Regulator-In-Chief:
The Presidency, Red Tape, and the Transformation of the Administrative State, 1975-1981

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Introduction

In the second month of the Trump Administration, Steve Bannon – the president's chief political strategist – boasted to the Conservative Political Action Conference (CPAC) that the White House was working on a daily basis to "deconstruct the administrative state."[1] Bannon's words were not hot air. Already by late February, President Trump had issued executive orders halting the enforcement of federal health protections and environmental regulations, as well as an order directing federal agencies to repeal two regulations for each new one proposed.[2] Moreover, Trump had nominated cabinet secretaries based seemingly on their animus toward their prospective agencies, ensuring the federal government would soon be staffed by a cohort of zealous deregulators.[3] In other words, Bannon's address to CPAC was not a mere instance of rhetorical posturing. He, the president, and other high-ranking advisers were poised to orchestrate the deepest rollbacks in a generation.

Since Bannon's opening salvo, the Trump Administration has coordinated a wide-ranging assault on the federal regulatory apparatus. At the president's direction, the administration has completed high-profile rescissions of Net Neutrality, the Clean Power Plan, and protections for national monuments.[4] The administration has also eliminated rules pertaining to fracking, labor

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[1] Philip Rucker and Robert Costa, "Bannon Vows a Daily Fight for 'Deconstruction of the Administrative State,'" *The Washington Post*, Feb. 23rd, 2017, https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html?utm_term=.f82ab03412fa

[2] Exec. Order 13765, "Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal," 82 *Federal Register* 8351 (January 20th, 2017); Exec. Order 13766, "Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects," 82 *Federal Register* 8657 (Jan. 30th, 2017); and Lydia Wheeler and Lisa Hagen, "Trump Signs 2-for-1 Order to Reduce Regulations," *The Hill*, Jan. 30th, 2017, http://thehill.com/homenews/administration/316839-trump-to-sign-order-reducing-regulations

[3] Meg Jacobs, "Trump is Appointing People Who Hate the Agencies They Will Lead," *CNN.com*, Dec. 12, 2016, https://www.cnn.com/2016/12/10/opinions/government-is-the-problem-jacobs/index.html

[4] Aja Romano, "Net Neutrality is Officially Repealed: Here's What Happens Next," *Vox*, Jun. 11th, 2018, https://www.vox.com/2018/6/11/17448680/fight-to-save-net-neutrality-repealed-what-next; Lisa Friedman and Brad Plumer, "EPA Announces Rules to Replace Clean Power Plan," *The New York Times*, Jul. 5th, 2018,

arbitration, stream protection, and coal and mineral royalties. Apart from outright repeals, federal departments have delayed a variety of pending rulemakings, including proposed standards for fuel economy, methane and waste prevention, prescription drug pricing, and train safety.[5] Trump appointees have also attacked many of the underlying foundations of regulatory policy, waging war on the science that informs administrative action,[6] proposing severe reductions to the federal budget,[7] and revoking dozens of agency "guidance documents" that promote effective compliance.[8]

The president has not been bashful about his deregulatory triumphs. Last December, he concluded a press conference by cutting a piece of red tape with a giant pair of scissors,[9] and this January he tweeted, "The Trump Administration has terminated more UNNECESSARY Regulation, in just twelve months, than any other Administration has terminated during their full term in office, no matter the length. The good news is, THERE IS MUCH MORE TO COME!"[10]

Only four years prior, regulatory policy headed in a very different direction. Long before anyone could imagine Trump's improbable rise and deregulatory offensive, the Obama administration was churning out sweeping new rules in a variety of fields. President Obama turned to executive action in response to Republican opposition in Congress, and his regulators

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https://www.nytimes.com/2018/07/05/climate/clean-power-plan-replacement.html; and Nadja Popovich, "Bears Ears National Monument is Shrinking: Here's What is Being Cut," *The New York Times*, Dec. 8th, 2017, https://www.nytimes.com/interactive/2017/12/08/climate/bears-ears-monument-trump.html

[5] Brookings Institution Center on Regulation and Markets, "Tracking Deregulation in the Trump Era," Oct. 20th, 2017, https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era/

[6] Jeff Tollefson, "Science Under Siege: Behind the Scenes at Trump's Troubled Environmental Agency," *Nature*, Jul. 12th, 2018, https://www.nature.com/articles/d41586-018-05706-9

[7] Dylan Matthews, "Donald Trump's First Budget Outline, Explained," *Vox*, Mar. 17th, 2017, https://www.vox.com/policy-and-politics/2017/3/16/14912638/trump-budget-2018-explained-cuts-growth

[8] Moriah Balingit, "DeVos Rescinds 72 Guidance Documents Outlining Rights of Disabled Students," *The Washington Post*, Oct. 21st, 2017, https://www.washingtonpost.com/news/education/wp/2017/10/21/devos-rescinds-72-guidance-documents-outlining-rights-for-disabled-students/?utm_term=.cd378e78ae92

[9] Brenna Williams, "Trump Literally Cuts the Red Tape on Regulations," *CNN.com*, Dec. 14th, 2017, https://www.cnn.com/2017/12/14/politics/trump-deregulation-in-gifs/index.html

[10] Donald J. Trump (@realDonaldTrump), *Twitter*, Jan 20th, 2018, 7:47 PM, https://twitter.com/realdonaldtrump/status/954878124214415360

implemented a wave of new controls in the fields of finance, healthcare, and environmental and consumer protection, to name a few.[11] At the time, Republicans decried Obama's actions as a "job-killing" regulatory explosion, accusing the president of executive over-reach and introducing a variety of proposals to restrain the administrative state and restore the separation of powers.[12] Conservative judges and legal scholars also chimed in, arguing it was high time to reconsider doctrines that enabled Obama's administrative excess.[13] Of course, those same conservatives did not have to wait long for a dramatic pendulum swing. As they would see in only a matter of years, Donald J. Trump would cruise to victory in the 2016 presidential election, assume control of the administrative apparatus, and steer the machinery of government – to Republicans' delight – in the direction of what Steve Bannon called "deconstruction."

Presidents have long wielded important powers of administrative control. By virtue of their appointment and removal power under the Constitution, presidents have shaped the composition and basic orientation of both "independent" agencies like the Federal Trade Commission (FTC) and executive branch agencies like the Environmental Protection Agency (EPA). Due to explicit grants of authority from Congress – such as the 1921 Budget and Accounting Act and 1939 Reorganization Act – they have claimed additional powers over

[11] Binyamin Applebaum and Michael D. Shear, "Once Skeptical of Executive Power, Obama Has Come to Embrace it," *The New York Times*, Aug. 13th, 2016, https://www.nytimes.com/2016/08/14/us/politics/obama-era-legacy-regulation.html?mtrref=thehill.com&gwh=2B0315A9C28DE3D717C8CD120F10D0C4&gwt=pay; and Lydia Wheeler and Tim Devaney, "Obama Eyes 'Audacious' Use of Executive Power in Final Year," *The Hill*, Jan. 18th, 2016, http://thehill.com/regulation/administration/266133-obama-eyes-audacious-use-of-executive-power-in-final-year

[12] Neil Siefring, "The REINS Act Will Keep Regulators and their Costs in Check," *The Hill*, Aug. 4th, 2015, http://thehill.com/blogs/pundits-blog/economy-budget/250178-the-reins-act-will-keep-regulations-and-their-costs-in; and Iain Murray, "Big Brother? How SOPRA Can Help Restore Proper Authority," *The Hill*, Jul. 7th, 2016, http://thehill.com/blogs/congress-blog/judicial/287248-big-brother-how-sopra-can-help-restore-proper-authority; and

[13] For three examples see Justice Clarence Thomas' concurrence critiquing *Chevron* deference in *Michigan v. Environmental Protection Agency*, 576 U.S. ___ (2015); then-Judge Neil Gorsuch's opinion in *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (2016); and also Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014)

agency resources and the organizational structure of the executive branch. Moreover, through a growing apparatus centered in the Executive Office of the President (EOP), presidents have used a handful of advisory councils – most notably, the National Security Council – to supervise the work of cabinet secretaries and executive departments.[14]

For much of the twentieth century, however, these pillars of administrative control (referred to as the "administrative presidency" by political scientists) stopped short of forcing strict adherence to presidential priorities. Indeed, one of the leading mantras of administrative regulation – that federal agencies enjoy a degree of separation from the political branches – long functioned as a shield against presidential control. Precisely because they had great faith in the power of independent experts to solve complex problems, the Progressive-Era and New Deal architects of the administrative state structured the regulatory process around the maxim of independent expertise. Through staggered terms of office and limits on politically-based removals, Congress insulated the independent commissions from presidential manipulation. Moreover, under the 1946 Administrative Procedure Act (APA), the vast bulk of administrative operations were judicial or "quasi-judicial" in nature. Like the independent judiciary, agencies were to make decisions based on adjudicatory hearings that involved strict rules of evidence, the accumulation of a written record, and other formal procedures that ensured impartiality. According to pioneering bureaucrats like James M. Landis, these mechanisms were vital to the

[14] See generally Stephen Hess, *Organizing the Presidency*, (Washington DC: Brookings Institution, 1988); Larry Berman, *The Office of Management and Budget and the Presidency, 1921-1979*, (Princeton: Princeton University Press, 1979); Barry D. Karl, *Executive Reorganization and Reform During the New Deal: The Genesis of Administrative Management, 1900-1939*, (Cambridge: Harvard University Press, 1963); and also Sidney M. Milkis, *The President and the Parties: The Transformation of the American Party System Since the New Deal*, (New York: Oxford University Press, 1993), pp. 101-111, 125-146

workings of the administrative state, thwarting overt political influence and giving agencies, in turn, the necessary autonomy to apply their expertise to their statutory missions.[15]

As a consequence of this independence, however, presidents claimed few direct powers of policy coordination. In the late 1930s, President Roosevelt's Committee on Administrative Management expressed frustration about this reality, calling the regulatory apparatus a "headless fourth branch of government."[16] While the committee's language was indeed hyperbolic – and was meant to build support for sweeping new presidential powers – it contained important seeds of truth. Chief executives could select the members and organize many of the initial parameters of administrative governance, but their power over agencies' ensuing policy actions was sparse. By the early 1960s, during the twilight struggle of the Cold War and perhaps the height of expert influence on policy, presidents ceded the importance of independence in this regard, maintaining it was improper to interfere in the day-to-day workings of the regulatory process. In 1961, President Kennedy put forth this view in a special message to Congress, claiming administration – once constituted – should remain at arm's length:

> Neither the president nor Congress should intrude or seek to intervene in those matters which by law these agencies have to decide on the basis of open and recorded evidence, where they, like the judiciary, must determine independently what conclusion will best serve the public interest as that interest may be defined by law. Intervention, if it be deemed desirable by the executive or the Congress in any such matter, must be as a party or an intervenor in the particular proceeding; and such intervention should be accorded to no special preference or influence.[17]

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[15] For more on the various features of agency independence see generally E. Pendleton Herring, *Public Administration and the Public Interest*, (New York: Russell & Russell, 1936); James H. Landis, *The Administrative Process*, (New Haven: Yale University Press, 1938); Robert E. Cushman, *The Independent Regulatory Commissions*, (New York: Oxford University Press, 1941); Merle Fainsod and Lincoln Gordon, *Government and the American Economy*, (New York: W.W. Norton & Co., 1941); and Marver H. Bernstein, *Regulating Business by Independent Commission*, (Princeton: Princeton University Press, 1955)

[16] President's Committee on Administrative Management, *Studies on Administrative Management in the Government of the United States*, (Washington DC: U.S. Government Printing Office, 1937)

[17] "White House Special Message on Regulatory Agencies," 107 *Cong. Rec*. 5357 (Apr. 13th, 1961)

Notwithstanding presidents' arsenal of administrative powers, the credo of independent expertise long functioned as a powerful defense. This, in turn, meant that regulators rarely moved in lockstep with the changing occupants of the Oval Office.

Fast forward to 2018 and the state of American governance looks very different. That is because presidents wield a new level of dominance over an increasingly politicized administrative state. The best measure of this sea change are the radical reversals in regulatory policy that Presidents Obama and Trump were each able to engineer, with very little help from either Congress or the Courts. In the words of one Harvard law professor-turned Supreme Court Justice, "We live today in an era of Presidential Administration." Regulations formulated by one administration hardly have time to weather court challenges before they are rescinded via executive order by the next (as was the case recently with EPA's Clean Power Plan). While a variety of factors have driven this process of politicization, two specific devices promote heightened congruence with presidential priorities.[18]

First and foremost is an institutional process known as "regulatory review." Administered by an executive office called the Office of Information and Regulatory Affairs (OIRA), regulatory review is a formal procedure that allows White House advisers to review, modify, and even veto the regulations of executive agencies before they are finalized. Called the "cockpit" of the regulatory state by one former member, OIRA gives presidents centralized substantive control over an array of policies. Currently, regulatory reviews are controlled by OIRA Administrator Neomi Rao, a former George Mason law professor, who some observers have labelled the Trump Administration's "deregulation czar." Second is an overarching constitutional

[18] Elena Kagan, "Presidential Administration," *Harvard Law Review*, Vol. 114 Issue 8 (2001): 2245-2385, pp. 2245; and Nathan Rott, "Trump Moves to Let States Regulate Coal Plant Emissions," *NPR.com*, Aug. 21st 2018, https://www.npr.org/2018/08/21/639396683/trump-moves-to-let-states-regulate-coal-plant-emissions

theory – known as the "unitary executive" – that supports the idea of administration as a mere instrument of the president's will. Unitary theory holds that because Article II of the Constitution grants "the executive power" exclusively to the president, the president in turn possesses absolute authority over the myriad operations of the executive branch. This provides a legal foundation not only for OIRA, but for the routine use of executive action. These two devices – unitary theory and regulatory review – have helped transform the administrative state from a patchwork of distant outbuildings into an interconnected compound managed by presidents and their advisers.[19]

Scholars of American Political Development and American law have long argued the Reagan Administration was responsible for these expansions to presidential power. Typically, scholars tell some version of the following story. After famously declaring "government is the problem" in his first inaugural address, Reagan moved to dismantle the rules and regulations of postwar liberalism in what subsequently became known as the "Reagan Revolution." To engineer this sweeping shift, the White House boldly seized control of the administrative state, using broadened executive power as its principal deregulatory tool. One particular action looms large in extant accounts of this period. Issued by President Reagan shortly after his inauguration, Executive Order 12291 established OIRA as the central clearinghouse for executive branch

[19] For more on regulatory review see Christopher C. Demuth and Douglas H. Ginsburg, "White House Review of Agency Rulemaking," *Harvard Law Review*, Vol. 99 Issue 5 (1985): 1075-1088; Peter L. Strauss and Cass R. Sunstein, "The Role of the President and OMB in Informal Rulemaking," *Administrative Law Review*, Vol. 38 Issue 2 (1986): 181-208; and Harold H. Bruff, "Presidential Management of Agency Rulemaking," *George Washington Law Review*, Vol. 57 Issue 3 (1989): 533-595; and for more on the unitary executive see Steven G. Calabresi and Kevin H. Rhodes, "The Structural Constitution: Unitary Executive, Plural Judiciary," *Harvard Law Review*, Vol. 105 Issue 6 (1992): 1153-1216; Saikrishna B. Prakash, "Hail to the Chief Administrator: The Framers and the President's Administrative Powers," *Yale Law Journal*, Vol. 102 Issue 4 (1993): 991-1018; Steven G. Calabresi and Saikrishna B. Prakash, "The President's Power to Execute the Laws," *Yale Law Journal*, Vol. 104 Issue 3 (1994): 541-666; Lawrence Lessig and Cass R. Sunstein "The President and the Administration," *Columbia Law Review*, Vol. 94 Issue 1 (1994): 1-123; and Cynthia R. Farina, "The Chief Executive and the Quiet Constitutional Revolution," *Administrative Law Review*, Vol. 49 Issue 1 (1997): 179-186

regulations and stipulated, additionally, that all proposed rules pass a strict "cost-benefit" test.[20] To support the order (as well as other novel uses of presidential authority), Reagan's Department of Justice (DOJ) developed the theory of the unitary executive, claiming agencies were mere instrumentalities of the president and in turn needed to follow deregulatory marching orders.[21] The conventional wisdom, then, is that conservatives centralized presidential control in the 1980s for the purpose of orchestrating Reagan's anti-government agenda. Indeed, the vast majority of scholars equate the expansion of the administrative presidency with the cresting of free-market conservatism in the 1980s.[22]

The following chapters tell a different story. By deepening our understanding of the regulatory state in the last third of the twentieth century, they identify the mid and late 1970s as the formative period of institutional development. New Deal liberals and New Democrats, not the New Right, were the principal architects of this structure. As the dissertation shows, the notoriously weak Carter Administration laid the groundwork for the muscular presidentialism of the Reagan Era. In a great irony of political history, advisers to Jimmy Carter built the legal and

[20] Exec. Order 12291, "Federal Regulation," 46 *Federal Register* 13193, (Feb. 17th, 1981)
[21] For examples see Office of Legal Counsel, "Memorandum: Proposed Executive Order Entitled Federal Regulation," Feb. 13th, 1981, pp. 59-68; Office of Legal Counsel, "Memorandum Opinion for the Director, Office of Management and Budget: Contacts between the Office of Management and Budget and Executive Agencies Under Executive Order No. 12291," Apr. 24th, 1981, pp. 107-115; William French Smith, "Separation of Powers in the U.S. Constitution," *Arkansas Lawyer*, Vol. 18 Issue 1 (1984): 40-44; and Edwin Meese III, "Toward Increased Government Accountability," *Federal Bar News & Journal*, Vol. 32 Issue 10 (1985): 406-408
[22] For this view see generally Richard A. Harris and Sidney M. Milkis, *The Politics of Regulatory Change: A Tale of Two Agencies*, (New York: Oxford University Press, 1996); Sidney M. Milkis and Michael Nelson, *The American Presidency: Origins and Development, 1776-2001*, (Washington DC: CQ Press, 2012); Terry M. Moe, "The Politicized Presidency," in John E. Chubb and Paul E. Peterson eds., *The New Direction in American Politics*, (Washington DC: Brookings Institution Press, 1985), pp. 235-271; Julian E. Zelizer, "The Conservative Embrace of Presidential Power," *Boston University Law Review*, Vol. 88 Issue 2 (2008): 499-503; Meg Jacobs and Julian E. Zelizer, *Conservatives in Power: The Reagan Years, 1981-1989*, (Boston: Bedford/St. Martin's, 2011); Theda Skocpol and Paul Pierson, eds., *The Transformation of American Politics: Activist Government and the Rise of Conservatism*, (Princeton: Princeton University Press, 2007); Gil Troy, *The Reagan Revolution: A Very Short Introduction*, (New York: Oxford University Press, 2009); Paul Pierson, *Dismantling the Welfare State?: Reagan, Thatcher, and the Politics of Retrenchment*, (New York: Cambridge University Press, 1994); and also Barry D. Friedman, *Regulation in the Reagan-Bush Era: The Eruption of Presidential Influence*, (Pittsburgh: University of Pittsburgh Press, 1995)

institutional frameworks for regulatory review and the unitary executive, only to see these co-opted and wielded for entirely different purposes by their Republican successors. In its effort to centralize presidential control, the Carter Administration received critical support from a Washington lawyer named Lloyd N. Cutler. This is where the dissertation begins. In 1975, the year after the conclusion of the Watergate scandal, Cutler began advocating for greater presidential powers. In an article published that year in the *Yale Law Journal*,[23] Cutler expressed the growing concern that federal regulations were contributing to double-digit inflation – the most serious national economic issue since the 1930s. In turn, Cutler proposed the radical idea – a mere 12 months after Watergate – that chief executives tighten their grip on federal agencies in order to align them with new economic priorities. To this end, Cutler called for Congress to enact a statute granting presidents new authority to "modify" and "direct" federal regulations. Subsequently, he led a multi-year study group funded by the American Bar Association (ABA) that aimed to build legitimacy for his ideas.

A former New Deal bureaucrat and veteran of the Washington beltway, Cutler exhibited remarkable foresight. Several years after his *Yale Law Journal* piece, the Carter White House began the first-ever regulatory reviews, motivated by the same idea: regulations were helping accelerate rising inflation. Through a new executive office called the Regulatory Analysis Review Group (RARG), presidential advisers began intervening in pending administrative proceedings, attempting to jawbone regulators into incorporating "cost-effective" or "non-inflationary" approaches to enforcement. Quickly, however, these reviews sparked legal challenges from public interest groups, who defended traditional agency independence. Regulators needed to make decisions independently and without special political preference,

[23] Lloyd N. Cutler and David R. Johnson, "Regulation and the Political Process," *Yale Law Journal*, Vol. 84 Issue 7 (1975): 1395-1418

their defenders argued. That is when the White House enlisted the expertise of Cutler and his ABA colleagues, who played a critical role legitimating – both legally and politically – new uses of presidential power. After months of painstaking legal and political work, the administration finally secured a firm foundation for both regulatory review and the unitary executive.

The ultimate victory came in a case called *Sierra Club v. Costle*,[24] decided by the ever-important U.S. Court of Appeals for the District of Columbia Circuit. In *Sierra Club*, the DC Circuit ratified the practice of regulatory review as conducted by RARG, determining (for the very first time) the White House could constitutionally modify the decisions of executive branch agencies. Handed down in the early months of 1981, *Sierra Club* involved an EPA rule that had been modified by presidential advisers and issued during the final months of the Carter presidency. Practically speaking, however, the decision enabled the incoming administration's deregulatory offensive. In fact, Reagan implemented much of his agenda not by breaking revolutionary new ground, but by quickly mastering the tools and precedents already put in place by Democrats.

In telling this story, the dissertation makes a number of distinct historiographical contributions. First, the project revises the origin story of the modern administrative presidency. Specifically, it argues that new tools of presidential control were not the invention of Reagan-Era conservatives, but the response of an embattled Democratic Party to the economic crises of the 1970s. Rather than neoliberal tools designed for deregulation, regulatory review and unitary theory were originally conceived as instruments for making policy tradeoffs during an era of scarcity, not as naked, anti-government devices. Only later, when the Reagan Administration wielded them to suspend and delay regulations altogether, did they acquire a new conservative

[24] *Sierra Club v. Costle*, 657 F.2d 298 (1981)

valence. On the whole, however, the dissertation challenges the partisan tropes of twentieth-century political history. Typically, scholars working in this field draw a sharp line between Democratic state-building and Republican-engineered deregulation, emphasizing the rift between New Deal and Great Society liberals (who grow government) and the leaders of the New Right and movement conservatism (who aim to limit its scope). The dissertation tells a more nuanced, less ideologically-skewed story in which liberals, under the pressure of sustained economic crisis, remade governing institutions in ways that ironically facilitated Reagan's free-market agenda. By highlighting the groundwork laid by moderate Democrats like Cutler and Carter, the project unsettles the "red-blue divide" ingrained in historical scholarship.[25]

[25] For examples of this approach see Matthew D. Lassiter, "Political History Beyond the Red-Blue Divide," *Journal of American History*, Vol. 98 Issue 3 (2011): 760764; and Brent Cebul, Lily Geismer, and Mason Williams, eds., *Shaped by the State: Toward A New Political History of the Twentieth Century*, (Chicago: University of Chicago Press, 2018)

"Regulation and the Political Process": Lloyd Cutler and the Idea of Presidential Directives

Fig. 1 Lloyd N. Cutler, pictured in 1983 following his service in the Carter Administration.[1]

By the early 1970s, Lloyd Cutler was one of the most powerful attorneys working in Washington DC. He had his own firm – Wilmer, Cutler & Pickering – and he advised some of the world's most powerful companies; including General Motors, IBM, and American Airlines. Cutler had worked in government during the administrations of Franklin Delano Roosevelt and Harry Truman, and then decided, after the war ended, to establish his own DC firm and enter private practice. Cutler thus followed the path of many of his peers in the legal profession, migrating from government work at federal agencies to advising private clients. By the 1960s, he had guided Wilmer, Cutler & Pickering to the upper echelon of Washington practice alongside Arnold & Porter, Covington & Burling, and other major firms inside the beltway. In 1969,

[1] C-SPAN.org, "Interview with Lloyd Cutler," conducted Jun. 8th, 1983, https://www.c-span.org/video/?88705-1/interview-lloyd-cutler

Fortune magazine labelled Cutler the "model of a modern legal conduit." Like many former government officials – who understood the mechanics of the policy process – Cutler had transitioned into the role of Washington lawyer and power broker.[2]

Cutler had law in his veins. His father had been a trial lawyer in New York City who had written several casebooks on evidence and eventually practiced with then-Congressman Fiorello LaGuardia. As a child living in Brooklyn, Cutler often visited his father's Manhattan law offices. The law "looked exciting," Cutler later recalled, and at an early age he decided he wanted to go to law school and follow in his father's professional footsteps.[3]

In 1936 Cutler enrolled at the prestigious Yale Law School – at a time when Yale was at the forefront of the legal realist movement.[4] After graduating with honors, and as editor-in-chief of the law journal,[5] Cutler clerked on the U.S. Court of Appeals for the Second Circuit. The court was a familiar stop for Yale graduates because two of its judges – Charles Edward Clark and Jerome Frank – had formerly been on the Yale faculty. After finishing his clerkship, Cutler remained in New York City and joined the original corporate law office: Cravath, Swaine, & Moore. However, in a move which surely pleased his Yale mentors, Cutler left Cravath after only a year to reenter public service. Throughout the New Deal, Yale and the other elite law schools had been sending talented students like Cutler to the nation's capital – to serve in the growing number of federal agencies that were infused with the process of law and that were

[2] Sheldon Zalaznick, "The Small World of Big Washington Law Firms," *Fortune*, Vol. 80, Sept. 1969, pp. 120-124
[3] His father's firm was a small litigation shop called Foster, LaGuardia & Cutler; for more on Cutler's upbringing in New York see "Interview with Lloyd Cutler: Final Edited Transcript," conducted May 29th, 2003, *Lloyd Cutler Biographical Oral History Project*, Miller Center for Public Affairs, University of Virginia, pp. 2-5
[4] For more on Yale as an epicenter of realist legal thought see generally Laura Kalman, *Legal Realism at Yale, 1927-1960* (Chapel Hill: University of North Carolina Press, 1986)
[5] During Cutler's tenure as editor of the law journal, he had the privilege of working one-on-one with the great realist scholar Karl Llewelyn, who was then at Columbia Law and who published a series for the *Yale Law Journal* in the late 1930s; for more on Cutler's time in law school, see "Interview with Lloyd Cutler," pp. 16-22

deeply reliant on legal expertise. In 1942, with the other Yale, Harvard, and Columbia graduates joining the New Deal and "warfare state," Cutler arrived in Washington DC.[6]

Cutler's first job in Washington was as an Assistant General Counsel in the Lend-Lease Administration. In this capacity, he worked on the legal and logistical aspects of delivering war supplies, at one point managing supply chains for "Operation Torch," the massive Allied invasion of North Africa. Working in the counsel's office required Cutler devote most of his time to coordinating military operations with other federal agencies, with foreign governments, and with the private companies that had wartime contracts.[7]

In this complex managerial role, Cutler learned from two of the most esteemed and politically savvy bureaucrats of their time: Thomas G. Corcoran and Benjamin V. Cohen. Corcoran and Cohen were members of President Roosevelt's "Brain Trust" who set up and ran many of the agencies created to address the depression and eventually win the war. Trained at Harvard Law School by the influential Felix Frankfurter,[8] Corcoran and Cohen helped write a host of New Deal legislative milestones, including the 1933 Securities Act and the 1938 Fair Labor Standards Act.[9] Later, they drafted the Lend-Lease policy and ran the agency that administered this program. Corcoran and Cohen were "operators," Cutler later remembered, who

[6] For more on Cutler's experience clerking on the Second Circuit see "Interview with Lloyd Cutler," pp. 26-30; for more on his time at Cravath see Ibid, pp. 30-34; and for more on the founding of the Cravath system and, later, the migration of elite law school graduates into government service during the New Deal see Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America*, (New York: Oxford University Press, 1976), pp. 14-39, 191-230

[7] "Interview with Lloyd Cutler," pp. 38-39, 42-43, 44-53

[8] For more on Frankfurter's role specifically see G. Edward White, "Felix Frankfurter, the Old Boy Network, and the New Deal: The Placement of Elite Lawyers in Public Service in the 1930s," *Arkansas Law Review*, Vol. 39 Issue 4 (1986): pp. 631-668

[9] For more on the importance of New Deal lawyers see Auerbach, *Unequal Justice*, pp. 191-230, Peter H. Irons, *The New Deal Lawyers*, (Princeton, NJ: Princeton University Press, 1982); and G. Edward White, "Recapturing New Deal Lawyers," *Harvard Law Review*, Vol. 102 Issue 2 (1988): 489-521; and for key biographical accounts see David McKean, *Tommy the Cork: Washington's Ultimate Insider from Roosevelt to Reagan*, (South Royalton, VT: Steerforth Press, 2004), and Thomas I. Emerson, *Young Lawyer for the New Deal: An Insider's Memoir of the Roosevelt Years*, (Savage, MD: Rowman & Littlefield, 1991)

supervised him at his first job in the counsel's office and who helped him "learn the ropes" of being an administrator.[10] It was hard to imagine Cutler having a more decorated pair of mentors at his first gig in Washington. In 1938, for instance, Corcoran and Cohen appeared on the cover of *Time* magazine as the "Gold Dust Twins" of the federal government. When it came to the nuts and bolts of policymaking, Cutler learned from the very best.[11]

Over the 1940s, Cutler worked at a number of other posts within the executive branch. In 1942, he was briefly recruited away from Lend-Lease to help a small team at the Department of Justice (DOJ) prosecute the eight Nazi saboteurs who had been arrested upon landing in the United States. In 1944 Cutler permanently departed Lend-Lease – after roughly two years at the agency – to join a special division at the Department of Defense (DOD). There, he focused on code-breaking and counter-intelligence and worked with a team of analysts to prepare the president's daily intelligence briefings during a critical stage of the war. Thus, by the mid-1940s Cutler had risen to the very top of the civilian military establishment, had formed personal relationships with many of the major players – including Cyrus Vance, Eugene Rostow, and McGeorge Bundy – and had learned the intricacies of the governmental system from several vantage points.[12]

[10] "Interview with Lloyd Cutler," pp. 44
[11] *Time Weekly Magazine*, "Thomas Corcoran and Benjamin V. Cohen," Vol. 32 No. 11, Sept. 12th, 1938
[12] For more on Cutler's career in government see "Interview with Lloyd Cutler," pp. 40-42, 53-63

Anyone in Cutler's position could have seen the allure of private practice. The expansion of federal administrative controls during the New Deal,[13] World War II,[14] and afterward generated a staggering amount of new legal business. As federal regulation – itself a legal apparatus patterned on the adversarial system[15] – exploded in the United States, so did the number of private stakeholders who demanded representation inside the beltway, who sought out insiders like Cutler to help them navigate the complexities of the administrative state. Of course, the fact that many federal programs relied on an "associational" model of governance[16] – which

[13] For the voluminous literature on the expansion of federal administrative capacities during the Progressive Era and New Deal see Robert H. Wiebe, *The Search for Order, 1877-1920*, (New York: Hill & Wang, 1967); Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920*, (New York: Cambridge University Press, 1982); Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States*, (Cambridge: Belknap Press of Harvard University Press, 1992); Barry Karl, *The Uneasy State: The United States from 1915 to 1945*, (Chicago: Chicago University Press, 1983); Morton Keller, *Regulating a New Economy: Public Policy and Economic Change in America, 1900-1933*, (Cambridge: Harvard University Press, 1990); Daniel Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation at Executive Agencies, 1862-1928*, (Princeton: Princeton University Press, 2001); Ellis W. Hawley, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence*, (Princeton: Princeton University Press, 1966); Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War*, (New York: Alfred A. Knopf, 1996); Jason Scott Smith, *Building New Deal Liberalism: The Political Economy of Public Works, 1933-1956*, (New York: Cambridge University Press, 2006); and also Ira Katzelson, *Fear Itself: The New Deal and the Origins of Our Time*, (New York: W.W. Norton & Co., 2013)

[14] A few recent examples include James T. Sparrow, *Warfare State: World War II Americans and the Age of Big Government*, (New York: Oxford University Press, 2011); Jennifer Mittelstadt, *The Rise of the Military Welfare State*, (Cambridge: Harvard University Press, 2016); and Mark R. Wilson, *Destructive Creation: American Business and the Winning of World War II*, (Philadelphia: University of Pennsylvania Press, 2016)

[15] For more on the "judicialization" of the administrative process see Daniel Ernst, *Tocqueville's Nightmare: The Administrative State Emerges in America, 1900-1940*, (New York: Oxford University Press, 2014); Joanna Grisinger, *The Unwieldy American State: Administrative Politics Since the New Deal*, (New York: Cambridge University Press, 2012), pp. 59-108; and also Ernst, "*Morgan* and the New Dealers," *Journal of Policy History*, Vol. 20 No. 4 (2008): pp. 447-481

[16] For early work on the associational order see Ellis W. Hawley, "Herbert Hoover, the Commerce Secretariat, and the Vision of an 'Associative' State, 1921-1928," *The Journal of American History*, 60.1 (1974): 116-140; Hawley, *The Great War and the Search for a Modern Order: A History of the American People and their Institutions*, (New York: St. Martin's Press, 1979); Louis Galambos, *Competition & Cooperation: the Emergence of A National Trade Association*, (Baltimore: Johns Hopkins Press, 1966); and for more recent scholarship see Brian Balogh, *A Government Out of Sight: The Mystery of National Authority In Nineteenth-century America*, (Cambridge: Cambridge University Press, 2009); Balogh, *The Associational State: American Governance in the Twentieth Century*, (Philadelphia: University of Pennsylvania Press, 2015); Christopher P. Loss, *Between Citizens and State: The Politics of American Higher Education in the 20th Century*, (Princeton: Princeton University Press, 2012); and also Laura Phillips Sawyer, *American Fair Trade: Proprietary Capitalism, Corporatism, and the "New Competition," 1890-1940*, (New York: Cambridge University Press, 2018)

delegated implementation to private groups – amplified the importance of retaining lawyers who knew the major players at the bargaining table.

Over the mid-twentieth century, Washington practice boomed as a legal occupation. In 1949, there were roughly 3,000 lawyers practicing in the nation's capital. Within a decade, that number had more than doubled. For Cutler's firm specifically, the early 1970s had been years of immense growth. Between 1970 and 1974 – when a wave of new health, safety, and environmental regulations were implemented – Wilmer, Cutler & Pickering more than doubled in size. Cutler was thus one example of the symbiosis that developed in the mid-twentieth century between the bureaucratic apparatus and the cadre of DC practitioners who understood how it worked. "The Washington law business," explained one of Tommy Corcoran's partners in 1969, "stays in a bull market no matter what."[17]

Politically, Cutler was a long-time supporter of the Democratic Party. Though he briefly worked at the Cravath firm – the famous Wall Street firm composed of old-money Republicans[18] – Cutler had been trained by realists at Yale, cut his professional teeth among New Dealers, and was a long-time admirer of FDR. As he settled into his law practice over the postwar period, he fashioned himself as a Democratic operative and political adviser in the mold of Clark Clifford.[19] He worked on John F. Kennedy's 1960 presidential campaign and was eventually offered two positions in the Kennedy Administration. While he ultimately declined both posts to focus on building his firm, he later advised the Kennedy White House on a number of cabinet-level appointments, including for administrator of the Federal Aviation Agency (FAA). Subsequently,

[17] See Zalaznick, "The Small World of Big Washington Lawyers," pp. 125; and also "Charles A. Horsky, *The Washington Lawyer: A Series of Lectures Delivered Under the Auspices of the Julius Rosenthal Foundation of Northwestern University School of Law*, (Boston, MA: Little & Brown, 1952)
[18] For more on the history of the Cravath firm see Neil Duxbury, *Patterns of American Jurisprudence*, (New York: Oxford University Press, 1995), pp. 10-32; and also Auerbach, *Unequal Justice*, pp. 14-39
[19] For more on Clifford's career see John Acacia, *Clark Clifford: The Wise Man of Washington*, (University Press of Kentucky, 2009)

Cutler chaired President Kennedy's "Lawyers' Committee for Civil Rights" (which offered legal aid to civil rights activists across the South). Moreover, after Kennedy fumbled the Bay of Pigs invasion, Cutler helped clean up the mess. Through a client of his in the pharmaceutical industry, he successfully negotiated the release of American prisoners in exchange for the shipment of medical supplies to Cuba.[20]

Though Cutler was something of an icon on the Democratic side, he was also a polarizing figure who antagonized a new strain of American liberalism. For the "public interest" movement, which rose to prominence in the 1960s,[21] Cutler was a sworn enemy. Indeed, the engines of public interest law – Public Citizen, the Natural Resources Defense Council, the Center for Law & Social Policy, and other groups – vilified Washington lawyers as former bureaucrats who sold their connections and influence to moneyed interests. To Ralph Nader and his band of Ivey-League "Raiders," Cutler himself was particularly offensive, personifying the "captured" nature of postwar governance.[22] For years, Cutler had represented the powerful automotive industry, making him one of Nader's archenemies. In the fall of 1969, Nader mounted a direct offensive, picketing outside the offices of Wilmer, Cutler, & Pickering to protest Cutler's advocacy on behalf of a car industry trade association (which had challenged new auto safety regulations).[23]

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[20] See "Interview with Lloyd Cutler," pp. 15-16, 74-90

[21] For more on the growth of "public interest" law see generally Simon Lazarus, *The Genteel Populists*, (New York: Holt, Rinehart, & Winston, 1974); Simon Lazarus and Joseph Onek, "The Regulators and the People," *Virginia Law Review*, Vol. 57 Issue 6 (1971): 1069-1108; "The New Public Interest Lawyers," *Yale Law Journal*, Vol. 79 Issue 6 (1970): 1069-1152; David P. Riley, "Challenges of the New Lawyers: Public Interest and Private Clients," *George Washington Law Review*, Vol. 38 Issue 4 (1970): 546-587; Robert L. Rabin, "Lawyers for Social Change: Perspectives on Public Interest Law," *Stanford Law Review*, Vol. 28 Issue 2 (1976): 207-262; and more recently Paul Sabin, "Environmental Law and the End of the New Deal Order," *Law & History Review*, Vol. 33 Issue 4 (2015): 965-1003

[22] For more on this view see Edward Finch Cox, Robert C. Fellmeth, and John E. Schulz, *The Nader Report on the Federal Trade Commission* (New York: R.W. Baron, 1969); Robert C. Fellmeth, *The Interstate Commerce Omission, the Public Interest and the ICC: The Ralph Nader Study Group Report on the Interstate Commerce Commission and Transportation* (New York: Grossman Publishers, 1970); Morton Mintz and Jerry S. Cohen, *America, Inc.: Who Owns and Operates the United States*, (New York: Dial Press, 1971)

[23] For a comprehensive overview of this episode see David P. Riley, "Challenges of the New Lawyers: Public Interest and Private Clients," *George Washington Law Review*, Vol. 38 Issue 4 (1970): 546-587, pp. 552-54

Later, one of Nader's associates – a young attorney named Mark J. Green – published an entire monograph on Washington lawyers which included a long, scathing chapter on Cutler. Green called Cutler one of the "links in the chain" of the Washington beltway – a practitioner of "power-law" – who peddled influence and leveraged his public experience for private gain. Cutler was a liberal Democrat, to be sure. But he was also a "corporate devil" whose old-boy networks and insider tactics preserved a rotten system of industry influence, according to Green and Nader.[24]

But there was more to Cutler than just his firm and his clients. In addition to being a Washington lawyer and deal-maker, he had big ideas about how the government should work. Since entering private practice in the mid-1940s, he had avoided the world of legal scholarship. Unlike some practitioners (who occasionally published in journals), Cutler had never written a law review article. In 1975, that changed. After a visiting position at Yale, where he taught a class on federal regulation, Cutler published a 24-page article, titled "Regulation and the Political Process," in his alma mater's law journal. In the article, Cutler advanced a sweeping proposal to remake the administrative state – to transform the sprawling apparatus which had so occupied his adult professional life.[25]

Just nine months after Richard M. Nixon resigned during the Watergate scandal, and in the midst of mounting criticism of the "Imperial Presidency," Cutler articulated a bold new argument in favor of presidential power. He argued that chief executives be given a new constitutional power: a power to "direct" and "modify" the regulations devised by administrative agencies. The mechanism at the heart of the proposal – which Cutler called "presidential

[24] See Mark J. Green, *The Other Government: The Unseen Power of Washington Lawyers*, (New York: Grossman Publishers, 1975), pp. 45-64
[25] "Interview with Lloyd Cutler: Part 2," pp. 64-65

directives" – began with Congress. Cutler urged the legislative branch to enact a statute that authorized presidents to 1) direct agencies to "take up and decide a regulatory issue within a specified period of time," and that also enabled presidents to 2) "modify or reverse an agency policy, rule, regulation or decision." This new power, which would have a statutory base – and which would allow presidents to compel new administrative actions or modify existing ones – would be exercised via executive order. Thus, Cutler's proposal transferred one of the key levers of Congressional power to the executive branch at the very moment that executive authority, arguably, was at its nadir in the wake of Vietnam, Watergate, and to a lesser extent, Ralph Nader.

The presidential directive was also subject to a number of other requirements. First, all such directives had to be published in the *Federal Register* with a statement outlining the justifications for presidential action. In the same way agencies gave notice and allowed public comments on their proposed rules, chief executives would need to publish their proposals and allow 30 days for written comments. No formal hearing would be required during this 30-day period, but all comments would be compiled into the administrative record. Cutler believed these transparency measures – which mimicked the notice and comment procedures of administrative rulemaking – would help guard against "overzealous [uses]" of the new power. In this regard, Cutler was in step with the times, as transparency – from calls for "Sunshine Laws" to the emergence of C-Span coverage of congressional debate proliferated in the wake of Watergate.[26]

Cutler was hardly oblivious to the dictates of the Constitution. He built in several measures that he believed would allow the measure to pass Constitutional muster. After the 30-day comment period, presidential directives would face a 60-day window, during which either

[26] Lloyd Cutler and David Johnson, "Regulation and the Political Process," *Yale Law Journal*, Vol. 84 Issue 7 (1975): 1395-1418, pp. 1414-15; and see also Michael Schudson, *The Rise of the Right to Know: Politics and the Culture of Transparency, 1945-1975*, (Cambridge, MA: Belknap Press of Harvard University Press, 2015)

house of Congress could veto the president's action. "If either house disagrees with the President," Cutler explained, "the agency would be left to pursue its own course." Assuming a directive passed legislative muster, it would be reviewed by the federal courts on an expedited timetable (not exceeding 180 days). "The purpose of the judicial review provision," Cutler wrote, "is to assure…that the President's decision is one authorized by the agency's statute." In the same way courts reviewed administrative actions for their conformance to congressional statutes, courts would review presidential *imprints* on administrative action to ensure that they, too, complied with legislative mandates.[27]

There was one other notable aspect of Cutler's plan: it made no distinction between independent regulatory commissions and executive branch departments, implying that presidents could issue directives to both. The one exception was federal licensing – the type of adjudicatory proceeding where agencies granted exclusive privileges to competing applicants – as that would create clear opportunities for "presidential favoritism." Outside of licensing, though, all types of agency action were fair game.[28]

All in all, Cutler's proposal was a sweeping bid to fundamentally transform the administrative state. Since the late nineteenth century, when Congress established the Interstate Commerce Commission (ICC), the first federal regulatory body, the ethos of public regulation in the United States had placed immense value in the notion of independent expertise. Federal agencies needed to be institutionally autonomous, Progressives such as Joseph B. Eastman and New Dealers such as James Landis insisted, so they could apply their specialized knowledge in a disinterested fashion immune from political pressure.

[27] Cutler, "Regulation and the Political Process," pp. 1415, 1417
[28] Ibid, pp. 1416

The administrative process was not entirely apolitical, as presidents and Congress had the authority to constitute and shape the basic orientation of the regulatory apparatus. Presidents had the power to appoint and remove agency personnel, as well as the power to shape agency budget requests. Furthermore, Congress established the basic parameters for administrative action in the form of statutes and periodically conducted legislative oversight.

Nevertheless, the "credo of non-political independence," as Cutler referred to it, had long been an ingrained aspect of the administrative state. Through "for cause" restrictions on removal as well as staggered terms for the leaders of the independent commissions, Congress had insulated certain agencies from presidential control, prompting the famous declaration of President Roosevelt's Committee on Administrative Management. Moreover, the faith in independent expertise had only burgeoned in the wake of World War II – the "Physicist's War." That growing legitimacy had functioned as a powerful defense against overt political intervention. Indeed, neither Congress or the executive branch had systematically sought to shape the day-to-day work of administrative decision-making. They concentrated on the broad outlines of the regulatory process, but avoided interfering with specific policy judgments, considering these a matter of internal administrative discretion. Perhaps most importantly, one of the most important political motivations for authorizing the burgeoning administrative state, and a crucial catalyst for its growth, was the ability of elected officials to delegate tough policy choices. While it was rewarding to pick winners, politicians soon learned that the far greater number of losers in most regulatory battles could and would exact career-ending retribution.[29]

[29] For the idea of agency independence see generally E. Pendleton Herring, *Public Administration and the Public Interest*, (New York: Russell & Russell, 1936); James H. Landis, *The Administrative Process*, (New Haven: Yale University Press, 1938); Robert E. Cushman, *The Independent Regulatory Commissions*, (New York: Oxford University Press, 1941); Merle Fainsod and Lincoln Gordon, *Government and the American Economy*, (New York: W.W. Norton & Co., 1941); and Marver H. Bernstein, *Regulating Business by Independent Commission*, (Princeton: Princeton University Press, 1955); for this paragraph see also Lloyd Cutler, "Regulation and the Political Process," pp. 1397, 1401

To create a process of "overt political intervention" was the overriding goal of presidential directives. Cutler's proposed mechanism would enable Gerald R. Ford, the chief executive in 1975, to intervene in administrative decision-making and "direct" a broad array of regulatory actions. Practically speaking, the president could take command of federal regulation in two different ways (both via executive order). First, the president could wield a new power of policy direction (compelling administrators to take up and decide particular issues). Second, the president could wield a new power of policy revision (ordering modifications to existing regulatory policies). Together, Cutler believed these new tools would go a long way to link the elected officials to their administrative subordinates. "Intervention by a politically-accountable decisionmaker," "effective and lasting political control over agency decisions," "continuous political monitoring of all government regulation" – these were some of the adages Cutler used to describe the effects of his bold prescription for the regulatory state.[30]

Nevertheless, Cutler inserted a careful mixture of procedural safeguards. Indeed, the mechanism he outlined was remarkably intricate. Though it would transform the White House into a "super administrative agency," according to one observer in the *Columbia Law Review*, it also employed a "three-tiered" procedure which respected the separation of powers by allowing the other two branches to check executive actions. While Cutler hoped his proposal would "[make] a reality…of Harry Truman's pithy phrase 'The buck stops here,'" he believed it would nevertheless preserve "fairness, open and public debate, and visible decision-making."[31]

The justification for presidential directives centered on what Cutler called the "need for rapid adjustment" to shifting national crises. One particular crisis framed Cutler's thinking.

