In postponing this point until the end of my legal discussion, and in treating it rather briefly, I do not intend to minimize the importance of procedural fairness as a critical administrative concern or deny that abuse of the "jawboning" process could deflect agencies from policymaking that is consistent with the governing statutes and the record before it.[125]

For two reasons, however, the fact that the order omits any reference to the problem of *ex parte* contacts cannot plausibly be thought to render the order facially invalid. First, nothing that the order requires conflicts in any way with the applicable law of *ex parte* contacts. Sec-

122. The possibility that powers conferred by the order are susceptible to abuse does not raise any question as to the order's facial legality. Bailey v. Richardson, 182 F.2d 46, 62 (D.C. Cir. 1950), *aff'd per curiam*, 341 U.S. 918 (1951).

123. *Rosenberg Report*, *supra* note 10, at 73.

124. *Id.* at 131.

125. For a thorough review of the legal and institutional issues raised by *ex parte* White House communications with regulatory agencies, *see generally* Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1980).

ond, and more important, neither the Constitution nor any statute, as a general matter, prohibits *ex parte* contacts by the President or Presidential advisers in informal rulemaking during or after any public comment period on a proposed rule.

In *Sierra Club v. Costle*,[126] the U.S. Court of Appeals for the District of Columbia recently upheld the substance of the Environmental Protection Agency's (EPA) "scrubber" regulation, which set strict antipollution standards for new coal-fired electric power plants. EPA issued the rule after two years of study and consultation, including White House consultations during and after the public comment period. The Court held that, in the absence of a contrary statute, oral intra-executive contacts may take place during and after the public comment period in informal rulemaking, and supported its conclusion with respect to Presidential contacts by express reference to the President's constitutional powers of administrative supervision.[127]

In sum, the "procedural integrity" issue no more involves a problem regarding the facial validity of Executive Order No. 12,291 than do the separation of powers problems that the Rosenberg Report identifies. However successful the Rosenberg Report may be in identifying questions as to the wisdom of the policies underlying the order, the essential challenge that the Report poses for the order is one only of policy, not one of law.

EXECUTIVE ORDER NO. 12,291 AND REGULATORY REFORM IN PERSPECTIVE

Whatever my disagreements with the legal analysis in the Rosenberg Report and my judgment that it considerably underestimates the legitimacy of the Presidential goals expressed in Executive Order No. 12,291, that report seeks commendably—and in a way foreclosed to the lawyers of the Department of Justice—to place Executive Order No. 12,291 in a broader context of regulatory reform. Having contributed my own legal analysis to the fray, I would like to add three brief points that may help, if such help is needed, to put my own assessment of the order in such a perspective.

First, given the potent centrifugal forces that operate on government policymaking, I would regard as desirable the Administration's experiment with Executive Order No. 12,291 whatever one's views—and my own are decidedly agnostic—concerning the substantive aims of the Administration's regulatory program and the broad use of cost-benefit analysis as the central tool of regulatory analysis. The aim of

126. 657 F.2d 298 (D.C. Cir. 1981).
127. *Id.* at 404-08.

effective management ought not be to favor coordination blindly over diversity, but to achieve, by degrees, a proper balance of the two. There is good reason to think that problems of ineffective management have loomed large among the reasons behind the national government's seeming inability to act expeditiously and decisively on such critical questions as energy and welfare policy. It is worth finding out if the centralized clearinghouse operation that Executive Order No. 12,291 creates can enhance the effectiveness, responsiveness, and accountability of executive branch policymaking.

Second, it is likewise my view that, because of its experimental nature, significant regulatory reform ought initially be pursued through executive branch initiatives instead of omnibus regulatory reform legislation.[128] Whatever consensus may exist as to the proper general purposes of reforming administrative procedures, we have little knowledge concerning the likely impact of wholesale reform on the current regulatory process, and the costs likely to attend any major attempt to restructure permanently the administrative process are likely to be enormous.[129] Seen in this light, an experiment such as Executive Order No. 12,291 offers a tremendous advantage of flexibility. Built into the order, for example, are a set of mechanisms to permit correction and refinement of the process as experience may counsel.[130] Because it is created by Executive order, the program may be changed or eliminated by a succeeding Administration in accord with that Administration's preferred management style. Congress, of course, retains authority at any time to disallow objectionable management practices or to enact into law any reform that proves its merit.

My final "perspective point" concerns the need for greater attention to the problems of interpreting the President's powers in the administrative process. The judicial materials on which both the Department of Justice memorandum and the Rosenberg Report necessarily rely amply demonstrate the paucity of helpful legal precedent in this area. *Youngstown Sheet & Tube Co. v. Sawyer*,[131] typically cited as the leading case on congressional limitations upon Presidential power, involved fairly extraordinary circumstances and evoked six opinions from the majority. The other major source of relevant legal authority,

128. Omnibus regulatory reform legislation is currently pending in both the Senate, S. 1080, 97th Cong., 1st Sess. (1981), and House of Representatives, H.R. 746, 97th Cong., 1st Sess. (1981). Congress has had similarly far reaching bills under consideration for the last two sessions.

129. On the potential impact of amendments to the APA provisions on judicial review that would be effected by currently pending bills, *see* Letter of Wm. E. Foley, Dir. of the Admin. Office of the U.S. Courts, to Rep. Geo. E. Danielson (July 20, 1981), *reprinted in* LEGAL TIMES OF WASHINGTON Jul. 27, 1981, at 20.

130. *Exec. Order No, 12,291*, §§ 6, 8(b).

131. 343 U.S. 579 (1952).

Supreme Court opinions on the President's discretion to remove subordinate executive officers,[132] address a question involving far less practical significance, and therefore less complex and compelling policy concerns, than the broad question of the President's proper role in administrative policymaking generally. Against this background, the need for detailed attention both to the President's powers under article II, and principles by which such powers ought to be construed, is clear.

As the nation's problems grow more complex and the difficulties in achieving effective government action seem more profound, pressure will surely increase for Presidential coordination of administrative policymaking. Such pressure will inevitably raise questions concerning not only the executive agencies, but the so-called "independent agencies" as well.[133] The President's lawyers, Congress, and the courts will confront with increasing urgency both legal questions concerning the President's powers and policy questions concerning the appropriate design of a regulatory management system that balances fairness and openness with efficiency, effectiveness, and accountability.

132. *See generally* Humphrey's Executor v. United States, 295 U.S. 602 (1935); Myers v. United States, 272 U.S. 52 (1926).

133. See note 108 *supra*.