[30] Cutler, "Regulation and the Political Process," pp. 1397
[31] Carl McGowan, "Congress, Court, and Control of Delegated Power," *Columbia Law Review,* Vol. 77 Issue 8 (1977): 1119-1174, pp. 1169, 1171; and also Cutler, "Regulation and the Political Process," pp. 1417

Beginning in 1968, the American economy – which had experienced over two decades of uninterrupted, Keynesian-driven growth – hit a snag. Initially, the problems stemmed from the country's long-standing balance-of-payments deficits, which President Johnson exacerbated through expansionary fiscal policies. The subsequent uptick in inflation and unemployment, as well as the rapid devaluation of the U.S. dollar, ushered in a new era of economic volatility represented by the 1969-70 recession, the institution of wage and price controls, and Nixon's subsequent closing of the gold window. When external supply shocks gripped the international economic system, the problems only became more acute. The 1971-72 Soviet grain shortage, but more importantly, the 1973 OPEC oil embargo, blew the door open on "stagflation" (the combination of high unemployment and high inflation for which Keynesian orthodoxy had no explanation). Following the OPEC embargo, the price of oil nearly quadrupled, leading to gas lines, energy shortages, double-digit price increases, and a broad-based economic slowdown. Thus, by the mid-1970s, the postwar economic boom had run aground. Balanced growth and rising standards of living were displaced by rising prices, reduced output, and broad feelings of scarcity and insecurity.[32]

This U-turn in American economic fortunes – the biggest economic crisis since the Great Depression – prompted a bipartisan reexamination of federal rules and regulations. In an era of "stagflation," officials from both parties gave heightened attention to the economic impacts of public policy; specifically, to the effects of government-imposed red tape on the private sector. This process of reexamination occurred on two different fronts. First, policymakers scrutinized

[32] For economic histories of this era see generally Robert M. Collins, "The Economic Crisis of 1968 and the Waning of the 'American Century,'" *American Historical Review*, Vol. 101 No. 2 (1996): 396-422; Allen Matusow, *Nixon's Economy: Booms, Busts, Dollars, and Votes*, (Lawrence: University Press of Kansas, 1998); Meg Jacobs, *Panic at the Pump: The Energy Crisis and the Transformation of American Politics in the 1970s*, (New York: Hill & Wang, 2016); Michael A. Bernstein, *A Perilous Progress: Economists and Public Purpose in Twentieth Century America*, (Princeton: Princeton University Press, 2001); and also Daniel T. Rodgers, *Age of Fracture*, (Cambridge: Belknap Press of Harvard University Press, 2011), pp. 41-75

the Progressive Era and New Deal-era agencies that were oriented toward producers of particular industries. Since the 1950s and 1960s, academic economists[33] and consumer advocates[34] had argued that these agencies – most notably, the Interstate Commerce Commission (ICC) and the Civil Aeronautics Board (CAB) – created de-facto monopolies. By maintaining a variety of anti-competitive regulations (which benefitted a small number of privileged firms), these agencies preserved a slew of economic inefficiencies, which were then passed on to consumers in the form of higher prices. By the mid-1970s, once rising prices topped the national political agenda, this economic critique found a receptive audience among policymakers from both parties. In 1975 Sen. Edward Kennedy (D-MA), working with then-Harvard law professor Stephen Breyer, held famous hearings on the exorbitant fares charged by the CAB. "Regulators," Kennedy declared in his opening statement, "all too often encourage…unreasonably high prices."[35] Due to their strong consumer bent, the Kennedy hearings received ample attention in the media and helped popularize the idea that federal regulations – not only in the airlines but in a number of key industries – defied economic reason and exacerbated the inflationary spiral. Importantly, the Kennedy hearings also created political momentum for "deregulation."[36]

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[33] See for instance John R. Meyer, *The Economics of Competition in the Transportation Industries* (Cambridge: Harvard University Press, 1959); Richard E. Caves, *Air Transport and Its Regulators: An Industry Study* (Cambridge: Harvard University Press, 1962); Paul W. MacAvoy, *Price Formation in Natural Gas Fields: A Study of Competition, Monopsony, and Regulation,* (New Haven: Yale University Press, 1962); MacAvoy, *The Economic Effects of Regulation: The Trunk-line Railroad Cartels and the Interstate Commerce Commission Before 1900,* (Cambridge: MIT Press, 1965); and later, Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions*, (New York: John Wiley & Sons, 1970); and George J. Stigler, "The Theory of Economic Regulation," *Bell Journal of Economics and Management Science*, Vol. 2 No. 1 (1971): 3-21

[34] Edward Finch Cox, Robert C. Fellmeth, and John E. Schulz, *The Nader Report on the Federal Trade Commission* (New York: R.W. Baron, 1969); and Robert C. Fellmeth, *The Interstate Commerce Omission, the Public Interest and the ICC: The Ralph Nader Study Group Report on the Interstate Commerce Commission and Transportation* (New York: Grossman Publishers, 1970)

[35] "Oversight of Civil Aeronautics Board Practices and Procedures, Vol. 1," *Hearings Before the Senate Subcommittee on Administrative Practice and Procedure*, 94th Cong., 1st sess., Feb. 6th, 14th, 18th, 19th, 25th, 26th, and Mar. 4th, 21st, 1975

[36] For more on the importance of the Kennedy hearings to the deregulation movement see Martha Derthick and Paul J. Quirk, *The Politics of Deregulation,* (Washington DC: Brookings Institution, 1985), pp. 29-57

The shifting economic environment also prompted a reexamination of new "social" regulations. Over the 1960s and early 1970s, the civil rights, consumer, and environmental movements had secured the passage of dozens of new regulatory laws[37] aimed at ameliorating broad social ills – discriminatory hiring practices, workplace safety hazards, dirty air, and more. These new statutes – and the administrative agencies they established – departed in a number of ways from traditional forms of regulation. Unlike older regulatory regimes (which were oriented around subsets of different producers) social regulation applied across the various sectors of the economy. Because they were tasked with wide-ranging goals pertaining to "quality-of-life," new bureaus like the Environmental Protection Agency (EPA) and Occupational Safety & Health Administration (OSHA) devised rules that affected industry writ large. Moreover, many of the new statutes levied strict deadlines on the issuance of particular regulations, and even included "citizen-suit" provisions which empowered grassroots activists to enforce those mandates via the legal process.[38]

By the mid-70s, however, the political pendulum had swung in the opposite direction of these robust new policy commitments. At a series of National Inflation Summits convened by President Ford in 1974, a broad coalition of economists, policymakers, and industry groups drew attention to the adverse effects of social regulation, highlighting it as an important "culprit" for

[37] Among the landmark pieces of legislation were the Civil Rights Act (1964), Federal Metal and Nonmetallic Mine Safety Act (1966), National Highway Transportation Safety Act (1966), Motor Vehicle Safety Act (1966), National Environmental Policy Act (1969), Endangered Species Conservation Act (1969), Clean Air Act Amendments (1970), Occupational Safety and Health Act (1970), Magnuson-Moss Warranty and FTC Improvements Act (1972), Federal Water Pollution Control Act (1972), Consumer Product Safety Act (1972), and Endangered Species Act (1973)

[38] For more on this new brand of administrative control see William A. Lilley III and James C. Miller III, "The New Social Regulation," *The Public Interest*, Issue 47, Spring 1977, pp. 49-61; David Vogel, "The New Social Regulation in Historical and Comparative Perspective," in Thomas McCraw ed. *Regulation in Perspective: Historical Essays* (Boston: Graduate School of Business Administration, Harvard University, 1981); and also Richard A. Harris and Sidney M. Milkis, *The Politics of Regulatory Change: A Tale of Two Agencies*, (New York: Oxford University Press, 1989), pp. 3-10

stagflation. Specifically, they pointed to massive compliance costs – imposed on large numbers of firms by "economy-wide" regulations – as an underlying cause for slowed productivity and rising prices.[39] Shortly after the summits, Ford gave a public address to Congress, calling inflation "public enemy number one" and announcing a new program to reduce the burdens of regulation.[40] In the address, Ford announced he would soon require all federal agencies to prepare "Inflation Impact Statements" (or IIS's) before they finalized "major" rules. Modeled on the assessments previously required by the 1970 National Environmental Protection Act (NEPA), IIS's were a sign of how rapidly times were changing. In the same way NEPA compelled federal agencies to pay heed to environmental factors, Ford hoped IIS's would advance the economic priorities that had appeared even more recently on the national agenda.[41]

Cutler published "Regulation and the Political Process" in the middle of this broad reexamination of regulatory programs. "The pace of inflation," Cutler noted on the opening page of his article, "has made us much more sensitive to the danger that government intervention…may deter innovation, protect inefficiencies, and increase costs." Unlike many of his contemporaries, though, Cutler did not advocate for deregulation per se:

> Government intervention in many important economic activities will still be necessary to achieve equally major and accepted public goals, ranging from environmental health and social justice to honest advertising and product safety. For example, freer entry into the trucking business might well be desirable, but we will probably still wish to control the size, safety, noise, energy consumption, and air pollution of trucks…We cannot blame all the evils of regulation on its excessive scope.[42]

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[39] U.S. Council of Economic Advisers, *Transcript of the Economists' Conference on Inflation,* Sept. 5th, 1974, (Washington, DC: U.S. Government Printing Office, 1974) pp. 3-10, 326-336, 580-585, 643-644; U.S. Department of Commerce, *Transcripts for the Business and Industry Conference on Inflation*, Sept. 16th and 19th, 1974, (Washington, DC: U.S. Government Printing Office, 1974) pp. 1-3, 117-126, 180

[40] Gerald R. Ford, "Whip Inflation Now Speech," Oct. 8th, 1974, transcript available at http://millercenter.org/president/ford/speeches/speech-3283

[41] For more on the IIS program itself see Thomas D. Hopkins, "An Evaluation of the Inflation Impact Statement Program," prepared for the Economic Policy Board (EPB) by the Council on Wage & Price Stability (COWPS) and the Office of Management and Budget (OMB), Dec. 7th, 1976, pp. 1-29

[42] Cutler, "Regulation and the Political Process," pp. 1396

Instead, Cutler identified a deeper problem which he termed "regulatory failure." Agencies "would be said to fail," he wrote, when their policy decisions "do not coincide" with the current demands of elected officials. Agencies failed, in other words, when their substantive policy choices did not match up with the broader priorities expressed through the political process (hence the title of Cutler's article). Viewed in this way, the recent economic crisis had generated a litany of regulatory "failures" because it had reoriented American politics around an entirely new axis. Thusly conceived, the problem was not that regulations existed at all, but that many – in their current form – were out of sync with the times.[43]

Cutler believed the necessary solution was to make administrative agencies more responsive to broad political shifts (notably, the crisis of stagflation). "Over the years," Cutler wrote, "the tasks facing the regulators have changed drastically." "Now that conditions change so rapidly, and today's massive problems arise before yesterday's problems have been analyzed and solved," he continued, "government policies must also change rapidly." "Basic policy decisions now need to be reexamined more frequently, more rapidly, and with broader perspective." "Environmental policies formulated a mere five years ago," Cutler claimed, "now may need to be rethought in the face of the rapidly-developing energy crisis and the pressure of rising prices." "We need today," he added, "a mode of…regulation that is…flexible enough to adapt to crises we can rarely foresee."[44]

In Cutler's mind, the primary obstacle to attaining a more responsive or "flexible" regulatory system was the long-standing tradition of independent expertise, one of the organizing principles of the administrative state. The mandate that agencies perform much of their work

[43] Ibid, pp. 1395, 1399
[44] Cutler, "Regulation and the Political Process," pp. 1399-1400, 1405, 1409

autonomously – and commit their professional knowledge to a narrow set of objectives – made the administrative state a hodgepodge of different entities, each focusing on parochial tasks. As recently as the 1960s and '70s, lawmakers had extended the tradition of independence to the new apparatus of social regulation, directing agencies like EPA and OSHA to formulate regulations irrespective of costs. "The agency which sets environmental quality standards must have only one goal," insisted Sen. Ed Muskie (D-ME), the principal architect of the 1970 Clean Air Act.[45] In light of the recent economic crunch, however, Cutler lamented this tendency for "single-purpose statutes" and "single-mission institutions." The tradition of agency independence produced "specialized" and "oblivious" regulators, in Cutler's words, who were stuck in the past and unable to adjust to shifting circumstances. Instead of adapting over time as a collective force, federal agencies followed "their own bureaucratic stars," leading them to ignore the "changing economic and social needs" expressed by the surrounding political branches. "If our government is to respond to new problems," Cutler concluded, "the agencies must be made responsible – and speedily responsive – to the elected power centers we have charged with the job of governing." "To paraphrase Clemenceau," he added with gusto, "regulation has become too important to leave to the regulators."[46]

Enter presidential directives. If national priorities had shifted around crises of economics and especially energy – and if the regulatory apparatus was "failing," by Cutler's standard, to adapt to these broad shifts – elected officials needed a new power to "review and where necessary…correct" the administrative policies that were responsible for the mismatch. Of course, Cutler believed the institution of the presidency was best equipped for such a task;

[45] Cited in "Status of the Programs and Policies of the EPA," *Hearing Before the Subcommittee on Environmental Pollution of the Senate Committee on Public Works*, 95th Cong., 1st sess., 1977, pp. 13-14
[46] Cutler, "Regulation and the Political Process," pp. 1397, 1400, 1406, 1408-1409

> The President is capable of acting more quickly than can the Congress in formulating and articulating national policy goals. In addition, the President and his immediate staff have an overview of government management – and a constitutional responsibility for executing all the laws – that is not shared by a single regulatory agency, by any specialized congressional committee or by the Congress as a whole. The President is the only nationally-elected officer, and thus, at least arguably, our most politically-accountable official. He is uniquely situated to intervene…in order to expedite, coordinate, and, if necessary, reverse agency decisions.[47]

Here, Cutler drew inspiration from the "stewardship theory" of presidential power (first articulated during the Progressive Era and later, by FDR) which held that chief executives were uniquely accountable, uniquely responsive, and thus uniquely positioned to govern on behalf of the entire nation. Interestingly, Cutler was borrowing from his Progressive and New Deal playbook, but to undermine a countervailing piece of that same liberal ethos: the insulation of administrative experts from overt political control.[48]

Notwithstanding Cutler's well-crafted arguments in the *Yale Law Journal*, presidential directives was an utterly shocking political proposition. In 1975, when Cutler published his article, not a year had passed since the conclusion of the Watergate Scandal. If Americans were increasingly wary of bread-and-butter economic issues as Cutler claimed, they were arguably equally wary of centralizing greater power in the executive. Indeed, Watergate was the latest salvo in a series of abuses of presidential power (which ranged from the prosecution of the Vietnam War to the impoundment of federal funds). During the Johnson Administration and increasingly during the Nixon years, Democrats in Congress had pushed back against executive over-reach. In response to greater congressional oversight, presidential advisers put forth

[47] Ibid, pp. 1411

[48] For good overviews see Sidney M. Milkis, *Theodore Roosevelt, the Progressive Party, and the Transformation of American Democracy*, (Lawrence: University Press of Kansas, 2009); Milkis, *The President and the Parties: The Transformation of the American Party System Since the New Deal*, (New York: Oxford University, 1993); and Stephen Skowronek, "The Unsettled State of Presidential History," in Brian Balogh and Bruce J. Schulman, eds., *Recapturing the Oval Office: New Historical Approaches to the American Presidency*, (Ithaca: Cornell University Press, 2015), pp. 13-33

belligerent constitutional arguments, claiming unrestrained powers and defending a host of unilateral actions that defied public opinion. Accordingly, in 1973 the historian Arthur M. Schlesinger Jr. coined the term "Imperial Presidency," describing the executive as a bastion of centralized power that derided checks and balances and was prone to abuses. For Cutler to argue in favor of presidential power was to seemingly disregard the lessons of recent political history.[49]

The mechanics of presidential directives flew directly in the face of the Watergate scandal. Though Watergate was a multi-faceted and wide-ranging political scandal, it focused attention on a specific kind of presidential transgression: improper political meddling at the various agencies of the administrative state. Of course, the most prominent example involved the Department of Justice (DOJ), its' independent investigation of the Watergate break-in, and Nixon's repeated attempts to impede the apparatus of law enforcement in order to conceal criminal wrongdoing. However, as the Senate's final Watergate report later revealed, the White House improperly interfered in a broad array of administrative matters. As it turned out, presidential transgressions extended across the bureaucratic establishment, far beyond the infamous cover-up itself.[50]

Before the principal scandal broke, for instance, the White House faced questions about its politicization of antitrust enforcement. In February, 1972, syndicated columnist Jack Anderson published a story regarding the telecommunications giant International Telegraph and Telephone Co. (ITT), and the company's proposed merger with Hartford Fire Insurance, itself a

[49] For background on presidential power and inter-branch conflict in the 1960s and '70s see generally James L. Sundquist, *The Decline and Resurgence of Congress*, (Washington DC: Brookings Institution, 1981); Louis Fisher, *Constitutional Conflicts Between Congress and the President*, (Princeton: Princeton University Press, 1985); Lawrence C. Dodd, "The Rise of the Technocratic Congress: Congressional Reform in the 1970s," in Richard A. Harris and Sidney M. Milkis, eds., *Remaking American Politics*, (Boulder: Westview Press, 1989), pp. 89-111; and also Arthur M. Schlesinger Jr., *The Imperial Presidency*, (Boston: Houghton & Mifflin, 1973)

[50] For an overview on the governing style of the Nixon Administration see Richard P. Nathan, *The Plot That Failed: Nixon and the Administrative Presidency*, (New York: Wiley, 1975)

large conglomerate. Initially, the DOJ responded to the merger with an anti-trust suit – one of three at the time against the behemoth ITT – and threatened to block the proposed union with Hartford. Nixon and his aides then stepped in, ordering the Attorney General, John Mitchell, and Mitchell's deputy, Richard Kleindiest, to drop the case. "The ITT thing, stay the hell out of it. Is that clear?" Nixon communicated to Kleindiest in 1971.[51] After receiving the order from the president, the DOJ negotiated a consent agreement, paving the way for ITT to merge with Hartford. Anderson and other journalists later confirmed that the White House intervened not based on interpretations of the Sherman or Clayton Acts, but because it had secured a large donation from ITT executives while the antitrust case was pending. During secret negotiations with White House staff in the early 1970s, ITT agreed to commit $400,000 to the 1972 Republican National Convention in exchange for the administration dropping the suit. The "ITT Affair," as it was known, became a major scandal 1) because it seemingly violated a provision of campaign finance law, and 2) because it raised the specter of the president leveraging the policy process for corporate campaign gifts.[52]

As the Watergate report subsequently revealed, the ITT Affair was only the tip of the iceberg in a series of *quid pro quo* deals. Through the insidiously-named Committee to Re-elect

[51] When Mitchell left his post as Attorney General in 1972 to head Nixon's reelection effort, the president nominated Kleindienst as his replacement. Unsurprisingly, the ITT Affair became a topic of great interest in Kleindienst's confirmation hearings. When pressed on the matter, however, Kleindienst denied any direct involvement by the president, and later pleaded guilty to investigators for making this false statement to Congress; see "Richard G. Kleindienst, Resumed: Part 2," *Hearings Before the Senate Committee on the Judiciary*, 92nd Cong., 2nd sess., Mar. 2nd, 3rd, 6th, 7th, 8th, 9th, 10th, 14th, 15th, 16th, 26th, and 29th, 1972, pp. 96-864; and "Richard Kleindienst, Resumed: Part 3," *Hearings Before the Senate Committee on the Judiciary*, 92nd Cong., 2nd sess., Apr. 10th-14th, 17th-20th, and 27th, 1972, pp. 865-1751

[52] For more on the original story detailing the ITT Affair see Jack Anderson, "Secret Memo Bares Mitchell-ITT Move," *Washington Post*, Feb. 29th, 1972, pp. B11; Anderson, "Kleindienst Accused in ITT Case," *Washington Post*, Mar. 1st, 1972, pp. B15; Anderson, "Contradictions Cited in ITT Case," *Washington Post*, Mar. 3rd, 1972, pp. D15; and also E.W. Kentworthy, "The Extraordinary ITT Affair," *New York Times*, Dec. 16th, 1973, pp. 233; and for more recent accounts see Anderson, *Peace, War, and Politics: An Eyewitness Account*, (New York: Forge, 1999), pp. 194-200; and John W. Dean, *The Nixon Defense: What He Knew and When He Knew It*, (New York: Viking, 2014), pp. 11-13

the President (CRP or "CREEP") – the fundraising apparatus for Nixon's 1972 campaign – White House aides launched a broad-based effort to use administrative agencies as fundraising devices. In March, 1972, Fred Malek and H.R. Haldeman, two of the leading members of CREEP, ordered executive agencies to draft plans outlining how they would use their available tools to bolster Nixon's political prospects. Malek and Haldeman called this initiative the "Responsiveness Program," or the "use of federal resources for re-election purposes," and ultimately pursued it across a variety of programs and agencies.[53]

One part of CREEP's strategy (that investigators later unearthed) involved the Occupational Safety & Health Administration, established only a year prior as a division of the Labor Department. In the spring of 1972, Malek met personally with Undersecretary of Labor Laurence H. Silberman to inquire about his agency's plans to support the president. Bowing to White House pressure, Silberman wrote to his subordinates, requesting they begin drafting specific proposals. In June, 1972, George C. Guenther – the first chairman of OSHA – wrote back, informing Silberman that CREEP had already approached him about the Responsiveness Program. In the memo, Guenther recounted a meeting with Lee Nunn, an aide to Nixon, in which he had discussed using OSHA as "a sales point" in order to encourage "support by employers." Moreover, Guenther reported to Silberman he had already made a specific promise to CREEP, agreeing to implement "no highly controversial standards (that is, cotton dust, etc.)" during the '72 campaign. Rather, he promised to focus on "low keyed" issues like "long-range planning."[54]

[53] For more on the Responsiveness Program generally see U.S. Senate, *Final Report of the Select Committee on Presidential Campaign Activities*, (Washington DC: U.S. Government Printing Office, 1974), pp. 361-442

[54] For more on the Guenther Memo see U.S. Senate, *Final Report of the Select Committee on Presidential Campaign Activities*, pp. 431-433; and also "Occupational Safety and Health Act Review, 1974," *Hearings Before the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare*, 93rd Cong., 2nd sess., Jul. 22nd, 30th, and 31st, Aug., 13th, 14th, 1974, pp. 465, 615

When investigators disclosed the "Guenther Memo" in 1974 during the Watergate hearings, they opened the White House to additional, ITT-style charges. "Labor Dept. Lagged on Health Rules to Spur Gifts," read one headline in *The New York Times*. "Safety Rules Delay Linked to Campaign," read another in *The Washington Post*. Peddling of health and safety regulations for campaign dollars infuriated public interest advocates. Sidney E. Wolfe – the head of Ralph Nader's Health Research Group – wrote Special Prosecutor Leon Jaworski about the Guenther episode, calling it a "conspiracy to deprive millions of workers of their health and lives" and demanding Jaworski investigate the extent of White House interference at OSHA.[55]

From the ITT Affair to the Guenther Memo to the more notorious Saturday Night Massacre, the Watergate scandal cautioned, above all, against presidential interference in the administrative arena of government. When viewed against this ominous backdrop, Lloyd Cutler's idea was audacious. For Cutler to call for a new power of presidential directives – which enabled "overt political intervention" and enhanced administrative "responsiveness" – was to call for a form of White House involvement that evoked the actions of Nixon's henchmen.

Even more provocatively, Cutler framed presidential directives as a legislative proposal. "I suggest a statute," he wrote, "that would authorize the President to modify or direct certain agency actions." This move also displayed great temerity. It was one thing for Cutler to urge chief executives to independently assert the power of directives. But it took even more chutzpah for Cutler to urge Democratic lawmakers, who had investigated the Watergate cover-up and introduced articles of impeachment against the president – and who had gained 49 House seats in

[55] David Burnham, "Nader Group Says Labor Dept. Lagged on Health Rules to Spur Gifts," *New York Times*, Jul. 16th, 1974, pp. 14; Bob Kuttner, "Safety Rules Delay Linked to Campaign," *Washington Post*, Jul. 16th, 1974, pp. A10; and Judith Randall, "Labor Department Hit on Politics in Worker Safety," *Washington Star-News*, Jul. 16th, 1974, pp. 3

the 1974 midterm elections by running on an anti-corruption platform[56] – to willingly codify that new power in the form of a statute. To review, Cutler – a New Dealer and long-time Democratic operative – was asking the Democratic Congress to forget about Watergate, dirty tricks, and Vietnam, and expand presidential power in the image of the disgraced Republican president. When framed in this way, presidential directives bordered on political insanity.[57]

Cutler was aware of the profound obstacles his idea might face. Indeed, he gestured to the uncongenial political context throughout his *Yale Law Journal* article. "To advance an argument in favor of expanded presidential power over the regulatory process," he noted, "may appear rash at a period in our history when Watergate is such a vivid memory." "Covert attempts to influence regulatory decisions for unworthy political reasons, such as rewarding a contributor or punishing an opponent," he continued, "are not mere folklore from our frontier past." "They continue to the present day, as the Watergate tapes so starkly reveal."[58]

More than anything, the political context explained why Cutler embellished his proposal with procedural safeguards. Recall that before taking effect, presidential directives needed 1) to receive public comments for 30 days, 2) surmount a legislative veto, and 3) survive expedited judicial review. Cutler's decision to include three different checks on presidential power evinced a genuine effort to guard against Nixon-style abuses. The first check – notice and public comment – mirrored the procedural requirements for administrative rulemaking (and for good reason). When presidents "modified" an existing regulation, or "directed" an agency to issue a new one, they would be engaging in a new, supervisory form of rulemaking. Accordingly, Cutler

[56] For background on the 1974 midterms and the so-called "Watergate Class" of new Democratic members see John A. Lawrence, *The Class of '74: Congress After Watergate and the Roots of Partisanship*, (Baltimore: Johns Hopkins University Press, 2018); and Julian Zelizer, *On Capitol Hill: The Struggle to Reform Congress and its Consequences, 1948-2000*, (New York: Cambridge University Press, 2004), pp. 156-176
[57] Cutler, "Regulation and the Political Process," pp. 1397, 1401, 1414
[58] Ibid, pp. 1403, 1411

believed directives should replicate existing administrative procedures and allow for public participation in accordance with due process of law.

Cutler's second check – a legislative veto procedure – was a direct nod to the post-Watergate political climate. Because it allowed Congress to strike down administrative actions after a period of debate, the legislative veto became one of Democratic lawmakers' favored devices for combatting executive over-reach in the early 1970s.[59] By accommodating this recent fad – and building a powerful legislative check into his proposal – Cutler hoped to appease the very legislators who would be skeptical of presidential directives. Lastly, the third check – judicial review – allowed federal judges to scrutinize the executive actions that passed legislative muster. This way, the federal courts would ensure that the president's new, interstitial role in the regulatory process occurred within the bounds of the law, and did not lead agencies to violate their statutory mandates.

Cutler's idea looked significantly less menacing in light of these critical safeguards. While Cutler's argument for presidential power occurred at an exceedingly controversial time, he was profoundly aware of the surrounding political context and willing to craft presidential directives accordingly – in a manner that respected the separation of powers and the need for meaningful checks on executive action. Because his proposal gave the public, the legislative branch, and the judiciary a say over presidential policy determinations, Cutler concluded, "Since presidential intervention to favor special friends or interests would be highly visible and therefore involve high political risks, the dangers of abuse in our proposal do not appear

[59] For more on the increased use of legislative vetoes in the 1970s see H. Lee Watson, "Congress Steps Out: A Look at Congressional Control of the Executive," *California Law Review*, Vol. 63 Issue 4 (1975): pp. 983-1094; Harold H. Bruff and Ernest Gellhorn, "Congressional Control of Administrative Regulation: A Study of Legislative Vetoes," *Harvard Law Review*, Vol. 90 Issue 7 (1977): pp. 1369-1440; James L. Sundquist, *The Decline and Resurgence of Congress*, pp. 344-366; and also Barbara Hinkson Craig, *Chadha: The Story of an Epic Constitutional Struggle*, (New York: Oxford University Press, 1988)

overwhelming." Cutler admitted, "there is always a danger that the power to intervene could be abused." Overall, though, he was confident that his "three-tiered" defense would minimize the danger of Watergate-style misconduct.[60]

Cutler's idea had another benefit working in its favor. Considered on its own terms – i.e. disentangled from the post-Watergate political moment – presidential directives were within the realm of historical imagination. Since the creation of the Bureau of the Budget in 1921,[61] presidents had slowly built up their capacity to manage the administrative state. Over the twentieth century, they steadily expanded the number of White House offices whose job was to pursue the president's agenda across the regulatory bureaucracy. In this area, FDR had been particularly influential. In 1939 – after his Brownlow Committee on Administrative Management famously declared "the president needs help" – Roosevelt established the Executive Office of the President (EOP), which became the "institutional foundation" for a growing White House staff.[62] By the early 1960s, the EOP comprised not only the Budget Bureau, but the Council of Economic Advisers (CEA), the National Security Council (NSC), the Domestic Policy Staff (DPS), and a number of other supervisory bodies. Tasked with overseeing different parts of the president's agenda, these entities acted as bureaucratic liaisons that worked to coordinate federal agencies with White House objectives. For instance, the Budget Bureau reviewed and revised agency budget requests to Congress, ensuring they comported with broad presidential priorities. CEA, NSC, and DPS met with cabinet secretaries to underscore those priorities to executive

[60] Cutler, "Regulation and the Political Process," pp. 1417; and Carl McGowan, "Congress, Court, and Control of Delegated Power," *Columbia Law Review*, Vol. 77 Issue 8 (1977): 1119-1174, pp. 1169

[61] See generally Larry Berman, *The Office of Management and Budget and the Presidency, 1921-1979,* (Princeton: Princeton University Press, 1979)

[62] Barry D. Karl, *Executive Reorganization and Reform During the New Deal: The Genesis of Administrative Management, 1900-1939*, (Cambridge: Harvard University Press, 1963); and Sidney M. Milkis, *The President and the Parties: The Transformation of the American Party System Since the New Deal*, (New York: Oxford University Press, 1993), pp. 101-111, 125-146

branch departments. Collectively called the "administrative presidency," these offices never possessed a sweeping power to "modify" or "direct" specific rules and regulations. Nevertheless, Cutler's idea fit into the broad, mid-twentieth-century trend of presidents expanding their institutional devices for shaping the administrative state.[63]

In addition, experts on public administration routinely argued for greater presidential control. Among the findings of the first Hoover Commission, formed in 1947, was the recommendation that administrative agencies be consolidated into twelve streamlined executive departments.[64] Subsequent reports completed by James Landis in 1960[65] and Roy Ash in 1971[66] offered similar blueprints for enhancing administrative accountability to the White House. Admittedly, presidents themselves had commissioned these studies to bolster support for their reorganization proposals. It was still true, however, that many of the leading experts on government organization favored more centralized presidential powers. One such authority – a University of Texas political scientist named Emmette S. Redford – even proposed an idea comparable to Lloyd Cutler's. In a 1960 report, Redford critiqued the prevailing structure of the administrative state, noting – with evidence from the fields of transportation and communications – that independent agencies failed to "harmonize their separate policies" with "newly-emerging problems." To promote what he called "long-run adjustment," Redford floated a Cutler-style idea, "The president should use his position of leadership to supply policy guidance, consistent with law, to the commissions, bringing to their attention urgent public

[63] Terry M. Moe, "The Politicized Presidency," in John E. Chubb and Paul E. Peterson eds., *The New Direction in American Politics*, (Washington DC: Brookings Institution Press, 1985), pp. 235-271; and Stephen Hess, *Organizing the Presidency*, (Washington DC: Brookings Institution, 1988)
[64] For more on the commission's final report see Joanna Grisinger, *The Unwieldy American State: Administrative Politics Since the New Deal*, (New York: Cambridge University Press, 2012), pp. 153-194
[65] James M. Landis, *Report on Regulatory Agencies to the President-Elect*, (Washington DC: U.S. Government Printing Office, 1961)
[66] President's Advisory Council on Executive Reorganization, *A New Regulatory Framework: Report on Selected Independent Regulatory Agencies*, (Washington DC: U.S. Government Printing Office, 1971)

needs." Though Redford's idea was never officially implemented, it demonstrated that Cutler's proposal was not entirely outside the intellectual mainstream.[67]

So did a handful of statutory provisions authorizing presidential intervention in narrow fields of administrative decision-making. Section 801 of the 1938 Civil Aeronautics Act, for instance, required that CAB regulators submit their international route decisions for presidential approval. While the act granted the CAB final authority over cases involving domestic carriers, Section 801 recognized the special importance of international flights to foreign policy and national security and thus allowed presidents to review and (if necessary) revise those decisions based on larger strategic considerations. In 1948, after a Midwestern airline challenged Truman's denial of an international route award, the Supreme Court roundly upheld executive power in this regard, determining that "Presidential control…is a positive and detailed control over the Board's decisions" and that orders pursuant to Section 801 were not subject to judicial review.[68] Similar provisions authorizing presidential review appeared in a number of other statutory schemes. Title VI of the 1964 Civil Rights Act – which created racial non-discrimination requirements for public universities – made the resulting rules of the Department of Health, Education & Welfare (HEW) subject to White House review. The same was true of orders by the Federal Energy Regulatory Commission (FERC) approving new gas pipelines.[69]

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[67] Emmette S. Redford, *The President and the Regulatory Commissions* (A Report Prepared for the President's Advisory Committee on Government Organization, 1960), pp. 2, 26; Redford, *Summary of the Report*, pp. 3; and for a rebuttal see Henry J. Friendly, "The Federal Administrative Agencies: The Need for Better Definition of Standards," *Harvard Law Review*, Vol. 75 Issue 7 (1962): 1263-1318, pp. 1298-1308

[68] *Chicago & Southern Airlines Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948)

[69] For more on Section 801 and other provisions enabling presidential review see James V. Dolan and Harry Huge, "Economic Regulation of Foreign Air Carriers by the CAB: Its Legality and Reviewability," *Georgetown Law Journal*, Vol. 51 Issue 3 (1963): 593-623; Nathan Calkins Jr., "Acquisition of Operating Authority by Foreign Carriers: The Role of the CAB, White House, and Department of State," *Journal of Air Law & Commerce*, Vol. 31 Issue 2 (1965): 65-88; and also Notes, "Section 801 of the Federal Aviation Act: The President and the Award of International Routes to Domestic Carriers: A Proposal for Change," *New York University Law Review*, Vol. 45 Issue 3 (1970): 517-538

In a nutshell, while Cutler's proposal ran explicitly counter to the post-Watergate political climate, it was compatible with long-standing patterns of institutional development. Indeed, there was ample evidence indicating that presidential directives, though controversial, might have better prospects than initial appearances suggested. Given the safeguards Cutler built into his proposal – and given the trajectory of presidential power over the twentieth century – there was reason to believe Watergate might not trump a number of other long-term trends, especially if Cutler was right about the seismic shifts being wrought by the recent economic crisis.

Overall, there were several ways to interpret Cutler's underlying motivations for such an idea. First, from the vantage point of his Washington law firm, Cutler represented some of the world's most powerful companies. Moreover, in the late 1960s and early '70s, he had battled with public interest advocates in order to protect many of these firms, particularly the auto industry, from sweeping new health and safety regulations. Given the nature of his law practice – and the number of business leaders in his rolodex – it was not unreasonable to see presidential directives as a deregulatory tool Cutler hoped would benefit his corporate clients. Indeed, the thrust of Cutler's proposal – that regulation needed to better reflect new economic priorities (and that chief executives should intervene in order to instill that new economic perspective) – sounded like a pretense for rolling back key regulatory protections and weakening the terms of compliance for affected firms. Cutler's idea could thus be interpreted as a theoretical offshoot of the broader deregulation movement.

Presidential directives could also be seen as a means of preserving special access. In different ways, Cutler's career depended on his insider knowledge of the Washington beltway and his mastery of the insular networks born of New Deal and Cold War liberalism. In the 1960s,

Ralph Nader and the public interest movement had challenged these cozy political arrangements, seeking to diffuse the power of Washington lawyers and, in turn, organized interests, by radically opening the governmental system to public participation. Accordingly, presidential directives could be seen as Cutler's rejoinder to Nader. A proposal that centralized decision-making authority in the White House – that created a focal point in the administrative state – could be regarded as an act of self-preservation, Cutler's attempt to preserve his own influence amidst a wave of aggressive new public interest lobbies. In a hypothetical world of presidential directives, Cutler's reputation as a Democratic operative – and more importantly, as a trusted adviser to multiple presidents – would leave him in a special position to shape federal regulations. In this way, Cutler's proposal could be seen as a means of maintaining his status, in the words of Public Citizen, as one of the essential "links in the chain" of federal power.[70]

The latter interpretation was more plausible than the former. As a veteran lawyer/lobbyist, Cutler was undoubtedly eager to guard the position of influence he had spent years cultivating in Washington. However, he was not an unabashed deregulator bent on slashing red tape. "We must not place all our hopes for reform on the relatively limited amount of deregulation that would be beneficial," Cutler emphasized. "It is equally important," he continued, "to reexamine the effectiveness of the regulatory programs that will still be required." Indeed, the problem he tackled in the *Yale Law Journal* was not necessarily one of more or less regulation, but of bureaucratic responsiveness and the need for continuous reevaluation and adjustment. "Most instances of regulatory failure," Cutler explained, "stem from the inability of independent and expert bodies with separate missions to set national policy priorities." In fact, rather than rollbacks, Cutler proposed a novel form of state-building – the creation of a

[70] Mark J. Green, *The Other Government*, pp. 45-64

"mechanism," in his words, that would be centered in the executive office and that presidents could use to fasten administrative decisions around broad national political shifts. Cutler was not writing another version of the Powell memorandum; he was arguing for a form of politicization that would reconfigure the liberal administrative state.[71]

Cutler recognized the limitations of his own article. "Obviously," he acknowledged in the final paragraphs, "the plan outlined above does not answer all possible questions about its thrust and practical application." Admittedly, the piece read as a brief sketch of a reform proposal, not a white paper outlining the various aspects of implementation. Nevertheless, two things could be said with some certainty about presidential directives. First, the concept of "balancing" was central to Cutler's thinking. Over and over, Cutler used the term "balance" to describe his proposal and its practical effects. In his mind, chief executives would use their new authority to weigh or "balance" an agency's narrow statutory goals against the broader priorities confronting the political branches. Thus, Cutler envisioned directives as a means to make policy tradeoffs; a way for presidents to "balance" agencies' parochial missions against the exigencies of the larger political moment. Finally, Cutler's idea was not a pot-shot proposal. While it arose at a moment of crisis for the American presidency, it was a serious, meticulous argument in favor of expanding presidential power, crafted by one of the more influential figures in Washington. Much about presidential directives still needed to be worked out, but it was an impressive proposal with an exceptionally powerful backer.[72]

[71] Cutler, "Regulation and the Political Process," pp. 1397, 1399, 1418
[72] Cutler, "Regulation and the Political Process," pp. 1417

"The Need for a Legal Analysis": Harold Bruff, the ABA Commission on Law and the Economy, and the Framework for Presidential Intervention

Fig. 2. Harold H. Bruff, pictured in 1996 during his tenure as Dean of the Colorado Law School[1]

In 1976 Harold H. Bruff had just been promoted to the rank of full professor at the Arizona State University College of Law. A native of Colorado, Bruff had graduated from Williams College in 1965 with a degree in American history and literature. Immediately after college, he began his legal education at Harvard Law School, where he served for two years on the law review and later received his J.D. *magna cum laude*. In 1968 Bruff moved to San Francisco to join the U.S. Coast Guard Reserve. Once he passed the California bar exam, he became an Assistant Legal Officer for the Coast Guard's Twelfth District. In that capacity, he

[1] ITT Chicago-Kent College of Law, "Harold H. Bruff Wins 2008 Chicago-Kent College of Law/Roy C. Palmer Civil Liberties Prize," http://www.kentlaw.edu/news/releases/palmerprize_08winners.html

performed miscellaneous legal duties, including representing officers before court-martials and appearing before administrative discharge and physical disability boards. During his stint in the reserve, Bruff also found time to publish an article in the *Hastings Law Journal* (which examined new applications of the 1st amendment for public employees).[2]

In 1971 Bruff left the armed forces to pursue a career in academia, joining Arizona State as an assistant professor of law. Initially, Bruff focused his scholarship on the law of state and local governments. Over the early 1970s, for instance, he published an article on the Arizona state judicial system,[3] and later, on judicial review of actions taken by city governments.[4] His publication record took a turn, though, when an organization called the Administrative Conference of the United States (ACUS) commissioned him for a new research project. Bruff's dean at Arizona State – a scholar of administrative law named Ernest Gellhorn – had worked as a paid consultant for ACUS throughout the early '70s.[5] It thus seems likely that Gellhorn had a say in recommending Bruff – a relatively new faculty member – for this particular assignment.

A federal agency which conducts research on how to improve the functioning and efficiency of the federal government,[6] ACUS commissioned Bruff to write on a new topic:

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[2] Harold H. Bruff, "Unconstitutional Conditions Upon Public Employment: New Departures in the Protection of First Amendment Rights," *Hastings Law Journal*, Vol. 21 Issue 1 (1969): 129-174

[3] Bruff, "Arizona's Inferior Courts," *Law & the Social Order*, Vol. 1973 Issue 1 (1973): 1-50

[4] Bruff, "Judicial Review in Local Government Law: A Reappraisal," *Minnesota Law Review*, Vol. 60 Issue 3 (1975-76): 669-710

[5] "Administrative Conference of the United States: News," Oct. 1971, Walter Gellhorn Papers, Administrative Conference of the United States, 1961-1972, Box 238 Folder 1, Rare Book and Manuscript Library, Columbia University, pp. 1-2

[6] The Administrative Conference of the United States was the brainchild of E. Barrett Prettyman – a judge on the U.S. Court of Appeals for the District of Columbia Circuit – and was modeled on the existing Judicial Conference (an association of judges which meets bi-annually to discuss the structure and operation of the federal courts). For more background on ACUS see Prettyman, "The Administrative Conference of the United States," *Public Utility Law: Addresses Delivered* (1961): 3-15; Prettyman, "Some Broader Aspects of an Administrative Conference of the United States," *Administrative Law Review*, Vol. 17 Issue 1 (1964): 48-60; Max D. Paglin, "The Structure and Functioning of the Administrative Conference," *Antitrust Bulletin*, 7.6 (1962): pp. 827-834; and also Robert Kramer and Arthur Selwyn Miller, "The Task of An Administrative Conference," *George Washington Law Review*, Vol. 32 Issue 1 (1963): 169-192;

presidential control over something called "mandatory retirements." The 1920 Civil Service Retirement Act subjected federal employees to mandatory retirement – usually at the age of 70 – but gave presidents broad discretion to issue executive orders exempting officials from this provision. Historically, presidents had issued exemptions to prevent turnover or to retain the services of bureaucratic allies, but whether this power extended to the independent regulatory commissions was an open question. Indeed, many of the independent commissions operated under statutes which made no mention of mandatory retirement, raising the question of whether the 1920 Retirement Act applied and whether presidents, in turn, could lawfully exempt their members. When the number of exemptions spiked during the Nixon and Ford Administrations, ACUS decided the issue merited further study and contracted Bruff to perform the research (which he eventually published as an article in the *Duke Law Journal*). After a lengthy analysis of precedent – which explored the president's constitutional relationship to the bureaucratic officialdom – Bruff determined the statutes governing the independent commissions should be regarded as "implied exceptions" to the 1920 Retirement Act. Accordingly, chief executives should refrain from exempting their members. Alternatively, Bruff added, Congress could amend the act in order to properly shield the commissions from presidential exemptions.[7]

Bruff's analysis of mandatory retirement quickly earned him another assignment on a similar topic. In 1976, a branch of the American Bar Association (ABA) called the "Commission on Law & the Economy" approached Bruff, hoping to enlist his expertise on the relationship between presidents and administrative agencies. Established the year prior in 1975, the Commission on Law and the Economy (CLE) had 25 distinguished members – including Lloyd Cutler – and a broad mandate to investigate the "structures and processes within the federal

[7] Bruff, "Presidential Exemption from Mandatory Retirement of Members of the Independent Regulatory Commissions," *Duke Law Journal*, Vol. 1976 Issue 2 (1976): 249-280

government that relate to the…regulating and planning of economic activities." In truth, the group had a more singular mission. According to one scholar briefed on the matter in 1976, the CLE was at work on a proposal which would allow presidents to "give directions" to administrative agencies via executive order. As Prof. Bruff also learned, the ABA had established the commission as the institutional sponsor for presidential directives – as the organizational means for putting Cutler's bold idea into action. Shortly after the publication of "Regulation and the Political Process," the commission approached Bruff – an anointed expert on presidents and administrative agencies – and recruited him to write a report that addressed 1) the president's power to "bring agencies in line" and 2) the "constitutional mechanisms for reconciling agency actions." In other words, the CLE contracted Bruff to research the legal mechanics of presidential directives, and to make recommendations on how to lawfully implement Cutler's proposal. If successful, Bruff would be laying an intellectual foundation for executive power in the immediate aftermath of Watergate.[8]

The CLE had its roots in the economic turbulence of the 1970s. In establishing the commission, leading members of the bar echoed the widely-held view that federal regulations (of all types) were exacerbating rising prices and slowed growth, and that the regulatory process, in turn, needed to be retrofitted for a new era of stagflation. Lawrence E. Walsh – a former judge and the president-elect of the ABA – aired these sentiments at a February, 1975 meeting of the association. There, Walsh introduced a motion recommending the ABA authorize a "major study" on federal regulation and its impact on the American economy (hence the commission's

[8] See "Letter from Lawrence E. Walsh to David Ginsburg," Dec. 4th, 1975, Box 5 Folder 6, David Ginsburg Papers, Manuscript Division, Library of Congress, Washington DC, pp. 1-2; "Letter from Walter Gellhorn to Robert A. Anthony," Apr. 20th, 1976, Walter Gellhorn Papers, Administrative Conference of the United States, 1972-1979, Box 322 Folder 1, Rare Book and Manuscript Library, Columbia University, pp. 1-3; and also "Memorandum from Peter B. Bloch to Members of the Commission: Draft of Minutes for Commission Meeting of September 17-19, 1976," Oct. 19th, 1976, Henry J. Friendly Papers, Box 205 Folder 5, Harvard Law School Library, Harvard University, pp. 2

formal title). "The combination of inflation and recession," Walsh explained in his motion, "has focused significant public attention on the nation's economic planning." "Economic decisions with profound effect on the welfare of the public," he continued, "are made increasingly within government." The president-elect thus saw the need for a special body of experts which would conduct research with ABA resources and, more specifically, would recommend improvements in the "methods and procedures" of administrative regulation.[9]

After the ABA House Delegates approved Walsh's motion in 1975, the CLE began to take shape. To serve as chairman and vice-chairman, Walsh selected two fellow Republican attorneys – John J. McCloy and Richard B. Smith – who both had long histories of public service. A graduate of Amherst College and Harvard Law, McCloy had practiced at the Cravath firm from 1928 to 1940, specializing in international litigation and eventually making partner. In 1940 he was appointed Assistant Secretary of War and became, in spite of his political leanings, a key foreign policy adviser to Presidents Roosevelt and Truman. After the war, he held a long list of prestigious positions, including second president of the World Bank (1947-49), U.S. High Commissioner for Germany (1949-55), chairman of Chase Manhattan Bank (1953-60), and chairman of the Ford Foundation (1958-65).[10] Dick Smith was significantly younger than McCloy but had taken a similar path into public service. A graduate of Yale and Penn Law, Smith had practiced securities law in New York since the early 1950s; first at the firm Reavis & McGrath. In 1967, President Johnson appointed him to fill a vacancy on the Securities & Exchange Commission (SEC) where he served for four years before returning to private practice.

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[9] American Bar Association Section of Administrative Law, *Annual Reports of the Committees*, Vol. 12 (1975): 1-320, pp. 127-137

[10] For background on McCloy's career see Erika J. Fischer and Heinz-D Fischer, eds., *John J. McCloy: An American Architect of Postwar Germany: Profiles of a Transatlantic Leader and Communicator*, (New York: P. Lang, 1994); Thomas Alan Schwartz, *America's Germany: John J. McCloy and the Federal Republic of Germany*, (Cambridge: Harvard University Press, 1991); and Kai Bird, *The Chairman: John J. McCloy, the Making of the American Establishment*, (New York: Simon & Schuster, 1992)

In 1971, he joined the New York office of Davis, Polk, & Wardwell as senior counsel. There, he worked alongside ABA president-elect Lawrence E. Walsh.[11]

Walsh selected these two establishment lawyers to oversee the CLE and its relatively small research team. Housed within the ABA's administrative law unit, the commission would be composed of 25 members in total, with McCloy and Smith planning to invite practicing lawyers, legal scholars, economists, political scientists, and "others of wide acquaintance with regulatory processes." Once it was fully staffed, the commission would divide into "units of research and study" – i.e. working groups – which would focus on a particular topic, field, or problem. By their own expertise or through outside consultants, these working groups would produce research papers, and then convene to discuss and revise them into formal recommendations. In theory, each paper and set of recommendations would constitute an individual chapter of a longer, final report. To complete its work, the CLE had secured $180,000 from the ABA's General Fund and planned to solicit additional resources, if necessary, from private foundations. The commission intended to publish its final report in 1978; ahead of the association's mid-year meeting. McCloy and Smith chose this date in order to highlight the importance of the CLE's findings. That year marked the ABA's centennial anniversary, meaning the commissioners envisioned a first-rate report befitting this milestone for the American legal profession. "It is an undertaking," Walsh wrote in December, 1975, "to which the association will give importance and prominence."[12]

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[11] For Smith's background see "Nomination of Richard B. Smith," *Hearing Before the Senate Committee on Banking and Currency*, 90th Cong., 1st sess., Mar. 21st, 1967, pp. 1-5

[12] American Bar Association Section of Administrative Law, *Annual Reports of the Committees*, Vol. 12 (1975): 1-320, pp. 127-137; "Commission Draft: Research Agenda and Call for Funding," Sept. 10th, 1976, Walter Gellhorn Papers, American Bar Association 1976-1979, Box 324 Folder 1, Rare Book and Manuscript Library, Columbia University, pp. 1-36; and "Letter from Lawrence E. Walsh to David Ginsburg," Dec. 4th, 1975, Box 5 Folder 6, David Ginsburg Papers, Manuscript Division, Library of Congress, Washington DC, pp. 1-2

As they commenced work in 1975 and 1976, McCloy and Smith echoed Walsh's original motion, identifying the shifting economic environment as the principal motive for the CLE's formation. Internal documents painted the commission as an outgrowth of economic instability and the new concern over regulatory burdens that instability generated. "Sen. Edward M. Kennedy," the commissioners wrote in a formal announcement, "[has] testified that regulations cost the economy billions of dollars every year." "There is near unanimous agreement," they continued, "that regulation has a very important effect on our society." Writing to a prospective member, Dick Smith explained,

> The Commission had its inception in the widely-held view that the impact of government on economic life has been increasing rapidly…and that the country has not yet met the challenge of finding satisfactory procedures for…implementing the interventions of public agencies in economic life.[13]

To recommend a new procedural structure for federal regulation – a structure that was more responsive to the exigencies of the moment – was the commission's overriding objective.[14]

In early writings, the commissioners also emphasized the unique position of the organized legal profession. Throughout the early twentieth century, the ABA had actively opposed administration as a locus of policymaking, considering it a dangerous departure from constitutional norms and the safeguards of the adversarial model (as well as a threat to lawyers' prestige and status). In 1916 ABA President Elihu Root famously expressed this unease, declaring, "A system of administrative law must be developed," and arguing, among other

[13] "Letter from Richard B. Smith to David Ginsburg," Jan. 12th, 1976, Box 39 Folder 5, David Ginsburg Papers, Manuscript Division, Library of Congress, Washington DC, pp. 1-2
[14] "Commission Draft: Research Agenda and Call for Funding," Sept. 10th, 1976, Walter Gellhorn Papers, American Bar Association 1976-1979, Box 324 Folder 1, Rare Book and Manuscript Library, Columbia University, pp. 1-36

things, for robust judicial review of administrative action.[15] The opposition of the bar culminated in the 1930s, when the ABA formed a "Special Committee on Administrative Law" to censure the New Deal's alphabet agencies. Led by Roscoe Pound, this Special Committee portrayed agencies as "absolutist," tyrannical entities, and proposed legislation to limit their powers through the imposition of sweeping court-like formalities.[16]

By the mid-1970s, however, much about the bar's orientation had changed. The 1946 Administrative Procedure Act – passed largely to deflect Pound and the ABA's more radical proposals[17] – created a comprehensive code which infused agencies with the process of law. With this new body of administrative procedure came perennial opportunities for the legal profession, resulting in a "government of lawyers," according to historian Dan Ernst.[18]As the profession increasingly gravitated to government service, and began wielding administration as a lever for power and influence, the opposition of the bar predictably waned.

The Commission on Law and the Economy – itself a branch of the administrative law unit originally led by Pound – embodied this broad shift in attitude. The CLE spoke of the administrative state not as an institutional menace (like prior generations), but in largely paternalistic terms. "It is obvious," noted one CLE memo, "that lawyers are sufficiently close to the center of most regulatory processes for their professional institutions to accept a role in

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[15] See Elihu Root, "Public Service by the Bar," *Annual Report of the American Bar Association*, Vol. 39 (1916): 355-374, pp. 369

[16] For more on these views see Pound, "The Place of the Judiciary in a Democratic Polity: An Examination of the Walter-Logan Veto Message," *American Bar Association Journal*, Vol. 27 (1941): 133-139; and for secondary material on the bar's anti-administrative campaign during the New Deal see Reuel E. Schiller, *Policy Ideals and Judicial Action: Expertise, Group Pluralism, and Participatory Democracy in Intellectual Thought and Legal Decision-Making, 1932-1970,* (Charlottesville, VA: 1997), Thesis (Ph.D), University of Virginia, pp. 384-413; Paul Verkuil, "The Emerging Concept of Administrative Procedure," *Columbia Law Review*, Vol. 78 Issue 2 (1978): 258-329, pp. 268-274; and more recently, Gillian Metzger, "1930s Redux: The Administrative State Under Siege," *Harvard Law Review*, Vol. 131 Issue 1 (2017): 1-95, pp. 57-62

[17] For more on the debates leading to the passage of the APA see Joanna Grisinger, *The Unwieldy American State: Administrative Politics Since the New Deal*, (New York: Cambridge University Press, 2012), pp. 59-108

[18] See Ernst, "*Morgan* and the New Dealers," *Journal of Policy History*, Vol. 20 No. 4 (2008): 447-481

monitoring and improving those processes in the public interest." In other words, because lawyers had evolved into the stewards of the administrative process, the commission saw a professional obligation to recommend structural reforms. "The national organization of the legal profession," the CLE's leaders continued, "felt it had a responsibility to make an appropriate contribution to the rethinking now being given to the way in which the government intervenes in the economy." The commission thus illustrated lawyers' transition from opponents to overseers of the administrative state.[19]

As the commission added members and held its first meetings in 1976, Lloyd Cutler's influence became increasingly clear. Among the first appointments to the CLE were David Ginsburg (a New Dealer turned Washington lawyer), Henry J. Friendly (a renowned judge on the 2nd Circuit Court of Appeals), Paul W. MacAvoy (a Yale economist and proponent of deregulation), Joseph Onek (a public interest advocate at the Center for Law and Social Policy), F. Mark Garlinghouse (chief counsel at AT&T), and William T. Lifland (a leading antitrust lawyer). The initial list of research consultants included Stephen Breyer, Lance Liebman, and Clark Byse; three giants from the Harvard Law faculty. All signs pointed to Cutler, though, as the leading force of this distinguished group. Having practiced law in DC since the mid-1940s, Cutler had long been active in the organized bar. Though he later "got bored" with the ABA, he was a mainstay in the organization throughout the 1950s and 1960s. He frequently contributed to the bar's administrative and international law units, and in 1966 he founded the ABA Section on Individual Rights and Responsibilities (which he subsequently chaired two years later).[20]

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[19] "Initial Memorandum to Explore Scope of the Commission's Inquiry," Jan. 9th, 1976, Box 39 Folder 5, David Ginsburg Papers, Manuscript Division, Library of Congress, Washington DC, pp. 1-20; and "Commission Draft: Research Agenda and Call for Funding," Sept. 10th, 1976, Walter Gellhorn Papers, American Bar Association 1976-1979, Box 324 Folder 1, Rare Book and Manuscript Library, Columbia University, pp. 1-36;

[20] See "Interview with Lloyd Cutler: Final Edited Transcript," conducted Jun. 5th, 2003, *Lloyd Cutler Biographical Oral History Project*, Miller Center for Public Affairs, University of Virginia, pp. 29; American Bar Association, *Summary of Proceedings of the Section of International and Comparative Law: Part 1*, Vol. 1963: 23-39, pp. 27-28;

As a member of the CLE, Cutler proved influential from the very beginning. At the group's first official meeting – held in Reston, VA in April, 1976 – Cutler led a discussion on the topic of "agency coordination." According to notes compiled by one staffer in attendance, Cutler launched an extended discussion of presidential directives:

> Agency coordination. Separate question from "over" or "de" regulation. Agency independent from political influence, becomes the problem. Cannot have a consistent overall policy. Now, extremely complex decisions in the public interest – but no one responsible for all implications of decisions, e.g. 12 agencies in energy, plus state's PUCs and environmental agencies. Not amenable to presidential control; not accountable to elected government.
>
> Question: whether can afford luxury of multitude of independent agencies. Failure or willingness of politicians to take responsibility for activities of agencies. Must have renewed faith in, and application of, politics to decide. Mechanisms needed for president where he could:
>
> 1. Modify agency decision or
> 2. Set priorities in conflict situations where competing goals subject to
>
> A. one-house veto and,
>
> B. expedited judicial review.
>
> President could require agency to take up issue or review (except licensing decision). Act by executive order after 30 days notice in Federal Register, i.e., President intervene only on record, in public. Executive order effective only after 60 days…
>
> Some increase in his ability to intervene.[21]

After Cutler's introductory statement, his peers on the commission responded. According to notes, Clark Byse expressed concern about the idea's political prospects: "doesn't think Cutler proposal be greeted with open arms." Judge Friendly worried that presidential directives would overtly politicize agency decision-making and disrupt, in turn, the "continuity" of regulatory

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American Bar News, Vol. 13 Issue 5 (1968); 1-20, pp. 5; and also American Bar Association Section of Administrative Law, "Oversight and Review of Agency Decision-Making: 1976 Bicentennial Institute," *Administrative Law Review*, Vol. 28 Issue 4 (1976): 569-742, pp. 701

[21] John T. Connor Jr., "Memorandum to Members of the ABA Commission on Law and the Economy: Notes from the Meeting at Reston, VA, Apr. 24-25, 1976," May 10th, 1976, Box 39 Folder 7, David Ginsburg Papers, Manuscript Division, Library of Congress, Washington DC, pp. 22-23

policy. However, Friendly added that Cutler's proposal had "better procedural safeguards" than the proposal introduced by Emmette S. Redford a decade earlier. Others offered fuller endorsements, citing "similar," "long-standing" powers – including the "801 procedure" for international air routes – and even declaring, "perhaps time has come." The meeting ended with Chairman McCloy asking, "Consensus for Cutler proposal?" and scheduling another plenary session for late June. In a mid-year update for the administrative law unit, a CLE staffer named Peter H. Keatinge suggested that consensus had, in fact, emerged at Reston. In his report on the first meeting, Keatinge announced that the commission was giving "serious consideration" to "an article in the *Yale Law Journal* by [Mr.] Cutler."[22]

In fact, all signs pointed to "Regulation and the Political Process" as the CLE's foundational text and to presidential directives as the group's primary focus. Ahead of the April meeting, McCloy and Smith distributed a packet of reading materials to the commissioners, which included newspaper articles on stagflation, transcripts of Sen. Kennedy's hearings on the CAB, and a copy of Cutler's article. Memos outlining the CLE research agenda also echoed the central themes of Cutler's piece;

> The Commission is concerned that the executive branch is suffering from serious structural defects which prevent…adequate reviews of our regulatory processes…Several of the commissioners suspect that the nation needs entirely new institutional approaches to make the regulatory agencies responsible and accountable to our political institutions and to permit the nation to develop a rational economic policy…The commission will examine the way in which the president [influences] the actions of regulatory agencies and will determine whether it is appropriate to recommend ways to increase the accountability of agencies and the reconciliation of conflicting decisions.[23]

[22] John T. Connor Jr., "Memorandum to Members of the ABA Commission on Law and the Economy: Notes from the Meeting at Reston, VA, Apr. 24-25, 1976," May 10th, 1976, Box 39 Folder 7, David Ginsburg Papers, Manuscript Division, Library of Congress, Washington DC, pp. 23-32

[23] "Commission Draft: Research Agenda and Call for Funding," Sept. 10th, 1976, Walter Gellhorn Papers, American Bar Association 1976-1979, Box 324 Folder 1, Rare Book and Manuscript Library, Columbia University, pp. 16-18

Beyond thematic overlap, internal documents explicitly recognized "Regulation and the Political Process" as the piece of scholarship structuring the CLE's work. "The Commission's focus is likely to be on the processes by which government reaches and reconciles economic decisions," McCloy and Smith wrote shortly after their appointments. "In this connection," they added, "the Cutler article in the June issue of the *Yale Law Journal* may be of interest." "Recommendations which might result from this study," they predicted in another announcement, "would include an opinion on…implementing the Cutler recommendation for administrative control of agencies."[24]

Even nonmembers had heard about the CLE's Cutlerian bent. Walter Gellhorn – a professor of administrative law at Columbia University who helped write the Administrative Procedure Act – heard from one of the CLE's research consultants in 1976 that presidential directives was indeed the group's main preoccupation;

> Dick Smith…is pushing a plan – or, perhaps, is only investigating a plan – which would allow a president to give directions to an administrative agency, by executive order. I understand that this proposal has been put forward by some segment of the American Bar Association. Clark Byse mentioned the matter to me in a summary fashion when I saw him in Cambridge a few days ago.[25]

While the commission had an exceedingly broad mandate – to recommend changes in the "methods and procedures" of administrative regulation – it was an endeavor headlined by Lloyd Cutler and rooted in his ideas about presidents and the administrative state.

In addition to presidential directives, the CLE offered several other hints regarding potential topics of interest. At multiple points, the commissioners cited the work of Charles L.

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[24] "Letter from Richard B. Smith to David Ginsburg," Jan. 12th, 1976, Box 39 Folder 5, David Ginsburg Papers, Manuscript Division, Library of Congress, Washington DC, pp. 1-2; "Initial Memorandum to Explore Scope of the Commission's Inquiry," Jan. 9th, 1976, Box 39 Folder 5, David Ginsburg Papers, Manuscript Division, Library of Congress, Washington DC, pp. 1-20; and "Commission Draft: Research Agenda and Call for Funding," Sept. 10th, 1976, Walter Gellhorn Papers, American Bar Association 1976-1979, Box 324 Folder 1, Rare Book and Manuscript Library, Columbia University, pp. 19

[25] "Letter from Walter Gellhorn to Robert A. Anthony," Apr. 20th, 1976, Walter Gellhorn Papers, Administrative Conference of the United States, 1972-1979, Box 322 Folder 1, Rare Book and Manuscript Library, Columbia University, pp. 2

Schultze – an economist and senior fellow at the Brookings Institution (who had a reputation as a center-left budget hawk). While completing his graduate work in the 1950s, Schultze had served on President Eisenhower's Council of Economic Advisers (CEA), learning the tools of Keynesian management and focusing on the effects of federal deficit spending. In 1962, President Kennedy elevated Schultze to Assistant Director of the Bureau of the Budget (BOB) – one of the administration's key advisory bodies for economic policy. Three years later, President Johnson appointed Schultze to lead BOB, making him the youngest director in the bureau's history. While Schultze was a Keynesian and had liberal leanings, he grew unnerved with Johnson's profligate fiscal policy, and urged the president to raise taxes to contain the stimulative pressure of heightened military spending. Notwithstanding the emergence of "stagflation," Schultze gained notoriety as an advocate for fiscal restraint on the Democratic side. When Republicans retook the White House in 1968, Schultze left government to join the Brookings Institution – a left-leaning policy research organization in Washington – where he published a number of influential works on the federal budget and economic policy generally.[26]

The ABA Commission fixated on two books Schultze had published in the mid-1970s while at Brookings. In *Pollution, Prices, and Public Policy* (1975) and *The Public Use of Private Interest* (1977) Schultze offered a new blueprint for implementing new social regulations. In both works, he lamented the "command-and-control" tendency of health, safety, and environmental rules. Schultze explained how laws like the 1970 Occupational Safety and Health Act and 1972 Water Pollution Control Act instructed regulators to write detailed, inflexible

[26] For background on Schultze's career see "Nomination of Charles L. Schultze," *Hearings Before the Senate Committee on Banking, Housing, and Urban Affairs*, 95th Cong., 1st sess., Jan. 11th, 1977, pp. 1-46; and for some of his scholarly works see Schultze, *Recent Inflation in the United States*, (Washington: U.S. Government Printing Office, 1959); Schultze and Joseph L. Tryon, *Prices and Costs in Manufacturing Industries*, (Washington: U.S. Government Printing Office, 1960); Schultze, *The Politics and Economics of Public Spending*, (Washington: Brookings Institution, 1968); Schultze, *National Income Analysis*, (Edgewood Cliffs, NJ: Prentice-Hall, 1971); and also Schultze, *Setting National Priorities: The 1976 Budget*, (Washington: Brookings Institution, 1975)

guidelines, which specified outcomes and the exact technological changes firms needed to make to attain those outcomes. "We usually tend to see only one way of intervening," Schultze explained, "namely, removing a set of decisions from the decentralized and incentive-oriented private market and transferring them to the command-and-control techniques of government bureaucracy." The problem with this technique, Schultze claimed, was that it imposed maximum costs on private industry; up to half a trillion dollars over the next decade, according to his estimates. Luckily, there were more efficient alternatives for meeting regulatory objectives. Social regulations could set broad targets, Schultze explained, but enforce them by channeling private incentives rather than imposing uniform technological mandates. If regulators employed "flexible," "incentive-oriented" alternatives – like pollution taxes or tradeable permits – Schultze believed government could achieve the same ends at a far lower cost. Schultze thus offered a way to fine-tune health, safety, and environmental goals for the recent economic crunch. "We can have our cake and eat it too," he wrote, "we can reconcile economic growth with a reasonably clean environment."[27]

For the CLE – a body intent on molding the regulatory process to new economic realities – Schultze's ideas were immensely attractive. Indeed, it was easy to see how "flexible" regulatory approaches could serve the broad aims of Lloyd Cutler and the ABA Commission. If environmental rules, for instance, followed incentive-based rather than command-and-control designs, the statutes mandating clean air and clean water would remain in place, but would be pursued in a less rigid way according to the shifting demands of the times. Ostensibly, such a

[27] See Allen V. Kneese and Charles L. Schultze, *Pollution, Prices, and Public Policy: A Study Sponsored by Resources for the Future, Inc., and the Brookings Institution*, (Washington: Brookings Institution, 1975), pp. 3; and also Schultze, *The Public Use of Private Interest*, (Washington: Brookings Institution, 1977), pp. 6, 80

change could be ordered or "directed" by the president and could fulfill Cutler's goal of preserving key regulatory commitments while administering them in a more "balanced" fashion. Accordingly, the CLE repeatedly cited Schultze's work, pointing to his findings as a pillar of the research program. Citing *The Public Use of Private Interest*, one CLE staffer observed, "Federal regulation often relies on command and control techniques, although the use of economic incentives would more efficiently achieve regulatory objectives." "The issue," added one of the group's initial announcements, "can be viewed not as the intellectual foundation for regulation, but rather its effectuation." Again, the CLE echoed "Regulation and the Political Process," distancing itself from the deregulation movement and framing its work, instead, as an investigation into how to "[achieve] regulatory ends." If the reliance on Schultze's research was any indication, the CLE was approaching the regulatory apparatus with a belt-sander, not a wrecking ball.[28]

To advance its prospective ideas about presidential control and "incentive-based" approaches, the commission planned to keep close contact with government officials. The leaders of the CLE envisioned the research program not as a purely academic endeavor, but as a catalyst for administrative reform inside the beltway. Indeed, the commissioners hoped their final recommendations would have an "important impact on the conduct of…government." To be influential, though, the group saw the need for outreach and political promotion. "As the work of the commission unfolds," McCloy and Smith wrote, "serious attention will be paid to developing

[28] Peter B. Bloch, "Memorandum to Consultants and Assistant Directors of the Commission: Hypotheses and Assumptions," Sept. 27th, 1977, Henry J. Friendly Papers, Box 205 Folder 3, Harvard Law School Library, Harvard University, pp. 1-5; and "Initial Memorandum to Explore Scope of the Commission's Inquiry," Jan. 9th, 1976, Box 39 Folder 5, David Ginsburg Papers, Manuscript Division, Library of Congress, Washington DC, pp. 6

and maintaining close relations to important officials of both the legislative and executive branches of government."[29]

By the middle of 1976, the commission had already made progress on this front. The second official meeting of the CLE – held in Washington DC on Jun. 28th – amounted to a preliminary briefing for government officials. Among those in attendance were Sen. Charles Percy (R-IL), Rep. Abner Mikva (D-IL), the chairman of the Securities & Exchange Commission (SEC), the chief counsel for the Congressional Budget Office (CBO), and the chief counsel for two different congressional committees. One member of the commission – David Ginsburg – had also met privately with Charlie Schultze at his Brookings Institution office in Washington. Moreover, the commissioners indicated that such outreach would be ongoing. In 1978 – when the CLE's final report was slated for completion – the commissioners anticipated another blitz of advocacy;

> Subsequent to issuing its final report, the commission anticipates a need for an implementation phase during which to present its work to our government…During this phase…the commission will use written, oral, and visual materials to present its case for the implementation of its recommendations.[30]

Through its small network of well-connected members, the CLE intended to bring its ideas to the highest levels of government and planned to see to it they were put into practice.[31]

Among the first actions taken by the commission was to establish an internal working group devoted to the study of presidential directives. At the group's third official meeting in September, 1976, a majority of the CLE approved a motion creating an "Accountability

[29] "Commission Draft: Research Agenda and Call for Funding," Sept. 10th, 1976, Walter Gellhorn Papers, American Bar Association 1976-1979, Box 324 Folder 1, Rare Book and Manuscript Library, Columbia University, pp. 33
[30] Ibid, pp. 33
[31] Ibid, pp. 13, 33; and "Letter from David Ginsburg to Charles L. Schultze," Feb. 2nd, 1976, Box 39 Folder 5, David Ginsburg Papers, Manuscript Division, Library of Congress, Washington DC, pp. 1

Committee" – chaired by Lloyd Cutler – and authorized that body to conduct a study on the "executive procedures" by which presidents could "bring agencies in line" with their policy priorities. Given the importance of Cutler's proposal to the commission's work, no single project was more central to the research agenda. Minutes from the third meeting offer a window into the CLE's motivations in sanctioning the project. According to notes compiled by one staffer in attendance, "Mr. Smith pointed out the need for papers in this area to address…the constitutional mechanisms for reconciling agency actions." According to notes, "Mr. Cutler stressed the need for a legal analysis of the limitations of presidential power." To have any real teeth, Cutler and Smith contended that presidential directives required a supporting piece of legal scholarship – a careful analysis of precedent which surveyed the constitutional landscape, identified any limits on presidential power, and outlined potential frameworks for White House intervention. Though "Regulation and the Political Process" was an impressive work in its own right, it was not a detailed investigation into the legal underpinnings of presidential directives. ABA lawyers were cognizant of the need for such a foundational legal analysis.[32]

To complete the project, the Accountability Committee contracted Harold H. Bruff – the Harvard Law graduate turned ASU professor who had recently published on the relationship between presidents and administrative agencies. Writing to Bruff in the winter of 1976, Cutler's working group requested – by the following summer – a report which examined the "authority of the president…to direct the result in a rulemaking proceeding." "The study," the CLE's staff director added, "might result in recommendations which would expand…the powers of the president." By the following January, Bruff distributed an early draft to the commissioners. By

[32] Peter B. Bloch, "Memorandum to Members of the Commission: Draft of Minutes for Commission Meeting, Sept. 17-19, 1976," Oct. 19th, 1976, Henry J. Friendly Papers, Box 205 Folder 5, Harvard Law School Library, Harvard University, pp. 1

the fall – a few months behind schedule – he had completed a full, edited version titled "Presidential Participation in Agency Rulemaking." "The purpose of this study," Bruff explained in the opening pages of his report, "is to analyze the present legal powers of the president to increase policy coordination by participating in agency rulemaking." So began a piece of scholarship that examined the authority of chief executives to politically intervene in administrative proceedings.[33]

To determine whether presidents could "direct the results" of regulatory policy, Bruff began with an analysis of the Supreme Court's removal cases, which involved the bluntest form of presidential control: firing agency heads. The U.S. Constitution made no mention of a presidential removal power. While Article II was quite clear about appointments – allowing presidents to appoint "officers of the United States" with the advice and consent of the Senate – it said nothing regarding a corresponding removal power, creating a legal grey area with regard to dismissals. While the very first Congress suggested presidents did, in fact, possess an exclusive removal power[34] – and while presidents consistently removed officers over the nineteenth century – the Supreme Court had never issued a definitive opinion on the matter. The court finally addressed the major constitutional questions in the 1920s, when President Wilson unilaterally fired Frank S. Myers; a First-Class Postmaster and member of a cabinet department.

[33] Peter B. Bloch, "Memorandum to Members of the Commission: Draft of Minutes for Commission Meeting, Sept. 17-19, 1976," Oct. 19th, 1976, Henry J. Friendly Papers, Box 205 Folder 5, Harvard Law School Library, Harvard University, pp. 1; Bloch, "Memorandum to Consultants and Assistant Directors of the Commission: Hypotheses and Assumptions," Sept. 27th, 1977, Henry J. Friendly Papers, Box 205 Folder 3, Harvard Law School Library, Harvard University, pp. 4; Bloch, "Memorandum to Members of the Commission: Application of Executive Orders to Independent Commissions," Jan. 4th, 1977, Henry J. Friendly Papers, Box 205 Folder 3, Harvard Law School Library, Harvard University, pp. 1; and also Harold Bruff, "Presidential Participation in Agency Rulemaking," Nov. 7th, 1977, "American Bar Association—Government Regulations" Folder, Box 24, Files of Simon Lazarus, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1

[34] For an early view see Edward S. Corwin, *The President's Removal Power Under the Constitution*, (New York: National Municipal League, 1927); and for a recent rebuttal see Saikrishna Prakash, "New Light on the Decision of 1789," *Cornell Law Review*, Vol. 91 Issue 5 (2009): 1021-1078

An 1876 statute provided that chief executives could only remove postmasters "by and with the advice and consent of the Senate." Wilson had terminated Myers, however, without Senate approval as mandated by the statute. When Myers subsequently brought suit to recover his salary, the Harding Administration came to the departed Wilson's defense, claiming the law was an unconstitutional restriction on Art. II. When the issue reached the Supreme Court, counsel for Myers admitted presidents had the authority to remove officers but maintained Congress needed to consent (as it did for appointments). The Solicitor General countered that an absolute removal power – free from all legislative restrictions – flowed from the Constitution's general grant of executive power, and from the president's broad duty in Art. II to "take care that the laws be faithfully executed."[35]

Chief Justice William Howard Taft – himself a former president – proved receptive to the government's arguments. In *Myers v. United States* (1926) Taft implied a sweeping removal power from the broad confines of Art. II. Drawing on legislative debates from the first Congress of 1789, Taft argued the power to dismiss had long been regarded as a "necessary incident" to presidential appointments Without the removal power, Taft added, presidents would be unable to fulfill their other constitutional duties. In this way, the chief justice showed how the broadly-worded provisions of Art. II – such as the vesting and "take care" clauses – carried implicit support for removal. Lastly, because the Constitution contained no express restrictions on presidential dismissals, the power was absolute and thus could not be limited by Congress. "The executive power," Taft wrote in his sweeping opinion, "was limited by direct expressions where

[35] For more background see Prakash, "The Story of *Myers* and Its Wayward Successors: Going Postal on the Removal Power," in *Presidential Power Stories*, Christopher H. Schroeder and Curtis A. Bradley eds., (New York: Foundation Press, 2009), pp. 165-188; and Jonathan L. Entin, "The Curious Case of the Pompous Postmaster: Myers v. United States," *Case Western Reserve Law Review*, Vol. 64 Issue 4 (2015): 1059-1082; and for contemporaneous accounts see George B. Galloway, "The Consequences of the *Myers* Decision," *American Law Review*, Vol. 61 Issue 4 (1927): 481-508; and Charles E. Morganston, *The Appointing and Removal Power of the President of the United States: A Treatise on the Subject*, (Washington DC: U.S. Government Printing Office, 1929)

limitation was needed, and the fact that no express limit was placed on the power of removal by the executive was convincing indication that none was intended." *Myers* thus established a plenary power for presidents to dismiss federal officers.[36]

After his overview of Taft's opinion, Bruff transitioned to a discussion of *Humphrey's Executor v. United States* (1935), decided a mere nine years after *Myers*. In 1925 President Calvin Coolidge had appointed William E. Humphrey – a Republican congressman from the state of Washington – to the 5-member board of the Federal Trade Commission (FTC). When President Roosevelt subsequently took office in 1933, he demanded Humphrey's resignation, deeming him a conservative opponent of the New Deal. After Humphrey twice refused, Roosevelt fired him, seemingly violating the agency's governing statute. The 1914 Federal Trade Commission Act stipulated that presidents could only remove FTC commissioners "for cause" – for "inefficiency, neglect of duty, or malfeasance in office." Having committed none of these infractions and been removed for partisan reasons alone, Humphrey sued to recover his salary. While Humphrey subsequently died during the litigation, the executors of his estate carried his case to the Supreme Court.[37]

On May 27th, 1935 – also known as "Black Monday" for the New Deal – the court unanimously disallowed the president's removal of Humphrey. Writing for the majority in *Humphrey's Executor*, Justice George Sutherland recounted how Congress had originally established the commission as an independent entity "free from political domination." In creating the FTC in 1914, Congress had expressly insulated the agency from political influence. Through "for cause" restrictions, staggered terms for commissioners, and the delegation of "quasi-

[36] *Myers v. United States*, 272 U.S. 52 (1926)
[37] For more background see Prakash, "The Story of Myers and Its Wayward Successors," pp. 188-194; and William E. Leuchtenberg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt*, (New York: Oxford University Press, 1996), pp. 52-81

judicial" functions, legislators built independence into the FTC's statutory core. "Such a body," Sutherland emphasized, "cannot…be characterized as an arm of the executive." Unlike Frank S. Myers, a member of the Post Office – a cabinet department which had long been a vehicle for political patronage – Humphrey belonged to an agency that was "separate and apart" from the executive branch. "The office of a postmaster," Sutherland explained in the opinion, "is so essentially unlike the office now involved that…the *Myers* case cannot be accepted as controlling our decision here." According to the majority, Chief Justice Taft had ignored these important categorical differences between agencies and, in turn, had painted with too broad a brush with regard to removals. Sutherland thus saw fit to limit the scope of *Myers*, "We think it plain…that illimitable power of removal is not possessed by the President." *Humphrey's Executor* thus "[drew] a bright line," in Bruff's words, between the officers of cabinet departments – who were subject to an unfettered removal power – and the officers of the independent commissions– who were comparatively shielded from political pressure.[38]

Bruff concluded that the legal mechanisms of agency independence evident in the removal cases did support presidential directives. In his *Yale Law Journal* piece, Lloyd Cutler had glazed over the distinction between independent regulatory commissions and cabinet-level departments, preferring to emphasize the insularity of administrative decisions *generally*. Bruff, who the ABA tasked with investigating the law's nuts and bolts, believed this distinction was a crucial factor in the CLE's inquiry. Moreover, Bruff argued the bifurcated nature of presidential removals was not particularly favorable to Cutler's proposed vision of presidential control. "The removal cases carry only limited value," he wrote in 1977, "in approaching the issue at hand." Considered on its own, *Myers* lent clear support to presidential directives. Indeed, if presidents

[38] *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); and Bruff, "Presidential Participation in Agency Rulemaking," pp. I-9

could claim an absolute removal power – if they could fire subordinates solely for political reasons (and could not be restricting by Congress in doing so) – one could reasonably argue they had the authority to "direct" those subordinates in their policymaking actions. Of course, the ensuing decision in *Humphrey's Executor* cut in the opposite direction. By empowering Congress to bar politically-motivated dismissals, the decision seemingly weakened support for the claim to a broad constitutional grant of presidential authority. "The Supreme Court's removal cases," Bruff concluded, "leave us without clear guidelines on the extent of presidential power to direct policymaking." By establishing two "simplistic categories" which prescribed divergent levels of presidential authority, *Myers* and *Humphrey's Executor* muddied the waters, according to Bruff, and provided no clear answer on the propriety of directives.[39]

Having gleaned little of value from the removal cases, Bruff continued his survey of the legal landscape, which led him next to *Youngstown Sheet & Tube Co. v. Sawyer* (1952) – another canonical case on the scope of presidential power. The *Youngstown* controversy began in 1950, when negotiations between labor and management broke down in the steel industry and the U.S. Steelworkers of America – one of the nation's largest industrial unions – went on strike. The strike occurred at an inopportune time, given the United States had recently entered the Korean War, and given the importance of the steel industry to war production. As the nation's Commander in Chief, however, President Truman took action to end the potentially damaging work stoppage. On April 8th, 1952, Truman issued an executive order directing Secretary of Commerce Charles W. Sawyer to seize control of the nation's steel mills and operate them on behalf of the federal government.[40]

[39] Bruff, "Presidential Participation in Agency Rulemaking," pp. I-8, I-11, I-13
[40] For more background see Maeva Marcus, *Truman and the Steel Seizure Case: The Limits of Presidential Power*, (New York: Columbia University Press, 1977); William H. Harbaugh, "The Steel Case Reconsidered," *Yale Law Journal*, Vol. 87 No. 6 (1978): 1272-1283; Patricia L. Bellia, "Executive Power in *Youngstown's* Shadows,"

Unlike his predecessors in the Oval Office, though, Truman ordered the seizure without congressional approval. Woodrow Wilson and Franklin Roosevelt had taken similar measures to quell wartime labor disputes, but only when backed by the force of legislation. For instance, Roosevelt seized over 40 private businesses during World War II, but did so pursuant to the 1943 War Labor Disputes Act (which explicitly granted him broad seizure authority). In 1947, though, the provision of the act authorizing seizures expired. While lawmakers considered renewing it the same year – during hearings on the 1947 Taft-Hartley Act – they ultimately rejected amendments to restore the president's seizure authority. Importantly, this left Truman's steel order without statutory support. After steel companies – including Youngstown Sheet & Tube – filed an injunction against the president's action, Truman's lawyers articulated a sweeping theory of presidential power which dismissed the need for congressional approval. Arguing in a federal district court in Washington DC, the president's lawyers claimed executive power was unlimited during national emergencies and bore no relation to the action (or inaction) of Congress. According to their separation of powers analysis, a host of unenumerated powers, including the seizure of property, could be implied from the broad language of Art. II and could be wielded unilaterally by the president.[41]

While the administration eventually moderated the tone of its constitutional arguments, the Supreme Court delivered a major rebuke to the president. In a 6-3 opinion written by Justice

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Constitutional Commentary, Vol. 19 Issue 1 (2002): 87-154; Bellia, "The Story of the Steel Seizure Case," in *Presidential Power Stories*, Christopher H. Schroeder and Curtis A. Bradley eds., (New York: Foundation Press, 2009), pp. 233-252; and also David J. Barron and Martin S. Lederman, "The Commander in Chief at the Lowest Ebb – A Constitutional History," *Harvard Law Review*, Vol. 121 Issue 4 (2008): 941-1113; and for contemporaneous accounts see Edward S. Corwin, "The Steel Seizure Case: A Judicial Brick Without Straw," *Columbia Law Review*, Vol. 53 Issue 1 (1953): 53-66; Jerre S. Williams, "The Steel Seizure: A Legal Analysis of a Political Controversy," *Journal of Public Law*, Vol. 2 Issue 1 (1953): 29-40; and also Glendon A. Schubert Jr., "The Steel Case: Presidential Responsibility and Judicial Irresponsibility," *Western Political Quarterly*, Vol. 6 Issue 1 (1953): 61-77

[41] Bellia, "The Story of the Steel Seizure Case," in *Presidential Power Stories*, Christopher H. Schroeder and Curtis A. Bradley eds., (New York: Foundation Press, 2009), pp. 237-252

Hugo Black, the court approved the injunction sought by the steel industry, finding 1) that Congress had rejected presidential seizures in enacting Taft-Hartley, and 2) that Art. II did not permit Truman an independent seizure power. While five justices signed on to Black's opinion, consensus proved elusive for the majority. Four justices wrote separate concurrences in a splintered decision which offered myriad rationales for ruling against the president. While the majority gave disparate explanations for the result in *Youngstown*, the overall judgement was clear: 6 votes to limit Truman's muscular use of presidential power.[42]

In his report to the ABA Commission, Harold Bruff relied on one strand of the fractured *Youngstown* majority – Justice Robert Jackson's famous concurrence.[43] Though Jackson censured Truman in the case at hand, his concurrence included broadly-worded dicta on the scope of presidential power generally. Specifically, his concurrence outlined three "practical situations" which could be used to analyze future controversies between the political branches;

> We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.
>
> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. If his act is held unconstitutional under these circumstances, it usually means that the federal government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the burden of persuasion would rest heavily upon any who might attack it.
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a *zone of twilight* in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of

[42] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), pp. 585-589
[43] For more on Justice Jackson's concurrence and its legal applications in the late twentieth century see Bellia, "The Story of The Steel Seizure Case," pp. 270-284

> power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
>
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.[44]

The steel seizure fell squarely in Jackson's third category, as Congress had expressly denied Truman seizure authority in recent legislative debates. In 1952, then, presidential power was "at its lowest ebb." Notwithstanding the specific result in *Youngstown*, Jackson's concurrence accommodated a robust executive. Indeed, his three-part scheme – specifically, the "zone of twilight" outlined in the second category – affirmed the validity of independent executive actions. In cases of "congressional inertia, indifference, or quiescence," Jackson explained, presidents could take independent measures that were not explicitly authorized by statutes or the Constitution. Though Jackson ruled against Truman with the five other members of the majority, his concurrence thus presented an opening for future enlargements of Art. II.[45]

Bruff used this opening as a building block for presidential directives. After citing the famous passage from Jackson's concurrence, Bruff proceeded to analyze Cutler's proposal through the lens of the tripartite framework. "To borrow from Justice Jackson's categories," Bruff wrote, "we have neither the clear congressional denial of authority that…accounts for the result in *Youngstown* itself, nor the clear congressional grant of authority that would surely suffice to justify…presidential action." "The situation at present," he continued, "is probably within the twilight zone of the second category." Here, one could easily follow Bruff's line of argument, as Congress had truly never addressed the matter at issue. The 1946 Administrative Procedure Act – the statute which outlined the legal mechanics of the administrative state – made

[44] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), pp. 635-638
[45] Ibid, pp. 635-638

no mention of a presidential role in agency decision-making. Moreover, the statutes establishing agencies and delegating them particular powers and responsibilities also supplied little clarity. Apart from Section 801 of the 1938 Civil Aeronautics Act, most federal statutes stipulated that "the administrator shall" issue particular regulations, giving no indication on whether presidents could act interstitially in directing policy. Lastly, while lawmakers had excoriated "presidential meddling" during the Watergate scandal and after, none of Congress' ensuing Watergate reforms explicitly barred chief executives from intervening in administrative proceedings. "Congress," Bruff concluded, "has not clearly taken a stand on the appropriateness of a presidential role." Of course, Jackson's concurrence made this quiescence a launching-off point, not a legal obstacle.[46]

However, to use *Youngstown* as a touchstone for presidential directives, Bruff needed to demonstrate Cutler's idea had what he called "functional" justifications. By the terms of Jackson's second category, independent presidential powers needed to serve practical policy ends. "In this area," Jackson noted in his concurrence, "any actual of test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." In other words, in order to situate presidential directives in the felicitous "twilight zone," Bruff needed to convey the functional advantages of Cutler's proposal. Accordingly, he pivoted away from complex doctrinal questions and focused instead on the practical, structural benefits of presidential control.[47]

To make this functional argument, Bruff leaned on "Regulation and the Political Process." Citing Cutler's *Yale Law Journal* piece – the article at the heart of the ABA Commission's agenda – Bruff wrote,

> Let us examine the argument a president could make for power to direct policymaking even within independent agencies…The first premise would be that

[46] Bruff, "Presidential Participation in Agency Rulemaking," pp. I-18-19
[47] Bruff, "Presidential Participation in Agency Rulemaking," pp. I-20

> legislation necessarily distributes power in a somewhat fragmentary fashion and cannot foresee all future problems of coordinating policy under separate statutes. Moreover, existing statutes do not allocate responsibility within or outside the executive branch according to any consistent functional principle. The result is that broad national issues such as transportation or energy are likely to fall within the jurisdiction of a mélange of executive branch and independent agencies, each having power to deal with only part of the problem…Accordingly, the president can forcefully urge the necessity for recognizing his power to exercise some overall supervision, in discharge of his constitutional responsibility to oversee the execution of the laws. It seems clear that the president, with his overview and national constituency, is the appropriate official for this function…Such an argument would advance for the first time important functional reasons for presidential control of agency policy.[48]

An analogy is useful to make sense of this passage. Essentially, Bruff saw the administrative state as an airline hub which lacked a centralized system of traffic control. Echoing Cutler, he criticized the "fragmentary" structure of administrative regulation; the "mélange" of administrative bodies which each specialized in narrow policy subfields. Bruff argued this institutional structure resulted in ad-hoc, uncoordinated policy, and prevented government from responding with collective force to "broad national issues" Like Cutler, though, he saw presidential control as a solution to these functional defects. The presidency's national political constituency – and constitutional obligation to "faithfully execute" a mass of legislation – gave chief executives special capacity for what Bruff called "overall supervision." Their overview of the national political scene and broad duties under Art. II bestowed them a unique, wide-ranging perspective which could integrate the patchwork of commissions and agencies. In a way, then, Bruff likened the executive office to air traffic control. With a view of the entire sky, so to speak, presidents could ensure that the sprawling regulatory apparatus operated as a collective, responsive, functioning whole. "This argument," Bruff wrote, "that the president can assert an implied authority to harmonize the welter of statutes, has a functional basis."[49]

[48] Ibid, pp. I-13-14
[49] Bruff, "Presidential Participation in Agency Rulemaking," pp. I-20

To add force to his functional argument, Bruff included a brief discussion on the existing powers of the institutional presidency. "The president," he wrote, "has a number of important statutory powers with which he can affect administrative policymaking indirectly." Among these was the power to control agency budget requests (granted by the 1921 Budget and Accounting Act and wielded by the Office of Management and Budget), the power to submit government reorganization plans (extended by Congress on 14 occasions since the 1930s), and the power to set broad priorities among cabinet departments (through inter-agency councils within the Executive Office of the President). "These powers," Bruff wrote, "allow the president to exert indirect but important influence on agency policymaking." Bruff knew none of these existing tools conferred an affirmative power to direct substantive regulatory policies. However, he claimed they added precedential value to his functional argument for directives. "They acknowledge," he explained, "the president's overview of the government and his interest in achieving coordination, efficiency, and a coherent set of priorities in government operations." "At the broadest levels of generality," he continued, "they recognize policy coordination as a legitimate presidential activity." While these antecedents stopped short of a Cutler-style power, they demonstrated the legitimate aims of presidential control broadly speaking (after all, many derived from the stewardship theory of presidential power). In turn, Bruff believed they validated his functional argument, confirming directives could be situated within the parameters established by *Youngstown*. Accordingly, Bruff determined the existing powers of the institutional presidency "provide sufficient implied authority" for the Cutler proposal.[50]

Bruff concluded his survey of the constitutional landscape by summarizing his implied powers argument. "Its assertion in *Youngstown* was out of place," he noted, as Congress had

[50] Bruff, "Presidential Participation in Agency Rulemaking," pp. I-23-24, I-26

"clearly denied" Truman the authority to seize property in the late 1940s. While the majority properly rejected inherent presidential powers in that particular case, it did not bar the same argument from being successfully deployed in other contexts. "The majority's rejection of it," Bruff emphasized, "was not preclusive of its validity elsewhere." Indeed, Justice Jackson's concurrence provided that presidents could take independent actions in cases of congressional "inertia, indifference, or quiescence" and if backed by functional justifications. Herein lay the opening for presidential directives. "*Youngstown*," Bruff concluded, "can be reconciled with presidential power to influence or direct the substance of policy." "There are substantial constitutional arguments," he added, "for some presidential role in coordinating policy, even with respect to independent agencies."[51]

However, this did not mark the conclusion of Bruff's report to the ABA Commission. Thus far, the ASU professor had operated at the most abstract level of legal analysis, examining the Supreme Court precedents which could support presidential power in case of a broad constitutional challenge to directives. With *Youngstown*, Bruff had identified such a constitutional underpinning. However, he had yet to address how directives would be implemented and exercised in a practical sense. "It remains to define [this] role further," Bruff wrote following his discussion of *Youngstown*, "how would it work and what would its limits be?" It was one thing to reconcile Cutler's proposal with existing strands of constitutional theory, but it was another to recommend specific procedures for presidential intervention which would allow chief executives effectively to wield their authority in administrative proceedings. On these practical challenges of implementation, Bruff focused the remainder of his ABA report.[52]

[51] Ibid, pp. I-19-20, I-30
[52] Bruff, "Presidential Participation in Agency Rulemaking," pp. I-30

Here, Bruff's main worry was that presidential directives would give rise to something called "ex parte communications." In Latin, ex parte means "on one side only" or "by or for one party." In American law, an ex parte communication refers to a prohibited form of bias in adversarial proceedings. If a judge communicates privately with one of the parties in a case – but excludes the opposing counsel from the conversation and denies them opportunity to respond – they commit a procedural error called an ex parte communication or contact. Generally, these contacts are serious ethical breaches (and are often grounds for a mistrial) because they abridge one of the litigants' due process rights and compromise the judiciary's promise of impartial decision-making. At a minimum, ex parte communications create the semblance of impropriety. At worst, they open the administration of justice to bias and improper influence.[53]

When the organized bar drafted its first code of legal ethics in the early twentieth century, it included a prohibition on ex parte contacts. In 1924 the ABA House of Delegates approved 34 "Canons of Judicial Ethics," one of which – Canon 17 – stipulated, "A judge should not permit private interviews, arguments, or communications designed to influence his judicial action where interests to be affected thereby are not represented before him." Except in narrow emergency situations,[54] Canon 17 applied to the proceedings of state and federal courts. In 1969 the ABA decided to broaden the rule's application, extending it to practicing attorneys in its "Model Code of Professional Responsibility" (the first comprehensive code of ethics for lawyers). For judges, then, as well as the parties who argued before them, ex parte contacts were firmly prohibited.[55]

[53] For a good explanation of the issues see Steven Lubet, "Ex Parte Communications: An Issue in Judicial Conduct," *Judicature*, Vol. 74 Issue 2 (1990): 96-101
[54] For more on emergency exceptions see Leslie W. Abramson, "The Judicial Ethics of Ex Parte and Other Communications," *Houston Law Review*, Vol. 37 Issue 5 (2000): 1343-1394, pp. 1383-1385
[55] Ibid, pp. 1343-1394

Ex parte contacts were not merely a judicial concern, however; they were also a growing administrative one (and it was here where Bruff's interest lay). Because administrative agencies had long styled their procedures in the image of the judiciary, holding adjudicatory hearings and replicating many judicial formalities,[56] they likewise adopted rules to limit ex parte influence. Many did so following the passage of the 1946 Administrative Procedure Act, which barred administrators from "[consulting] any person or party on any fact in issue unless upon notice and opportunity for all parties to participate." By the late 1940s, a growing number of agencies had approved internal guidelines pursuant to this provision; guidelines which prohibited ex parte contacts in the "quasi-judicial" adjudicatory context.[57]

However, lawmakers quickly found multiple agencies in violation of these very ethical guidelines. In 1959, an investigatory body of the House of Representatives called the "Special Committee on Legislative Oversight" uncovered rampant ex parte contacts between industry representatives and officials from the Federal Power Commission (FPC) and Federal Communications Commission (FCC). Only four years earlier, Marver Bernstein – a Princeton political scientist – had postulated that agencies "age" over time, lose their vitality, and become susceptible to industry influence.[58] The findings of the House Special Committee affirmed Bernstein's hypothesis and showed that ex parte appeals were one of industry's preferred means

[56] For background on the judicialization of federal regulatory agencies see Marver H. Bernstein, *Regulating Business by Independent Commission*, (Princeton: Princeton University Press, 1955), pp. 14-74; Robert E. Cushman, *The Independent Regulatory Commissions*, (New York: Oxford University Press, 1941), pp. 45-61; James O. Freedman, *Crisis and Legitimacy: The Administrative Process and American Government*, (New York: Cambridge University Press, 1978), pp. 21-30; Daniel R. Ernst, "*Morgan* and the New Dealers," *Journal of Policy History*, Vol. 20 Issue 4 (2008): 447-481; and more recently, Hiroshi Okayama, "The Interstate Commerce Commission and the Genesis of America's Judicialized Administrative State," *Journal of the Gilded Age and Progressive Era*, Vol. 15 Issue 2 (2016): 129-148

[57] See Cornelius J. Peck, "Regulation and Control of Ex Parte Communications with Administrative Agencies," *Harvard Law Review*, Vol. 76 No. 2 (1962): 233-274

[58] Marver H. Bernstein, *Regulating Business by Independent Commission*, (Princeton: Princeton University Press, 1955), pp. 74-102

of procuring favors and attaining special influence. In a fiery set of legislative hearings, members of the Special Committee grilled FPC and FCC administrators for holding secret, improper meetings with lawyers from regulated firms. During one particularly testy exchange, Rep. John Moss (D-CA) slammed FPC chairman Jerome K. Kuykendall for speaking off the record with Thomas G. Corcoran – the famous Washington lawyer/lobbyist – who then represented a Tennessee gas company involved in a pending FPC case.[59] Lawmakers uncovered similar forms of special influence at the FCC, where cable companies often made back-door appeals to bolster their chances of securing federal broadcast licenses.[60]

While the findings of the Special Committee caused a brief stir, it was not until the mid-1970s that Congress prohibited ex parte contacts with the full force of statute. Though the Special Committee, the ABA, and even President Kennedy pushed lawmakers to enact a uniform code of administrative ethics which addressed the ex parte problem, a coalition of agencies fought their proposals throughout the early 1960s (emphasizing the need for self-policing and individualized enforcement) and ultimately buried the issue.[61] Only in 1976, after the Vietnam War and the Watergate scandal focused attention on the need for greater openness in government,[62] did legislative majorities finally coalesce around an ex parte ban. That year, Congress enacted the Government in the Sunshine Act – one of the transparency laws passed on

[59] See "Ex Parte Communications and Other Problems (Federal Power Commission)," *Hearings Before the House Committee on Interstate and Foreign Commerce*, 86th Cong., 2nd sess., May 10th-13th, 16th-20th, 23rd, and 24th, 1960, pp. 64-70

[60] See generally "Investigation of Regulatory Commissions and Agencies*," Hearings Before the House Committee on Interstate and Foreign Commerce*, 85th Cong., 1st sess., Feb. 13th, 17th, 18th, 19th, 20th, and 21st, 1958, pp. 417-834; and also "Investigation of Television Quiz Shows," *Hearings Before the House Committee on Interstate and Foreign Commerce*, 86th Cong., 1st sess., Nov. 2nd-6th, 1959, pp. 623-1156

[61] Joanna Grisinger, *The Unwieldy American State: Administrative Politics Since the New Deal*, (New York: Cambridge University Press, 2012), pp. 243-246

[62] For more background see Michael Schudson, *The Rise of the Right to Know: Politics and the Culture of Transparency, 1945-1975*, (Cambridge, MA: Belknap Press of Harvard University Press, 2015)

the heels of Watergate – which, among other things, prohibited off-the-record contacts in adjudicatory proceedings.[63]

However, this provision of the Sunshine Act did not extend to all types of administrative proceedings. It applied to adjudications and other trial-type hearings, as those were modeled on the judicial process and its norms of strict procedural fairness. But the act *did not* apply to something called "rulemaking" – a device outlined in §553 of the Administrative Procedure Act – which agencies were increasingly using to make policy. Rulemaking bore little resemblance to judicial models. Where adjudication entailed complex procedural safeguards, rulemaking required only that agencies give notice of a proposed regulation, allow 30 days for public comments, and then issue a short statement on the rule's basis and purpose. Because it was not bound by a narrow evidentiary record (and could impact a wider range of issues and interests), rulemaking also allowed agencies to devise broader policies.[64] Due to its informality and wide-ranging scope, administrative law experts generally encouraged open communication during rulemaking (even on an ex parte basis). In his 1958 treatise, for instance, Kenneth Culp Davis described informal contacts as the "mainstay" of the rulemaking process, sharply distinguishing it from adjudication.[65] As agencies made greater use of rulemaking in the 1960s and 1970s, the Supreme Court also intervened to preserve its distinctiveness. In the early 1970s – in a pair of unanimous decisions authored by Nixon appointee William Rehnquist – the court strictly

[63] Arlen J. Large, "Ford Signs Bill to Require Most Agencies of the U.S. to Open Meetings as of March '77," *The Wall Street Journa*l, Sept. 14th, 1976, pp. 3; and Philip Shabecoff, "New Sunshine Law Gives Public Access to Federal Records," *The New York Times*, Sept. 14th, 1976, p. 53

[64] For more background on the history and advantages of rulemaking see Reuel E. Schiller, "Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s," *Administrative Law Review*, Vol. 53 Issue 4 (2001): 1139-1188

[65] Kenneth Culp Davis, *Administrative Law Treatise*, (St. Paul: West Pub. Co., 1958), pp. 363

construed §553 as well as the due process clause of the Constitution, holding that rulemaking *did not* require additional, trial-type procedures and instead needed to remain informal.[66]

The Sunshine Act respected these distinctions by exempting rulemaking from its ex parte provisions. "Informal rulemaking proceedings…will not be affected by this provision," Sen. Edward Kennedy (D-MA) explicitly noted in the act's legislative history. Though a handful of sponsors had sought a broader prohibition, their proposals never gained significant traction.[67]

In 1977, the year after Congress passed the Sunshine Act – and, more importantly, the year Bruff was completing his study for the ABA Commission – a federal appellate court upended the law on ex parte communications. In a case called *Home Box Office v. Federal Communications Commission*, the U.S. Court of Appeals for the District of Columbia Circuit made the leap Congress had not, imposing a blanket ex parte ban on notice-and-comment rulemaking. The second most important court in the country, the DC Circuit was also arguably the most liberal. At the time of the *Home Box Office* decision, a "legal liberal" named David L. Bazelon served as chief judge. Since assuming this post in 1962, Bazelon had steered the court firmly to the left, helping orchestrate what legal historians call the "rights revolution."[68] Because

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[66] See Rehnquist's opinions in *United States v. Allegheny-Ludlum Steel Corp*., 406 U.S. 742 (1972): and *United States v. Florida East Coast Railway Co.*, 410 U.S. 224 (1973)

[67] "Government in the Sunshine," *Hearings Before the Senate Subcommittee on Reorganization, Research, and International Organizations*, 93rd Cong., 2nd sess., May 21st, 22nd, and October 15th, 1974, pp. 1-394; and also "Government in the Sunshine," *Hearings Before the House Committee on Government Operations*, 94th Cong., 1st sess., Nov. 6th and 12th, 1975, pp. 1-565; and also 121 Cong. Rec. 35,330 (1975)

[68] For more on Bazelon's jurisprudence see Bazelon "Implementing the Right to Treatment*," University of Chicago Law Review*, Vol. 36 Issue 4 (1969): 742-754; Bazelon, "New Gods for Old: Efficient Courts in a Democratic Society," *New York University Law Review*, Vol. 46 Issue 4 (1971): 653-674; Bazelon, "Institutionalization, Deinstitutionalization, and the Adversary Process," *Columbia Law Review*, Vol. 75 Issue 5 (1975): 897-912; Bazelon, "The Impact of the Courts on Public Administration," *Indiana Law Journal*, Vol. 52 Issue 1 (1976): 101-110; and Bazelon, "Coping With Technology Through the Legal Process," *Cornell Law Review*, Vol. 62 Issue 5 (1976): 817-832; and for more on the "rights revolution" of the 1960s and '70s see generally Hugh Davis Graham, *The Civil Rights Era: The Origins and Development of National Policy*, (New York: Oxford University Press, 1990); Philip A. Klinker and Rogers M. Smith, *The Unsteady March: The Rise and Decline of Racial Equality in America*, (Chicago: University of Chicago Press, 1999); Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*, (New York: Oxford University Press, 2004); John D. Skrentny, *The Minority Rights Revolution*, (Cambridge, MA: Belknap Press of Harvard University Press, 2002); David Garrow, *Liberty and Sexuality: The Making of Roe v. Wade, 1923-1973*, (New York: Lisa Drew Books, 1994);

it had jurisdiction over the myriad agencies inside the beltway, the DC Circuit was particularly influential in the field of administrative procedure. Indeed, Bazelon's court gained notoriety in the 1970s for ginning up fixes for the growing problem of capture. With evidence mounting that agencies were pawns of regulated firms,[69] the DC Circuit began wielding judicial review with increasing force, taking bold steps to facilitate public participation and promote fairness in the administrative process. Often, the court did so by flouting Justice Rehnquist and engrafting trial-type safeguards onto rulemaking.[70] By the mid-1970s, the court had attempted to open up "captured" agencies by directing them to conduct oral hearings,[71] allow cross examination,[72] and expand the administrative record in rulemaking proceedings.[73]

Home Box Office was the latest salvo in the DC Circuit's procedural crusade. The case itself involved an FCC rulemaking for "pay cable" – a new type of broadcasting service which allowed viewers to pay extra fees to subscribe to additional channels. In 1975, after years of

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Laura Kalman, *The Strange Career of Legal Liberalism*, (New Haven: Yale University Press, 1996); and also Risa Goluboff, *Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s*, (New York: Oxford University Press, 2016)

[69] See generally C. Wright Mills, *The Power Elite,* (New York: Oxford University Press, 1956); Henry S. Kariel, *The Decline of American Pluralism* (Stanford, CA.: Stanford University Press, 1961); Grant McConnell, *Private Power & American Democracy* (New York: Knopf, 1966); Gabriel Kolko, *The Triumph of Conservatism: A Reinterpretation of American History, 1900-1916* (Chicago: Quadrangle Books, 1967); Theodore Lowi, *The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority,* (New York: Norton, 1969); George Stigler, "The Theory of Economic Regulation," *Bell Journal of Economics and Management Science*, 2.1 (1971): 3-21; Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge: Harvard University Press, 1965); James M. Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Ann Arbor: University of Michigan Press, 1965); Edward Finch Cox and Robert C. Fellmeth. *The Nader Report on the Federal Trade Commission,* (New York: R.W. Baron, 1969); and also Fellmeth, *The Interstate Commerce Omission, the Public Interest and the ICC: The Ralph Nader Study Group Report on the Interstate Commerce Commission and Transportation,* (New York: Grossman Publishers, 1970)

[70] For more on the DC Circuit and the transformation of administrative law in the 1960s and '70s see Paul R. Verkuil, "Judicial Review of Informal Rulemaking," *Virginia Law Review*, Vol. 60 Issue 2 (1974): 185-249; Richard B. Stewart, "The Reformation of American Administrative Law," *Harvard Law Review*, Vol. 88 Issue 8 (1975): 1667-1813; and also Reuel E. Schiller, "Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970," *Vanderbilt Law Review,* Vol. 53 Issue 5 (2000): 1389-1454

[71] *American Airlines, Inc. v. Civil Aeronautics Board*, 359 F.2d 624 (1966); and *Walter Holm & Co. v. Hardin*, 449 F.2d 1009 (1971)

[72] *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (1973); *Mobile Oil Corp. v. Federal Power Commission*, 483 F.2d 1238 (1973); and *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375 (1974)

[73] *Kennecott Copper Corp v. Environmental Protection Agenc*y, 462 F.2d 846 (1972)

investigation and study, the FCC issued its inaugural pay cable rules (which limited programming on pay cable networks to prevent them from "siphoning" content from regular television). Shortly after the rules were finalized, however, Henry Geller – former General Counsel at the FCC – filed a complaint with his former agency, alleging that the commissioners had held 18 secret meetings with broadcasting interests during the proceeding and that the regulations, in turn, were procedurally tainted. When the FCC admitted this ex parte blitz had in fact occurred but offered Geller no means of recourse, he took his case to the DC Circuit. On appeal, the DC Circuit vacated the pay cable rules in full, determining that the industry's ex parte blitz had reduced the entire rulemaking "to a sham." In its *per curiam* opinion, the court added that ex parte contacts violate "fundamental notions of fairness implicit in due process."[74]

As a remedy, the court imposed rigid new procedures designed to limit ex parte influence in rulemaking proceedings. The *Home Box Office* guidelines established a number of new requirements;

> Once a notice of proposed rulemaking has been issued…any agency official or employee who is or may reasonably be expected to be involved in the decisional process of the rulemaking proceeding, should refuse to discuss matters relating to the disposition of a rulemaking proceeding with any interested private party, or an attorney or agent for any such party, prior to the agency's decision. If ex parte contacts nonetheless occur, we think that any written document or a summary of any oral communication must be placed in the public file established for each rulemaking docket immediately after the communication is received so that interested parties may comment thereon.[75]

Under this new judicial standard, any administrators involved in their agency's "decisional process" needed to refrain from communicating with interested parties (or anyone representing those parties) after their agency gave notice of a proposal. In other words, regulators could not speak with anyone outside their agency until after rules were completed and finalized. As a

[74] *Home Box Office, Inc. v. Federal Communications Commission*, 567 F.2d 9 (1977), pp. 15-17, 38-39, 42
[75] Ibid, pp. 43

number of scholars observed in law journals, this amounted to a sweeping new gag rule (far beyond anything contemplated by the Sunshine Act). However, *Home Box Office* also stipulated that if regulators *did* engage in forbidden ex parte discussions, they needed publish written summaries of the conversations and then make those logs available for public comment. While the decision firmly discouraged ex parte meetings, it also created disclosure procedures in case they did occur, ensuring that any secret discussions would be later subjected to public scrutiny. Of course, one could argue these new disclosure procedures were in excess of the notice-and-comment baseline recently mandated by Justice Rehnquist and the Supreme Court.[76]

In the final section of his ABA report, Harold Bruff analyzed *Home Box Office* in the context of presidential directives. Typically, ex parte contacts referred to communications between 1) judges and lawyers, or 2) government officials and industry representatives (like FCC administrators and commercial broadcasters). However, Bruff argued that directives would involve contacts between the White House and federal agencies which presented roughly analogous legal questions. The president, for instance, could be viewed as another "interested party" in a rulemaking proceeding. After all, the president had a distinct set of political interests and technically existed outside agencies' "decisional processes." Framed in this way, a "directive" to regulators would constitute a form of special, presidential influence that subverted the normal channels of public participation. "The President's considerable power over the agencies," Bruff wrote, "carries the clear potential for deflecting an agency from an intended decision consistent with the record before it." "White House 'comments' on a proposed rule that

[76] For scholarly reactions to *Home Box Office* see "Perspectives on Current Developments," *Regulation Magazine*, Vol. 1 Issue 1, July/August 1977, pp. 4; Carl A. Auerbach, "Informal Rulemaking: A Proposed Relationship Between Administrative Procedures and Judicial Review," *Northwestern University Law Review*, 72.1 (1977): 15-68; and also Stuart N. Brotman, "Ex Parte Contacts in Informal Rulemaking: Home Box Office, Inc. v. FCC and Action for Children's Television v. FCC," *California Law Review*, 65.6 (1977): 1315-1332

are extraneous to the record and perhaps of unknown content," he continued, "could easily deprive a reviewing court of confidence that the rule is what it purports to be, and that the proceedings have been fair to all covered." In other words, if the FCC conducted another pay-cable proceeding (giving notice of a proposal and then receiving public comments), but then met privately with the White House off the record, Bruff argued the government would be vulnerable to the same due process accusations invoked in the original *Home Box Office* case. "Fairness to interested persons," he concluded, "…[is] seriously threatened by any scheme for White House participation."[77]

To avoid putting directives in such legal jeopardy, Bruff recommended they strictly adhere to the DC Circuit's ex parte guidelines. "The initiation of any program of White House participation in the formation of rules," he wrote, "should be accompanied by the imposition of procedural rules similar to those in *Home Box Office*." "The requirements of *Home Box Office* for placing written documents and summaries of oral communications in the public file," he added, "are appropriate as a means of control." In other words, if the president or presidential advisers secretly meddled with regulations, the affected agency would need to disclose the substance of the conversations and then make the summaries available for comment. Without these gestures to openness and participation, Bruff believed directives ran the risk of reversal on due process grounds.[78]

Practically speaking, Bruff's recommendation would create new logging responsibilities for the agencies targeted by the White House. Bruff recognized that these new transparency requirements could create "obvious problems" for regulators, impairing their ability to candidly discuss proposed rules and increasing their reporting and paperwork burdens. "It is necessary to

[77] Bruff, "Presidential Participation in Agency Rulemaking," pp. II-5, II-6
[78] Ibid, pp. II-6

avoid over-rigidity here," Bruff admitted, lest *HBO*-style guidelines became unruly and grew to encompass "every presidential remark after a cabinet meeting." Nevertheless, he maintained that "any communication adding something new" – i.e. any communication which introduced material not already in the public record – be disclosed and made available for comment by the affected agency. Bruff hoped that amending the record in such a way, so that it reflected "all significant influences on the rule," would reduce the potency of any ex parte challenges. Of course, this meant administrators would need to fastidiously keep track of what did and did not already appear in the record during the course of White House involvement.[79]

Compared to surrounding legal commentators, Bruff was relatively deferential to *HBO* in his analysis. Indeed, one of the leading voices on administrative law – the Administrative Conference of the United States (ACUS) – had recently published a report that was sharply critical of the DC Circuit's ruling, suggesting it was based on faulty reasoning and need not be followed going forward. Immediately following the decision, ACUS – the federal agency which conducts research and issues reports on administrative procedure – established a special "Select Committee on Ex Parte Communications" to study the "problems crystallized by the opinion…in *Home Box Office v. FCC*." Three months later, the committee published a report attacking the decision. Written by a Northwestern University law professor named Nathanial L. Nathanson, the report portrayed *HBO* as a breach of the prevailing consensus on informal rulemaking. "The Court's *Home Box Office* opinion, in its strictures against all ex parte communications after notice of proposed rulemaking," Nathanson wrote, "is a departure from the generally prevailing view over many years with respect to the informality and flexibility permissible in §553 rulemaking proceedings." Emphasizing Justice Rehnquist's decisions strictly construed the

[79] Bruff, "Presidential Participation in Agency Rulemaking," pp. II-6, II-7

Administrative Procedure Act, Congress' recent choice to exempt rulemaking from the ex parte provisions of the Sunshine Act, and a number of other relevant precedents, Nathanson attacked *HBO's* disclosure requirements, calling them "strikingly out of place" and claiming agencies would have "strong reasons" not to follow them.[80] On the heels of Nathanson's report, the full Administrative Conference approved a recommendation that October calling *HBO* "undesirable" and insisting, "informal rulemaking should not be subject to the constraints of the adversary process." "Ease of access to information and opinions," the recommendation added, "whether…by consultation with informed persons, or by other means, should not be impaired."[81]

Considered alongside this biting critique of *HBO*, Bruff's analysis appeared far more circumspect. Given that ACUS recommendations were generally seen as blueprints for good government (and given that Bruff himself had conducted research for ACUS in the past), he could have easily incorporated the conference's recent findings and claimed, to this end, that *HBO*-style procedures were not a necessary precondition for directives. But there are obvious reasons why Bruff opted for caution and urged the ABA Commission to follow *HBO's* disclosure guidelines. First, the shadow of the Watergate scandal warned against covert uses of executive power. Failing to disclose presidential directives would thus risk obvious political attacks. Second, the DC Circuit played an outsized role reviewing administrative actions. While *HBO* might indeed be inconsistent with Justice Rehnquist's recent pronouncements, it would be imprudent to count on the intervention of the Supreme Court (as most controversies involving

[80] Nathanson published his report the following year; see Nathaniel L. Nathanson, "Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings," *Administrative Law Review,* Vol. 30 Issue 3 (1978): 377-403, pp. 377, 391, 39, 400

[81] Administrative Conference of the United States, "Recommendation 77-3: Ex Parte Communications," 42 *Federal Register* 54253, Oct. 7th ,1977

federal agencies were resolved at the circuit level). Thus, Bruff advised the ABA Commission to incorporate the DC Circuit's procedural guidelines in order to minimize legal risk.

Overall, Bruff's report to the ABA Commission was an impressive piece of legal scholarship that advanced two basic conclusions. First, *Youngstown* provided a basis of constitutional support for directives. Justice Jackson's concurrence stipulated that implied presidential powers could stand legal muster if they had a clear functional basis (something Bruff had been able to demonstrate in the case of directives). Second, in order to surmount the obstacles recently established in *HBO*, directives needed to follow a two-step logging requirement. Otherwise, they would reek of "unwarranted influences," in Bruff's words, and "[subvert]" prevailing values of participation and openness. Essentially, Bruff had concluded that presidents could wield special influence over federal agencies and their substantive policies, but only if they did so in full public view and in accordance with the DC Circuit's expansion conceptions of due process. In spite of the political headwinds created by Watergate, Bruff had fleshed out legal support for Cutler's idea with relative ease. The work of the ABA Commission was far from over, but – with Bruff's careful analysis in hand – the group was well-armed with a legal and procedural framework that might someday be of use to interested policymakers.[82]

[82] Ibid, pp. I-30, II-1

"The Groups Working in This Area Need a Lawyer": The Carter Administration, the Regulatory Analysis Review Group, and the Controversy Over the 1978 Cotton Dust Standard

James Earl Carter Jr., the President-Elect of the United States, was an unlikely and unconventional politician. Only fifteen years before winning the 1976 presidential election, Carter had worked full-time operating his family's peanut farm in Plains, Georgia (a rural community located several hours south of Atlanta). A man of humble origins, Carter had also shown little interest in politics for much of his life. He had studied engineering at the U.S. Naval Academy in the 1940s and then moved to five different states to work on the Navy's fleet of nuclear submarines. More than a distinct set of political beliefs, his engineering and military background instilled a pragmatic, technical mindset rooted in practical problem-solving.

Not until the early 1960s – after returning to Plains to manage the family peanut farm – did he begin to exhibit political ambitions. A long-time Democrat, Carter was nonetheless troubled by the party's opposition to integration in the wake of the *Brown* decision, and in 1962 he decided to run for Georgia State Senate against an incumbent segregationist. Promising to support civil rights and do things differently, Carter ultimately won the race. As a state senator, he took aim at "politics-as-usual," allegedly reading every bill that he voted on, and eventually decided to run for governor. During the 1970 gubernatorial campaign, when asked if he was a liberal, a conservative, or a moderate, Carter responded, "I am a more complicated person than that."[1] As governor, he further cultivated this outsider image. He held "Speak-up Days" at the governor's mansion, inviting constituents to visit Atlanta and voice their personal concerns.

[1] See Peter G. Bourne, *Jimmy Carter: A Comprehensive Biography from Plains to Post-Presidency*, (New York: Scribner, 1997), pp. 153

While on the road, he often stayed overnight at the homes of constituents. By the mid-1970s, he had gained a reputation as a maverick who was attuned to the needs of ordinary Georgians.[2]

Nor was Carter a conventional Democrat. Indeed, he was part of a group of centrist Southern governors (which included John West of South Carolina, Reubin Askew of Florida, and eventually, Bill Clinton of Arkansas) who adopted conservative fiscal policies in an attempt to retain Democratic control of the region and stave off the movement of southerners to the Republican Party.[3] A former small-businessman, Carter had long advocated fiscal responsibility. While campaigning for governor, he distanced himself from the expansive initiatives of the Great Society, promising to make Georgia government more efficient and to champion a more prudent version of liberalism. Once in the governor's mansion, Carter made good on this promise, reorganizing 300 state agencies into 22 streamlined departments, and introducing something called "zero-based budgeting" (which required that state agencies annually justify each dollar they spent). During the 1976 presidential cycle, he championed reorganization at the federal level, referring to the bureaucracy as "overlapping and wasteful," and also pledged to balance the federal budget and deregulate anti-competitive industries.[4]

In addition to holding a more limited view of government's role, Carter was also not beholden to the Democratic Party leadership or to the party's traditional constituencies. In his

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[2] Julian E. Zelizer, *Jimmy Carter*, (New York: Times Books, 2010), pp. 3-30

[3] For more on the emergence of the "New South" and the transformation of the Democratic Party see Bruce J. Schulman, *From Cotton Belt to Sunbelt: Federal Policy, Economic Development, and the Transformation of the South, 1938-1980*, (New York: Oxford University Press, 1991); Schulman, *The Seventies: The Great Shift in American Culture, Society, and Politics*, (New York: Free Press, 2001), pp. 102-120; Edward D. Berkowitz, "Jimmy Carter and the Sunbelt Report: Seeking a National Agenda," in Herbert D. Rosenbaum and Alexej Ugrinsky eds., *The Presidency and Domestic Policies of Jimmy Carter*, (Westport, CT: Greenwood Press, 1994), pp. 33-44; Matthew Lassiter, *The Silent Majority: Suburban Politics in the Sunbelt South*, (Princeton: Princeton University Press, 2006); and also Joseph Crespino, *In Search of Another Country Mississippi and the Conservative Counterrevolution* (Princeton: Princeton University Press, 2007)

[4] E. Stanly Godbold Jr., *Jimmy and Rosalynn Carter: The Georgia Years, 1924-1974*, (New York: Oxford University Press, 2010), pp. 170-190; and James Wooten, *Dasher: The Roots and Rising of Jimmy Carter*, (New York: Summit Books, 1978), pp. 307-314

first-ever race for state senate, he beat a candidate backed by Joe Hurst (one of the leaders of the Democratic machine in Georgia). Ever since, Carter had branded himself as a Democrat who was largely independent from the party apparatus. When running for president fourteen years later, he boasted that he had refused to "kiss Ted Kennedy's ass to win the nomination."[5] Moreover, although he received the endorsement of key interest groups in 1976, Carter had risen to prominence largely without the support of party stalwarts such as organized labor. Instead, he often relied on moral, religiously-based appeals. A born-again Christian, Carter spoke openly about his evangelical faith, using it to advertise a pure, honest approach to politics and to appeal to religiously-inclined Americans (who Democrats had long struggled to reach). "I'll never tell a lie," Carter promised voters during the 1976 campaign. In a multitude of ways, then, Carter bucked the traditional Democratic and political playbook.[6]

In 1976 Carter proved to be the right candidate at the right moment. His reputation as a maverick allowed him to exploit the country's appetite for an outsider who could shake up the political system and fight Watergate-style corruption. Indeed, anti-establishment themes formed the backbone of his presidential candidacy. "I owe the special interests nothing," Carter told an audience in Warm Springs, Georgia during the campaign, "I owe the people everything."[7] In the mid-1970s, such rhetoric had enormous political currency. It appealed not only because of the turmoil of Watergate, but because of Americans' growing distrust of government institutions generally; something that had been stoked by the events surrounding the Vietnam War, the

[5] Jules Witcover, "Carter Is Slowed But Delegates Grow," *The Washington Post*, May 27th, 1976, pp. A1
[6] Stuart Eizenstat, "President Carter, the Democratic Party, and the Making of Domestic Policy," in Herbert D. Rosenbaum and Alexej Ugrinsky eds., *The Presidency and Domestic Policies of Jimmy Carter*, (Westport, CT: Greenwood Press, 1994), pp. 3-16; Julian Zelizer, *Jimmy Carter*, pp. 15-16; Martin Schram, *Running for President, 1976: The Carter Campaign*, (New York: Stein and Day, 1977), pp 26; and E. Stanly Godbold Jr., *Jimmy and Rosalynn Carter: The Georgia Years, 1924-1974*, pp. 129-139
[7] Martin Schram, *Running for President, 1976*, pp. 253; and "Jimmy Carter: Not Just Peanuts," *Time Magazine*, Mar. 8th, 1976, pp. 17-19

energy crisis, and other recent developments.[8] Carter's track record as the Georgia governor – which included sweeping reorganization of the state's bureaucracy – also demonstrated he was capable of reforming entrenched institutions. Also working in Carter's favor was the fact that his opponent – the incumbent President Ford – had not been democratically-elected, had pardoned his disgraced former running mate, and had badly stumbled in the presidential debates.[9]

From the very beginning of his administration, President Carter was preoccupied with the issue of "stagflation," the combination of high inflation, slow growth, and high unemployment. In his first year in office, the rate of inflation stood at 6.7% and the rate of unemployment at 6.4% – far below the double-digit totals of previous years but still at troubling, historically-high levels. Stagflation was a vexing economic problem for which there were no easy solutions. One could attack unemployment through deficit spending and the other traditional Keynesian prescriptions, but only at the risk of overheating the economy and accelerating inflation. Conversely, one could attack inflation through contractionary economic measures – such as budget cuts or heightened interest rates – but only at the risk of slowing growth and thereby increasing unemployment (neither of which were politically palatable). Such was the nature of stagflation; a two-headed economic monster which would haunt Carter through the remainder of his administration.[10]

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[8] See Hugh Heclo, "The Sixties False Dawn: Awakenings, Movements, and Post-Modern Policymaking," in Brian Balogh, ed., *Integrating the Sixties: The Origins, Structure, and Legitimacy of Public Policy in a Turbulent Decade*, (University Park, PA: Pennsylvania State University Press, 1996), pp. 34-63; and also Meg Jacobs, *Panic at the Pump: The Energy Crisis and the Transformation of American Politics in the 1970*s, (New York: Hill & Wang, 2016)

[9] Julian Zelizer, *Jimmy Carter*, pp. 50-52

[10] For an insider's explanation of "stagflation" see Stuart Eizenstat, *President Carter: The White House Years*, (New York: Thomas Dunne Books, 2018), pp. 277-282; and for a scholarly examination of Carter-Era economic policy see Bruce J. Schulman, "Slouching Toward the Supply Side: Jimmy Carter and the New American Political Economy," in Gary M. Fink and Hugh Davis Graham, eds., *The Carter Presidency: Policy Choices in the Post New Deal Era*, (Lawrence, KS: University Press of Kansas), pp. 51-71

In the early days of his presidency, Carter focused his efforts on containing rising prices. A fiscal conservative with a "bent for frugality," Carter made it clear to his economic team he was more worried about the prospect of continued inflation (and the painful uncertainty it generated) than the prospect of a temporary downturn. Spoken like a former small-businessmen, he told a room of White House staffers two months after his inauguration, "I am *very* concerned with inflation. It will be devastating…if inflation gets to 8 or 9 percent." In the same period, he displayed comparatively little concern for job creation and unemployment. On April, 15th, 1977, Carter delivered an "anti-inflation" message which outlined a comprehensive set of ameliorative actions and which officially named prices as his leading economic priority. Perhaps unsurprisingly, "fiscal discipline to assure a balanced budget" appeared at the top of the president's list. Before long, Carter would also appoint a special counselor on inflation – colloquially called the "Anti-Inflation Czar" – who was the administration's point-person on rising price levels.[11]

The president's initial approach to economic policy angered his Democratic colleagues in Washington. With Carter as the first Democratic president in 8 years, liberal committee chairmen in the House and Senate were hopeful for a return to Keynesian pump-priming, eager to use federal funds to deliver new goods to their constituents. In President Carter, they were quickly disappointed. Though on the campaign trail Carter had pledged to work with Congress to enact a broad-based stimulus package, he frequently resisted congressional demands as president, wary of the potential for pork-barrel spending to aggravate the country's underlying inflation. In January, 1977, during the first negotiations on a stimulus bill, Carter sparred with Democratic

[11] Stuart Eizenstat, *President Carter: The White House Years*, pp. 284, 296; and Jimmy Carter, "Anti-Inflation Program Outlining Administrative Actions," Apr. 15th, 1977, online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, http://www.presidency.ucsb.edu/ws/?pid=7356

leaders Jim Wright and Robert Byrd, who implored the president to add billions more in public works spending to his proposal. While Carter later agreed to a modest increase, he stipulated to Wright and Byrd that the projects be fully paid for. In another tense moment at a breakfast for congressional leaders, Carter declared, "Democrats have a reputation for irresponsible spending. To control this, it will mean…our friends can't get all they want." Rep. Tip O'Neill (D-MA) – the newly-elected Speaker of the House who attended the breakfast – appeared furious upon hearing Carter's remarks.[12]

Highlighting inflation also infuriated key liberal interest groups. Ahead of his anti-inflation message in April, Carter met with George Meany – the long-time president of the AFL-CIO – and other labor leaders at the White House. After Carter arrived in the Roosevelt Room, Meany spoke up and lambasted the president for prioritizing inflation and budget cuts over workers and jobs, berating him for not supporting a larger increase to the minimum wage. After the meeting – which domestic adviser Stuart Eizenstat called "disastrous and rancorous" – Carter pledged to avoid any future encounters with Meany. "I will never do this again," he reportedly told Eizenstat.[13]

Tensions between the administration and the core elements of the Democratic Party only deteriorated over the course of Carter's tenure. In January, 1978, the rate of inflation began to trend upward. Due to a seasonal increase in global food prices and a price hike by the American steel industry, the Consumer Price Index (CPI) jumped to a frightening annualized rate of 9.6%. The winter spike prompted one economist to warn of another "double-digit disaster" – a return of the runaway price increases that had gripped consumers years earlier in the wake of the 1973 OPEC oil embargo. "The nation," a *New York Times* columnist observed that April, "is once

[12] Stuart Eizenstat, *President Carter: The White House Years*, pp. 286-291, 297
[13] Ibid, pp. 297-300

again deeply worried about inflation." Carter responded by launching another front in his war against rising prices.[14] On March 23rd, 1978, Carter issued Executive Order 12044; titled "Improving Government Regulations." Designed to reduce the inflationary impact of federal rules, the order represented an additional cost-cutting measure intended to supplement actions already taken by the administration. Like the president's repeated calls for budgetary restraint, however, the order on regulation would soon inflame liberal constituencies (including, yet again, organized labor).[15]

The link between inflation and federal regulation had been made only very recently. While economists such as George Stigler had long written about the burdens and inefficiencies of New Deal-era rules,[16] it was Sen. Edward Kennedy (D-MA) – speaking for the nascent consumer movement – who first popularized the idea that regulations contribute to inflation. Held in 1974, Kennedy's famous hearings on the Civil Aeronautics Board (CAB) showed that the agency's price and entry restrictions led to direct increases in consumer prices and underscored the way government fueled inflation.[17] Building on these ideas, but separately from Kennedy and the consumer movement, big business began making the same arguments about "social regulation." In the mid-1970s, industry-supported think tanks, academic centers, and

[14] See Clyde H. Farnsworth, "Intimations of More Inflation," *The New York Times*, Mar. 5th, 1978, pp. 1 of Sect. 3; Hobart Rowen, "Inflation: The Worst is Yet to Come," *The Washington Post*, Mar. 16th, 1978, pp. A23; and George Will, "Inflation Talk," *The Washington Post*, Apr. 16th, 1978, pp. B7

[15] "Improving Government Regulations," Mar. 23rd, 1978, "Regulatory Reform—Executive Order [12044], [11/15/77-4/6/78]" Folder, Box 70, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-5

[16] See John R. Meyer, *The Economics of Competition in the Transportation Industries* (Cambridge: Harvard University Press, 1959); Richard E. Caves, *Air Transport and Its Regulators: An Industry Study* (Cambridge: Harvard University Press, 1962); Paul W. MacAvoy, *Price Formation in Natural Gas Fields: A Study of Competition, Monopsony, and Regulation,* (New Haven: Yale University Press, 1962); and MacAvoy, *The Economic Effects of Regulation: The Trunk-line Railroad Cartels and the Interstate Commerce Commission Before 1900*, (Cambridge: MIT Press, 1965); and also George Stigler, "The Theory of Economic Regulation," *Bell Journal of Economics and Management Science*, 2.1 (1971): 3-21

[17] "Oversight of Civil Aeronautics Board Practices and Procedures, Vol. 1," *Hearings Before the Senate Subcommittee on Administrative Practice and Procedure*, 94th Cong., 1st sess., Feb. 6th, 14th, 18th, 19th, 25th, 26th, and Mar. 4th, 21st, 1975, pp. 1-757

consulting firms began producing research to document the inflationary effects of new health, safety, and environmental rules.[18] One particular study – written by Murray Weidenbaum of Washington University's Center for the Study of American Business – estimated the annual compliance cost of social regulation at a staggering $79.1 billion. To offset this skyrocketing total, Weidenbaum explained, businesses had no choice but to significantly raise their prices. Thus, rules designed to improve air quality or workplace safety could abet rising inflation.[19] As historian Benjamin Waterhouse has shown, corporate lobbies such as the Business Roundtable insinuated these findings into the Washington political lexicon over the mid and late 1970s, solidifying the argument (originally popularized by Kennedy) that regulations exacerbate rising prices.[20] In 1977, for instance, Congress' Joint Economic Committee admitted this new economic critique had become a staple of Washington political doctrine. "The evidence is flooding in," the joint committee noted in its annual report, "to suggest that increased regulation constitutes a significant extra cost of doing business." "We believe," the committee added, "that government regulation can aptly be called the new 'cost-push' affecting consumer prices."[21]

Since the 1976 campaign, Jimmy Carter had shown interest in reforming regulation as part of a broader war on inflation. Though he was more passionate about government

[18] For examples see William A. Lilley III and James C. Miller III, "The New Social Regulation," *The Public Interest*, Issue 47, Spring 1977, pp. 49-61; Edward F. Denison, "Effects of Selected Changes in the Institutional and Human Environment Upon Output Per Unit of Input," *Survey of Current Business*, Vol. 58 (Jan. 1978): 21-44; and also the presentations and findings from the National Inflation Summits convened by President Ford in 1974; Council of Economic Advisers, *Transcript of the Economists Conference on Inflation*, Sept. 5th, 1974, (Washington, DC: U.S. Government Printing Office, 1974) pp. 3-10, 326-336, 580-585, 643-644; U.S. Department of Commerce, *Transcripts for the Business and Industry Conference on Inflation*, Sept. 16th and 19th, 1974, (Washington, DC: U.S. Government Printing Office, 1974) pp. 1-3, 117-126, 180

[19] Murray Weidenbaum, *Business, Government, and the Public*, (Englewood Cliffs, NJ: Prentice Hall, 1977); and also Weidenbaum, "On Estimating Regulatory Costs," *Regulation Magazine*, Vol. 2 Issue 3 (May/June, 1978): 14-18

[20] See Benjamin Waterhouse, *Lobbying America: The Politics of Business from Nixon to NAFTA*, (Princeton, NJ: Princeton University Press, 2014), pp. 106-139

[21] Joint Economic Committee, *The 1977 Joint Economic Report*, (Washington, DC: U.S. Government Printing Office, 1977), pp. 203

reorganization (something he had worked on as the Georgia Governor), he was also a vocal proponent of deregulation. On the campaign trail, for instance, Carter echoed Sen. Kennedy's calls for deregulating the airlines as well as the transportation and telecommunications industries. Furthermore, after winning the presidential election, Carter nominated Charles L. Schultze to chair the prestigious Council of Economic Advisers (CEA). Schultze – a long-time government economist who was later confirmed to lead the CEA – was one of the leading authorities on regulatory reform. Indeed, his recent book, *The Public Use of Private Interest* (1977), outlined a comprehensive strategy for retaining social regulations while ensuring agencies implemented them in cost-effective, "non-inflationary" ways.[22] In the anti-inflation message Carter delivered in his first year in office, he hinted that he might soon pursue Schultze-style regulatory reforms. "We will not go back on our commitment to a better quality of life," Carter noted in his message. "But we must insure that our methods of achieving this objective involve no unnecessary costs." To this end, Carter echoed Schultze's main recommendation from *The Public Use of Private Interest*, suggesting agencies "emphasize incentives and performance standards, rather than detailed specifications of the means by which the goals should be achieved."[23]

Titled "Improving Government Regulations," Executive Order 12044 represented the official launch of such a reform program. The order, which applied only to executive agencies (but encouraged the independent commissions to comply), directed administrators to conduct "regulatory analyses" for all "significant" rules. By the terms of the order, agencies were to develop their own "selection criteria" to determine which rules constituted "significant" ones. As a tentative recommendation, however, the order suggested rules that imposed $100 million or

[22] See generally Charles L. Schultze, *The Public Use of Private Interest*, (Washington, DC: Brookings Institution, 1977)
[23] Jimmy Carter, "Anti-Inflation Message Outlining Administrative Actions," Apr. 15th, 1977, online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, http://www.presidency.ucsb.edu/ws/?pid=7356

more in compliance costs or that might cause a "major increase in costs or prices." Further, the order stipulated that regulatory analyses include 1) "a succinct statement of the problem" (i.e. a justification for the proposed rule), 2) "a description of the alternative ways of dealing with that problem," 3) "an analysis of the economic consequences of each of these alternatives," and 4) "a detailed explanation of the reasons for choosing one alternative over the others." In other words, regulatory analyses amounted to cost-benefit analyses. Procedurally speaking, the order required agencies publish them in tandem with notices of proposed rulemaking and then make the analyses available for public comment (like the substantive rule itself). To summarize, "Improving Government Regulations" directed executive agencies to flag "significant" rules at a pre-proposal stage, analyze the various economic options for implementing them, and then subject the resulting analyses to public scrutiny. On paper, then, the order established a new set of administrative procedures designed to integrate economic analysis into bureaucratic decision-making. Of course, the whole point of requiring such analysis was to incentivize cost-effective approaches or, in the words of the order, cost-effective "alternatives."[24]

However, "Improving Government Regulations" provided few concrete details on the mechanics of enforcement. At one point, the order stipulated, "The Office of Management and Budget shall assure the effective implementation of this Order." Beyond this brief delegation of authority, though, the order did not provide any specifics on OMB's role in assuring bureaucratic compliance. Moreover, much of its language appeared to rely upon self-enforcement. Thus, the order left unaddressed the crucial issue of how the White House planned to instill an economic perspective in the regulatory bureaucracy.[25]

[24] "Improving Government Regulations," Mar. 23rd, 1978, "Regulatory Reform—Executive Order [12044], [11/15/77-4/6/78]" Folder, Box 70, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-5
[25] Ibid, pp. 5

In the late spring of 1978, a working group led by Charlie Schultze called the "Regulatory Analysis Review Group" (RARG) aggressively took the lead on regulatory reform within the administration. Formed three months prior to "Improving Government Regulations," RARG brought together a number of different entities from the Executive Office of the President (EOP). Indeed, the group included members of the Council of Economic Advisers (CEA), the Office of Management & Budget (OMB), the Council on Wage & Price Stability (COWPS), and the Domestic Policy Staff (DPS), all of whom were professional economists or lawyers working to contain rising inflation. In addition to Charlie Schultze, who served as chairman, RARG included George C. Eads (CEA), James T. McIntyre (Director of OMB), Alfred E. Kahn (Chairman of COWPS), Stuart Eizenstat (Executive Director of DPS), and Richard M. Neustadt and Simon Lazarus (Associate Directors of DPS). Though Carter had organized RARG prior to issuing E.O. 12044, the review group and the order had always been institutionally linked. In Schultze's words, the group's mission was to ensure "that the requirements of the executive order have been met." "RARG was created," another member added, "to provide a mechanism for EOP personnel…to review the regulatory analyses." The review group was thus the enforcement prong of the entire reform program. As its title suggested, RARG would review regulatory analyses after agencies submitted them for public comment. During the comment period, the group would evaluate the new economic assessments, and, if necessary, respond with its own suggestions to encourage regulators to adopt more cost-effective approaches.[26]

[26] See "Fact Sheet on Regulatory Analysis Review Group," Oct. 30th, 1978, Box 18 Folder 14, Alfred E. Kahn papers #4055, Division of Rare and Manuscript Collections, Cornell University Library, pp. 1-7; "Statement of Charles L. Schultze," *Executive Branch Review of Environmental Regulations: Hearings Before the Senate Subcommittee on Environmental Pollution*, 96th Cong., 1st sess., Feb. 26th, 27th, 1979, pp. 332-33; and also Robert Litan, "The Future of RARG," "Staff Files: Litan, Robert [1]" Folder, Box 158, Files of Charles L. Schultze, Records of the Council of Economic Advisers, Jimmy Carter Presidential Library, pp. 3

In practice, however, RARG proved to be far more than a detached team of economic analysts. Ultimately, Schultze's group would operate not merely as an advisory body, but as a blunt force instrument that directly influenced administrative decision-making. "Our hidden agenda," one CEA member explained, "has always been to use the RARG to improve the design and cost-effectiveness of the regulations *themselves*." In its first major action in 1978, the review group demonstrated that its objective was not merely analytic in nature; rather, it was direct presidential control of federal regulations.[27]

As the rate of inflation ticked upward in 1978, RARG set its sights on a long controversial health regulation: the Occupational Safety & Health Administration's (OSHA) standard on "cotton dust." Since its creation within the Department of Labor in 1970, OSHA had been working on regulations to limit worker exposure to cotton dust, a substance prevalent in American textile mills. For decades, textile unions had heard complaints from their members about a mysterious ailment of the lungs. Textile workers would recount returning to work on a Monday, and then being gripped by severe coughing and shortness of breath by the end of the work day. In the 1960s, medical researchers finally identified the affliction as byssinosis or "brown lung" – a disease that had long affected British textile workers and that caused chest tightness, breathlessness, chronic coughing, and eventually, permanent reductions in lung capacity. Though scientists were able to identify hundreds of American cases in the late '60s, they could not definitively establish the root cause of byssinosis. However, a majority attributed brown lung to a form particulate matter, or dust, which lingered in textile mills wherever raw cotton was opened, processed, and spun. Textile manufacturers disputed the exact number of afflicted workers, but some estimates ranged upwards of 30,000. To concerned labor unions – as

[27] Robert Litan, "The Future of RARG," "Staff Files: Litan, Robert [1]" Folder, Box 158, Files of Charles L. Schultze, Records of the Council of Economic Advisers, Jimmy Carter Presidential Library, pp. 3

well as Ralph Nader's Health Research Group – this amounted to a health crisis in the textile industry, one that merited a swift bureaucratic response.[28]

Fig. 3. An American textile worker processing raw cotton.[29]

In the early 1970s, OSHA administrators began drafting the first-ever cotton dust regulation. Initially, health regulators drafted a set of "technology-forcing" provisions (which would have required textile mills to install expensive new ventilation equipment in order to remove hazardous particulates from factory air). The draft proposal quickly became a point of controversy, however. In 1972, the draft guidelines were swept up in the Nixon Administration's

[28] For more on the medical history of byssinosis see "Statement of Sol Stetin," *Hearing on Brown Lung Before the Senate Subcommittee on Appropriations*, 95th Cong., 1st sess., 1978, pp. 63-71; "Summary: ATMI Position Concerning OSHA Proposed Cotton Dust Standard," "Regulatory Assistance Project (RAP) – Cotton Dust [O/A 11,159] [1]" Folder, Box 109, Files of Simon Lazarus, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-2; and also "Memorandum from Barry Bosworth to RARG Executive Committee: OSHA's Draft Final Cotton Dust Regulation," Jun. 7th, 1978, Regulatory Assistance Project (RAP) – Cotton Dust [O/A 11,159] [1]" Folder, Box 109, Files of Simon Lazarus, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library pp. 1-15

[29] Brett Emison, "Textile & Cotton Workers Face Dangers of Brown Lung Disease," *Kansas City Legal Examiner*, Aug. 1st, 2011, http://kansascity.legalexaminer.com/workplace-injuries/did-you-know-textile-workers-face-dangers-of-brown-lung-disease/

"Responsiveness Program," the corrupt effort by White House advisers to use federal agencies as campaign fundraising tools. Worried the cost of complying with a sweeping new cotton dust rule would discourage industry contributions to Nixon's re-election bid, presidential advisers met with George C. Guenther, the first chairman of OSHA, who ultimately agreed to implement "no highly controversial standards (that is, cotton dust, etc.)" during the campaign cycle.[30] After the Senate Watergate Committee investigated the Guenther episode, OSHA re-launched its decision-making process and moved to finalize a cotton dust standard without any further delay. As the agency would soon discover, however, finalizing the regulation would be no easy feat.[31]

In 1976, after publishing a new cotton dust proposal, OSHA again confronted the obstacle of economics. The 1976 standard capped a permissible level of dust (200 micrograms per cubic meter of air) and then imposed a blanket requirement on all firms in the industry (who needed to install new equipment and meet the required threshold over a 7-year period). During the ensuing comment period, textile manufacturers decried this "one-size-fits-all," "technology forcing" approach, submitting dozens of critical responses and estimating the annual cost of compliance at $800 million. According to one industry trade group, the 1976 standard was so rigid and financially burdensome that it would protect workers' health by "shutting down the plants in which they are now employed."[32]

In response to this wave of critical comments, OSHA voluntarily decided to propose a brand-new cotton dust rule. The following year, Eula Bingham – Assistant Secretary of Labor for

[30] For more on the Responsiveness Program and the so-called "Guenther memo" see U.S. Senate, *Final Report of the Select Committee on Presidential Campaign Activities*, (Washington DC: U.S. Government Printing Office, 1974), pp. 361-442, 431-433

[31] "Occupational Safety and Health Act Review, 1974," *Hearings Before the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare*, 93rd Cong., 2nd sess., Jul. 22nd, 30th, and 31st, Aug., 13th, 14th, 1974, pp. 465, 615

[32] "Summary: ATMI Position Concerning OSHA Proposed Cotton Dust Standard," "Regulatory Assistance Project (RAP) – Cotton Dust [O/A 11,159] [1]" Folder, Box 109, Files of Simon Lazarus, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-2;

Occupational Safety and Health – published another proposal which incorporated something called "variable exposure limits." Because the incidence of brown lung varied across different parts of the textile industry, Bingham's 1977 proposal imposed staggered limits on the permissible level of dust; limits that were adjusted to the relative health risks. While the new standard retained its "technology-forcing" provisions, it cut compliance costs by an estimated 75%. Understandably, Bingham was hopeful these changes would mollify the opposition of the industry and shield OSHA, in turn, from any future economic complaints. She was also convinced President Carter's recent executive order would not apply. Because regulators had closed the comment period prior to Carter issuing E.O. 12044 (and were ensconced in the final, internal stages of the decision-making process) they were confident that a cotton dust regulation, at long last, would soon go into effect.[33]

No such luck. Even though "variable" exposure limits cut costs dramatically, and even though advisers to the president admitted E.O. 12044 "does not apply," RARG decided to intervene nonetheless to demand additional changes. "The stakes in this regulation are enormous," Charlie Schultze explained to Carter, alluding to recent price increases and the need to limit the impact of OSHA's proposed standard. Subsequently, on May 2nd, 1978, Schultze informed the president that he and his inflation fighters would soon be conducting an "informal review" of the latest cotton dust rule. With this "informal" review, Schultze wanted to achieve one simple goal. He wanted to strong-arm OSHA, forcing the agency to eliminate the rule's "technology forcing" provisions, and replace them with less burdensome performance standards;

[33] "Memorandum from Barry Bosworth to RARG Executive Committee: OSHA's Draft Final Cotton Dust Regulation," Jun. 7th, 1978, Regulatory Assistance Project (RAP) – Cotton Dust [O/A 11,159] [1]" Folder, Box 109, Files of Simon Lazarus, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library pp. 1-15; and also Christopher C. DeMuth, "Regulatory Costs and the Regulatory Budget," Dec. 1979, James C. Miller Papers, Box 90 Folder "OIRA," Hoover Institution Archives, pp. 18-19

with the flexible, cost-effective approaches Schultze had recently written about in *The Public Use of Private Interest* (1977). Schultze had a number of specific alterations in mind. Rather than mandate the installation of new ventilation equipment, he wanted the cotton dust rule to require employers to 1) provide respirator masks to workers, and 2) conduct periodic medical surveillance in order to monitor worker health. According to the RARG Chairman, these changes would save an additional $125 million annually (although they would do far less to eliminate the underlying risks to worker health).[34]

Ahead of the group's "informal" cotton dust review, members of RARG predicted their involvement would likely spark political controversy; potentially great enough to necessitate Carter's direct intervention. On May 5th, Simon Lazarus – Associate Director of DPS – wrote Stu Eizenstat predicting a "bloody" confrontation with Bingham, OSHA administrators, and their allied interest groups. According to Lazarus, the informal review could prompt a fierce, interagency dispute; one that was "quite likely to end up on the president's desk." Schultze agreed that Carter might need to intervene in order to break a potential stalemate. "We are moving into uncharted waters," Schultze explained to Carter on May 2nd. "The time is near," Schultze added, "when presidential intervention will become necessary." Evidently, the members of RARG were gearing up for a showdown. Despite the 1972 Guenther episode and the direct

[34] "Memorandum from Charlie Schultze to the President: Regulatory Actions to Date," May 2nd, 1978, "Cotton Dust 5/78-6/78, [O/A 679]" Folder, Box 41, Files of Simon Lazarus, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-5; "Memorandum from Barry Bosworth to RARG Executive Committee: OSHA's Draft Final Cotton Dust Regulation," Jun. 7th, 1978, Regulatory Assistance Project (RAP) – Cotton Dust [O/A 11,159] [1]" Folder, Box 109, Files of Simon Lazarus, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library pp. 1-15; and also "Memorandum from Chuck Knapp to Simon Lazarus: Performance Standards Agreement," May 19th, 1978, "Department of Labor [2]" Folder, Box 216, Files of George C. Eads, Records of the Council of Economic Advisers, Jimmy Carter Presidential Library, pp. 1-3

parallels to Watergate, advisers to Carter were launching a program of direct interference in administrative decision-making.[35]

What ensued over the following month and a half was a bitter dispute between two different parts of the federal government: OSHA, a regulatory agency within the executive branch, and RARG, a branch of Carter's advisory staff. On May 19th, Charlie Schultze sent a memo to Labor Secretary Ray Marshall, instructing him to order Bingham to incorporate respirator masks and medical surveillance in the final cotton dust standard. But Marshall refused to budge. In response to Schultze's directive, Marshall sent an angry appeal to Carter. Writing to the president on May 24th, Marshall explained his opposition to performance standards by emphasizing the degree to which OSHA's proposal already met RARG's standard for cost-effective regulation. "Economic considerations," Marshall pleaded, "have been taken into account to the maximum extent possible." According to the Labor Secretary, Bingham's decision to incorporate variable exposure limits resulted in an "eminently reasonable standard," one that "[balanced]" the economic concerns of the industry against the health risks to affected workers. To ask for additional cuts was a step too far. Marshall also argued the window for White House involvement (as established by E.O. 12044) had already passed. With notice and comment over and the public record officially closed, Marshall claimed RARG had missed its opportunity to comment on the regulation and lobby for alternative approaches.[36]

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[35] "Memorandum from Simon Lazarus to Stuart Eizenstat: Regulatory Actions to Date," May 5th, 1978, "Cotton Dust 5/78-6/78, [O/A 679]" Folder, Box 41, Files of Simon Lazarus, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-2; and "Memorandum from Charlie Schultze to the President: Regulatory Actions to Date," May 2nd, 1978, "Cotton Dust 5/78-6/78, [O/A 679]" Folder, Box 41, Files of Simon Lazarus, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-5

[36] "Memorandum from Ray Marshall to the President: OSHA's Cotton Dust Standard," May 24th, 1978, "Regulatory Assistance Project (RAP) – Cotton Dust [O/A 11,159] [1]" Folder, Box 109, Files of Simon Lazarus, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-5

Furthermore, Marshall echoed the prior concerns of Si Lazarus. He warned Carter that if RARG proceeded any further with its review, the group would spark a "major political upheaval" on the Democratic side. Liberal members of Congress, labor unions, health advocates, and public interest groups had been clamoring for a cotton dust standard since the early 1970s, only to have seen successive proposals kicked to the curb. If Carter's inflation fighters applied any additional pressure, Marshall predicted an escalation of tensions on the left (which could further jeopardize relations between the administration and the Democratic coalition). During the stalemate in late May, Si Lazarus and Stu Eizenstat wrote directly to Carter, admitting that few options remained apart from direct presidential interference. However, they acknowledged the seriousness of such a move. "As Ray's memo emphasizes," they wrote to Carter on May 29th, "it is likely that OSHA, organized labor, and their allies in Congress will explode, despite whatever efforts you make to reassure them." In addition, they admitted to Carter that his overt involvement could open him to damaging press coverage alleging he "cares more about cotton industry profits than workers' health."[37]

Despite the explosive potential of Carter's direct intervention, RARG members maintained the political benefits would outweigh the political costs. While a confrontation with OSHA would likely generate interest group blowback, advisers to Carter also hoped it would allow the president to dramatize his commitment to reducing inflation (even if the tangible economic effects were relatively minor). "All cost estimates are fuzzy," conceded Richard M. Neustadt, the other Associate Director of DPS. Notwithstanding the admittedly imprecise

[37] "Memorandum from Ray Marshall to the President: OSHA's Cotton Dust Standard," May 24th, 1978, "Regulatory Assistance Project (RAP) – Cotton Dust [O/A 11,159] [1]" Folder, Box 109, Files of Simon Lazarus, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-5; and "Memorandum from Stuart Eizenstat and Si Lazarus to the President: Marshall and Schultze Memoranda on OSHA Cotton Dust Regulations," May 29th, 1978, "Regulatory Assistance Project (RAP) – Cotton Dust [O/A 11,159] [1]" Folder, Box 109, Files of Simon Lazarus, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-5

economic data, Neustadt believed further intervention held great symbolic importance, describing it as "one of the few dramatic anti-inflation actions we can take before 1980." Si Lazarus agreed with his colleague, claiming that an intramural governmental fight held "dramatic public value." "My own feeling," Lazarus added, "is that a confrontation…should be welcomed, since [it] will provide excellent opportunities for the president to confirm dramatically his commitment to sticking it to regulators who fail to minimize regulatory burdens." Like Lazarus, CEA member William Nordhaus urged Carter to embrace the opportunity to take on unelected bureaucrats, writing "The risks of offending certain groups must be weighed against the public perception that the president exercises control over his own executive branch." RARG members were not unaware of the political risks; they were merely convinced of the benefits of a presidential show of anti-bureaucratic force.[38]

During the final week of May, RARG and OSHA remained at loggerheads, with both Charlie Schultze and Ray Marshall refusing to back down. At this point, only the president had sufficient political clout to compel a particular decision and resolve the dispute. Increasingly, members of RARG encouraged Carter to intervene. Meanwhile, affected interest groups decried the president and his economic team for keeping the cotton dust standard in bureaucratic limbo.

[38]"Memorandum from Richard Neustadt to Simon Lazarus: Regulatory Review," Aug. 7th, 1978, "Regulatory Reform—EOP Regulatory Review" Folder, Box 70, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-8; "Memorandum from Si Lazarus to Stuart Eizenstat: Cotton Dust Meeting with the Vice President," Jun. 1st, 1978, "Regulatory Assistance Project (RAP) – Cotton Dust [O/A 11,159] [1]" Folder, Box 109, Files of Simon Lazarus, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-2; "Memorandum from Si Lazarus to Stuart Eizenstat: Regulatory Actions to Date," May 5th, 1978, "Cotton Dust, 5/78-6/78 [O/A 679]" Folder, Box 41, Files of Simon Lazarus, Records of the Domestic Policy Staff, Jimmy Party Presidential Library, pp. 1-2; "Memorandum from Si Lazarus to Stu Eizenstat: Ozone & Cost-Benefit – further thoughts," Jan. 11th, 1978, "Regulatory Reform—(Executive Office of the President) EOP Involvement" Folder, Box 70, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-5; and also "Memorandum from William Nordhaus on the Regulatory Review Process," Aug. 16th, 1978, "Regulatory Reform—(Executive Office of the President) EOP Involvement" Folder, Box 70, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 8-14

On May 30th, the president received the following message from the North Carolina Brown Lung Association;

> What is going on up there? We cotton textile workers waited for OSHA protection under Nixon and we waited under Ford. We sincerely thought the cotton dust cover-up would end with your election. But now, 17 months after the proposed cotton dust standard was issued, you are telling us to wait even longer while your economic advisers study its inflationary impact. President Carter, we urge you to listen to a different sort of adviser, the working people who elected you and who are suffering the consequences of your delay…Our waiting time has run out.[39]

As with many of his decisions as president, however, Carter would ultimately listen to his conservative fiscal instincts, not pro-regulation constituencies such as the Carolina Brown Lung Association.[40]

On June 4th, RARG secured a formal directive from the president ordering Ray Marshall to include performance standards in the final rule. Charlie Schultze had long implored Carter for such an order. "Only a directive from you," Schultze had written three days prior, "can secure a change in the regulation." Upon attaining Carter's directive, Schultze immediately wrote to Marshall. "The president," Schultze reported to the Labor Secretary, "has directed me to request you prepare one or more alternative approaches…that protect workers' health, but impose lower costs." In addition, Schultze requested a private meeting with Marshall; presumably, to discuss the mechanics of implementing Carter's directive and accordingly modifying the cotton dust rule. The two subsequently met face-to-face. As Schultze quickly discovered, however, the president's direct involvement had done little to weaken Marshall's resolve. Indeed, the Labor

[39] "Telegram from the North Carolina Brown Lung Association: OSHA Protection for cotton textile workers," May 31st, 1978, "Cotton Dust, 5/78-6/78 [O/A 679]" Folder, Box 41, Files of Simon Lazarus, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1

[40] "Memorandum from Si Lazarus to Stuart Eizenstat: Cotton Dust Meeting with the Vice President," Jun. 1st, 1978, "Regulatory Assistance Project (RAP) – Cotton Dust [O/A 11,159] [1]" Folder, Box 109, Files of Simon Lazarus, Records of the Domestic Policy Staff, pp. 1-2

Secretary held firm in his support for the existing cotton dust standard, claiming it had already been revised to account for economic factors and thus was non-inflationary. Having arrived to the meeting backed by the president's explicit support, Schultze was furious. Afterward, he expressed deep frustration, referring to Marshall as "impossible." To make matters worse for Schultze, Marshall had informed him at the end of the meeting that he would be requesting his own meeting with Carter in an effort to change the president's mind. Evidently, the dust might not settle anytime soon.[41]

As tensions flared between Marshall and Carter's economic team, OSHA administrators dusted off a tried-and-true political technique: the leak. Following the president's cotton dust directive, members of the agency pushed back by leaking RARG's secret correspondence with Marshall to journalists at the *New York Times*. The ensuing media exposure was a massive embarrassment for the Carter Administration. Multiple stories painted Carter and his staff as heartless inflation fighters who were insensitive to the plight of sick workers – who were so narrow-minded in focus that they were unwilling to let go of a regulation the agency had already paired down significantly. Ralph Nader joined the dustup. Nader described RARG as a group of "pink-cheeked academics" armed with "callous calculators." He even singled out Carter specifically, lambasting the president for "sticking it to the sick and the weak" in his battle against rising prices. The leaks and resulting stories constituted RARG's debut in the political

[41]"Memorandum from Charlie Schultze to the President: OSHA's Cotton Dust Regulation," Jun. 4th, 1978, "Regulatory Assistance Project (RAP) – Cotton Dust [O/A 11,159] [1]" Folder, Box 109, Files of Simon Lazarus, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-3; "Memorandum from Charles L. Schultze to Ray Marshall: OSHA Draft Regulations on Cotton Dust," June 4th, 1978, "Regulatory Assistance Project (RAP) – Cotton Dust [O/A 11,159] [1]" Folder, Box 109, Files of Simon Lazarus, Records of the Domestic Policy Council, Jimmy Carter Presidential Library, pp. 1-2; "Memorandum from Charles L. Schultze to the President: OSHA's Cotton Dust Regulation," June 4th, 1978, "Regulatory Assistance Project (RAP) – Cotton Dust [O/A 11,159] [1]" Folder, Box 109, Files of Simon Lazarus, Records of the Domestic Policy Council, Jimmy Carter Presidential Library, pp. 1-3; and also "Memorandum from Charles L. Schultze to Ray Marshall: OSHA Draft Regulations on Cotton Dust," June 5th, 1978, "Cotton Dust, 5-6/78 [O/A 5328]" Folder, Box 118, Files of Margaret McKenna, Records of the Counsel's Office, Jimmy Carter Presidential Library, pp. 1

spotlight. Until this point, the review group had flown under the political radar and kept its first major initiative – the cotton dust review – a clandestine bureaucratic operation. As with many executive actions in the 1960s and '70s, however, RARG's review soon caught the attention of investigative journalists (who were still riding high in the aftermath of Watergate scandal). Henceforth, Schultze's group would face a new degree of public scrutiny.[42]

Most damaging of all, the leaks opened the White House to serious new legal allegations. Throughout late May and early June, RARG had corresponded with Marshall outside the confines of the comment period, introducing new arguments to the Labor Secretary *in private* and repeatedly lobbying him to alter the final cotton dust decision. Moreover, RARG had initiated this correspondence without paying heed to prevailing norms of due process. For instance, Schultze had not given notice to any affected interests prior to approaching Marshall; nor had he afforded any opportunities to respond to his arguments for performance standards. In other words, RARG's "informal" review amounted to a secret, ex parte attempt to sway a decision-maker. After the leaks brought this covert operation into the spotlight, a coalition of labor unions filed a civil action in federal district court, alleging the cotton dust standard had been tainted by improper, ex parte presentations. On June 7th, the AFL-CIO and Amalgamated Clothing and Textile Workers Union petitioned the U.S. District Court for the District of Columbia to grant a preliminary injunction against RARG. In a legal brief authored by Alan Morrison (the head of Ralph Nader's Public Citizen Litigation Group) the unions alleged,

> "During the months of May and June, 1978, more than six months after the record on the cotton dust standard had been closed, various White House officials…have had discussions with and presented oral and written evidence and arguments to, various officials of the Department of Labor with the intent to affect changes in

[42] The environmental reporter Philip Shabecoff first broke the story; see Shabecoff, "Carter Acts to Soften Dust Rule," *The New York Times*, June 7th, 1978, pp. D1; and also David Burnham, "Carter Gets Warning on Cotton Dust: Marshall Chides Economic Aides," *The New York Times*, June 1st, 1978, pp. D1; and "Wayne King," Shift on Cotton Dust is a Carter Compromise," The New York Tines, Jun. 9th, 1978, pp. D1

> the content of the cotton dust standard…At no time was an opportunity afforded to representatives of workers to make any similar kind of ex parte presentation of counter-evidence or argument to officials within that Department."[43]

With a preliminary injunction, organized labor hoped to quash any further attempts at improper influence by RARG or Carter himself.

In addition to filing a civil action, the AFL-CIO sent an angry letter to Si Lazarus elaborating its opposition to White House involvement in the cotton dust standard. While the AFL conceded that rules proposed by executive agencies were subject to the provisions of E.O. 12044, it denied legitimacy to RARG's deviant, post-comment activities. "This standard is not subject to such review," the federation noted. "We most strongly object," the group continued, "to this interference with the normal course of OSHA rulemaking." It was one thing for the White House to mandate and then comment on regulatory analyses, especially if it submitted recommendations during the comment period; alongside other affected interests as they participated openly in the decision-making process. However, it was another thing for the White House to conduct "special reviews," in the words of the AFL, where RARG advisers intervened off-the-record and where "due process is taken off the track." Accordingly, the federation recommended the cotton dust standard "be removed from review by the RARG and be promulgated as scheduled by OSHA." If Carter failed to rescind his directive, however, the AFL warned Lazarus the administration would be demonstrating that it "regards the dollar costs of complying with health standards as of greater importance than protecting the lives and health of American workers." This, in turn, would further alienate the labor movement.[44]

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[43] "Motion for Summary Judgement: Amalgamated Clothing & Textile Workers Union of America, AFL-CIO, and North Carolina Public Interest Research Group v. Marshall," Jun. 7th, 1978, "Cotton Dust, 5-6/78 [O/A 5328]" Folder, Box 118, Files of Margaret McKenna, Records of the Counsel's Office, Jimmy Carter Presidential Library, pp. 1-4

[44] "Position of AFL-CIO & Amalgamated Clothing & Textile Workers Union of America on Proposed OSHA Cotton Dust Standards and Issues Arising Therefrom," "Regulatory Assistance Project (RAP) – Cotton Dust [O/A

The allegations of improper influence were particularly damaging to Carter who – as part of his pledge to heal the nation after Vietnam and Watergate – had pledged to govern transparently. "There is no reason for secret meetings of regulatory agencies or executive departments," Carter wrote in his campaign autobiography, in an effort to distance himself from Cold War secrecy and Nixon-Era corruption. "Such meetings," he added, "must be opened to the public." As the cotton dust episode illustrated, however, Carter's war on inflation (and push for cost-effective regulation) was coming at the expense of his stated commitment to ethics and transparency in government. In response to economic duress, his RARG advisory staff had launched an opaque new administrative program. At this point, that program failed the president's own standard of institutional openness and harkened back to the dreaded "imperial presidency."[45]

The upheaval caused by the leaks ultimately forced Carter to back down. On June 9th, after an emergency meeting with Ray Marshall, the president formally withdrew his directive to OSHA, allowing Bingham to implement the cotton dust standard absent many of the changes requested by RARG. After OSHA's leaks to the *Times*, RARG advisers had warned Carter to avoid reneging on his directive. "The world knows [you] have already made a decision," Si Lazarus explained to the president, "which cannot be changed without appearing to back down." However, Carter hoped the pivot would help him save face by helping diffuse the backlash in the press. In fact, the pivot only made matters worse. The president's "dramatic reversal" on cotton dust – in the words of the *New York Times* – made him look like a captive of his own subordinates. It created the perception that, while Carter was sincerely concerned about rising

11,159] [1]" Folder, Box 109, Files of Simon Lazarus, Records of the Domestic Policy Council, Jimmy Carter Presidential Library, pp. 1-3

[45] See Jimmy Carter, *Why Not The Best?* (Nashville, TN: Broadman Press, 1975), pp. 148; and also Arthur M. Schlesinger Jr., *The Imperial Presidency*, (Boston, MA: Houghton Mifflin, 1973)

prices, he was powerless to order remedial actions to lower-level members of his own administration. If he had held firm (and continued to back Schultze on the use of performance standards), he would have certainly alienated labor leaders and their political allies, but he could have at least claimed a small victory for the anti-inflation program. By supporting Schultze and then withdrawing that support, however, Carter sacrificed both the goodwill of organized labor as well as an opportunity to appear strong on inflation. In the end, he came across as irresolute.[46]

The final outcome of the controversy was a cotton dust standard that nobody seemed to like. On June 19th – in a joint press conference held at the White House – Schultze and Marshall stood side by side in a show of unity to announce a final rule the administration billed as a compromise. Like the previous cotton dust standard, the final rule enacted "variable" exposure limits for different parts of the industry and stipulated that firms protect workers through the installation of ventilation equipment and other "technology-forcing" provisions. But the compromise departed from the original proposal in two critical respects. In last-minute negotiations ahead of the White House briefing, Schultze had obtained 1) a longer timetable for compliance, and 2) a provision allowing the conditional use of performance standards. This latter provision deserves some explanation. It provided that textile firms could implement performance standards if they could establish parity between ventilation equipment and alternatives like respirator masks; if, in other words, they could prove to OSHA that performance standards worked just as well as preventative technology in mitigating adverse health effects. While

[46] Wayne King," Shift on Cotton Dust is a Carter Compromise," *The New York Tines*, Jun. 9th, 1978, pp. D1; and "Memorandum from Simon Lazarus to Stuart Eizenstat: Cotton Dust Meeting with the President" Jun. 6th, 1978, "Cotton Dust, 5/78-6/78 [O/A 679]" Folder, Box 41, Files of Simon Lazarus, Records of the Domestic Policy Council, Jimmy Carter Presidential Library, pp. 1-3

officials at the agency doubted industry could establish parity, they agreed, at RARG's urging, to include this option in the final compromise.[47]

While the White House applauded the final cotton dust rule, effectively all the major stakeholders expressed opposition. Schultze portrayed the standard as an effective blend – a real-world application of *The Public Use of Private Interest* – that balanced the aims of social regulation against broad economic imperatives. "One does not need to choose between inflation and effective regulation," Schultze proudly declared at the cotton dust press briefing. Obviously, organized labor did not feel the same. While the final compromise retained technology-based controls, it also included a bypass provision which might one day lead to the use of respirator masks and shift the onus of health protection onto workers. Thus, to union leaders, the final standard represented an additional watering-down of health protections. On the other side of the debate, industry expressed disappointment the president had withdrawn his initial directive and failed to hold the line on performance standards. To concerned manufacturers, then, the compromise represented a discernible step backward. The ensuing *New York Times* headline – "It's Safety First, Sort Of" – distilled the lackluster final outcome. After inserting himself into a heated regulatory battle, Carter had inflamed a distinct set of political interests. Then, in an effort to mitigate the resulting backlash, Carter reversed his position. By doing so, however, the president appeased no one.[48]

[47] For the final cotton dust rule see 43 *Federal Register* 23750; June 23rd, 1978; and for OSHA's skeptical view of respirator masks see "Memorandum from Chuck Knapp to Simon Lazarus: Performance Standards Agreement," May 19th, 1978, "Department of Labor [2]" Folder, Box 216, Files of George C. Eads, Records of the Council of Economic Advisers, Jimmy Carter Presidential Library, pp. 1-3

[48] For lukewarm reactions to the final standard see David Burnham, "Cotton Dust Rule Issued; Both Sides Are Unhappy," *New York Times,* Jun. 20th, 1978, pp. D3; Helen DeWar, "Compromise Standard for Cotton Dust is Unveiled, Attacked," *New York Times,* Jun. 20th, 1978, pp. A4; and also Virginia Adams and Tom Ferrell, "It's Safety First, Sort Of, In Dispute Over Brown Lung," *New York Times,* Jun. 11th, 1978, pp. E9

During the cotton dust controversy, public interest groups established themselves as the main opponents of RARG and direct presidential involvement in the regulatory process. Ahead of Carter's formal directive, health advocates had written the president, "what is going on up there?" to protest the additional delay incurred by Schultze's review. The controversy had also caught the attention of Ralph Nader – the leader of Public Citizen – who censured Carter in the press for "sticking it to the sick and weak" in his effort to contain rising prices. Nader's litigation group, led by Alan Morrison, had also coordinated with the affected labor unions and filed a preliminary injunction against the administration.

It is easy to understand why the public interest movement saw RARG's first major action as an institutional assault. Beginning in the mid-1960s, Nader, Morrison, and other public interest advocates had taken the Washington political establishment by storm, publishing muckraking exposés on special interest influence, fighting corporate lobbies inside the beltway, and building support for a new breed of administrative agency that governed on behalf of the broad, unrepresented public. OSHA was just one of the movement's administrative success stories. But to public interest advocates, the agency's recent tussle with RARG signaled the beginning of a new movement; a movement by White House economists to weaken new regulatory commitments in the name of restraining inflation. While OSHA had successfully undermined Carter's initial directive, the cotton dust review signaled the president's decision to address the crisis of double-digit inflation at the expense of health, safety, and environmental imperatives of years past. Nothing represented this shift in priorities better than RARG's proposed solution of respirator masks. To labor unions, masks would utterly dilute OSHA's statutory commitments, failing to remove the underlying safety hazards and shifting the onus of health protection from industry (where it belonged) onto afflicted textile workers. By this

standard, RARG was an adversary of social regulation; a group of inflation-fighting economists eager to roll back the gains of public interest law.

Members of RARG saw their mission quite differently. Indeed, most opposed outright deregulation and instead portrayed their work as an effort to achieve "balance" in regulatory policy.[49] Reporting on the review group's activities in the fall of 1978, Stuart Eizenstat claimed the group's mission was to "ensure that a proper balance is struck between regulatory objectives and economic costs." "We are not slackening our commitment to safety and environmental goals," added Jack Watson (another RARG adviser who had previously chaired Carter's transition team). "But we want to ensure, as much as possible," Watson continued, "that we are pursuing those goals sensibly and efficiently." It is true that RARG was not eliminating regulations wholesale. After all, the cotton dust standard had weathered presidential review and been finalized by OSHA for implementation. Rather than outright repeal, RARG aimed to retrofit federal rules with cost-effective designs. But it is also true that RARG's push for performance standards, if successful, would sacrifice something important. To replace stringent health protections – like the promise of a dust-free workplace – with precarious alternatives like respirator masks was to dull the blade of administrative enforcement. While RARG was not a deregulatory instrument per se, it aimed to relax the terms of implementation and thus could have deregulatory effects. To health groups and labor unions, the group's approach threatened to dramatically weaken regulatory commitments. To White House economists, it reflected the complexities of governing in an era of rising inflation.[50]

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[49] For a recent examination of this effort see Paul Sabin, "'Everything Has a Price': Jimmy Carter and the Struggle for Balance in Federal Regulatory Policy," *Journal of Policy History,* Vol. 28 Issue 1 (2016): 1-47

[50] See "Memorandum from Stuart Eizenstat, Jim McIntyre, and Charlie Schultze to the President: some proposed regulatory reform measures for your anti-inflation program," Oct. 8th, 1978, "Regulatory Reform—EOP Involvement" Folder, Box 70, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-5; and "Memorandum from Jack Watson to Charlie Schultze, Stu Eizenstat, and Barry Bosworth: Proposed Initiative for Deregulation: Draft Memo," Jul. 18th, 1978, "Regulatory Reform—EOP

Most importantly, the cotton dust controversy prompted one public interest group, the Environmental Defense Fund (EDF), to develop a prospective new legal strategy against White House involvement. On July 19th – one month after the cotton dust standard was finalized – EDF attorney Robert Rauch sent a 7-page memo to Charlie Schultze, threatening RARG with litigation. Should the group interfere similarly in other rulemaking proceedings, Rauch promised to sue in federal court on the grounds that White House contacts with regulators constituted improper, ex parte communications. Following the lead of Alan Morrison's earlier civil action, Rauch elaborated on the legal basis for such a challenge. Citing the recent *Home Box Office* decision (1977), Rauch wrote, "As you undoubtedly know, the U.S. Court of Appeals for the District of Columbia Circuit has recently emphasized its concern over the influence of ex parte contacts." "In *Home Box Office*," he continued, "these concerns were of such importance that the court set aside the rules entirely and adopted a stringent prohibition on ex parte contacts between interested parties and agency decision-makers." "EDF submits," Rauch went on, "that ex parte contacts by executive branch officials pose many of the same problems." Exactly as Harold Bruff had predicted in his analysis for the ABA Commission, the case law on ex parte communications was a potential area of vulnerability for any system of presidential directives.[51]

Rauch did more than merely recite the *HBO* holding, however. Indeed, his memo to Schultze accounted for recent developments in the case law. Following its ruling in *HBO*, the DC Circuit had decided another case involving ex parte communications. In a controversy called *Action for Children's Television v. Federal Communications Commission* (1977), a different

Involvement" Folder, Box 70, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-7

[51] "Memorandum from Robert Rauch to Jimmy Carter, Paul Rogers, Edmund Muskie, Douglas Costle, and Eula Bingham," Jul. 19th, 1978, "Regulatory Reform—RARG (Regulatory Analysis Review Group)" Folder, Box 76, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-6

panel of judges had limited the scope of *HBO's* ex parte restrictions. Emphasizing the distinctness of rulemaking from adjudication – and the need to maintain an informal, free exchange of information – the court wrote; "Ex parte contacts do not per se vitiate agency informal rulemaking action, but only do so if it appears from the administrative record under review that they may have *materially influenced* the action ultimately taken." In articulating this new standard, the DC Circuit emphasized the unworkability of *HBO's* sweeping ex parte guidelines;

> If we go as far as *Home Box Office* does in its ex parte ruling in ensuring a whole record for our review, why not go further to require the decisionmaker to summarize and make available for public comment every status inquiry from a Congressman or any germane material – say a newspaper editorial – that he or she reads or their evening-hour ruminations? In the end, why not administer a lie-detector test to ascertain whether the required summary is an accurate and complete one? The problem is obviously a matter of degree, and the appropriate line must be drawn somewhere.

In the end, Judges Tamm, MacKinnon, and Wilkey drew that line at ex parte contacts that "materially influenced" an agency's final decision. This was a sharp break from the court's prior holding in *HBO* (which mandated that all contacts be subsequently disclosed in the public record and made available for comment). By contrast, *Action for Children's Television* held that not all communications were indicative of "poisonous ex parte influence." Indeed, only the most impactful ones – ones that bore directly on final administrative outcomes – needed to be opened to scrutiny in order to ensure procedural fairness. Otherwise, the court noted, *HBO* would impose ludicrous reporting obligations on administrators, requiring they disclose all innocuous contacts regarding prospective regulations.[52]

Interestingly, Rauch argued that the holding in *Children's Television,* despite limiting the scope of *HBO,* actually bolstered the legal arguments against RARG intervention. After all, the

[52] *Action for Children's Television v. Federal Communications Commission*, 564 F.2d 458 (1977)

White House had substantially more political clout over agencies than any ordinary interested party, meaning White House contacts carried greater potential to "materially influence" administrative actions. "The possibility that an ex parte contact from an executive branch official will materially influence the action ultimately taken," Rauch explained, "is substantially more likely than a similar ex parte contact from a private party." Theoretically, then, *Children's Television* would bar anything resembling the cotton dust review. If, as there, RARG intervened off the record, afforded no opportunities to respond to its arguments, and made no additional transparency gestures, EDF was confident of its legal chances in the DC Circuit. "Not every ex parte contact must be included in the record," Rauch admitted, referring to the recent precedent in *Children's TV*. "On the other hand," he continued, "we believe the court would take a quite different view regarding ex parte communications, particularly after the close of the comment period, from the Chairman of the Council of Economic Advisers to the affected agency head."[53]

Of course, Harold Bruff's analysis suggested that RARG could easily contain such legal exposure. While the group might not be able to defend its cotton dust review, it could insulate itself from ex parte allegations by tying any future reviews to a set of transparency guidelines. Bruff had argued, correctly, that the rulings of the DC Circuit did not prohibit contacts between the White House and subordinate officers in the executive; they merely stipulated that any such contacts be entered into the record and then opened to public scrutiny. As long as they were, Bruff claimed there would be no basis for EDF (or any other groups) to challenge them as ex parte communications.[54]

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[53] "Memorandum from Robert Rauch to Jimmy Carter, Paul Rogers, Edmund Muskie, Douglas Costle, and Eula Bingham," Jul. 19th, 1978, "Regulatory Reform—RARG (Regulatory Analysis Review Group)" Folder, Box 76, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-6

[54] Harold Bruff, "Presidential Participation in Agency Rulemaking," Nov. 7th 1977, "American Bar Association—Government Regulations," Folder, Box 24, Files of Simon Lazarus, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. II-1-II-11

Two months later, EDF sent an additional, 40-page memo to Charlie Schultze that dramatically raised the stakes of litigation. In this longer, supplementary brief, EDF explained that it was prepared not only for ex parte suits, but a broad-based challenge to presidential authority over federal regulations. As he had in the July memo on ex parte contacts, Robert Rauch took the lead for the concerned environmental lobby. "Does the president or his immediate staff," Rauch asked at the outset of his report, "have the authority to direct [an] administrator…to take a specific course of action in a rulemaking proceeding?" "The recent activities of the Regulatory Analysis Review Group," Rauch continued, referencing the fight over cotton dust, "have raised serious questions as to whether presidential advisers have exceeded their legal authority in attempting to influence rulemaking decisions."[55] As these passages suggest, Rauch's 40-page supplement amounted to a comprehensive rebuttal to Harold Bruff's legal analysis for the ABA Commission.

Rauch's analysis then proceeded in several parts. First, he examined federal regulatory statutes – the various laws passed by Congress that governed agency action – to determine if any could be construed to sanction presidential direction of rulemaking. He concluded that the overwhelming majority vested exclusive authority in federal regulators. As representative examples, he cited many of the statutes familiar to EDF attorneys, including the 1970 Clean Air Act, the 1972 Water Pollution Control Act, the 1974 Safe Drinking Water Act, and the 1976 Toxic Substances Control Act. "All of these acts," Rauch declared, "provide the administrator with exclusive authority to make final rulemaking decisions." "Nowhere in any of these statutes," he continued, "is the president or his immediate advisers given authority to dictate the

[55] "Memorandum from Robert Rauch to Addressees: Legal Restrictions on Presidential Interference in EPA Rulemaking," Sept. 5th, 1978, "Regulation: Ozone [2]" Folder, Box 74, Files of Charles L. Schultze, Records of the Council of Economic Advisers, Jimmy Carter Presidential Library, pp. 1

outcome of specific rulemaking decisions." Like most laws passed by Congress, these environmental statutes contained the operative phrase "the administrator shall." According to Rauch, this critical phrase granted agency chairman "and no one else" the authority to promulgate federal regulations. Moreover, Rauch argued that wherever Congress intended to allow presidential involvement in the regulatory process, it explicitly said so: "Where Congress intends the president or his advisors to have final authority over rulemaking, it specifically provides for such authority in the enabling legislation." One example was Section 801 of the 1938 Civil Aeronautics Act (which authorized White House review of international route awards for national security purposes). Another more recent example was Title VI of the 1964 Civil Rights Act (which mandated presidential approval for racial non-discrimination requirements at public universities). However, Rauch claimed these provisions were the clear exception to the statutory rule. According to this analysis, Congress had precluded White House involvement in the vast majority of cases. Advancing a strict constructionist argument, Rauch claimed presidential control was thus only allowed in the rare instances where expressly enumerated.[56]

Next, Rauch turned to the 1946 Administrative Procedure Act (APA); the statute that governed administrative decision-making generally. Rauch began by citing an excerpt from §553, the provision of the APA outlining the procedural requirements for rulemaking:

> After notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments, with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.[57]

[56] "Memorandum from Robert Rauch to Addressees: Legal Restrictions on Presidential Interference in EPA Rulemaking," Sept. 5th, 1978, "Regulation: Ozone [2]" Folder, Box 74, Files of Charles L. Schultze, Records of the Council of Economic Advisers, Jimmy Carter Presidential Library, pp. 5-7
[57] Ibid, pp. 10

According to Rauch, these existing rules of administrative procedure made no allowance for an interstitial presidential role. "Neither this section nor any other in the APA," he concluded, "provides for subsequent presidential review of the agency's decision nor an initial decision by the president himself or his advisors." "It should be clear," he emphasized, "that it is the agency, and no one else, which is given authority to make a final decision." Much like the first prong of his argument, Rauch claimed that if Congress had intended to sanction presidential control of rulemaking, it would have outlined as much in the leading code of administrative procedure.[58]

In his discussion of the APA, Rauch also made an intriguing observation about an extremely recent Supreme Court decision. Decided in April, 1978 and titled *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council* (1978), the decision was the high court's most recent construction of the APA and its' requirements for informal rulemaking. In *Vermont Yankee,* Associate Justice William Rehnquist reiterated the principles of two unanimous decisions from the early 1970s.[59] Rulemaking, Rehnquist insisted, was procedurally distinct from administrative adjudication. Whereas adjudication was of a formal, judicial character, rulemaking was of an informal, legislative nature, involving fewer procedural trappings and encompassing a broader range of substantive issues and interests. Accordingly, the APA's procedural requirements for rulemaking needed to be strictly construed; they mandated notice and public comment, but should not be interpreted to require the same trial-type formalities as slow and burdensome adjudications. Of course, in ensuing cases such as *Home Box Office* (1977), legal liberals on the DC Circuit had flagrantly disregarded the Supreme Court's

[58] "Memorandum from Robert Rauch to Addressees: Legal Restrictions on Presidential Interference in EPA Rulemaking," Sept. 5th, 1978, "Regulation: Ozone [2]" Folder, Box 74, Files of Charles L. Schultze, Records of the Council of Economic Advisers, Jimmy Carter Presidential Library, pp. 10

[59] See Rehnquist's opinions in *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972): and *United States v. Florida East Coast Railway Co.*, 410 U.S. 224 (1973)

instructions, imposing a mix of trial-type safeguards onto various rulemaking proceedings. A direct appeal from the DC Circuit, *Vermont Yankee* was intended to finally put an end to this appellate-level revolution in the field of administrative due process. It was meant to supply additional force to the argument that rulemaking needed to remain an informal and flexible tool for decision-making. According to Robert Rauch, however, Rehnquist's decision in *Vermont Yankee* could be read not only as a bar on judicially-imposed administrative procedures, but on ones imposed by RARG and the White House as well.[60]

At issue in *Vermont Yankee* was a rule proposed by the Nuclear Regulatory Commission (NRC) concerning how nuclear power plants analyzed their environmental impacts. Despite the fact that NRC had conducted an oral hearing in excess of the APA's procedural requirements, the DC Circuit remanded the agency's proposal for perceived procedural deficiencies. In an opinion written by Chief Judge David L. Bazelon, the court issued a vague mandate to NRC, directing the agency to conduct additional, adversarial procedures that "in one way or another" helped "generate a record."[61] After an appeal by an affected Vermont nuclear plant, the Burger Court granted *certiorari*; and in April, 1978, Justice Rehnquist delivered the unanimous *Vermont Yankee* opinion. It read as a stinging rebuke to the DC Circuit and its recent procedural impositions. "The Court of Appeals," Rehnquist emphatically wrote, "has unjustifiably intruded into the administrative process." Strictly construing §553 of the APA, Rehnquist observed that agencies need only provide notice, allow opportunity for comments, and publish a "concise general statement" when engaging in rulemaking. No more, he wrote, was required by the APA

[60] For commentary on the *Vermont Yankee* opinion see Richard Stewart, "Vermont Yankee and the Evolution of Administrative Procedure," *Harvard Law Review*, Vol. 91 Issue 8 (1978): pp. 1805-1822; Clark Byse, "Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View," *Harvard Law Review*, Vol. 91 Issue 8 (1978): pp. 1823-1832; and also Stephen Breyer, "Vermont Yankee and the Court's Role in the Nuclear Energy Controversy," *Harvard Law Review*, Vol. 91 Issue 8 (1978): pp. 1833-1845;
[61] *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 547 F.2d 633 (1977), pp. 654

or the due process clause of the Constitution. Rehnquist conceded that agencies could choose to allow procedures in excess of notice and comment (as NRC had). However, he maintained that decision should be left to agencies' own discretion and could never be determined ad-hoc by reviewing courts based on vague conceptions of due process. According to Rehnquist, any supplemental, judicially-imposed procedures (like the one envisioned by Judge Bazelon) amounted to "Monday morning quarterbacking" in clear violation of the APA. In another particularly dramatic line, Rehnquist censured the DC Circuit for years of "unwarranted judicial examination" that "bordered on the Kafkaesque." Following the decision, one commenter described *Vermont Yankee* as an "April shower" on judicial review – a key precedent that would quash the DC Circuit's bold prescriptions for the administrative process.[62]

Though *Vermont Yankee* barred judicially-imposed procedures, Rauch believed Rehnquist's strict construction of the APA would also bar the emergent process of regulatory review by RARG. "The court," Rauch wrote, commenting on *Vermont Yankee*, "specifically rejected efforts by the…DC Circuit to impose additional procedural requirements beyond those required by the Administrative Procedure Act." "But it is quite likely," he explained, "that the court would take the same view of presidential efforts to tamper with the basic rulemaking process." In other words, if *Vermont Yankee* prohibited courts from engaging in procedural ornamentation, Rauch believed RARG would be similarly prohibited and that the group's reviews, in turn, would be ripe for challenge at the Supreme Court. Of course, this argument presumed that *Vermont Yankee* would apply equally to the president as a lower federal court.[63]

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[62] See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978), pp. 481, 487-488; and Victor Rosenblum, "Supreme Court's April Shower on Judicial Review of Rulemaking," *Administrative Law Review*, Vol. 30 (1978), pp. xi

[63] "Memorandum from Robert Rauch to Addressees: Legal Restrictions on Presidential Interference in EPA Rulemaking," Sept. 5th, 1978, "Regulation: Ozone [2]" Folder, Box 74, Files of Charles L. Schultze, Records of the Council of Economic Advisers, Jimmy Carter Presidential Library, pp. 10-11

Rauch then devoted a relatively brief discussion to the major constitutional cases on executive power. Like Harold Bruff the year prior, he began with the removal precedents: *Myers v. United States* (1926) and *Humphrey's Executor v. United States* (1935). Unlike Bruff, however – who believed the two cases sent mixed messages on the constitutionality of directives – Rauch believed they clearly prohibited presidential control of regulations. While Rauch acknowledged the existence of a constitutional removal power, he distinguished the holding in *Myers* from the authority being currently sought by RARG advisers. "The court stopped short," he wrote in his discussion of *Myers*, "of holding that the president's power to remove his subordinates also conferred the authority to dictate their decisions." According to Rauch, the power to remove was conceptually distinct from the power to influence specific decisions. Of course, the former could be wielded with important effects on the latter. "Obviously," Rauch admitted, "such a holding gave the president substantial political leverage in influencing those decisions." Nevertheless, he maintained the removal power was a retroactive presidential tool; it could be used to dismiss subordinates after they made specific policy judgements, but it did not include an affirmative power to interfere in decisional processes entrusted to officers by statute. Yes, executive officers served at the pleasure of the president, but Rauch claimed this did not eliminate their underlying discretion. Moreover, Rauch argued *Humphrey's Executor* further undermined arguments for presidential control. By upholding the "for cause" restrictions in the 1914 Federal Trade Commission Act, the decision insulated the members of the independent commissions from politically-based removals. Thus, even if the removal power could be conflated with presidential directives, *Humphrey's Executor* sharply limited the area where

political considerations could permissibly play a role. According to Rauch, this "substantially cut back" the justifications for directives.[64]

The various legal threats generated by the cotton dust fiasco prompted the members of RARG to express heightened concern about issues of institutional legitimacy. Excerpts of internal memoranda from August and September give a sense of this new preoccupation. After receiving EDF's roadmap for legal challenges, Richard Neustadt wrote, "We must expect litigation on each regulation in which there is any off-the-record EOP involvement." "The jury is still out on the legal issues," declared CEA lawyer Robert Litan. "The power of the president may very much be on the line," warned CEA economist William Nordhaus. Ultimately, the mounting danger posed by public interest groups induced members of RARG to discuss enlisting outside legal expertise. Neustadt was one of the first to make this suggestion in the months following the cotton dust review;

> CEA's effort to review proposed regulations with major economic impact is constantly running afoul of questions about ex parte rules and about the president's authority to tell regulatory agencies how to execute their statutes. The groups working in this area (CEA, OMB, and DPS) need a lawyer who has some background in administrative law to review the relevant statutes and case law and provide advice…we really need someone working on some of these issues who can get into the problem.[65]

In a similar vein, Robert Litan had called for an "outside review by well-known legal experts" in order to "increase the legitimacy of EOP involvement in regulatory decision-making" and to

[64] "Memorandum from Robert Rauch to Addressees: Legal Restrictions on Presidential Interference in EPA Rulemaking," Sept. 5th, 1978, "Regulation: Ozone [2]" Folder, Box 74, Files of Charles L. Schultze, Records of the Council of Economic Advisers, Jimmy Carter Presidential Library, pp. 21-26

[65] "Memorandum from Richard Neustadt to Doug Huron," Sept. 7th 1978, "Regulatory Reform 1977-78 [2/28/77-12/13/78]" Folder, Box 66, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1

address the "uncertain legal status pertaining to presidential involvement." Here was an opening for Lloyd Cutler and the ABA Commission.[66]

[66] See "Memorandum from Richard Neustadt to Simon Lazarus: Regulatory Review," Aug. 7th, 1978, "Regulatory Reform—EOP Regulatory Review" Folder, Box 70, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-8; "Memorandum from Robert Litan to Charlie Schultze, William Nordhaus, and Peter Gould: RAP at the Crossroads; some options (revised)" Aug. 2nd, 1978, "Regulatory Reform [2]" Folder, Box 75, Files of Charlie Schultze, Records of the Council of Economic Advisers, Jimmy Carter Presidential Library, pp. 1-18; and also "Memorandum from William Nordhaus on the Regulatory Review Process," Aug. 16th, 1978, "Regulatory Reform—(Executive Office of the President) EOP Involvement" Folder, Box 70, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 8-14

"We Have Two Rulemakings": The Carter White House, the ABA Commission, and the Consolidation of Regulatory Review

In the summer of 1978, the ABA Commission on Law & the Economy (CLE) was proceeding with its work on schedule. Two years prior – during the group's first official meeting – members of the commission had targeted August, 1978 as the prospective release date for an initial draft of recommendations. They chose that date because it marked not only the ABA's annual meeting in New York City, but the association's centennial anniversary (a milestone the CLE hoped would draw attention to its substantive recommendations). As scheduled in early August, the commission published an initial draft. Titled "Federal Regulation: Roads to Reform" and released ahead of the New York meeting, the report was framed as a policy white paper that addressed a number of issues within the broad topic of regulatory reform. In reality, there was only one "road to reform" envisioned by the CLE; namely, Lloyd Cutler's proposal from "Regulation and the Political Process" (1975).[1]

News coverage surrounding the draft's release distilled its' primary focus. In the opening lines of an article surveying "Roads to Reform," a reporter from *The Wall Street Journal* noted:

> An American Bar Association group, challenging conventional wisdom, has suggested that the problem with federal regulatory agencies is that they're too independent. A draft report by the ABA Commission on Law & the Economy proposes that the President should have authority to modify or direct certain critical actions by regulatory agencies.[2]

[1] See "Commission Draft: Research Agenda and Call for Funding," Sept. 10th, 1976, Walter Gellhorn Papers, American Bar Association 1976-1979, Box 324 Folder 1, Rare Book and Manuscript Library, Columbia University, pp. 1-36; and also Note, "Highlights of the 1978 Centennial Annual Meeting Program," *American Bar Association Journal,* Vol. 64 Issue 5 (1978): pp. 710-717

[2] "Regulatory Bodies Are Too Independent, Law Panel Says; It Proposes Overseeing," *The Wall Street Journal*, Aug. 9th, 1978, pp. 6

As expected, the draft urged the enactment of a Cutler-style statute; one that granted presidents the authority 1) to order agencies to take up "critical" regulatory issues, and 2) to "modify" and "reverse" certain agency actions.[3] During a panel at the ABA's New York meeting, several of the commissioners explained the justifications for their proposal. Echoing Cutler's original *Yale Law Journal* piece, CLE Chairman John J. McCloy declared, "Each agency's actions affect a wide range of interests other than the single mission they are charged with performing." "But few mechanisms exist," McCloy continued, "for coordinating their actions with those of other agencies and departments." The draft itself sounded similar themes. "Agency actions taken in pursuit of one goal," a plurality of the commissioners noted, "can impair efforts to achieve other goals." "When major balancing decisions must be made," the CLE majority continued, "only elected officials and their immediate staffs can provide the requisite overview and coordination, make practical political judgments that weigh competing claims, and stand accountable at the polls for the results."[4]

The report did attract a number of internal dissents. Rhoda Karpatkin – Executive Director of the Consumers Union and one of the few public interest advocates on the CLE – refused to join the majority. Specifically, Karpatkin worried presidential directives would "politicize agency decision-making when there appears to be a post-Watergate consensus that administrative decisions should be insulated from direct political interference." Elliott Bredhoff, a Washington lawyer specializing in labor law, also published a separate dissent. According to Bredhoff, the CLE's principal recommendation was wide of the mark. If the commission was

[3] The recommendation also included similar provisions for legislative and judicial review; for a refresher on these requirements see Cutler, "Regulation and the Political Process," *Yale Law Journal*, Vol. 84 Issue 7 (1975): 1395-1418, pp. 1415-1417

[4] See "Regulatory Bodies Are Too Independent, Law Panel Says; It Proposes Overseeing," *The Wall Street Journal*, Aug. 9th, 1978, pp. 6; and also American Bar Association, "Report to the House of Delegates by the Commission on Law and the Economy," August, 8th, 1978, Box 38 Folder 9, David Ginsburg Papers, Manuscript Division, Library of Congress, Washington DC, pp. 2-12

concerned about how agencies were implementing their statutory mandates, Bredhoff argued the solution was not to give the president "directive" authority, but to urge Congress to revise and amend the underlying enabling statutes.[5]

The draft's release signaled an important new phase for the CLE. Since its inception in 1975, the commission had focused almost entirely on internal research. While the commissioners had operated as a branch of the ABA (and with a generous grant from the association), they had yet to present their work in anything resembling a public forum. The publication of "Roads to Reform" represented an important shift in focus. Backed by a rigorous piece of scholarship (Harold Bruff's "Presidential Participation in Agency Rulemaking") the CLE had officially begun what it called the "implementation phase" of its investigation; the effort to politically advance and implement its recommendations. Among the CLE's first priorities in this regard was to secure the endorsement of the full ABA. Indeed, the basis for releasing "Roads to Reform" ahead of the New York meeting was to introduce the full association to presidential directives, with the idea that Cutler's proposal could then be debated by the House of Delegates and later sanctioned as ABA policy. At that point, the CLE could lobby for its proposal with the bar's official institutional endorsement (something that would carry significant political weight in Washington). "If the association eventually adopts the report as official policy," one journalist explained, "its lobbyists would then attempt to persuade Congress and Executive Branch officials to try out the ideas." As things stood in August, the commissioners anticipated debate to take place in the House of Delegates the following summer. According to C. David Ginsburg – a

[5] American Bar Association, "Report to the House of Delegates by the Commission on Law and the Economy," August, 8th, 1978, Box 38 Folder 9, David Ginsburg Papers, Manuscript Division, Library of Congress, Washington DC, pp. 2-12

Washington lawyer participating in the CLE – the recommendations had a "fair chance" at approval "at the next Annual meeting."[6]

Behind the scenes, however, the CLE had already laid the groundwork for implementation at the federal level. Since the first year of the Carter Administration, the commissioners had kept in contact with at least four senior members of the White House staff: Charles L. Schultze (Chairman of CEA), Richard M. Neustadt and Simon Lazarus (Associate Directors of DPS), and Robert S. Strauss (Carter's "Inflation Czar"). In 1977 and 1978, the commissioners reached out to these potentially interested members of the White House, keeping them apprised of the CLE's internal research. For instance, before Schultze was confirmed to lead CEA, David Ginsburg had called him at his Brookings Institution office to update him on the progress of the Commission.[7] Soon after Schultze's confirmation, CLE staffers invited him to participate in an ABA seminar on regulatory reform as a spokesperson for the administration (Schultze ultimately declined the invitation).[8] Further, Lloyd Cutler's "Accountability Committee" – the branch of the CLE studying the legal basis of presidential directives – had forwarded Si Lazarus an early version of Harold Bruff's report.[9] In addition, after the commission released its initial draft in August, David Ginsburg wrote Richard Neustadt (who

[6] "Regulatory Bodies Are Too Independent, Law Panel Says; It Proposes Overseeing," *The Wall Street Journal*, Aug. 9th, 1978, pp. 6; and also "Letter from David Ginsburg to Richard Neustadt," Aug 22nd, 1978, Box 38 Folder 9 David Ginsburg Papers, Manuscript Division, Library of Congress, Washington DC, pp. 1
[7] "Letter from David Ginsburg to Charles L. Schultze," Feb. 2nd, 1976, Box 38 Folder 4, David Ginsburg Papers, Manuscript Division, Library of Congress, Washington DC, pp. 1
[8] "Letter from Peter Petkas to Simon Lazarus," May 3rd, 1977, Box 38 Folder 7, David Ginsburg Papers, Manuscript Division, Library of Congress, Washington DC, pp. 1
[9] Harold Bruff, "Presidential Participation in Agency Rulemaking," Nov. 7th, 1977, "American Bar Association—Government Regulations" Folder, Box 24, Files of Simon Lazarus, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1

was handling legal issues for RARG). "If there's any information you need or want," Ginsburg emphasized, "let me know."[10]

The CLE's repeated overtures, combined with the threat of litigation following the cotton dust fiasco, prompted the Carter White House to schedule a formal briefing with the commission. In early September, Richard Neustadt phoned CLE Chairman John J. McCloy and arranged a meeting at the White House for the afternoon of Sept. 14th. McCloy, CLE Vice Chairman Richard Smith, Lloyd Cutler, and a few others planned to attend. In an ensuing memo sent to Stuart Eizenstat, Neustadt elucidated the basis of the meeting. "This proposal," Neustadt wrote, referring to the CLE draft and the recommendation of presidential directives, "implies support for our cotton dust effort and similar interventions." "The main points of the meeting," Neustadt added, "are to demonstrate that we care about the issues they are raising and to learn about how they think presidential intervention should work." Neustadt's underlying message was clear. RARG's cotton dust review had sparked political opposition – from labor unions, environmentalists, and other public interest groups – who had developed a plan to litigate the scope of presidential authority should it be wielded in future administrative proceedings. With RARG facing the prospect of litigation, Neustadt decided to enlist the expertise of the ABA Commission, which had studied the relevant issues since 1975 and would be able to defend RARG in its effort to wrest control of administrative policymaking. In other words, Neustadt was under pressure, aware of the CLE's relevant expertise, and hopeful the commission would provide the legal know-how to help Jimmy Carter transform the administrative state.[11]

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[10] "Letter from David Ginsburg to Richard Neustadt," Aug. 22nd, 1978, Box 38 Folder 9, David Ginsburg Papers, Manuscript Division, Library of Congress, Washington DC, pp. 1; and also "Letter from Robert S. Strauss to David Ginsburg," Aug. 10th, 1978, Box 7 Folder 2, David Ginsburg Papers, Manuscript Division, Library of Congress, Washington DC, pp. 1

[11] "Memorandum from Richard Neustadt to Stuart Eizenstat: Meeting with ABA Commission on Regulatory Reform," Sept. 8th, 1978, "Regulatory Reform—ABA Report [2]" Folder, Box 68, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-3

On September 14th, McCloy, Smith, and Cutler arrived at the White House to brief a room of the president's economic advisers; including Richard Neustadt, Charlie Schultze, Stuart Eizenstat, James McIntyre, and a number of officials from CEA. In the weeks following the ABA briefing, members of RARG revealed that two main things had transpired on the 14th. First, the CLE had assured them their constitutional position was strong. In the face of EDF's challenge to presidential authority, McCloy, Smith, and Cutler underscored the constitutionality of directives; not in Cutler's original statutory form, but as currently practiced by RARG. On October 8th, in a memo on how to proceed with regulatory review after cotton dust, Schultze and Eizenstat informed the president;

> There are potential legal challenges to your right to intervene. There is no doubt that a directive along the lines proposed above will be countered by an attack from such groups as the Environmental Defense Fund, who claim that you have no such authority. But in a forthcoming report on regulations, the American Bar Association Commission on Law and the Economy strongly defends your constitutional authority in this matter and urges you to assert it.[12]

Others spoke of the ABA briefing in similar terms. For instance, two lawyers from CEA reported, "The ABA's Commission on Law & the Economy and particularly Lloyd Cutler…have urged us to proceed by assuming the president has full rights to intervene." At a minimum, then, the commissioners used the meeting to allay RARG's outstanding concerns, to assure the group that future actions would not be constitutionally suspect (as EDF claimed they would), and to encourage the group to continue pursuing its anti-inflation program. In another memo, Robert

[12] "Memorandum from Stuart Eizenstat, James McIntyre, and Charles Schultze to the President: Some proposed regulatory reform measures for your anti-inflation program," Oct. 8th, 1978, "Regulatory Reform—EOP Involvement" Folder, Box 70, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-5

Litan – counsel for CEA – described the briefing more bluntly. "Lloyd Cutler says yes," Litan wrote in late October.[13]

Beyond providing constitutional assurance, the ABA briefing had one other major impact. Following the lead of Harold Bruff's legal analysis, McCloy, Smith, and Cutler pointed RARG to the importance of drafting *HBO*-style disclosure requirements; a set of transparency policies that could shield the group from ex parte allegations. During the fall after the ABA briefing, members of RARG expressed new confidence that their legal exposure could be significantly diminished through the creation of a new disclosure process. Indeed, presidential advisers began repeating one of Harold Bruff's main insights: the idea that White House advisers could intervene in administrative proceedings, provided they log their contacts, submit them into the record, and abide by an open policy. Excerpts from internal memoranda testify to the new sense of optimism provided by the idea of disclosure. "A disclosure rule," wrote CEA economist William Nordhaus, "would probably help a great deal to remove some of the 'sinister mystique' that appears in some minds to surround the current process." "Whatever legal risks may exist," noted CEA lawyer Robert Litan, "they can be mitigated by inserting in the rulemaking record summaries of all meetings and conversations in the same period between the EOP and the agency." "Perhaps the most important part of the process," another RARG staffer emphasized, "concerns the disclosure requirements." To begin drafting the new logging guidelines, Richard Neustadt scheduled a preliminary consultation with the Justice Department's influential Office of Legal Counsel (OLC). In addition, Neustadt sent a gracious note to Harold Bruff in early

[13] "Memorandum from Peter Gould and Bob Litan to Alfred Kahn: Fact Sheet on Regulatory Analysis Review Group," Oct. 30th, 1978, Box 18 Folder 14, Alfred E. Kahn papers #4055, Division of Rare and Manuscript Collections, Cornell University Library, pp. 1-7; and "Memorandum from Robert Litan to Charlie Schultze; Major Regulatory Actions to Date," Oct. 30th, 1978, Box 18 Folder 14, Alfred E. Kahn papers #4055, Division of Rare and ManusBcript Collections, Cornell University Library, pp. 1-7

October, writing, "Dear Hal, As I'm sure you know, your paper has quickly become the main guidepost on a set of very current issues." Neustadt would later help Bruff secure a position working in the executive branch.[14]

As the individual handling legal issues for RARG, Neustadt commenced work on a disclosure rule that fall. As he did, however, he expressed a degree of ambivalence. The son of Richard E. Neustadt – a Harvard political scientist and one of the foremost experts on the American presidency[15] – Richard M. Neustadt Jr. had grown up in Boston, attended Harvard College and Harvard Law School, and then served as an information officer in the Navy.[16] By 1978, he found himself working on a host of domestic policy issues for the Carter Administration; namely, the procedural framework for RARG intervention. Following the ABA briefing, Neustadt expressed reservations about using Harold Bruff's findings as a procedural model. While he accepted Bruff's central insight – that *HBO*-style requirements should be implemented as a precautionary measure – he was unsure how *HBO* squared with the Supreme

[14] "Memorandum from William Nordhaus on the Regulatory Review Process: The Future of Regulatory Review," Sept. 16th, 1978, "Regulatory Reform—Executive Office of the President (EOP) Involvement" Folder, Box 70, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-14; "Memorandum from Robert Litan to Charlie Schultze: Actions on Major Regulatory Proposals," Oct. 30th, 1978, Box 18 Folder 14, Alfred E. Kahn papers #4055, Division of Rare and Manuscript Collections, Cornell University Library, pp. 1-5; "Letter from Richard Neustadt to John Harmon," Nov. 13th, 1978, "Regulatory Reform – Executive Office of the President (EOP) Involvement" Folder, Box 70, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1; "Letter from Richard Neustadt to Harold Bruff," Oct. 2nd, 1978, "Regulatory Reform—Legal Issues/Ex Parte [Rules]" Folder, Box 72, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1; "Memorandum from Richard Neustadt to Jodie Bernstein, John Harmon, and Peter Petkas," Jan. 22nd, 1979, "Regulatory Reform—Legal Issues, Law Review Article" Folder, Box 72, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1

[15] For a selection of his scholarship on the American presidency see Richard E. Neustadt, *Presidential Power: The Politics of Leadership*, (New York: Wiley, 1960); Neustadt, *Alliance Politics*, (New York: Columbia University Press, 1970); Neustadt and Ernest R. May, *Thinking in Time: The Uses of History for Decision-Makers*, (New York: Free Press, 1986); and also Matthew J. Dickinson and Elizabeth A. Neustadt, eds., *Guardian of the Presidency: The Legacy of Richard E. Neustadt*, (Washington DC: Brookings Institution Press, 2007)

[16] Neustadt Jr. (sometimes called "Little Richard" by family members) worked predominantly on telecommunications issues for the Carter Administration; for more on his background see "Richard M. Neustadt Dies: Businessman, Aide to Carter," *The Washington Post*, Jul. 7th, 1995, pp. B4; and "Richard M. Neustadt; Founded Satellite, Wireless Communications Firms," *The Los Angeles Times*, Jul. 7th, 1995, pp. WVB11

Court's recent decision in *Vermont Yankee v. Natural Resources Defense Council* (1978). In another October letter, Neustadt expressed this uncertainty to Bruff directly, writing "I had one question. Do you think the DC Circuit was right in grafting ex parte rules onto informal rulemaking? Is the broad language consistent with *Yankee Power*?" The answer was probably no. In his brief for the Environmental Defense Fund (EDF), Robert Rauch had argued the Supreme Court's narrow construction of the Administrative Procedure Act in *Vermont Yankee* would function as a bar on White House procedural impositions (meaning the procedures constituting RARG review). That was one potential reading of Justice Rehnquist's decision. But Neustadt's reading – likely the more accurate reading – was that the decision would bar the DC Circuit's procedural impositions (meaning the disclosure requirements enumerated in *HBO*). After all, *Vermont Yankee* had arisen on appeal from the DC Circuit, whereupon the Supreme Court emphatically reversed, censuring Judge Bazelon and his colleagues for "Kafkaesque" judicial review. If *Vermont Yankee* rebuffed federal judges, not White House advisers, then Neustadt wondered if *HBO's* procedural mandate was still applicable. Thus, in his letter to Bruff, Neustadt perceived a disparity between the rulings of the DC Circuit, the procedures the CLE recommended, and the recent message of the Supreme Court. Simon Lazarus – Neustadt's partner at the Domestic Policy Staff (DPS) – interpreted *Vermont Yankee* similarly, arguing that it likely eliminated the need for new disclosure procedures. "*HBO* may not now be dead," Lazarus remarked in November, "but its vital life signs are plainly ebbing." "It seems very unlikely," Lazarus added in agreement, "that much of anything from that decision will survive."[17]

[17] "Letter from Richard Neustadt to Harold Bruff," Oct. 2nd, 1978, "Regulatory Reform—Legal Issues/Ex Parte [Rules]" Folder, Box 72, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1; and "Memorandum from Simon Lazarus to John Harmon and Larry Simms: Further Thoughts on

Nevertheless, Neustadt urged caution and ultimately chose to follow Bruff's proposed disclosure guidelines. Though Neustadt and Lazarus believed any such guidelines were likely incongruent with *Vermont Yankee*, the decision itself did not speak directly to ex parte issues. Admittedly, Rehnquist had narrowly construed the requirements for rulemaking under the Administrative Procedure Act, and, in theory, this narrow construction would prohibit *HBO*-style requirements. But ex parte contacts had played no role in the *Vermont Yankee* controversy and were not mentioned anywhere in the final judgement. Pending a definitive case, then, it was still not a complete certainty that disclosure procedures were not required of RARG. "The Supreme Court may eventually hold ex parte rules do not apply to informal rulemaking," Neustadt explained, "but no case presenting the question is pending." Accordingly, Neustadt described the state of the law as "somewhat murky" and insisted "EOP staffers should be cautious." In this way, Neustadt acknowledged there were still unresolved questions about the scope of *Vermont Yankee* (which the Supreme Court had only recently decided). To this end, he recommended RARG follow Bruff's original recommendations as a precaution. After conferring again with Lloyd Cutler,[18] as well as attorneys in the Office of Legal Counsel (OLC),[19] Neustadt sent draft disclosure guidelines to President Carter. According to the proposed standards, RARG would need to provide written summaries of its conversations with regulators, submit those logs into the public record, and then work with the issuing agency to make those logs available for public

EOP Participation in Executive Branch Rulemaking," Nov. 22nd, 1978, "Regulatory Reform [2]" Folder, Files of Phillip Bobbitt, Records of the Counsel's Office, Jimmy Carter Presidential Library, pp. 1-2

[18] "Letter from Richard Neustadt to Lloyd Cutler," Nov. 13th, 1978, "Regulatory Reform – Executive Office of the President (EOP) Involvement" Folder, Box 70, Files of Richard Neustadt, Records of the DPS, Jimmy Carter Presidential Library, pp. 1

[19] "Letter from Richard Neustadt to John Harmon," Nov. 13th, 1978, "Regulatory Reform – Executive Office of the President (EOP) Involvement" Folder, Box 70, Files of Richard Neustadt, Records of the DPS, Jimmy Carter Presidential Library, pp. 1

comment.[20] Lastly, Neustadt claimed there would be tangible benefits to this cautionary approach. "This procedure," he wrote with a new air of confidence, "should defeat any legal challenge and will protect us from charges of secrecy and improper dealings." "Such guidelines," he emphasized to the president, "would also reduce suspicions among consumer, environmental, and labor groups, as well as the press, about your regulatory review process."[21]

Shortly after Neustadt completed this draft, however, his partner Si Lazarus intervened to suggest changes. Lazarus argued that Bruff and Neustadt had misread the applicable law on ex parte contacts. In a November 22nd memorandum, Lazarus took aim at a long-standing assumption in the ongoing debate on presidential directives. Since Bruff had completed his report for the ABA Commission, no one had challenged the premise that White House contacts presented analogous legal questions as ex parte contacts from private parties (like the TV broadcasters in the original *HBO* case). Ingrained in this assumption was the idea that the White House existed outside the realm of agencies' decision-making processes, and thus was akin to all other interested parties and subject to the same legal restrictions. In the draft guidelines he forwarded to President Carter, Neustadt had accepted this basic conclusion, noting that *HBO* "[applies] to any contacts," including ones by RARG advisers.[22]

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[20] "Memorandum from Richard Neustadt to Wayne Granquist, Si Lazarus, Robert Litan, Bill Nordhaus, and Peter Petkas: Guidelines on Legal Issues in Presidential EOP Involvement in Informal Rulemaking," Nov. 6th, 1978, "Regulatory Reform [2]" Folder, Box 220, Files of Phillip Bobbitt, Records of the Counsel's Office (OLC), Jimmy Carter Presidential Library, pp. 1-2

[21] Richard Neustadt, "Legal Restraints on EOP Intervention in Rulemaking," "Regulatory Reform—Legal Issues/Ex Parte [Rules]" Folder, Box 72, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-11; and "Memorandum from Richard Neustadt to the President: Limitations on EOP Staff Contacts with Interested Private Parties in Connection with Executive Branch Rulemaking," Dec. 16th, 1978, "Regulatory Reform [2]" Folder, Box 220, Files of Phillip Bobbitt, Records of the Counsel's Office (OLC), Jimmy Carter Presidential Library, pp. 1-5

[22] "Memorandum from Si Lazarus to John Harmon and Larry Simms: Further thoughts on EOP Participation in Executive Branch Rulemaking," Nov. 22nd, 1978, "Regulatory Reform [2]" Folder, Box 220, Files of Phillip Bobbitt, Records of the Counsel's Office (OLC), Jimmy Carter Presidential Library, pp. 1-2; and "Memorandum from Richard Neustadt to Wayne Granquist, Si Lazarus, Robert Litan, Bill Nordhaus, and Peter Petkas: Guidelines on Legal Issues in Presidential EOP Involvement in Informal Rulemaking," Nov. 6th, 1978, "Regulatory Reform

Conversely, in his November 22nd memorandum, Lazarus put forth the novel (but not unreasonable) idea that White House contacts were qualitatively different from private ones. "I am not entirely comfortable with the procedural guidelines proposed by Rick," Lazarus began. "I am inclined to disagree with his basic conclusion," Lazarus added, emphasizing the need to "[distinguish] between the two types of contacts." Then, Lazarus underscored the distinctive qualities of the office of the presidency. Unlike TV broadcasters, presidents and their advisers were motivated not by narrow self-interest or pecuniary goals, but by broad national political objectives. Here, Lazarus underscored the fact that the presidency claimed the only truly national constituency in the American constitutional order, meaning it tackled the broad national issues affecting all Americans and could not be analogized to a narrowly-interested private party. Contacts from the White House, Lazarus explained, did not present the "traditional" capture scenario evident in controversies like *HBO*. Rather than a case of an outside group seeking special influence, RARG intervention was a case of *internal* consultation (between presidents and their subordinates in the executive branch) that did not incur the same fairness and due process violations. Thus, Lazarus believed RARG could not be deemed an "interested party" under prevailing ex parte doctrines. For this reason, Lazarus wrote, "I do not like the idea of treating intra-governmental contacts as if they are analogous or quasi-analogous."[23]

Moreover, Lazarus argued that "intra-governmental" contacts – from the White House or elsewhere – should actually be welcomed in the field of regulatory policy. In an era when agency actions cut across jurisdictions and impacted broad swaths of private conduct, Lazarus believed

[2]" Folder, Box 220, Files of Phillip Bobbitt, Records of the Counsel's Office (OLC), Jimmy Carter Presidential Library, pp. 1-2

[23] "Memorandum from Si Lazarus to John Harmon and Larry Simms: Further thoughts on EOP Participation in Executive Branch Rulemaking," Nov. 22nd, 1978, "Regulatory Reform [2]" Folder, Box 220, Files of Phillip Bobbitt, Records of the Counsel's Office (OLC), Jimmy Carter Presidential Library, pp. 1-2

regulators should heed the input of other policymakers; whether from RARG or other federal agencies. Lazarus explained this as: "the need of the decision-makers within the issuing agency to make maximum use of all relevant expertise within the government." Here, Lazarus put forth a vision of the executive branch similar to the one originally articulated by Lloyd Cutler. Like Cutler, he saw other parts of the government (notably, RARG) as critical sources of input that could "balance" the goals of "single-minded" agencies against other important objectives. Like Cutler, he conceived of federal administrative bodies in this distinctive new way, regarding them not as private islands that needed to be institutionally shielded from non-agency personnel, but as individual parts of a larger matrix of governmental actors and policy agendas. According to Lazarus, it was one thing to limit undue influence by TV broadcasters, but it was an entirely different matter to foist the same restrictions on the chief executive, the president's agents, or other bureaucratic officials. "It is more natural," Lazarus wrote, departing from Bruff and Neustadt's analysis, "to view all intra-governmental communications as generally…appropriate and favored." In effect, he was saying the executive branch was one big happy family – a unitary entity that should jettison institutional subdivisions. In conclusion, Lazarus restated his central criticism of Neustadt's guidelines, writing, "The line between contacts covered by…ex parte doctrine should not be drawn at the doors of the agency."[24]

However, Lazarus clarified that his findings would not absolve RARG from the ex parte problem. He merely thought previous analysts had approached the issue from the wrong angle. In his mind, ex parte allegations could arise during the course of regulatory review, but they would originate from an entirely different source:

[24] "Memorandum from Si Lazarus to John Harmon and Larry Simms: Further thoughts on EOP Participation in Executive Branch Rulemaking," Nov. 22nd, 1978, "Regulatory Reform [2]" Folder, Box 220, Files of Phillip Bobbitt, Records of the Counsel's Office (OLC), Jimmy Carter Presidential Library, pp. 1-2

> I would suggest an alternative approach to dealing with the ex parte problem…Post [notice of proposed rulemaking] or perhaps after the close of the comment period, EOP officials dealing with a particular proposed regulation should have no ex parte contacts with interested private parties.

According to Lazarus, the danger stemmed not from contacts between the White House and the issuing agency (which were "intra-governmental" and served the national interest), but from contacts between the White House and interested private parties (which were external and raised the specter of private lobbying). By this standard, organized interest groups – not presidential advisers – were the real vehicles of improper influence. For instance, if RARG advisers consulted with one another, decided to modify a proposed regulation, and then issued a directive to regulators conveying their request, that would not itself violate ex parte doctrines. If, however, industry groups had lobbied RARG to gut a proposed regulation (and eventually secured a directive to that effect), that would constitute improper influence and render the group vulnerable to ex parte allegations. It was this latter scenario that worried Lazarus. To avoid becoming an "avenue of industry influence," in his words, RARG should follow a modified version of Bruff and Neustadt's disclosure rule; a version that shifted *HBO's* procedural remedy from the government itself to the private sector.[25]

Under these amended disclosure guidelines, presidential advisers would no longer need to submit their contacts with institutional subordinates. Instead, they would need to disclose all their communications with outside groups (lest private interests used their influence to co-opt regulatory review). Lazarus thus put forth a new reading of the *HBO* decision; a reading that exempted intra-governmental contacts from ex parte restrictions and applied only "at the boundary between the government and the public, i.e. private parties." Lazarus maintained this

[25] "Memorandum from Si Lazarus to John Harmon and Larry Simms: Further thoughts on EOP Participation in Executive Branch Rulemaking," Nov. 22nd, 1978, "Regulatory Reform [2]" Folder, Box 220, Files of Phillip Bobbitt, Records of the Counsel's Office (OLC), Jimmy Carter Presidential Library, pp. 1-2

modified disclosure rule would have the same salutary effects as the original. "It would also go far," he assured, "to remove the suspicions about EOP involvement in regulation development."[26]

Lazarus had written about these issues before. After graduating from Yale Law School in the late 1960s (and briefly working at a federal agency in Washington), Lazarus had served as General Counsel for New York City's Department of Consumer Affairs. A fledgling municipal agency that had won praise from Ralph Nader, the department was fast becoming one of the most aggressive consumer protection units in the entire country. There, under the leadership of former Miss America turned consumer advocate Bess Myerson, Lazarus worked on a variety of initiatives in New York City, including "unit pricing" and reforms for insurance companies, car salesmen, grocery stores, and more.[27]

Lazarus then decided to write a book on the larger public interest movement of which he was part. Titled *The Genteel Populists* and published in 1974, the monograph became a manifesto of public interest law. In it, Lazarus bemoaned the "malignant power" of corporate interests over the governmental process, recounting how a variety of liberal "grand designs" – such as the 1914 Federal Trade Commission Act and 1933 National Industry Recovery Act – had been subverted by industry groups and no longer served the general public. Like many of his peers, Lazarus proposed a variety of reforms designed to expand public participation in government. But he also wrote briefly about another prescription; one that was not widely

[26] "Memorandum from Si Lazarus to John Harmon and Larry Simms: Further thoughts on EOP Participation in Executive Branch Rulemaking," Nov. 22nd, 1978, "Regulatory Reform [2]" Folder, Files of Phillip Bobbitt, Records of the Counsel's Office (OLC), Jimmy Carter Presidential Library, pp. 1-2

[27] For more on Lazarus' role at the Department of Consumer Affairs in the early 1970s see W. Stewart Pinkerton Jr., "Curbing Fraud: New York City Fights Shady Merchandisers with New Legal Curbs," *The Wall Street Journal,* Jan. 7th, 1970, pp. 1; Richard Phalon, "City is Drafting Stricter Rules for Warranties on Used Cars," *The New York Times,* Sept. 22nd, 1970, pp. 50; Simon Lazarus and Leonard Ross, "How to Collect Without a Lawyer: No Fault," *The New York Times,* Nov. 28th, 1971, pp. E4; and also Simon Lazarus, "Anti-Trust: Vs. The Autocrats of the Breakfast Table" *The New York Times,* Jan. 30th, 1972, pp. E2

supported by his public interest colleagues. Despite a plethora of Nixon-Era evidence to the contrary, Lazarus expressed optimism in *The Genteel Populists* that greater presidential power could someday be used to break the stranglehold of special interest influence;

> The one point that can be made in favor of increased presidential control…from the standpoint of the agencies' responsiveness to public interests, is that when public enthusiasm for consumer, environmental, or similar regulatory objectives suddenly becomes intense…agencies subject to direct presidential control will respond more speedily.[28]

When Lazarus wrote this in 1974, the White House was still embroiled in the Watergate scandal and was generally seen as a vehicle of untoward political corruption. Nevertheless, Lazarus believed the office of the presidency – by virtue of its national political constituency – could someday be a mechanism to advance broad "public interests" and thereby ensure greater administrative "responsiveness."[29]

Lazarus' contribution to the debates over disclosure within the Carter Administration indicated he still had faith in these earlier ideas. By advising RARG to adopt guidelines that limited secret appeals from private groups, he was recommending a set of procedures to ensure the White House remained attuned to broad national interests and did not fall prey to private lobbying. Thus, with the proper safeguards in place, Lazarus believed RARG could serve the general public and promote the broad goal of responsiveness he had outlined in *The Genteel Populists*. While his former peers in the public interest movement saw regulatory review in a much different light, Lazarus regarded it as a pro-consumer initiative consonant with his earlier professional experiences. On multiple occasions in 1978, he hailed the group's efforts to limit the compliance costs of federal regulations, predicting these would help lower price levels to

[28] Simon Lazarus, *The Genteel Populists*, (New York: Rinehart & Winston, 1974), pp. 36
[29] Ibid, pp. 27-44

the advantage of ordinary American consumers. Labor unions and environmentalists could paint regulatory review as a hand-out to industry groups, but Lazarus maintained it was a genuine attempt at macroeconomic management in the public interest, provided it could follow procedural safeguards and steer clear of private machinations.[30]

As Neustadt and Lazarus debated complex procedural questions, other members of RARG set their sights on an entirely new proposed regulation: a rule drafted by the Department of the Interior (DOI) for an industrial practice called "strip mining." By the mid-1970s, strip mining had become the standard form of resource extraction in the mining and energy industries. Unlike underground mining – where miners dawn headlamps and venture deep into underground shafts – strip mining involves the removal of surface-level topsoil by some of the world's largest industrial vehicles. With the aid of these enormous machines (like the thirteen-thousand-ton "Bagger 288"), mining companies tear apart and remove the earth that overlies mineral deposits, thus opening access to coal and other raw materials. In doing so, however, they transform entire landscapes into terraced waste pits that resemble enormous scars on the earth's surface. In 1978, strip mining had not yet been regulated by the federal government. Indeed, the proposal drafted by DOI (and flagged by RARG) was the inaugural rule in this field. In addition, the DOI proposal marked RARG's first major review since the shambolic cotton dust review, as well an opportunity for Neustadt and Lazarus to put their ex parte guidelines into practice.[31]

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[30] See for instance "Memorandum from Si Lazarus to Stu Eizenstat: Ozone & cost/benefit, further thoughts," "Regulatory Reform—(Executive Office of the President) EOP Involvement" Folder, Box 70, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-5; and "Memorandum from Si Lazarus to Stuart Eizenstat: Regulatory Actions to Date," May 5th, 1978, "Cotton Dust, 5/78-6/78 [O/A 679]" Folder, Box 41 Files of Simon Lazarus, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-2

[31] For a recent account on the emergence, development, and impact of strip mining see Jedediah Purdy, "The Violent Remaking of Appalachia," *The Atlantic*, Mar. 21st, 2016, available at https://www.theatlantic.com/technology/archive/2016/03/the-violent-remaking-of-appalachia/474603/

Fig. 4. A resident of West Virginia surveys the land bordering his family's property, which was devastated by years of "mountaintop removal" mining.[32]

All forms of mining have negative environmental impacts, but those incurred by strip mining are particularly severe. When machines obliterate enormous tracts of topsoil, they generate a host of environmental problems for the surrounding rural communities (especially, for the traditional mining regions of Appalachia and the Mountain West). As mining vehicles gouge topsoil from hillsides, they often blast something called "fly rock" into the atmosphere. Because fly rock contains the same harmful chemical compounds as coal itself, its' release into the atmosphere can dramatically worsen air pollution. Strip mining also generates millions of tons of toxic waste or "overburden" which companies often dump into nearby alluvial valleys. Typically, these "valley fills" pose as many environmental hazards as the mining itself. Valley fills can devastate both vegetation and wildlife and can permanently damage the tributaries and

[32] "Images of Mountaintop Removal Mining," available at http://earthjustice.org/slideshow/images-of-mountaintop-removal-mining

streams that feed larger watersheds. Moreover, the dumping of toxic overburden can adversely impact local water quality. In addition, strip mining has been linked to heightened risk of flooding, severe erosion, and various other environmental hazards.[33]

Beginning in the late 1960s, mining companies began an industry-wide shift toward these destructive, surface-level extraction techniques. Prompting this shift was the 1969 Federal Coal Mine Health and Safety Act – an act of Congress that transformed the day-to-day business of underground coal mining. Catalyzed by the 1968 Farmington Mine disaster in West Virginia, the 1969 Coal Act created a new office within DOI – called the Mining Enforcement and Safety Administration (MESA) – to enforce hundreds of new health and safety requirements for underground mines; including standards for roof support, ventilation, blasting, removal of combustible materials, maintenance of electrical equipment, and countless other aspects of mine operations. In the face of this robust new regulatory framework for underground mining, coal companies increasing turned to strip mining (which at this point was only regulated by states and was thus subject to fewer, less effective restrictions). In the late 1960s, strip mining accounted for under forty percent of all coal produced in the United States. By the mid-1970s, however – in the wake of the 1969 Coal Act – it accounted for almost sixty percent.[34]

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[33] For a discussion of these environmental hazards within the Carter Administration see "Strip Mining and Environmental Problems," "Regulatory Reform—Strip Mining Regulations" Folder, Box 78, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-2; for congressional hearings on the environmental issues see "Regulation of Strip Mining," *Hearings Before the House Subcommittee on Mines and Mining of the House Committee on Interior and Insular Affairs*, 92nd Cong., 1st sess., Sept 20th-21st, Oct. 21st, 26th, Nov. 29th-30th, 1971, pp. 1-898; and "Strip Mining and Flooding in Appalachia," *Hearings Before the House Subcommittee on Environment, Energy, and Natural Resources of the House Committee on Government Operations*," 95th Cong., 1st sess., Jul. 26th, 1977, pp. 1-108; and for other reports detailing the environmental issues see U.S. Department of the Interior, *Study of Strip and Surface Mining in Appalachia: An Interim Report to the Appalachian Regional Commission*, (Washington DC: U.S. Government Printing Office, 1966); and also Marc Karnis Landy, *The Politics of Environmental Reform: Controlling Kentucky Strip Mining*, (Baltimore: Johns Hopkins University Press, 1975)

[34] For background on the origins and impact of the 1969 Coal Act see Jonathon Free, "Redistributing Risk: The Political Ecology of Coal in Late-Twentieth-Century Appalachia," Doctoral Dissertation, Duke University, Durham, NC, 2016; Edward K. Wheeler and John W. Snow, "Proposals for Administrative Action Under the Federal Coal Mine Health and Safety Act of 1969," *Natural Resources Lawyer*, Vol. 3 Issue 2 (1970): 248-265; Ken Hechler,

This industry-wide transition soon prompted calls for the enactment of corresponding federal regulations. Admittedly, the environmental hazards of strip mining had prompted legislative action at the state level – particularly in the Western United States – but not until the early 1970s did momentum begin to build in Congress. Spurred by a host of damning environmental studies, as well as a Washington-based interest group called the Environmental Policy Center (which had strip-mining lobbyists on staff), Reps. Morris Udall (D-AZ) and Patsy Mink (D-HI) began drafting strip mining legislation designed to balance the country's energy needs against the need for new environmental controls. For several years, however, Udall and Mink's proposals faced significant opposition. Under the leadership of Rep. Wayne Aspinall (D-CO) – who had close ties to mining interests and had long supported Western resource development – the House Committee on Interior and Insular Affairs refused to hear debate on strip mining legislation. Since 1959, Aspinall had chaired this influential committee, repeatedly infuriating environmental advocates who he called "over-indulged zealots."[35] In 1972, however, Aspinall finally lost his seat, helping clear the way for Udall and Mink's strip-mining proposals. The ensuing congressional debates pitted environmental advocates, Western ranchers and farmers, and their allies in Congress against powerful industry groups; including the National Coal Association, the National Association of Electric Companies, and the U.S. Chamber of Commerce. After months of debate in 1973 and 1974, President Nixon finally intervened, threatening to veto strip-mining legislation out of fear it would cripple domestic energy

"The Development of the Federal Coal Mine Health and Safety Act of 1969," *West Virginia Law Review*, Vol. 77 Issue 4 (1975): 613-622; Ralph E. Bailey, "The Federal Coal Mine Health and Safety Act of 1969: Its Impact on Safety and Coal Production," *Duquesne Law Review*, Vol. 14 Issue 4 (1976): 671-682; and also Terry D. Edgmon and Donald C. Menzel, "The Regulation of Coal Surface Mining in a Federal System," *Natural Resources Journal*, Vol. 21 Issue 2 (1981): 245-266

[35] For more on Aspinall's political career and stance on environmental issues see Steven C. Schulte, *Wayne Aspinall and the Shaping of the American West*, (Boulder, CO: University of Colorado Press, 2002); and Stephen C. Sturgeon, *The Politics of Western Water: The Congressional Career of Wayne Aspinall*, (Tucson, AZ: University of Arizona Press, 2002)

producers in the wake of the OPEC oil embargo and undermine, in turn, his recently-announced "Project Independence."[36]

When Gerald Ford assumed office, Congress continued debate on a strip-mining bill. Toward the end of 1974, a joint House-Senate conference finally approved what was regarded as a compromise measure. The proposal created a federal-state regulatory partnership and enacted detailed environmental criteria on mining companies, requiring they return mined lands to their "approximate original contour" and outlining comprehensive standards for backfilling, revegetation, water quality, and other aspects of the reclamation process. The proposal also protected certain sensitive areas from strip mining and required energy companies to obtain the consent of land owners before leasing federal mineral rights. When the bill reached President Ford's desk, however, he vetoed it, expressing the same economic and energy-related concerns as his predecessor. On the strip-mining issue, Ford had been swayed by the protestations of Frank Zarb – the Administrator of the Federal Energy Administration (FEA). Throughout the fall of 1974, Zarb had repeated industry talking points to the president, claiming that new legislative restrictions would "lock up" between 12 and 72 million tons of coal, further exacerbating energy shortages. Ford ultimately proved sympathetic to Zarb's appeals. On Dec. 31st, he vetoed the strip-mining bill, arguing it would hurt coal producers "when the nation can ill afford significant losses from this critical energy source." In the spring of the following year, Ford vetoed another strip-mining bill, deeming it inflationary and counter to national energy policy.[37]

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[36] For a good overview of the early legislative debates see Luther J. Carter, "Strip Mining: Congress Moves Toward 'Tough' Regulation," *Science,* Vol. 185 No. 4150 (Aug. 9th, 1974), pp. 513-514; and Cristine Russell, "Congress Struggles with Strip-Mining Legislation: Energy vs. Environment," *BioScience,* Vol. 24 No. 11 (Nov. 1974), pp. 625-626

[37] See Luther J. Carter, "Strip Mining: A Practical Test for President Ford," *Science,* Vol. 186 No. 4170 (Dec. 27th, 1974), pp. 1190; Luther J. Carter, "Strip Mining: The Tug of War Continues," *Science,* Vol. 188 No. 4190 (May 23rd, 1975), pp. 813-815; Luther J. Carter, "A Conversation with Frank Zarb," *Science,* Vol. 189 No. 4202 (Aug. 15th, 1975), pp. 533-535; John Herbers, "President Vetoes Strip Mining Bill, Oil Tanker Plan," *The New York Times,*

In his first year as president, Jimmy Carter gave Morris Udall – the leading sponsor of a strip-mining bill – the legislative victory that had long eluded him. Having worked on the issue of strip mining as a state senator in Georgia, Carter had promised to chart a different course than his Republican predecessors, pledging to make new environmental controls a top legislative priority. Eight months after taking office, Carter fulfilled this campaign promise, signing the 1977 Surface Mining Control and Reclamation Act. Like earlier proposals, the act required that mining companies restore (or "reclaim") mined areas by following a variety of new environmental criteria; from air quality standards to the protection of rivers and streams to new limits on "valley fills." Before mining, companies would also need to obtain a federal permit demonstrating how they planned to comply with new environmental guidelines. The act also prohibited strip mining in National Parks and designated wilderness areas and required that companies obtain the consent of land-owners prior to mining. In addition, the act levied a small coal tax (35 cents/ton) to help pay for the restoration of previously-damaged lands. Lastly, and most importantly for RARG, the act established a new office within the Interior Department – the Office of Surface Mining (OSM) – to develop the accompanying regulations.[38]

Initially, the Carter Administration talked a tough game on the issue of strip mining. In fact, at the signing ceremony for the 1977 Reclamation Act, the president lamented the bill had not gone even further. "I'm not completely satisfied with the legislation," Carter declared, "I would prefer to have a stricter strip-mining bill." Among the president's objections was a provision delaying compliance for small mines until 1979 as well as a provision curbing (but not

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Dec. 31st, 1974, pp. 45; and also Ben A. Franklin, "Ford Will Repeat Strip Mining Veto," *The New York Times*, May 20th, 1975, pp. L77

[38] For background on the act see James A. McDaniel, "The Surface Mining Control and Reclamation Act: An Analysis," *Harvard Environmental Law Review*, Vol. 2 (1977): pp. 288-328; D. Michael Harvey, "Paradise Regained: Surface Mining Control and Reclamation Act of 1977," *Houston Law Review*, Vol. 15 Issue 5 (1978): pp. 1147-1174; and also Mollie E. Schechter, "The Surface Mining Control and Reclamation Act of 1977: Its Background and Effects," *New York Law School Law Review*, Vol. 25 Issue 4 (1980): pp. 953-1000

prohibiting) a ruinous practice called "mountaintop removal." In spite of these shortcomings, the president had appointed Cecil D. Andrus – the long time-governor of Idaho who had strong environmental credentials – to lead DOI, oversee OSM, and develop strict new environmental standards for strip mining. After being elevated to Interior Secretary, Andrus pledged to aggressively enforce the provisions of the 1977 Reclamation Act. During a 1977 address to the National Wildlife Federation, Andrus proclaimed, "The initials BLM no longer stand for 'Bureau of Livestock and Mining.'" Thus, all signs pointed to the Carter Administration maintaining a strong environmental stance.[39]

Throughout the winter of 1978, however, Andrus and OSM faced sustained pressure from interested members of RARG. That September – only a year after Congress established OSM – Secretary Andrus announced the inaugural strip-mining rule. The omnibus regulation gave effect to a number of different statutory provisions; from the federal permitting process to air and water quality standards to detailed "valley fill" criteria. By the terms of Executive Order 12044, the agency also published a "regulatory analysis" alongside its proposal (which estimated annual compliance costs between $300 and $400 million/year). During the ensuing public comment period, RARG intervened, submitting a critical report on the strip-mining standards that echoed many of the group's prior arguments from the cotton dust proceeding. Specifically, Schultze's team urged DOI to reevaluate its underlying approach to enforcement. Referring to valley fill criteria and new permitting requirements, RARG lambasted the agency for taking an "unnecessarily detailed, complex, and costly" approach to regulation. In place of command-and-control guidelines, the group argued for performance standards and greater "flexibility" – for

[39] See Jimmy Carter, "Surface Mining Control and Reclamation Act of 1977: Remarks on Signing H.R. 2 Into Law," August 3, 1977, available online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=7913; and also Luther J. Carter, "Interior Department: Andrus Promises 'Sweeping Changes,'" *Science*, Vol. 196 No. 4289 (Apr. 29th, 1977): pp. 507-510

alternative regulatory approaches that would "maintain environmental protection," but allow for greater "cost savings." After processing hundreds of public comments – including similar economic critiques from the coal industry – DOI informed Schultze's team that it would not be incorporating performance standards and would be moving forward with the strip-mining rule as written. In late November, Secretary Andrus closed the comment period over RARG's objections, potentially putting DOI on a potentially cotton-dust-style collision course.[40]

For the next month – as DOI officials mulled over the final strip-mining rule – they adhered to a strict gag rule, refusing to discuss the regulation with any non-agency personnel. Behind this decision was a restrictive interpretation of the DC Circuit's *HBO* decision. Earlier that spring, during OSM's first several months of existence, the agency had published a set of internal guidelines for its rulemaking proceedings. An attempt to avoid embarrassing reversal in the DC Circuit, the guidelines treated *HBO* with extreme sensitivity. Unlike Harold Bruff, Richard Neustadt, and Si Lazarus – who saw the holding merely as a mandate for disclosure – OSM administrators saw it as a sweeping ban on all external, non-agency contacts. According to OSM documents, regulations needed to be formulated behind a veil of strict independence;

> OSM must not rely on any research, data, or source materials which are not presented to interested parties for comment at the proposed rulemaking stage…After the public hearing and close of the comment period, OSM must scrupulously avoid substantive communications about the regulations with outsiders.[41]

[40] "Synopsis of RARG comments and current OSM responses," "Regulatory Reform—Strip Mining Rulemaking, [12/5/78-12/11/79]" Folder, Box 78, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-7

[41] "Memorandum from Associate Solicitor, Division of Surface Mining to Director, Office of Surface Mining, Reclamation, and Enforcement: Guidance on the preparation and maintenance of the administrative record on the permanent program regulations and the rulemaking process itself," Apr, 17th, 1978, "Regulations—Surface Coal Mining [1]" Folder, Box 74, Files of Charles L. Schultze, Records of the Council of Economic Advisers, Jimmy Carter Presidential Library, pp. 1-7

After Secretary Andrus officially closed the comment period, these guidelines took effect, establishing a bureaucratic firewall between OSM and non-agency "outsiders." Leo M. Krulitz, General Counsel for DOI, explained in a memo that no one – from within or outside the federal government – could communicate with officials in the strip-mining "decision-chain."[42]

In early December, Charlie Schultze and his staff appealed to the agency, requesting additional opportunities to discuss the proposal and the possibility of incorporating performance standards. On multiple occasions, however, they were denied a seat at the bargaining table. "Interior," Si Lazarus recounted, "has so far refused to permit CEA's staff and Charlie Schultze himself to sit down with its staff or with Secretary Andrus to discuss the issues." "Interior takes the DC Circuit cases very seriously," explained Richard Neustadt, "and is resisting any EOP contacts." "Charlie is, I think, pretty mad," Lazarus added. The stonewalling by OSM caused both officials (but especially Lazarus) great frustration. "It is just not appropriate," Lazarus complained in mid-December, "to have one high-ranking member of the president's family…'locked out' by another." While Labor Secretary Ray Marshall had openly resisted RARG's appeals on the cotton dust standard, Marshall had at least accommodated Schultze's requests to meet. At this juncture, DOI had made no such effort to hear the concerns of presidential advisers. To Lazarus, this amounted to flagrant insubordination. Referring to OSM's policy as an "extreme" and "paranoid" reading of *HBO*, Lazarus argued it would have ridiculous practical consequences on the operations of the executive branch. If every agency followed an OSM-style gag rule, presidents elected by all the people would be siphoned off from members of

[42] "Memorandum from Associate Solicitor, Division of Surface Mining to Director, Office of Surface Mining, Reclamation, and Enforcement: Guidance on the preparation and maintenance of the administrative record on the permanent program regulations and the rulemaking process itself," Apr, 17th, 1978, "Regulations—Surface Coal Mining [1]" Folder, Box 74, Files of Charles L. Schultze, Records of the Council of Economic Advisers, Jimmy Carter Presidential Library, pp. 1-7

their own cabinet; prevented from communicating with the appointees they had chosen to help implement their agenda. This, Lazarus believed, was no way to run the federal government, especially during an era of sustained economic crisis. Adopting the tone of a furious spectator, Lazarus claimed OSM was "off in left field" in denying RARG's requests.[43]

OSM had legitimate reasons to be so cautious, however. First, the agency was eager to avoid any procedural missteps that could jeopardize its inaugural regulatory proposal. To open its doors to White House advisers and allow post-comment discussions would be to create the semblance of impropriety at a time when the DC Circuit was throwing out proposed rules solely on the basis of ex parte contacts. Thus, OSM saw no reason to accommodate RARG and create any unnecessary legal exposure. "Krulitz," Si Lazarus wrote in December, referring to DOI's General Counsel, "says Interior won't take the litigation risk." Richard Neustadt observed similar attitudes at the agency, reporting that OSM administrators were being particularly vigilant about anything that could potentially "open the rule" to lawsuits. Of course, these feelings of caution at OSM were only heightened by the fact that strip-mining legislation had been bottled up in Congress for years, meaning regulators were desperate to avoid any procedural errors that might further delay the implementation of environmental standards.[44]

More important to OSM was the fact that RARG had held extensive discussions with industry groups regarding the strip-mining proposal. Admittedly, presidential advisers had

[43] "Memorandum from Simon Lazarus to Stuart Eizenstat: Strip mining regulations," Dec. 24th, 1978, "Regulatory Reform—Strip Mining Regulations" Folder, Box 78, Files of Richard Neustadt, Records of the DPS, Jimmy Carter Presidential Library, pp. 1-5; and "Memorandum from Rick Neustadt to Stuart Eizenstat: Status Report: Regulatory Reform Projects," Dec. 15th, 1978, "Regulatory Reform—Legal Issues/Ex Parte [Rules]" Folder, Box 72, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-6

[44] "Memorandum from Simon Lazarus to Stuart Eizenstat: Strip mining regulations," Dec. 24th, 1978, "Regulatory Reform—Strip Mining Regulations" Folder, Box 78, Files of Richard Neustadt, Records of the DPS, Jimmy Carter Presidential Library, pp. 1-5; and "Memorandum from Rick Neustadt to Stuart Eizenstat: Status Report: Regulatory Reform Projects," Dec. 15th, 1978, "Regulatory Reform—Legal Issues/Ex Parte [Rules]" Folder, Box 72, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-6

discussed the rule with a variety of concerned interests; including environmental advocates like the Sierra Club, Western governors, state agencies, and academic scientists and engineers. However, CEA economists had arguably corresponded more frequently with the mining and energy industries. Charlie Schultze had heard appeals from multiple electric utilities centered in Appalachia and the Midwest. These firms encouraged Schultze to "use the influence" of his office to secure the "deferment" of new strip-mining regulations. Otherwise, one Indiana utility threatened, the burdens of compliance would cause "substantial cost increases in the price of coal" and "compound our energy problem." CEA economist William Nordhaus had engaged similar industry lobbyists. During the OSM firewall, while analyzing the agency's proposal, Nordhaus had spoken with the National Coal Association, the American Mining Congress, Peabody Coal Co., Falcon Coal Co., and the West Virginia Surface Mining Association (many of whom had submitted comments on the original rule). On multiple occasions, Nordhaus solicited their input on the proposal's economic impact, requesting they forward him detailed cost estimates.[45]

There were also rumblings in the press that RARG was being used as an industry front. In early December, the *New York Times* published an article that explicitly portrayed the group as a vehicle for business interests. In the article, Ben A. Franklin – a national correspondent who had

[45] For RARG's correspondence with outside parties and especially industry groups see "Telegram from Indianapolis Power & Light Co. to Charlie Schultze," Dec. 6th, 1978, "Surface Mining: Outside Correspondence" Folder, Box 75, Files of Charles L. Schultze, Records of the Council of Economic Advisers, Jimmy Carter Presidential Library, pp. 1; "Telegram from Kentucky Utility Co. to Charles Schultze," Dec. 8th, 1978, "Surface Mining: Outside Correspondence" Folder, Box 75, Files of Charles L. Schultze, Records of the Council of Economic Advisers, Jimmy Carter Presidential Library, pp. 1; "Telegram from Southern Indiana Gas & Electric Co. to Charlie Schultze," Dec. 13th, 1978, "Surface Mining: Outside Correspondence" Folder, Box 75, Files of Charles L. Schultze, Records of the Council of Economic Advisers, Jimmy Carter Presidential Library, pp. 1; and also "Records of Conversations with Various Parties in Surface Mining by William Nordhaus, member of the Council of Economic Advisers," Dec. 16th, 1978, "Regulations—Surface Coal Mining [1]" Folder, Box 74, Files of Charles L. Schultze, Records of the Council of Economic Advisers, Jimmy Carter Presidential Library, pp. 1-12

long covered mining in Appalachia – claimed there were "echoes of coal industry arguments in the review group's criticism," implying RARG was taking cues from mining companies and perhaps working on their behalf. During the cotton dust proceeding, the White House had avoided allegations of industry influence. The allegations which nonetheless arose – that Schultze and his staff improperly meddled in the decision-making process – had been damaging enough. Ostensibly, though, the White House had acted alone. On the issue of strip mining, presidential advisers could claim no insulation from business interests. "CEA's staff," Si Lazarus conceded, "has had rather extensive contacts with industry about this issue." Although CEA lawyer Peter Gould subsequently wrote to editors at the *New York Times* – claiming it was "flatly inaccurate" to suggest RARG was "representing outside parties" – there was a broad perception the group was privileging the concerns of the business community (despite its stated commitment to broad national interests). Obviously, this provided additional justifications for OSM to continue avoiding discussions with the White House.[46]

In late December – after over a month of being locked out from the strip-mining negotiations – RARG approached Secretary Andrus with a solution to break the deadlock: a Bruff-style disclosure rule with Lazarus-style modifications. Since the ABA briefing in September, Neustadt and Lazarus had gone back and forth on the propriety and scope of transparency guidelines, ultimately settling on a disclosure rule that required RARG to log *only* its contacts with private parties. Given the amount of private contacts on the issue, strip mining presented a ready opportunity to put these new guidelines into practice. "The solution," Neustadt

[46] See Ben A. Franklin, "U.S. Agencies Clash Over Strip Mining," *The New York Times*, Dec. 4th, 1978, pp. A20; "Memorandum from Simon Lazarus to Stuart Eizenstat: Strip mining regulations," Dec. 24th, 1978, "Regulatory Reform—Strip Mining Regulations" Folder, Box 78, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-5; and also "Statement by Peter G. Gould, Special Assistant to the Chairman, to the New York Times," Jan. 8th, 1979, "Regulatory Reform—Strip Mining Regulations" Folder, Box 78, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-2

determined on Dec. 15th, during the middle of the OSM stalemate, "is to write a memo listing off-the-record contacts with affected industries and put it into the rulemaking record." "The disclosure of private contacts," Neustadt added, "would solve the legal problem and CEA could thereafter hold meetings." In order to convince Andrus and OSM, however, Neustadt and Lazarus opted to apply additional pressure. On Christmas Eve, 1978, Lazarus wrote his boss Stuart Eizenstat – the president's leading domestic policy adviser – and urged him to intervene: "My advice is that you call Andrus…and say that there are ways for Interior to permit CEA and Charlie to discuss the issues with Cecil and his staff." The more obvious course of action would have been to appeal to Carter himself and request direct presidential intervention. But Carter's involvement in the cotton dust standard had made headlines and opened the president to a wave of critical coverage. Rather than risk another high-profile clash, Lazarus enlisted Eizenstat in what he called a "low visibility" approach to the strip-mining proposal. Equally important, Lazarus beseeched Eizenstat to inform Andrus that the revised disclosure guidelines had received the preliminary approval of lawyers in the influential Office of Legal Counsel. According to Lazarus, this fact would help convince Andrus and OSM to hold meetings with RARG, as it would add force to the argument that disclosure could "virtually eliminate" all legal risks.[47]

One week later, after Eizenstat phoned Secretary Andrus, DOI finally ended the strip-mining lockout. On Jan. 4th, 1979, the agency announced in the *Federal Register* that it would be

[47] "Memorandum from Richard Neustadt to Stuart Eizenstat: Status Report; Regulatory Reform Projects," Dec. 15th, 1978, "Regulatory Reform—Legal Issues/Ex Parte [Rules]" Folder, Box 72, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-6; and "Memorandum from Simon Lazarus to Stuart Eizenstat: Strip mining regulations," Dec. 24th, 1978, "Regulatory Reform—Strip Mining Regulations" Folder, Box 78, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-5; "Memorandum from Peter G. Gould to Charles L. Schultze: DOI Procedures for Strip Mining Regulations," Dec. 26th, 1978, Regulations—Surface Coal Mining [1]" Folder, Box 74, Files of Charles L. Schultze, Records of the Council of Economic Advisers, Jimmy Carter Presidential Library, pp. 1-3; "Letter from Larry A. Hammond to Peter G. Gould," Dec. 29th, 1978, "Regulatory Reform—Strip Mining Regulations" Folder, Box 78, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-3

reopening the strip-mining proceeding in order to hold last-minute discussions with RARG. The announcement read as follows:

> As part of the process for review of the proposed regulations and CEA's comments thereon, the Secretary, pursuant to Executive Order 12044 and after consultation with the Executive Office of the President…has decided to consult with CEA prior to promulgation of final regulations. This will assure that the final rules now under consideration will strike the proper balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy.[48]

The post in the *Federal Register* included a number of other important details. First, the meeting between Andrus and RARG would occur the following day on January 5th. Second, in order to "allow the public to participate…at this stage," OSM reopened the administrative record and published a "catalog" of CEA's discussions with private parties (which included a list of groups and short summaries of the conversations). Third, the agency invited the public to submit comments on the catalog for a three-week period. All interested persons, the agency declared, could voice their concerns regarding the "nature and substance of these contacts." Finally, the agency was willingly submitting to presidential directives.[49]

Upon seeing DOI's announcement, environmental groups expressed their dismay to Secretary Andrus. On Jan. 5th, the day of RARG's long-awaited meeting, the National Wildlife Federation (NWF) wrote Andrus that it was "deeply troubled" by his sudden change of heart:

> The OSM has, until now, scrupulously adhered to a policy of open meetings and careful avoidance of special treatment for any interested party, public or private, in the development of its permanent program regulations. We believe that policy has significantly contributed to the fairness of the proceeding and that it represents a wise and effective response to recent judicial decisions interpreting the limitations imposed by the Administrative Procedure Act…The announced meeting with the Council of Economic Advisers represents a departure from that policy...We fear that political considerations extraneous to the merits of the proposed rules have impelled the Office of Surface Mining to agree to reopen the

[48] "Surface Coal Mining and Reclamation Operations: Permanent Regulatory Program," *Federal Register*, Vol. 44 No. 3, Jan. 4th, 1979, pp. 1355
[49] Ibid, pp. 1355

> record in order to make a special exception for the Council…This decision violates the Department of the Interior's own rules governing this rulemaking and basic principles of administrative law.[50]

In other words, the ability to comment on a "catalog" was no consolation to the Wildlife Federation. After all, it remained true that presidential advisers were being granted a special meeting with Andrus and OSM administrators – a meeting that would *not* be open to the public and the substance of which might never be divulged. Neustadt and Lazarus could pay lip service to open government by disclosing RARG's prior discussions with outside parties. According to the Wildlife Federation, however, this procedural carrot did nothing to mitigate the underlying problem: the White House was receiving special treatment during the regulatory process. Indeed, the conversations that mattered – the conversations between presidential advisers and agency officials on Jan. 5th – would take place in the absence of public participation and DOI had announced no plans to disclose them thus far. Of course, Neustadt and Lazarus had actively discouraged the agency from doing so, claiming that "intra-governmental" discussions could not be properly labelled ex parte. By their standard, RARG was a critical part of the executive branch, not an "interested party" external to the decision-making process. Nevertheless, the Wildlife Federation maintained that its inability to see and respond to the presidential directives themselves constituted special treatment and a clear violation of procedural fairness.[51]

After the federation's appeal failed and Secretary Andrus began consultations with RARG, the doors opened to media speculation. While a DOI spokesperson insisted on Jan. 6th

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[50] "Letter from National Wildlife Federation to Cecil D. Andrus," Jan. 5th, 1979, "Regulations—Surface Coal Mining [1]" Folder, Box 74, Files of Charles L. Schultze, Records of the Council of Economic Advisers, Jimmy Carter Presidential Library, pp. 1-2

[51] The Wildlife Federation, as well as the Natural Resources Defense Council (NRDC) and Environmental Policy Institute (EPI), did file a petition under the Freedom of Information Act (FOIA) to gain access to the discussions that took place on January 5th. However, the request was never granted; see "Letter from L. Thomas Gallaway, Jonathan Lasch, and Ed Grandis to Cecil D. Andrus: Freedom of Information Act Request," Jan. 5th, 1979, "Regulations—Surface Coal Mining [1]" Folder, Box 74, Files of Charles L. Schultze, Records of the Council of Economic Advisers, Jimmy Carter Presidential Library, pp. 1-2

"this agency is not changing course," the discussions with Schultze and his staff remained a black box, prompting reporters to allege improper dealings. Ben. A. Franklin – the *New York Times* reporter who had originally expressed concern about RARG's correspondence – published another critical article on Jan. 7th. Franklin described the reopened proceeding as a case of the coal industry "enlisting" the White House to do its bidding. Franklin also quoted a public interest lawyer from the Center for Law and Social Policy who claimed, "It is clear to us that 85 to 90 percent of CEA's information about the regulations came from industry sources with obvious special interest viewpoints…The CEA is giving the coal industry extra innings." Franklin's article prompted another retort from CEA lawyer Peter Gould. In a formal statement sent to the *Times*, Gould attacked the thesis that RARG was a mere pawn of corporate interests; "The Council and the White House staff are participating in discussions with the Interior Department in their roles as advisers to the President, and any suggestions that they are in any sense representing outside parties in this matter are completely false."[52]

Yet the allegations persisted in the absence of opportunities to prove otherwise. "We have two rulemakings," observed EDF attorney Robert Rauch in another article in the *Times*. "One is a public rulemaking at which everyone gets a shot," Rauch continued, "and the other is a private rulemaking that goes on behind closed doors…where the real decisions are made." An attorney from the Natural Resources Defense Council (NRDC) took the criticism a step further, telling the *Washington Post* "this is the reemergence of the imperial presidency."[53]

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[52] Ward Sinclair, "Inflation Warriors Quiz Strip Mining Enforcers," *The Washington Post*, Jan. 6th, 1979, pp. A10; Ben A. Franklin, "Curbs on Strip Mining Put Off As Industry Enlists Aides to Carter," The New York Times, Jan. 7th, 1979, pp. 1; and "Statement by Peter G. Gould, Special Assistant to the Chairman, to the New York Times," Jan. 8th, 1979, "Regulatory Reform—Strip Mining Regulations" Folder, Box 78, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-2;

[53] Martin Tolchin, "Battle Intensifies Over Authority of President to Control Agencies," *The New York Times*, Jan. 19th, 1979, pp. A1; and Ward Sinclair, "Environmentalists Sue United States to Protect Strip Mine Rules, *The Washington Post*, Jan. 13th, 1979, pp. A2

Environmental advocates then filed suit against the United States. On Jan. 12th, the National Wildlife Federation and NRDC petitioned the U.S. District Court for the District of Columbia to grant a preliminary injunction against Secretary Andrus and Charlie Schultze's staff. In their petition, the litigants made several familiar arguments. First, they accused DOI of allowing "ex parte communications with outside parties" in violation of the Administrative Procedure Act. Second, they argued Schultze and his staff possessed "no authority to participate in the rulemaking" according to OSM's internal guidelines. In the words of the petitioners, administrative procedure mandated that "genuine opportunities to comment…be given to all interested parties" (something that had been denied to the federation and NRDC). In conclusion, the environmental groups urged the DC District Court to issue an injunction halting the ongoing discussions between RARG and DOI and preventing Andrus from considering any views or materials already conveyed by Schultze's team.[54]

Five days after the filing of this civil action, the Office of Legal Counsel delivered a stinging blow to RARG's opponents, issuing a formal opinion that endorsed the group's involvement in the strip-mining proceeding. A division of the Justice Department, OLC assists the Attorney General in advising the president and executive agencies. To this end, the office drafts legal opinions in response to requests from federal officials, often brokering disputes between two agencies in disagreement. While not binding as precedent, OLC opinions are afforded significant weight within the executive branch (which is why some commentators refer to the office as the "mini-supreme court").[55] Throughout the fall, Richard Neustadt and Si

[54] "Complaint for Declaratory Judgment and Injunction: NRDC v. Schultze," Jan. 12th, 1979, "Regulations—Surface Coal Mining [1]" Folder, Box 74, Files of Charles L. Schultze, Records of the Council of Economic Advisers, Jimmy Carter Presidential Library, pp. 1-9

[55] For an excellent overview of OLC's role see Rachel Ward Saltzman, "Executive Power and the Office of Legal Counsel," *Yale Law & Policy Review*, Vol. 28 Issue 2 (2010): pp. 439-480

Lazarus had engaged OLC attorneys ad-hoc, requesting their input at various points on RARG's legal position. After the ABA briefing, for instance, Neustadt forwarded his draft disclosure guidelines to Larry Hammond, Larry Simms, and John Harmon – three Assistant Attorneys General from OLC – and then met with them in person to discuss the issues. Subsequently, Lazarus communicated his views on disclosure to Simms and Harmon (who ultimately endorsed his proposed modifications). Later, after Stuart Eizenstat pressured Secretary Andrus to meet with RARG, DOI took the step of requesting a formal OLC opinion on the matter. Writing to John Harmon in late December, Leo M. Krulitz noted;

> A number of questions have been raised regarding the permissibility of oral and written communications between the Department of the Interior and the White House…Since the questions touch upon important legal and policy matters concerning the relationship between the Department and the White House and its executive offices we request a legal opinion which addresses the limitations on ex parte communications during such informal rulemaking proceedings.[56]

Five days after the new civil action, OLC published the opinion Krulitz originally requested. Released on Jan. 17th and addressed to Secretary Andrus, it represented the most significant endorsement of presidential directives to date.[57]

The 10-page opinion proceeded in several parts. "The first question," author Larry Hammond explained, "is whether the Constitution…prevents the president's economic advisers from conferring with you." Citing the Supreme Court's holding in *Myers v. United States* (1926),

[56] "Letter from Leo M. Krulitz to John Harmon," "Regulations—Surface Coal Mining [1]" Folder, Box 74, Files of Charles L. Schultze, Records of the Council of Economic Advisers, Jimmy Carter Presidential Library, pp. 1-2

[57] See "Letter from Richard Neustadt to John Harmon," Nov. 13th, 1978, "Regulatory Reform – Executive Office of the President (EOP) Involvement" Folder, Box 70, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1; "Memorandum from Richard Neustadt to Judy Areen, Bob Bedell, Wayne Grandquist, Doug Huron, Si Lazarus, Bob Litan, Bill Nordhaus, and Peter Petkas: Legal Issues in EOP Intervention in Rulemaking," Nov. 13th, 1978, "Regulatory Reform—Openness" Folder, Box 72, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1; and also "Memorandum from Simon Lazarus to John Harmon and Larry Simms: Further Thoughts on EOP Participation in Executive Branch Rulemaking," Nov. 22nd, 1978, "Regulatory Reform [2]" Folder, Files of Phillip Bobbitt, Records of the Counsel's Office, Jimmy Carter Presidential Library, pp. 1-2

Hammond determined it did not. If, as under *Myers*, the president could constitutionally remove department heads, then Hammond argued it "must be assumed" the president also possesses the inherent power to "supervise the exercise of that authority." Unlike Harold Bruff, who had avoided *Myers* because of the Supreme Court's subsequent ruling in *Humphrey's Executor v. United States* (1935), OLC attorneys relied on Chief Justice Taft's holding, but only because they were responding to a request from DOI and the *Myers* decision was limited to executive departments. Nevertheless, Hammond concluded presidents could issue directives to regulators by virtue of their authority to fire them. The Assistant Attorney General then proceeded to the issue of congressional statutes. "The only substantial issue is, in our view," Hammond continued, "whether Congress has attempted to limit or regulate participation by the Chairman [Charlie Schultze] or any other federal officials not within Interior." "We think the answer," he continued, "is an unqualified negative." According to Hammond, neither the Administrative Procedure Act (APA) nor the 1977 Reclamation Act "suggest an intent to limit or otherwise to regulate the interagency review that has been accorded this rule." Where Robert Rauch found no express authorizations for White House participation, Hammond found no express limitations, meaning Schultze and his staff were free to influence DOI decision-making. Furthermore, Hammond noted that *Vermont Yankee* (1978) – the high court's most recent interpretation of the APA – gave agencies control over their own rulemaking procedures. "The Supreme Court's decision in *Vermont Yankee*," he wrote, "indicates that §553 is an affirmative grant of power to agencies to devise procedures most congenial to them." In the case at hand, DOI had allowed White House

regulatory review as a component of its rulemaking process. Under *Vermont Yankee*, administrators – not anybody else – were free to make such procedural judgement calls.[58]

Lastly, Hammond affirmed Lazarus' views on disclosure. While admitting that *Vermont Yankee* "[casts] considerable doubt" on "court-fashioned ex parte rules," Hammond maintained the disclosure of private contacts was legally prudent and would "satisfy *Home Box Office*." By disclosing the arguments made by private parties (and allowing public comments thereon) DOI had ensured there was "no longer any reasonable likelihood" of ex parte influence. "The only question that remains under *Home Box Office*," Hammond wrote in conclusion, "is whether…the meetings and communications between your staff and CEA must *themselves* be placed in the public record." Given that *HBO* involved commercial broadcasters rather than government officials, however, the Assistant Attorney General determined the decision applied only to "interested persons outside the decision-making process." "We find no bar," Hammond added, "to communications from others within the executive branch."[59]

Although the civil action against RARG was still pending, the OLC opinion provided an enormous boost to presidential directives. The same day OLC published its opinion, Richard Neustadt wrote a spirited letter to his boss Stuart Eizenstat. "The process we designed last fall worked in this case," Neustadt happily observed. He also applauded Eizenstat for deftly supplying pressure at the eleventh hour. "Your call," Neustadt wrote with a hint of gratitude, "forced Interior to take RARG seriously." If the White House could replicate the procedures employed for strip mining, Neustadt was confident about the viability of regulatory review

[58] Office of Legal Counsel, "Memorandum for the Secretary of the Interior: Administrative Procedure – Rulemaking – Department of the Interior – Ex Parte Communications – Consultation with the Council of Economic Advisers – Surface Mining Control and Reclamation Act," Jan. 17th, 1979, pp. 23-25

[59] Office of Legal Counsel, "Memorandum for the Secretary of the Interior: Administrative Procedure – Rulemaking – Department of the Interior – Ex Parte Communications – Consultation with the Council of Economic Advisers – Surface Mining Control and Reclamation Act," Jan. 17th, 1979, pp. 25-27

moving forward. One week later, the *Washington Post* published a story that suggested the strip-mining proceeding signaled the beginning of a major institutional shift. The headline read, "Who Runs the Government?" That the *Post* was even asking this question suggested there might be a new answer.[60]

[60] See "Memorandum from Richard Neustadt to Stuart Eizenstat: Status Report—Strip Mining Regulations," Jan. 17th, 1979, "Regulatory Reform—Strip Mining Regulations" Folder, Box 78, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1; and also "Who Runs the Government?" *The Washington Post*, Jan. 22nd, 1979, pp. A20

"A Shadow Rulemaking Process Has Developed": The 1979 Ozone Standard, the Rise of Inter-Branch Conflict, and the Failure of Legislative Reform

Nine days after the Office of Legal Counsel (OLC) published its opinion, the Regulatory Analysis Review Group claimed another critical legal victory. On Jan. 26th, the U.S. District Court for the District of Columbia dismissed the civil action brought by environmentalists against the reopened strip-mining proceeding, determining the meetings between Secretary Andrus and Charlie Schultze's staff did not meet the necessary bar for injunctive relief. Writing for the court in *Natural Resources Defense Council v. Schultze* (1979), Judge Thomas A. Flannery roundly rejected the petitioners' arguments, finding them "not so compelling." To attain an injunction, Flannery explained, environmentalists needed to demonstrate they would suffer "dramatic and irreparable harm" in the absence of judicial intervention. Flannery then claimed the meetings between DOI and CEA posed no such immediate threat. Specifically, he distinguished the case at hand from the controversy in *Home Box Office* (1977), which involved what he called "more egregious" contacts by private parties. In contrast to that case, DOI and CEA had amended the record to reflect private influence and had also allowed public comments on this so-called "catalog" of communications. According to Flannery, these transparency gestures "[tempered] plaintiffs' claims of patent violation of agency authority," eliminating the justifications for an injunction. "The most significant shortcoming in the plaintiffs' case," the judge held, "is the absence of 'irremediable' harm to their rights."[1]

[1] See *Natural Resources Defense Council v. Schultze*, No. 79-153 (D.D.C. 1979); and for coverage in the national press see "Court Backs President on Rules Intervention," *The New York Times*, Jan. 25th, 1979, pp. B10; and also "Judge Dismisses Suit on Pending Strip Mine Rules," *The Washington Post*, Jan. 25th, 1979, pp. A10

Practically speaking, Flannery's decision cleared the path for the final strip-mining rule. By dismissing the petition from environmentalists, Flannery ensured that discussions between Andrus and Schultze's staff could proceed and that there would be no intermediate judicial roadblocks to DOI publishing its final standards. This did not foreclose the possibility of future legal challenges, as the same environmental advocates could challenge the final rules through the traditional, statutorily-prescribed method of judicial review. But it did foreclose additional interruptions in the strip-mining proceeding. Accordingly, on Jan. 31st, DOI announced the first-ever federal strip-mining regulations. As expected, they bore the mark of Schultze and his team of economic advisers. While many provisions remained as originally written, others incorporated RARG's economic demands, substituting rigid, command-and-control criteria for more flexible approaches to enforcement. For instance, the new rules gave mining companies more latitude in disposing of dirt than previously proposed. They also relaxed the requirements necessary to attain a federal mining permit, eliminating the mandatory 1-year minimum for studies of local water quality. In addition, the standards relaxed the criteria on abandoned strip mines, relieving them of air and water regulations unless there was proof of continued environmental damage.[2]

Predictably, there were mixed reactions to the final rules. Mining and energy companies expressed muted approval. A trade group named the Mining and Reclamation Council of America reported that it was "generally pleased" with the final standards, though it wished RARG had secured additional concessions. Environmental groups felt differently. A staffer from the Environmental Policy Institute – the interest group that had helped shepherd strip-mining

[2] "Seth S. King, "U.S. Discloses Strip-Mine Rules Revised to Cost Companies Less," *The New York Times*, Jan. 31st, 1979, pp. A20; and "Agency Scales Back Strip-Mining Rules Following Talks with Carter Economists," *The Wall Street Journal*, Jan. 31st, 1979, pp. 10

legislation through Congress – lambasted DOI's revisions, accusing the agency of succumbing to political pressure and "shying away from its responsibilities" under the 1977 Reclamation Act.[3]

Interestingly, the Carter Administration portrayed the regulations as a crowning moment for the environmental movement. In a 1979 interview, RARG adviser Jack Watson emphasized the mere fact the rules had been finalized, declaring, "Without reciting a long list of things the president has done…as an environmentalist president, I would simply refer to the fact that we now have the first federal standards for coal strip-mining that have ever been promulgated." Indeed, President Carter had promised to chart a different course on strip-mining than his Republican predecessors (who had vetoed successive legislative proposals). With the regulations now finalized, Carter fulfilled this earlier pledge to implement environmental improvements. Walter N. Heine, a spokesman for the Office of Surface Mining (OSM), echoed Jack Watson, claiming the standards represented a critical step forward in mitigating environmental hazards. "We envision the final regulations," Heine explained, "as having the effect that 20 years after surface mining is completed you should not be able to see it has ever occurred." While environmentalists were correct in arguing that economic factors had played a critical last-minute role and that the final rules could have been more stringent, the administration was also correct in claiming baseline support for environmental objectives. After all, Schultze had never wielded RARG as a naked anti-regulation device that delayed or suspended regulations altogether. Both the cotton dust and strip-mining standards had been subject to presidential review and then – relatively quickly – been finalized for implementation. The Carter Administration hoped observers would not lose sight of this critical fact.[4]

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[3] See "Agency Scales Back Strip-Mining Rules Following Talks with Carter Economists," *The Wall Street Journal,* Jan. 31st, 1979, pp. 10; and Seth S. King, "U.S. Discloses Strip-Mine Rules Revised to Cost Companies Less," *The New York Times,* Jan. 31st, 1979, pp. A20

[4] Comment, "A White House View," *EPA Journal,* Vol. 5 Issue 5 (May, 1979): pp. 12-15

More than anything, the strip-mining standards represented an unequivocal victory for RARG and the group's ongoing project of presidential directives. With assistance from the ABA Commission and later the OLC, Richard Neustadt and Si Lazarus had crafted an intricate set of disclosure guidelines. Ultimately, these provided assurance to DOI regulators, helped RARG gain a foothold at the agency, and prompted the DC District Court to dismiss a preliminary legal challenge. Perhaps more importantly, RARG's disclosure policy allayed inter-agency tensions, preventing leaks as well as a cotton-dust-style backlash in the press. While further legal challenges could still be expected, White House intervention had been comparatively discreet and had yet to trigger damaging public blowback. "Strip mining came off just right politically (in contrast to cotton dust)," Neustadt wrote in late January following DOI's final announcement. Indeed, after Neustadt and Lazarus finessed White House intervention at DOI, there were seemingly few obstacles to RARG intervening in a range of administrative proceedings and consolidating the apparatus of presidential control. On Jan. 30th, Labor Secretary Ray Marshall (an administrator who had first-hand experience with regulatory review) advanced this perspective, writing that the presidentially-modified strip-mining standards portended a monumental institutional shift. In a memorandum addressed to his fellow cabinet secretaries, Marshall wrote, "We are, I feel, at a critical juncture with regard to the regulatory roles of both this Department and the entire federal government." Framed in this way, the new year might signal the routinization of presidential directives.[5]

[5] See "Memorandum from Richard Neustadt to Wayne Granquist, Si Lazarus, and Alice Rogoff," Jan. 31st, 1979, "Regulatory Reform—Memos (Miscellaneous) to Carter Stu (Eizenstat) etc., [8/25/77 – 12/10/79]" Folder, Box 72, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp 1; and also "Memorandum from Ray Marshall to the Executive Staff: Regulatory Procedures within the Department," Jan. 30th, 1979, "Regulatory Reform—Accomplishments" Folder, Box 68, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1

No such luck. In fact, RARG faced unprecedented scrutiny throughout the first half of 1979. In mid-January, as Secretary Andrus and Charlie Schultze's staff were concluding their negotiations, Schultze received an ominous letter from Sen. Edmund Muskie (D-ME) – the most powerful environmental advocate on Capitol Hill – regarding another administrative proceeding in which presidential advisers had recently been involved. Shortly after Andrus agreed to meet with Schultze, news reports broke that another federal department – the Environmental Protection Agency (EPA) – was making similar efforts to accommodate White House demands. Specifically, the media reported that EPA Administrator Douglas M. Costle was preparing to relax the agency's ozone standard in response to pressure from Schultze and other "inflation fighters" from the White House.[6] Upon reading these reports about the ozone standard, Sen. Muskie wrote Schultze to announce that the subcommittee he chaired would be conducting oversight of RARG's involvement:

> The Subcommittee on Environmental Pollution has periodically reviewed the important steps in the process for developing federal environmental regulations and policies. As part of this continuing oversight, the subcommittee is currently reviewing Executive Office involvement in the regulatory process of the EPA. The activities of the RARG…have added a new dimension to this process.[7]

As chair of this important subcommittee, Muskie oversaw EPA and the agency's wide array of programs and administrative actions. By seeking modifications of the agency's ozone standard, RARG had entered the senator's political crosshairs. Soon, the president's economic advisers would shift their attention from battling environmentalists in litigation to battling environmentalists on Capitol Hill – from internal procedural questions to the theatrics of a public

[6] Margot Hornblower, "EPA Set to Ease Smog Standards for Urban Areas," *The Washington Post*, Jan. 21st, 1979, pp. A1

[7] "Letter from Edmund S. Muskie to Dr. Charles Schultze," Jan. 17th, 1979, "Rulemaking – EOP Participation in, 1/79-2/79 [CF, O/A 422]" Folder, Box 140, Files of Margaret McKenna, Records of the Counsel's Office, Jimmy Carter Presidential Library, pp. 1

hearing before Muskie's panel. Not only would this expose RARG to unseen public scrutiny, but it would resurrect the image of Congress holding rogue presidential advisers accountable for their actions. At the center of this interbranch clash was EPA's latest standard for ozone.

The 1970 Clean Air Act granted EPA the authority to regulate a chemical compound called ground-level ozone (O_3). Not to be confused with the ozone layer – the part of the stratosphere that insulates the planet from ultra-violet radiation – ground-level ozone forms when pollution from cars, power plants, and other anthropogenic sources collides with direct sunlight in the atmosphere (on a clear sunny day, for instance). When this occurs, a photochemical reaction transforms the mixture of existing pollutants into the "secondary" pollutant O_3 – a by-product of industrial pollution writ large and the principle component of ozone, often referred to as "smog."[8]

On clear sunny days in mid-twentieth century America, ground-level ozone was a dangerous health hazard. At the height of postwar expansion in the 1950s and 1960s, residents of metropolitan areas routinely experienced pollution events in which their booming cities and suburbs were enveloped in giant clouds of toxic air. In 1953, for instance, the air was so hazy and the visibility so bad in Los Angeles that some residents mistook the layer of smog for chemical weapons launched by the Soviets. Ozone also reached hazardous levels in New York City with some frequency. Over the 1966 Thanksgiving Holiday, New York experienced the worst smog event in American history. For three straight days, a mass of dirty air loomed over Manhattan, sending otherwise healthy individuals to the hospital with shortness of breath, wheezing and coughing, and stinging sensations in the nose and eyes. The infamous Thanksgiving smog also killed several hundred sensitive individuals – children, seniors, and

[8] Office of Air and Radiation, U.S. Environmental Protection Agency, *Ozone: Good Up High, Bad Nearby* (Washington DC: U.S. Government Printing Office, 2003), pp. 1-2

persons with respiratory conditions – who were particularly susceptible to pollutants. Due to its fatal and wide-ranging impact, the event garnered national attention and helped raise the alarm on the adverse health effects of industrial growth. It thus stood alongside events like the Cuyahoga River Fire as a political catalyst for environmentalism. Ultimately, the New York smog played a critical role building momentum for the passage of the 1970 Clean Air Act (CAA). The CAA dramatically expanded federal regulatory powers over air quality, giving policymakers a massive new apparatus to control dangerous compounds like ozone.[9]

The tools in the CAA to control air pollutants were designed for one thing and one thing only: protecting human life at whatever the cost. The heart of the statute – something called the National Ambient Air Quality Standards (NAAQS or "knacks") program – directed EPA to develop federal standards for six different pollutants (including O_3). However, unlike other parts of the statute, the NAAQS program prevented EPA from incorporating "feasibility" considerations into these new standards. Some parts of the law, as well as other environmental statutes, permitted the agency to balance health and safety considerations against economic and technological factors – against the financial and engineering constraints industry would face complying with new environmental controls. Conversely, the NAAQS program mentioned *only* health considerations, implying that EPA was barred from using "feasibility" as a determinant as

[9] For background on smog events and the development of air pollution control in the United States see generally Scott Hamilton Dewey, *Don't Breathe the Air: Air Pollution and U.S. Environmental Politics, 1945-1970,* (College Station, TX: Texas A&M University Press, 2000); R. Shep Melnick, *Regulation and the Courts: The Case of the Clean Air Act,* (Washington DC: Brookings Institution, 1983); and Bruce A. Ackerman and William T Hassler, *Clean Coal/Dirty Air: How the Clean Air Act Became a Multibillion-Dollar Bail-Out for High-Sulfur Coal Producers and What Should Be Done About It*, (New Haven: Yale University Press, 1981); and for background on the rise of the environmental protection more generally see Paul Sabin, "Environmental Law and the End of the New Deal Order," *Law & History Review*, Vol. 33 Issue 4 (2015): pp. 965-1004; Karl Boyd Brooks, *Before Earth Day: The Origins of American Environmental Law: 1945-1970* (Lawrence, KS: Kansas University Press, 2009); Samuel B. Hays, *Beauty, Health, and Permanence: Environmental Politics in the United States, 1955-1985,* (Cambridge: Cambridge University Press, 1989); Richard J. Lazarus, *The Making of Environmental Law,* (Chicago: University of Chicago Press, 2004); Philip Shabecoff, *A Fierce Green Fire: The American Environmental Movement* (New York: Hill & Wang, 1993); and also Richard N. Andrews, *Managing the Environment, Managing Ourselves: A History of American Environmental Policy* (New Haven: Yale University Press, 2006);

it did elsewhere. Moreover, the Senate Report that accompanied the CAA confirmed the program's singular focus, stipulating that industrial sources of air pollution "meet the standard of law or be closed down." Several years later, the U.S. Supreme Court affirmed this rigid interpretation of the statute, determining the NAAQS program contained "no room" for economic or technological considerations, and that human health needed to be the sole deciding factor in air pollution control.[10]

Fig. 5: A view of the Manhattan skyline during the 1966 smog event.[11]

[10] See David P. Currie, "Federal Air-Quality Standards and their Implementation," *American Bar Foundation Research Journal*, Vol. 1976 Issue 2 (1976): pp. 365-410; Currie, "Relaxation of Implementation Plans Under the 1977 Clean Air Act Amendments," *Michigan Law Review*, Vol. 78 Issue 2 (1979): pp. 155-203; and Barbara A. Finamore and Elizabeth E. Simpson, "Ambient Air Standards for Lead and Ozone: Scientific Problems and Economic Pressures," *Harvard Environmental Law Review*, Vol. 3 (1979): pp. 261-274

[11] See Alexander C. Kaufman, "Smog-Choked Beijing Should Have Learned from New York's Mistakes," *The Huffington Post*, Dec. 9th, 2015, http://www.huffingtonpost.com/entry/beijing-smog-nyc_us_5668847fe4b009377b2372bd

However, the inaugural ozone standard demonstrated how, frankly, unfeasible it was for EPA to disregard feasibility as a matter of law. In 1971, EPA Administrator William Ruckelshaus (who would later be fired in the infamous Saturday Night Massacre), developed the first-ever ozone standard – an exposure limit of 0.08 parts per million (ppm)[12] – in accordance with the statute's "health-only" mandate. By 1975, when the window for compliance had ended and the country's air monitoring regions needed to meet the required threshold, non-attainment was a fact of life. Not a single steel mill met the bar set by Ruckelshaus. Neither did half of all utilities, refineries, pulp mills, and commercial boilers. In total, almost four thousand "major" sources of air pollution were reportedly out of compliance. The bar for attainment in Los Angeles further illustrated the stringency of the initial standard. To meet the 1975 compliance deadline, LA would have had to reduce automobile traffic by a whopping 82 percent. Similar measures were required for most urban areas on the Eastern seaboard (the majority of which were also out of compliance). In a new era of energy shortages and economic stagnation, the changes required by this single-minded approach looked less and less palatable.[13]

In 1977, Congress elected to amend the CAA and allow accommodations. Interestingly, the 1977 amendments provided relief not by enabling EPA to use feasibility as a determinant in its decision-making process. While the statute's "health-only" language remained in place, the amendments loosened the compliance timetable, removing the rigid 1975 deadline and allowing more extensions and variances. In other words, they mandated the same environmental commitments, but not at such a breakneck pace. Many congressmen saw the amendments as a

[12] For the 1971 standard, EPA relied on a scientific paper that showed health effects appearing at concentrations of 0.10 parts per million (ppm). Because the Clean Air Act directed the agency to protect sensitive individuals with an "adequate margin of safety," EPA set the standard at 0.08 ppm (below the hazardous "effects threshold"); for the study used by the agency see Charles E. Shoettlin and Emanuel Landau, "Air Pollution and Asthma Attacks in the Los Angeles Area," *Public Health Reports*, Vol. 76 Issue 6 (1961): 545-551

[13] See Currie, "Relaxation of Implementation Plans," pp. 155-203; and Pete Domenici, "Clean Air Act Amendments of 1977," *Natural Resources Law Journal*, Vol. 19 Issue 3 (1979): pp. 475-486

means of retrofitting the CAA for the real world. However, EPA still needed to implement the NAAQS program on the basis of health considerations alone.[14]

After the passage of the amendments, Charlie Schultze's staff began discussing ozone-related issues. Given that RARG was composed primarily of economists – and was chaired by Schultze, the federal government's leading economic adviser – it was odd for the group to show any interest in the NAAQS program. For RARG to intervene in this field would be to risk introducing data and arguments that were still flatly prohibited by the agency's enabling statute. Notwithstanding the letter of the law, the group began contemplating another regulatory review. Early in 1978, EPA Administrator Doug Costle[15] announced he would be conducting a full rulemaking proceeding to develop a brand-new ozone standard. Soon after the announcement, Schultze and his staff expressed a new level interest in ozone regulation. Toward the end of 1978, they became increasingly adamant that EPA should pay heed to economic factors over the course of the new proceeding. Despite the lingering, health-only mandate of the NAAQS program, RARG insisted "costs do matter" and even referred to the agency's air-quality rules as "policy judgements" into which economic considerations "must enter."[16]

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[14] Pete Domenici, "Clean Air Act Amendments of 1977," *Natural Resources Law Journal*, Vol. 19 Issue 3 (1979): 475-486, pp. 478

[15] A native of the Pacific Northwest, Costle grew up hiking and fishing in the area around Seattle, learning the importance of environmental protection at an early age. After graduating from the University of Chicago Law School in 1964, Costle worked for a year in the Justice Department's Civil Rights Division, and then for two years as an attorney in the Economic Development Administration (EDA), a new branch of the Commerce Department. Costle subsequently served on the Ash Council, the group President Nixon established in 1969 to propose recommendations on the reorganization of the executive branch. As a member of the council, Costle authored the section of the group's final report recommending the creation of EPA. In 1972, Costle left Washington for state government, agreeing to lead Connecticut's Department of Environment Protection. Five years later, President Carter nominated him EPA Administrator; for more on Costle's background see Dennis Williams, "Interview of Douglas M. Costle," conducted August 4th-5th, 1996, at the Ritz-Carlton Hotel, McLean, VA, and at Costle's personal residence in VT, https://archive.epa.gov/epa/aboutepa/douglas-m-costle-oral-history-interview.html

[16] See "Memorandum from Larry White to Bill Nordhaus: The RARG Ozone Report: CEA's Lawyer to EPA's Response," Dec. 8th, 1978, Box 16 Folder 29, Alfred E. Kahn papers #4055, Division of Rare and Manuscript Collections, Cornell University Library, pp. 1-8; and "Memorandum from Larry White to Charlie, Frank, Fred, Bill, Dennis, Gil, and Carl: EPA's Proposed Regulations on Ozone (Smog)," Jan. 11th, 1978, "Regulation: Ozone [1]"

To the president's team of inflation fighters, Costle's decision to revisit the ozone standard represented an opportunity during an escalating economic crisis. Since the spring of 1978, the rate of inflation had remained in double digits. However, there were warning signs of another OPEC embargo-type event that could dramatically worsen the situation. In November, 1978, over thirty thousand workers at Iran's national oil refineries went on strike, joining a wave of popular protests against the American-supported Shah. If unrest against the Shah continued and Iranian oil remained at a fraction of its prior capacity, the global economy could be exposed to a second oil shock and a new wave of devastating price increases.[17]

RARG viewed the ozone proceeding with these international developments in mind. Indeed, the new ozone standard promised to be expensive, however Costle and EPA drafted it. With yearly compliance estimates ranging between $7 billion (the number the agency used), and $19 billion (the number industry groups preferred), the standard would impose significant economic costs, particularly on the utility and energy companies struggling amidst new disruptions in the global oil market. "These are costs," one member of RARG emphasized, "that will be directly incurred by consumers…or incurred by businesses and eventually passed on to consumers." With inflation already at alarming levels, and with warning signs appearing again in the Middle East, Carter's economic team fretted about any standard formulated solely on the basis of health factors and underscored the need to intervene and advance economic arguments in

Folder, Box 74, Files of Charles L. Schultze, Records of the Council of Economic Advisers, Jimmy Carter Presidential Library, pp. 1-10

[17] For background on the origins of the Iranian Revolution and its impact on domestic policy in the United States see Meg Jacobs, *Panic at the Pump: The Energy Crisis and the Transformation of American Politics in the 1970s*, (New York: Hill & Wang, 2016), pp. 161-234

order to avoid stoking further inflation. "We badly…need to be tough in this area," explained Alfred Kahn, in a memo assessing the global economic scene.[18]

In the fall of 1978, RARG made its opening salvo during the period for public comment. According to the group's critical submission, EPA's new proposed standard of 0.10 parts per million (ppm) should be *further* relaxed because it was based on inconclusive scientific evidence. Over the 1960s and 1970s, business lobbies and industry trade associations began deploying this new line of argument, invoking scientific uncertainty and pioneering a new "language of doubt" in order to stave off federal regulatory actions.[19] The ozone standard was an easy target for these new talking points. Compared to other NAAQS-listed pollutants, O_3 had easily the least developed body of scientific evidence. In fact, EPA had based its inaugural ozone standard on a single health study published in 1961 – a study the agency's own Scientific Advisory Board began questioning in the mid-1970s.[20] In 1978, a staffer on Capitol Hill who helped write the original CAA described the same problem, noting "the data on…ozone isn't nearly as good as anyone would like." In its public comment, RARG capitalized on this point, calling the science on ozone (especially, the data on what level of O_3 generated adverse health effects) "highly uncertain and speculative." Importantly, the group did not argue, as many affected industries had, that uncertainty justified the outright suspension of regulation. Rather, it aimed to use uncertainty as an entering wedge for its economic arguments. Here, the idea was that if the

[18] See Dirk Kirschten, "EPA's Ozone Standard Faces a Hazy Future," *The National Journal*, Dec. 16th, 1978, pp. 2015-2019; "Memorandum from Larry White to Charlie, Frank, Fred, Bill, Dennis, Gil, and Carl: EPA's Proposed Regulations on Ozone (Smog)," Jan. 11th, 1978, "Regulation: Ozone [1]" Folder, Box 74, Files of Charles L. Schultze, Records of the Council of Economic Advisers, Jimmy Carter Presidential Library, pp. 1-10; and "Memorandum from Alfred E. Kahn to Charles Schultze, Frank Press, and Stu Eizenstat: Ozone," Jan. 12th, 1979, Box 16 Folder 29, Alfred E. Kahn papers #4055, Division of Rare and Manuscript Collections, Cornell University Library, pp. 1-4

[19] For background see Naomi Oreseks and Erik M Conway, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues From Tobacco Smoke to Global Warming*, (New York: Bloomsbury Press, 2010)

[20] For the study see Charles E. Shoettlin and Emanuel Landau, "Air Pollution and Asthma Attacks in the Los Angeles Area," *Public Health Reports*, Vol. 76 Issue 6 (1961): 545-551

available health evidence was uncertain, then EPA should weigh other factors in its decision-making process.[21]

Following the comment period, EPA administrators derided RARG for its arrogance. On November 8th, Walter C. Barber – a senior staffer at the agency's Air Office – expressed dismay at economic appeals by the White House. "The RARG approach is presently illegal," Barber wrote to a colleague. "Nowhere in the [comment]," he continued, "does RARG recognize [the] statutory limitation, thus implying that the agency is without such a constraint." According to Barber, the CAA's "disallowance" of economic factors meant the agency could only properly rely on the available health evidence. It was immaterial if that evidence was less robust than the data for other NAAQS-listed pollutants. By law, it was all EPA could consider.[22]

Facing a hostile EPA officialdom, RARG decided – as it had for cotton dust and strip-mining – to work behind the scenes and make a last-minute appeal to the agency's leadership. The group did so in a surprising fashion, however, given the trajectory of its recent actions. After the White House heard in mid-January that Doug Costle was preparing to finalize the new standard, Charlie Schultze and Alfred Kahn opened a secret back-channel with the EPA Administrator. Unlike the recent strip-mining review, this backchannel paid no lip service to the transparency guidelines developed by Richard Neustadt and Si Lazarus. This led to the following sequence of events. After Schultze, Kahn, and Costle met secretly (and without notice) in mid-January, the press broke the story that Costle was planning to further relax the ozone standard in response to illegal economic pressure. When asked by reporters about the secret meetings, Costle

[21] See Dirk Kirschten, "EPA's Ozone Standard Faces a Hazy Future," *The National Journal*, Dec. 16th, 1978, pp. 2015-2019; and also "Memorandum from Larry White to Bill Nordhaus: The RARG Ozone Report: CEA's Lawyer to EPA's Response," Dec. 8th, 1978, Box 16 Folder 29, Alfred E. Kahn papers #4055, Division of Rare and Manuscript Collections, Cornell University Library, pp. 1-8

[22] See "Memorandum from Walter C. Barber to David G. Hawkins: Council on Wage & Price Stability/Regulatory Analysis Review Group Critique of the Proposed Ambient Air Quality Standards," Nov. 8th, 1978, Box 16 Folder 29, Alfred E. Kahn papers #4055, Division of Rare and Manuscript Collections, Cornell University Library, pp. 1-7

maintained he made the final decision *prior* to consulting White House advisers, and that the discussions with Schultze and Kahn had been merely informative. However, given the secretive nature of the review itself, there were reasons to doubt Costle's claims to innocence.[23]

There are a number of explanations for why RARG eschewed the disclosure guidelines that had so preoccupied its members in previous months. First, secrecy was one of the few ways to neutralize the statutory limitation of the CAA. If the discussions between Schultze, Kahn, and Costle remained opaque, there would be no way to definitively prove that RARG had introduced illegal economic arguments. While the group's covert involvement would inevitably raise eyebrows, the outcry would be arguably less pronounced than if the group published a "catalog" that included explicit references to economic factors. "We should not say anything more than necessary," insisted Si Lazarus regarding the back-channel. Second, Iran was inching closer and closer to political revolution. With the Shah recently forced into exile – and with further interruptions in the oil supply a distinct possibility – RARG advisers were increasingly adamant about the need to take emergency actions to limit any sources of inflationary pressure. In Alfred Kahn's words, the group should use the ozone proceeding to send an "unmistakable sign" that it was treating the prospect of another oil shock seriously. Accordingly, the imperative to intervene could have simply come at the expense of disclosure. Third, because RARG drew its membership from a number of entities within the executive office, it was also possible the decision not to disclose was a failure of internal coordination. After all, the group's disclosure guidelines had been finalized by Neustadt and Lazarus at the Domestic Policy Staff, not by Schultze and his colleagues at the Council of Economic Advisers (i.e. by the individuals who engaged directly with regulators). With the members of RARG parceled out among different

[23] Margot Hornblower, "EPA Set to Ease Smog Standards for Urban Areas," *The Washington Post*, Jan. 21st, 1979, pp. A1; and Hornblower, "EPA Relaxes Nation's Smog Standard," *The Washington Post*, Jan. 27th, 1979, pp. A1

offices, it was possible Neustadt and Lazarus' guidelines had not been fully adopted by the group's constituent parts.[24]

However, more evidence pointed to RARG embracing *Vermont Yankee* (1978) as a rebuke to judicially-imposed disclosure. In an earlier exchange with Harold Bruff, Richard Neustadt had suggested the ex parte guidelines "engrafted" by the DC Circuit in *Home Box Office* might be inconsistent with the Supreme Court's more recent message in *Vermont Yankee*, and, in turn, that disclosure procedures might not be legally necessary.[25] At the time, however, Neustadt was not fully convinced of his own position. *Vermont Yankee* did not involve ex parte issues and had only recently been decided, meaning there were still lingering uncertainties about its scope and potential applicability. For this reason, Neustadt described the state of the law as "somewhat murky" and ultimately recommended Bruff's *HBO*-style guidelines as a precaution.[26] Over the early months of 1979, however, Neustadt became increasingly confident that *HBO* was incompatible with *Vermont Yankee* and that Justice Rehnquist's holding eliminated the need for disclosure procedures. A number of factors led Neustadt to embrace a broad reading of the decision. First, in mid-January, Neustadt read an article in the *Harvard Law Review* regarding the decision's "impact on general federal administrative law." Authored by a Harvard law professor named Richard Stewart, the article portrayed *Vermont Yankee* as a watershed ruling

[24] "Memorandum from Alfred E. Kahn to Charles Schultze, Frank Press, and Stu Eizenstat: Ozone," Jan. 12th, 1979, Jan. 12th, 1979, Box 16 Folder 29, Alfred E. Kahn papers #4055, Division of Rare and Manuscript Collections, Cornell University Library, pp. 1-4

[25] "Letter from Richard Neustadt to Harold Bruff," Oct. 2nd, 1978, "Regulatory Reform—Legal Issues/Ex Parte [Rules]" Folder, Box 72, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1

[26] Richard Neustadt, "Legal Restraints on EOP Intervention in Rulemaking," "Regulatory Reform—Legal Issues/Ex Parte [Rules]" Folder, Box 72, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-11; and "Memorandum from Richard Neustadt to the President: Limitations on EOP Staff Contacts with Interested Private Parties in Connection with Executive Branch Rulemaking," Dec. 16th, 1978, "Regulatory Reform [2]" Folder, Box 220, Files of Phillip Bobbitt, Records of the Counsel's Office (OLC), Jimmy Carter Presidential Library, pp. 1-5

that "[jeopardized]" the various initiatives of the DC Circuit, including *HBO*-style guidelines (according to one of Stewart's footnotes). After finishing the piece, Neustadt wrote Stewart a personal note of thanks. In the letter, he expressed increased assurance the Supreme Court had "[sat] on" the DC Circuit with its ruling in *Vermont Yankee*.[27]

The second factor behind Neustadt's embrace was the recent opinion of the Office of Legal Counsel (OLC). Published on Jan. 17th and authored by Assistant Attorney General Larry Simms, the opinion echoed Stewart on the ex parte issue, noting that *Vermont Yankee* "casts considerable doubt on the correctness and applicability of…court-fashioned ex parte rules." Later in January, Simms reiterated to a colleague that *HBO* was "bad law" and that the Justice Department would seek to overturn it should the opportunity arise in future litigation. This strong condemnation by the OLC provided Neustadt additional comfort. By late January, his ambivalent tone had largely vanished. In one particular memo, he called *HBO* "wrong" and expressed confidence that it "will be reversed when the issue gets to the Supreme Court." Rather than an internal misstep, the ozone backchannel embodied RARG's growing realization that *HBO*-style guidelines were inconsistent with Supreme Court precedent.[28]

However, the new reading of *Vermont Yankee* did little to assuage opposition to the backchannel. Following the secret meetings, the Natural Resource Defense Council (NRDC)

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[27] For the law review article see Richard B. Stewart, "Vermont Yankee and the Evolution of Administrative Procedure," *Harvard Law Review*, Vol. 91 Issue 8 (1978): 1805-1822, pp. 1809, 1817; and for Neustadt's reaction see "Letter from Richard Neustadt to Richard Stewart," Jan. 29th, 1979, "Regulatory Reform—Process Bills (3), [1/24/79-2/9/79]" Folder, Box 74, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1

[28] See Office of Legal Counsel, "Memorandum for the Secretary of the Interior: Administrative Procedure – Rulemaking – Department of the Interior – Ex Parte Communications – Consultation with the Council of Economic Advisers – Surface Mining Control and Reclamation Act," Jan. 17th, 1979, pp. 25; "Letter from Larry Simms to Margaret McKenna," Jan. 26th, 1979, "Rulemaking – EOP Participation in, 1/79-2/79 [CF, O/A 422]" Folder, Box 140, Files of Margaret McKenna, Records of the Counsel's Office (OLC), Jimmy Carter Presidential Library, pp. 1; and also "Memorandum from Richard Neustadt to Stuart Eizenstat," Jan. 8th, 1979, "Regulatory Reform—Memos (Miscellaneous) to Carter, Stu (Eizenstat), etc., [8/25/77-12/10/79" Folder, Box 72, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-2

decried RARG's off-the-record involvement, calling it "fundamentally lawless."[29] Soon, the list of critics included the Environmental Defense Fund, the Sierra Club, the National Clean Air Coalition, and the American Lung Association. In critical letters forwarded to EPA, each group made different version of the following argument. First, by hearing appeals from White House economists, Doug Costle had violated the plain language of the NAAQS program. Second, Costle's decision to relax the standard – presumably because of scientific uncertainty – was morally reprehensible. If EPA made absolute certainty a prerequisite for its actions, the agency would never protect sensitive individuals from the risks of pollution that *did* exist, even if an exact health-effects threshold had not been established. Accordingly, environmental groups accused Schultze, Kahn, and Costle of a "callous disregard for human life" and for adopting a "wait for dead bodies" approach to environmental health. "We think the American people are entitled to more from Jimmy Carter," they wrote with disgust in late January.[30]

Next, the heat came from Sen. Ed Muskie (D-ME), the chair of the Senate Subcommittee on Environmental Pollution. In late January, Muskie wrote Charlie Schultze, informing him the subcommittee would be conducting oversight in connection with RARG's intervention in the ozone proceeding. Since the escalation of the Vietnam War, and with increased frequency during the Nixon Administration, Congress had grown accustomed to holding the executive branch accountable through the mechanism of congressional oversight. To Muskie and his Democratic colleagues in the Senate, the ozone back-channel was a disturbing reminder that the presidency –

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[29] See "Report of the Natural Resources Defense Council: Analysis of Comments of CWPS/RARG on EPA's Revision of the National Ambient Air Quality Standard for Photochemical Oxidants, Jan. 3rd, 1979," included in the appendix of "Executive Branch Review of Environmental Regulations," *Hearings Before the Senate Subcommittee on Environmental Pollution*, 96th Cong., 1st sess., Feb. 26th, 1979, pp. 123-157

[30] See "Statement from the Natural Resources Defense Council, American Lung Association, Environmental Defense Fund, League of Women Voters of the United States, National Clean Air Coalition, and Sierra Club Legal Defense Fund Regarding Weakening of the National Health Standard for Oxidant Air Pollution, Jan. 25th, 1979, in "Executive Branch Review of Environmental Regulations," *Hearings Before the Senate Subcommittee on Environmental Pollution*, 96th Cong., 1st sess., Feb. 26th, 1979, pp. 117-118

despite its current Democratic occupant – was prone to "imperial" machinations. This time around, it was the war on inflation that was generating potentially improper dealings. To further investigate the ozone matter, Muskie scheduled two days of legislative hearings. Scheduled for late February, the hearings would be an opportunity to dramatically increase pressure on the White House and ostensibly thwart presidential directives. Importantly, the hearings would also be a litmus test for RARG's sweeping new legal position.[31]

On the first day of the ozone hearings, environmental groups testified, relying on a familiar set of legal arguments. Speaking to the committee on Feb. 26th, the Natural Resources Defense Council and Environmental Defense Fund reiterated the importance of *Home Box Office* and the need to prohibit ex parte contacts in administrative proceedings. To sanction the ozone back-channel, they claimed, would not only violate the terms of the CAA, but would allow the federal government to conduct its affairs entirely in the dark; in the utter absence of public participation. Both groups crafted their testimony around these appeals to procedural fairness. "What this all boils down to," EDF attorney Robert Rauch testified, "is that we have two rulemakings." "We have one," Rauch continued, "which is a public rulemaking, and we have another which is a private rulemaking – a shadow rulemaking, if you will." Notably, Rauch did not address the Supreme Court's holding in *Vermont Yankee* or its potential implications. However, the image of a "shadow rulemaking" commanded by the White House was a powerful one to conjure before many of the same legislators who had investigated the Watergate scandal and heard the revelations of the Church Committee.[32]

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[31] "Letter from Edmund S. Muskie to Dr. Charles Schultze," Jan. 17th, 1979, "Rulemaking – EOP Participation in, 1/79-2/79 [CF, O/A 422]" Folder, Box 140, Files of Margaret McKenna, Records of the Counsel's Office, Jimmy Carter Presidential Library, pp. 1

[32] "Statement of Robert Rauch," in "Executive Branch Review of Environmental Regulations," *Hearings Before the Senate Subcommittee on Environmental Pollution*, 96th Cong., 1st sess., Feb. 26th, 1979, pp. 53-59; and "Statement of Richard E. Ayres and Jonathan Lash," in "Executive Branch Review of Environmental Regulations," *Hearings Before the Senate Subcommittee on Environmental Pollution*, 96th Cong., 1st sess., Feb. 26th, 1979, pp. 23-39

Tensions ran higher on the second full day of hearings, when Charlie Schultze, Alfred Kahn and Doug Costle appeared to testify. Before they spoke, however, members of the subcommittee censured the administration with dramatic opening statements. "A shadow rulemaking process has developed," Ed Muskie declared, borrowing the language of Robert Rauch, "with secret negotiations and no chance for rebuttal by public participants." "The officials at RARG," added Sen. Robert Stafford (D-VT), "seem to regard the requirements of the law as mere niceties which they can ignore."[33]

With the stage set for a high-octane clash, Doug Costle appeared first in the witnesses' chair. Over and over, Costle attempted to placate the Senate with assurances that the new ozone standard had "simply not been changed" by last-minute appeals from the White House. "I did not consider those," the EPA Administrator pledged, "because the statute does not allow me to." Obviously, this was a difficult sell. Costle's discussions with Schultze and Kahn still remained a state secret, meaning there was no way to verify whether he had considered their arguments or not. Nevertheless, Costle maintained the meetings had not resulted in special treatment for presidential advisers. Rather, he referred to the meetings as part of the president's "proper scrutiny" of federal agencies.[34]

Ed Muskie refused to believe the hogwash. Responding to Costle's repeated assurances, the Maine senator exclaimed, "There is no way for the public to know whether or not that is true!" Referring to the lack of transparency and absence of documents, Muskie declared "There is no way of measuring the extent of the pressure, the effect of the pressure, the direction of the

[33] "Opening Statement of Ed Muskie," in *Hearings Before the Senate Subcommittee on Environmental Pollution*, 96th Cong., 1st sess., Feb. 27th, 1979, pp. 231-232; and "Opening Statement of Robert Stafford," in *Hearings Before the Senate Subcommittee on Environmental Pollution*, 96th Cong., 1st sess., Feb. 27th, 1979, pp. 232-233
[34] "Statement of Doug Costle," in *Hearings Before the Senate Subcommittee on Environmental Pollution*, 96th Cong., 1st sess., Feb. 27th, 1979, pp. 236-260

pressure, whether it is in the public interest." "There is no way of measuring that," Muskie added, "given the present way of the process." The EPA Administrator could attempt to placate the Senate all he wanted. But no verbal pledge could change the reality that both the agency and the White House had remained tight-lipped about the whole incident. To Muskie and others, this was the most telling fact of all.[35]

Costle parried the attack by denying the need for disclosure. "There is…no requirement," he responded, "that every conversation be memorialized in writing." When Muskie shot back and asked Costle to explain the basis for this position, Costle deployed Neustadt's broad new construction of *Vermont Yankee*. "There is a distinction," Costle explained, "between adjudicatory hearings and rulemaking…rulemaking is intended to net the widest possible range of facts and analysis." Here, Costle was reiterating one of the central insights of Justice Rehnquist's decision: rulemaking was not bound by the same formalities as the judicial process and needed to remain a flexible device for decision-making. By this standard, the information Schultze and Kahn conveyed to Costle represented a valuable input that should properly be accounted for in the final decision. The administration's new legal arguments were thus making their first appearance.[36]

When Schultze and Kahn later appeared, they echoed Costle's earlier points, underscoring rulemaking's distinctiveness. Facing the same transparency questions from the committee, Schultze and Kahn restated Costle's thesis but with a bit more rhetorical flare. "You cannot conduct all the business of government," Kahn incredulously told the committee, "in front of microphones in the middle of RFK stadium." Kahn's analogy was accurate in one sense

[35] "Statement of Douglas M. Costle," in *Hearings Before the Senate Subcommittee on Environmental Pollution*, 96th Cong., 1st sess., Feb. 27th, 1979, pp. 236-250
[36] Ibid, pp. 236-260

but inaccurate in another. Kahn was correct that federal administrators could likely not record every conversation that took place within the doors of an agency. That would be simply unfeasible and would generate a staggering paperwork burden. However, as DOI had shown in the strip-mining proceeding, it was not difficult for an agency to publish a brief log of contacts with private parties and be reasonably transparent about the nature of White House involvement. In any case, Kahn's RFK stadium analogy lit a fire in Ed Muskie, who pounded the podium and tore into the RARG economist. "You're telling me," Muskie allegedly shouted, "the EPA Administrator is not the top dog and regulations can be influenced without accountability, without minutes, without a record?"[37]

To deflect the latest attack, Schultze and Kahn advanced the argument that the White House was a part of EPA's decision-making process. Taking a page out of the book of Si Lazarus, the duo distinguished their intervention from that of an interested private party and framed the meetings, instead, as appropriate deliberations internal to the executive branch. "As advisers to the president," Schultze argued, "we are not ex parte to the process." "We are part of the administration," he emphasized.[38]

Having defended a broad new theory of executive power before the Senate, the members of RARG became increasingly wary of the prospect of legislative retribution. Practically speaking, the ozone hearings accomplished very little. They did not lead to subsequent information requests or subpoenas and they unearthed few additional specifics regarding the ozone back-channel. While the hearings were primarily an act of political theater, they did lead to several damaging news stories[39] and more importantly, they led the White House to grow

[37] "Statement of Alfred Kahn," Feb. 27th, 1979, pp. 335-363
[38] "Statement of Charles Schultze," Feb. 27th, 1979, pp. 329-335
[39] Margot Hornblower, "Muskie Pounds Podium as Economizers Shrug," *The Washington Post*, Feb. 28th, 1979, pp. A2

fearful that the specter of a "shadow rulemaking" would further stoke inter-branch tension and prompt Congress to enact sweeping new limitations on executive power. Specifically, the members of RARG feared the spread of the legislative veto device – one of Congress' preferred tools for reining in the executive – that had seen a recent surge in political interest. Ultimately, the apprehensions generated by the ozone hearings prompted RARG to launch a new project; a preventative legislative strategy aimed at mitigating the potential for inter-branch conflict. Though the group continued its interventions in administrative proceedings, it increasingly focused on relations with congressional leaders.

Like his embattled Republican predecessors, Jimmy Carter had a rocky relationship with the Democratic Congress. From the beginning of his term, Carter's eagerness to govern as an outsider – as a "maverick" who was independent from the traditional party leadership – strained relations with the congressional rank-and-file. First, Carter appointed members of his existing Georgia political team – loyalists like Bert Lance, Hamilton Jordan, and Jody Powell – to almost all the top cabinet positions, passing on an opportunity to elevate party stalwarts. This perturbed Rep. Tip O'Neill (D-MA), the recently-elected Speaker of the House, who quickly assailed the president's team of southerners for their lack of national political experience. Indeed, Carter's decision to elevate this "Georgia Mafia" – in the words of the media – did little to allay the potential for inter-branch tension. Instead, it created an early schism with Democrats on the Hill that would only widen throughout the administration.[40]

An early ethics scandal made matters worse. When Bert Lance, one of the members of the Georgia Mafia who Carter had chosen to lead the Office of Management and Budget (OMB), became the subject of a congressional ethics investigation, the media swarmed around the

[40] Julian E. Zelizer, *Jimmy Carter*, (New York: Times Books, 2010), pp. 53-72

controversy, reporting on the scandal for over two months. While the probe found no explicit wrongdoing in Lance's prior management of a Georgia bank, it inflicted serious political damage and ultimately forced him to resign. To the congressmen spearheading the probe, it also raised fundamental questions about Carter's leadership. On the campaign trail, Carter had painted himself as an antidote to the corrupt, insider politics of the Vietnam and Watergate period. To have a cabinet officer resign over ethically questionable conduct – and less than a year into his administration, at that – was to seemingly undermine this promise to clean up the system.[41]

Even more alarming to Democratic lawmakers were the positions Carter staked out in early legislative fights. Apart from the controversial initiatives of RARG, the president had fanned political flames in repeatedly urging budget discipline. During negotiations over the federal budget for 1978, for instance, Carter requested the elimination of almost two dozen public works projects. Democrats on the Hill were livid, furious that their party's standard bearer was prioritizing inflation and departing from the New Deal fiscal playbook. Tensions also flared in the field of healthcare, where Sen. Ted Kennedy (D-MA) – one of the most important Democratic lawmakers who almost ran for president in 1976 – was pushing a plan to expand coverage. When Carter approached Kennedy regarding his healthcare bill, he urged the senator to support more conservative, piecemeal reforms, citing the need to prevent additional inflation. Kennedy balked, accusing the president of a "failure of leadership on the issue."[42]

The rift between Carter and Democratic lawmakers (and between the president and Ted Kennedy in particular) was highlighted at the party's 1978 midterm convention in Memphis. There, Kennedy gave an impassioned speech, decrying Carter for giving undue priority to inflation and for lending only tepid support to the programs traditionally supported by

[41] Zelizer, *Jimmy Carter*, pp. 67-69
[42] Ibid, pp. 70-72

Democrats. In his speech in Memphis, Kennedy urged Democrats to stick to first principles – to resist the allure of fiscal conservatism and continue to champion government as a proactive force for good. When Carter subsequently addressed the delegation, he responded that limiting inflation was a prerequisite to achieving the important pillars of the Democratic platform. Whether or not this was true, there was no doubt that Carter's early actions had put him at loggerheads with the leaders of his own party, especially with the popular brother of RFK.[43]

One of the clearest symptoms of the president's deteriorating relationship with Congress was the continued use of the legislative veto device. Since the early 1970s, the legislative veto had undergone something of a political renaissance. Originally a component of reorganization statutes that allowed Congress to strike down presidential proposals, the legislative veto had recently been extended to new fields, including to the president's war powers (via the 1973 War Powers Resolution) and authority to impound federal funds (via the 1974 Congressional Budget and Impoundment Control Act). As Congress searched for new tools to check the "Imperial Presidency," the number of veto provisions surged, as they enabled one or both houses to review executive actions (typically, for a period of 30 or 60 legislative days) and then affirm or negate the policy in question. While the device itself was constitutionally suspect, this did not prevent congressional leaders from developing a host of creative new uses. Beginning in the mid-1970s, a young firebrand named Elliott Levitas (D-GA) molded the veto into a device for controlling federal regulators, not merely chief executives. In 1975, Levitas introduced a sweeping proposal called the Rulemaking Control Act that incorporated a veto requirement into the rulemaking process, threatening to make every federal regulation subject to congressional approval.[44]

[43] Ibid, pp. 73-87

[44] For early uses of the veto see Robert W. Ginnane, "The Control of Federal Administration by Congressional Resolutions and Committees," *Harvard Law Review*, 66.4 (1953): 569-611, pp. 576-582; and for its extension in the early and mid-1970s see James L. Sundquist, *The Decline and Resurgence of Congress*, (Washington DC:

Initially, Carter hoped to avoid such harsh congressional treatment. But as he progressively fell out of favor on Capitol Hill, legislators from his own party ratcheted up the pressure. In Carter's first year in office – during legislative debates on a national energy bill – the Democratic House sent a major political signal. By passing an amendment that established a government-wide veto (similar to the one contained in Levitas' Rulemaking Control Act), the House demonstrated it would not relinquish control merely because the president was a Democrat. While the Senate ultimately dropped the amendment in conference and enacted a clean, veto-free energy bill, the House vote was deeply symbolic; a sign the administration would likely not be spared from restrictive veto provisions.[45]

Tensions over the veto ran higher the following year. Riding a wave of anti-government sentiment fueled by the return of inflation and events like the California Tax Revolt, Levitas and his allies in the House tightened their grip on regulators. By the summer of 1978, they had inserted veto requirements into nine new pieces of legislation, impacting agencies from the National Highway and Traffic Safety Administration (NHTSA) to the Department of Education (DOE). Moreover, there were forty additional bills pending before Congress that included some sort of veto provision, according to reports. In addition, Levitas was still pushing for the government-wide variety that had haunted the recent debate on energy. Perhaps most concerning, Levitas refused to hear the administration's repeated objections, rejecting an opportunity to sit

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Brookings Institution Press, 1981), pp. 344-366; H. Lee Watson, "Congress Steps Out: A Look at Congressional Control of the Executive," *California Law Review*, 63.4 (1975): 983-1094, pp. 1089-92; Elliott Levitas, "Oversight and Review of Agency Decision-Making: Part II, Morning Session," *Administrative Law Review*, Vol. 28 Issue 4 (1976): 675-684, pp. 676, 684; and also "Testimony of Elliott Levitas," *Hearings on the APA Amendments of 1976 Before the House Subcommittee on Administrative Practice and Procedure*, 94th Cong., 2nd sess., May 3rd, 1976, pp. 128-136

[45] See Richard E. Cohen, "Junior Members Seek Approval for Wider Use of the Legislative Veto," *National Journal,* August 6th, 1977, pp. 1228-1232

down with Carter's Attorney General and discuss the proper separation of powers. In response, Levitas openly welcomed inter-branch conflict, declaring "we will just have to go at it."[46]

On June 21st, 1978, Carter responded by issuing a stern warning to the Democratic Congress. In a special presidential message, he implored Levitas and other members of the House to put down their guns. Calling the legislative veto a "fundamental departure" that generated "indefinite deadlock," the president lambasted the recent surge of offensive provisions. Cautioning legislators that they were threatening to upset the "constitutional balance" and create "serious practical problems," Carter begged members to halt the practice of inserting veto provisions into legislation and also informed Congress his administration would no longer regard them as legally binding. However, in open defiance of the president's message, the House voted by a wide margin in late June to tighten its grip on yet another agency – this time, on the Department of Housing and Urban Development (HUD).[47]

The escalation of inter-branch conflict early on in the administration prompted the White House to consider a shift in strategy. By 1978, the White House had taken few steps to combat the immediate spread of veto provisions within the executive branch. Carter had made multiple public appeals and the DOJ was searching for a suitable test case by which to challenge the veto on constitutional grounds. But with Congress rejecting the president's calls to stand down, the White House realized it needed to do more than issue public statements or wait around for a

[46] See Edward Walsh, "President Trying to Blunt Hill Weapon Against Bureaucrats," *The Washington Post*, Jul. 1st, 1978, pp. A2-A3; and "Memorandum from John M. Harmon to the Attorney General," Feb. 9th, 1978, "Veto, Congressional: Miscellaneous (Pending), 2/77-7/79 [CF, O/A 441]" Folder, Box 47, Files of Robert Lipschutz, Records of the Counsel's Office, Jimmy Carter Presidential Library, pp. 1; and also "Notes on Levitas Meeting," "Veto, Congressional: Miscellaneous (Pending), 2/77-7/79 [CF, O/A 441]" Folder, Box 47, Robert Lipschutz Files, Records of the Counsel's Office, Jimmy Carter Presidential Library, pp. 1

[47] Jimmy Carter, "Legislative Vetoes Message to Congress," June 21st, 1978, "Veto, Congressional; Presidential Memorandum, 1/77-10/78 [CF, C/A 441]" Folder, Box 47, Files of Robert Lipschutz, Records of the Counsel's Office, Jimmy Carter Presidential Library, pp. 1-4

federal court decision; it needed to consider bigger, bolder measures to alleviate the potential for inter-branch warfare.

In the fall of 1978, Richard Neustadt and Si Lazarus floated a novel idea to blunt the spread of the veto: a legislative proposal that codified the president's recent executive order on regulation. "Because the president strongly opposes the legislative veto," Neustadt wrote in October, "and because he *must not* be put on the defensive, we should go into the next Congress with our own alternative proposals." The alternative proposal was regulatory review. Writing in November, Lazarus argued that a proposal codifying E.O. 12044 could potentially function as a political shield. According to Lazarus, if the White House presented Congress with an alternative means of controlling regulators, that could temper enthusiasm for countervailing legislative restrictions. Specifically, if the White House could portray RARG as a "constructive alternative" for disciplining the affairs of the executive branch, it might reduce the veto's overall political appeal. Of course, this exploratory idea ignored the fact that it was abuses of presidential power that had initially prompted the explosion of veto provisions. Thus, it would likely be difficult for the White House to sell an executive order as a constructive alternative to Congress.[48]

Ironically, the ozone hearings compelled the White House to move forward with a modified version of this preventative strategy. At first blush, such a decision would seem utterly backward. After all, a sure way to prompt congressional backlash was to introduce a bill that codified RARG's original charter following the group's controversial appearance before Muskie's subcommittee. Upon further inspection, however, it was possible to understand

[48] See "Memorandum from Richard Neustadt to Stu Eizenstat: Regulatory Reform Bill," Feb. 28th, 1979, "Regulatory Reform, 1/79-3/79, [12/28/78-3/28/79]" Folder, Box 66, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-3; and also "Memorandum from W. Michael Blumenthal to the EPG Steering Group: Proposed Regulatory Reform Package," Mar. 13th, 1979, "Regulatory Reform Process Bills – Administrative Conference of the U.S. (ACUS)" Folder, Box 74, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-3

Neustadt and Lazarus' political calculus. The ozone hearings constituted the review group's first public defense of a broad new theory of executive power. Ostensibly, this would heighten pressure in Congress to enact new limitations on the executive. To stave off such limitations, Neustadt and Lazarus perceived a need to dramatically take control of the legislative agenda. "If we do not go up with a sensible bill," Neustadt wrote Carter following the ozone hearings, "Congress may well pass a crazy one." To avoid this fate, Neustadt suggested a modified version of his initial strategy; a broad-based revision of administrative procedure. While the White House proposal would include a provision codifying E.O. 12044, it would include a litany of other regulatory reforms. Hopefully, these would function as sweeteners for Congress that diverted attention from the legislative veto, counteracting the legislative outcomes opposed by the Carter Administration.[49]

One month after the ozone hearings, Carter sent Congress the 1979 Regulation Reform Act, calling it a proposal to "revamp regulatory procedures." If there were any doubts about the underlying motivations of the act, Richard Neustadt allayed them prior to the bill's unveiling, writing Carter that its "major purpose" was to "convince Congress that the legislative veto is not necessary." To this end, the Reform Act modified administrative procedure in a number of ways. It mandated that executive agencies conduct comprehensive reviews of all old and new regulations. It also asked agencies to publish their own "regulatory calendars" in order to give the public advance notice of rules under development. In addition, the act took steps to streamline administrative hearings and reduce bureaucratic delay, and included a number of provisions designed to enhance public participation. Buried amidst these provisions, the act

[49] "Memorandum from Richard Neustadt to the President: Reorganizing to Oversee Regulatory Reform," Mar. 19th, 1979, "Regulatory Reform Process Bills – Administrative Conference of the U.S. (ACUS)," Folder, Box 74, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-6

codified the terms of E.O. 12044, requiring that executive agencies conduct regulatory analyses, submit those analyses for public comment, and then select cost-effective regulatory approaches. While it stopped short of authorizing RARG's post-comment interventions, it created a statutory base for the group's original charter, thereby solidifying the group's authority. Irrespective of the other sections of the Reform Act, this one was bound to be the most explosive. While Neustadt and Lazarus believed they could sell it as a reasonable alternative to the legislative veto – and limit controversy by surrounding it with other sweeteners – Congress was in no mood to ratify the administration's authority over regulators, as the ozone hearings aptly illustrated. To codify the executive order would be for legislators to rubber-stamp the program that had resulted in a "shadow rulemaking" at EPA.[50]

However, the White House believed it could sell the Reform Act as a moderate attempt to improve administrative management. In his message to Congress announcing the bill's major provisions, Carter highlighted the portions that were unrelated to E.O. 12044, referring to them as "vital new rules for regulators" that represented an effort at "common-sense management." Rather than a rubber-stamp for the powers of the presidency, the White House portrayed the Reform Act as a measure to streamline the machinery of government. In the end, however, this entire effort turned out to be a huge political miscalculation.[51]

[50] See Edward Walsh, "President Seeks to Streamline Federal Regulatory Machinery," *The Washington Post*, Mar. 3rd, 1979, pp. A1; "Memorandum from Richard Neustadt to the President: Reorganizing to Oversee Regulatory Reform," Mar. 19th, 1979, "Regulatory Reform Process Bills – Administrative Conference of the U.S. (ACUS)" Folder, Box 74, Files of Richard Neustadt, Records of the DPS, Jimmy Carter Presidential Library, pp. 1-6; and also "Regulatory Reform Message to the Congress on a Program of Legislative and Executive Actions," Mar. 26th, 1979, "Inflation #1 of 2: Regulatory Coordination 11/78-5/79 [CF, O/A 437]" Folder, Box 20, Files of Robert Lipschutz, Records of the Counsel's Office, Jimmy Carter Presidential Library, pp. 1-6

[51] See "Regulatory Reform Message to the Congress on a Program of Legislative and Executive Actions," Mar. 26th, 1979, "Inflation #1 of 2: Regulatory Coordination 11/78-5/79 [CF, O/A 437]" Folder, Box 20, Files of Robert Lipschutz, Records of the Counsel's Office, Jimmy Carter Presidential Library, pp. 1-6

In the early 1970s Congress became a more free-wheeling political entity. Since the early twentieth century, the institution had been dominated by powerful committee chairmen like Rep. Wilbur Mills (D-AR), who controlled the House Ways & Means Committee for almost three decades. Committee barons like Mills held an effective monopoly over the legislative process and could block any changes that undermined their institutional authority. However, the structure of Congress changed beginning in the 1960s, when fissures emerged in the ruling Democratic Party over civil rights and eventually the Vietnam War. Younger members of the party – who represented a rising suburban middle-class and who were generally more liberal – became disgruntled by the insularity of the committee-dominated system (which propped up older, more conservative chairs merely due to seniority). In the mid-1960s, younger members began a grass-roots insurgence against the long-standing committee structure, arguing it was outmoded, unresponsive to changes within the party, and in desperate need of reform.[52]

Eventually, these reformers pushed through the 1970 Legislative Reorganization Act – a bundle of institutional reforms that diffused the power of committee chairmen and made Congress more decentralized and participatory. The act reduced the power of chairmen in a number of ways. It gave non-committee members greater opportunities to offer amendments after bills went to the floor, thereby increasing the number of pressure points inherent in legislating. It also apportioned congressional staff more equally among members and revamped the Congressional Research Service (CRS), Congress' in-house source of policy research. Both changes gave members greater access to policy expertise and, in turn, greater capacity to pursue

[52] See generally Julian E. Zelizer, *Taxing America: Wilbur D. Mills, Congress, and the State, 1945-1975*, (New York: Cambridge University Press, 1998); and also Zelizer, *On Capitol Hill: The Struggle to Reform Congress and Its Consequences, 1948-2000*, (New York: Cambridge University Press, 2004), pp. 14-32

their own initiatives. The act also included a number of measures that empowered minority members and made the committee process more transparent.[53]

As the 1970s wore on, a number of factors prompted legislators to pursue additional institutional reforms. First was the growing rift within the Democratic Party between long-time committee chairs – who represented rural, more conservative districts – and the rapidly-growing liberal majority. According to young liberals like Delaware's Joe Biden, the committee system continued to stack the deck against emergent issues from civil rights to consumer protection, making additional reforms a political necessity. In 1973, the reform coalition enacted a resolution called the "Subcommittee Bill of Rights," which extended the accomplishments of the Reorganization Act by giving subcommittees new autonomy from committee barons. This helped enlarge the number of competing power centers in Congress. Second and perhaps more importantly was the Watergate Scandal, which led to a massive infusion of young Democratic members and established a broad mandate to reform entrenched institutional arrangements. After the 1974 midterm elections brought 49 "Watergate Babies" to the House of Representatives, young liberals in the Democratic caucus saw a golden opportunity to exploit the recent batch of reforms. Armed with a range of new procedural devices, the 94th Congress moved to unseat long-time committee chairs, taking a final, dramatic step toward de-solidifying the old system. Ultimately, the Watergate Babies removed 3 powerful chairmen and forced another to resign.[54]

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[53] For background on the institutional structure of Congress and the reform coalition which emerged in the mid twentieth century see Lawrence C. Dodd, "The Rise of the Technocratic Congress: Congressional Reform in the 1970s," in *Remaking American Politics*, Richard A. Harris and Sidney M. Milkis eds., (Boulder, CO: Westview Press, 1989), pp. 89-111; Steven S. Smith, "New Patterns of Decision-Making in Congress," in *The New Direction in American Politics*, John E. Chubb and Paul E. Peterson eds., (Washington DC: Brookings Institution, 1985), pp. 203-234; Thomas E. Mann and Norman J. Ornstein, *The New Congress*, (Washington DC: American Enterprise Institute for Public Policy Research, 1981); and also Leroy N. Rieselbach, *Congressional Reform: The Changing Modern Congress*, (Washington DC: CQ Press, 1994)

[54] For a recent examination of the so-called "Watergate Class" see John A. Lawrence, *The Class of '74: Congress After Watergate and the Roots of Partisanship*, (Baltimore: Johns Hopkins University Press, 2018); see also Zelizer, *On Capitol Hill*, pp. 125-155, 156-176

Thus, by the time President Carter introduced the Regulation Reform Act, Congress was a remarkably transformed institution. Gone were the tight-knit relationships between powerful committee chairs – and the insular bargaining networks that contained only a small number of important participants – and in their place were a thicket of new pressure points and nodes of influence. While this "spreading of the action," as one political scientist referred to it, democratized Congress by opening it to rank and file members, it created new obstacles for governance. With authority parceled out among independent subcommittees – and with young, entrepreneurial members offering a wave of new floor amendments – the path to finished legislation was more convoluted and precarious. Decentralization certainly had its virtues, but it also had the effect of eliminating the political stability fostered by a committee hierarchy. Indeed, the reforms of the 1970s turned Congress into a "more porous" institution, according to historian Julian Zelizer, that allowed for a broader range of policy outcomes.[55]

Ultimately, the institutional reforms of the 1970s combined with a number of other developments to ruin the prospects of Carter's Regulation Reform Act. Initially, though, reactions to the White House proposal were positive. Throughout April and May of 1979, the Senate Judiciary and Government Affairs Committees – which shared jurisdiction over administrative procedure – held nine productive days of hearings. The hearings attracted a wide range of interested parties, the majority of which expressed support for the bill. A cross-section of federal regulators voiced support for the Reform Act. The business lobbies were also largely on board. Importantly, the legal profession – which had played an instrumental role in drafting the original Administrative Procedure Act – had testified in support. After Carter introduced the

[55] See Joel H. Silbey, *Encyclopedia of the American Legislative System: Studies of the Principal Structures, Processes, and Policies of Congress and State Legislatures since the Colonial Era*, (New York: Charles Scribner's Sons, 1994), pp. 815; and also Zelizer, *Taxing America*, pp. 356

Reform Act in March, the ABA Commission on Law & the Economy had established a special "Coordinating Group on Regulatory Reform" to contribute to the legislative debate. Chaired by commission vice chairmen Richard B. Smith, this Coordinating Group was intended to supplement the commission's ongoing work within the ABA. During preliminary hearings, the group endorsed the provision codifying E.O. 12044, but recommended it incorporate language that explicitly authorized presidents to "direct" and "modify" regulatory proposals. To this end, the group requested that a copy of Lloyd Cutler's "Regulation and the Political Process" be inserted into the record. In addition to the support of the bar, Ted Kennedy had pledged to advance the Reform Act. A traditional foe of the Carter Administration, Kennedy had recently replaced long-time chairman James Eastland (D-MS) as head of the Judiciary Committee. Kennedy's support could thus prove influential. Only one major political bloc – consumer and environmental groups – opposed the act during preliminary hearings. To this group of dissenters, the entire legislative debate was "grossly distorted" against health and safety regulation. Overall, though, Si Lazarus was optimistic about the bill's political prospects. "It appears probable," Lazarus wrote Carter in August, "that a good bill, similar to the original administration proposal, will be reported."[56]

[56] See "Testimony of Charles D. Ferris Michael Pertschuk, and Susan B. King," in "Regulatory Reform Legislation," *Hearings Before the Senate Committee on Government Affairs*, 96th Cong., 1st sess., Apr. 24th, 1979, pp. 301-316, 375-392; "Testimony of William L. McKinley" and "Testimony of Jeffrey H. Joseph," in "Regulatory Reform Legislation," *Hearings Before the Senate Committee on Government Affairs*, 96th Cong., 1st sess., May 4th, 1979, pp. 956-977; William Warfield Ross, "The Chairman's Report: Ad Hoc Committee on Legislative Reform Initiatives," *Administrative Law News*, Vol. 5 No. 3 (1979): pp. 1-4; "Testimony of William Warfield Ross, Ira Millstein, and Philip Harter," in "Regulatory Reform," *Hearings Before the Senate Judiciary Committee*, 96th Cong., 1st sess., May 15th, 1979, pp. 136-156; "Testimony of Mark Green, Nancy Drabble, Tony Roisman, Jonathan Lasch, and Michael Podhorzer," in "Regulatory Reform," *Hearings Before the Senate Judiciary Committee*, 96th Cong., 1st sess., May 15th, 1979, pp. 103-136; Robert Shogan, "Regulatory Reform: Most Agree It's Vital But Problem is How?" *The Los Angeles Times*, Jun. 17th, 1979, pp. F1; Steven Rattner, "Federal Regulatory Red Tape Proves to Be a Sort of Gordian Knot," Apr. 20th, 1979, *The New York Times*, pp. E5; "Regulatory Reform Legislation Moves Ahead in Both Chambers of Congress," *Regulatory Eye*, Vol. 1 No. 4 (May 1979): pp. 1; and also "Memorandum from Simon Lazarus to the President: Restrictions on Intra-Governmental Communications in Regulatory Reform Legislation," Aug. 11th, 1979, "Regulations, 8/79" Folder, Box 104, Files of Lloyd Cutler, Records of the Counsel's Office, Jimmy Carter Presidential Library, pp. 1-8

Nevertheless, there were underlying reasons to be pessimistic. First, a broad-based revision of administrative procedure was an audacious proposition at this stage. Indeed, the debates that culminated in the original Administrative Procedure Act had been long and bitterly ideological.[57] To launch a similarly broad-based reform effort was to create a tall order for Carter in the final years of his presidency. Second, debate on the Reform Act was likely to carry over into a presidential election year, meaning the entire effort could be derailed by partisan pressures. Third and perhaps more importantly, Carter was rapidly losing political capital due to the escalating energy crisis and his poorly-received "Crisis of Confidence" speech. Carter's recent struggles thus provided legislators with few incentives to hitch their wagons to the White House proposal. As a result, pundits were not bullish about the prospects of the Reform Act. One reporter from the *Los Angeles Times* wrote, "The road to meaningful reform is likely to be long and rocky." Another commentator in *Regulation* magazine observed, "It seems safe to predict that by year's end Ayers Rock will be standing as it has before and the…path to regulatory reform will continue to elude us."[58]

In an effort to bolster the bill's chances, Carter turned to Lloyd Cutler. Prior to his appointment that August as White House Counsel, Cutler had achieved an important victory. Earlier in August at the association's annual meeting in Dallas, the ABA House of Delegates had voted in favor of a recommendation called "Resolution A" that had been introduced by members of the Commission on Law & the Economy. The culmination of the commission's multi-year

[57] For background on the debates leading up to the Administrative Procedure Act see Reuel Schiller, *Policy Ideals and Judicial Action: Expertise, Group Pluralism, and Participatory Democracy in Intellectual Thought and Legal Decision-Making, 1932-1970,* Charlottesville, VA: 1997, Thesis (PhD)--University of Virginia, pp. 380-413

[58] See Merrill Brown, "White House Bill to Force Major Regulatory Changes," *The Washington Star*, Mar. 2nd, 1979, pp. D7; Steven Rattner, "Carter Announces Legislative Plan to Revise US Regulatory Process," *The New York Times,* Mar. 16th, 1979, pp. A14; Robert Shogan, "Regulatory Reform: Most Agree It's Vital But Problem is How?" *The Los Angeles Times,* Jun. 17th, pp. F1; and also Ernest Gellhorn, "Reform as Totem: A Skeptical View," *Regulation Magazine*, May/June 1979, pp. 23-26

research program, Resolution A mirrored Cutler's initial presidential directives proposal. Like the original, the resolution recommended that Congress enact a statute authorizing presidents to "modify" and "direct" the proposals of executive branch and independent regulatory agencies (subject to a legislative veto and expedited judicial review). After securing the ABA's official endorsement in early August, Cutler flew to the Mediterranean to vacation on a yacht. Once there, however, he received an urgent call from President Carter, who asked him to join the administration as White House Counsel and help promote the Regulation Reform Act. To secure congressional authorization for E.O. 12044, the White House had turned to the nation's foremost expert on presidential control of regulations. While Carter aides would likely object to the legislative veto provision that had long been aspect of Cutler's proposal, the president was giving him a powerful platform to pursue his idea.[59]

Following Cutler's appointment, however, the revamped Democratic Congress bombarded the Reform Act with an onslaught of killer amendments. The first was introduced by Ted Kennedy in mid-August. Although Kennedy had originally pledged to support the act, he ultimately used the debate as a trial balloon for a new proposal. In committee, Kennedy introduced a proposal that struck at the core of RARG's regulatory reviews. An effort to promote open government, Kennedy's bill (S. 1291) attached a rigid set of disclosure requirements to RARG intervention. Specifically, it mandated that executive agencies disclose all communications regarding proposed rules that took place outside the public comment period. Whether they originated from private parties or from concerned government officials, an

[59] For the ABA's endorsement of presidential directives see American Bar Association, "Minutes of the Annual Meeting of the Council and Section in Dallas, TX, August 11-14, 1979," ABA Section on Administrative Law, pp. 535-575; and Laura A. Kiernan, "ABA Endorses Presidential Veto of Agencies' Decisions," *The Washington Post*, Aug. 15th, 1979, pp. A8; and for initial reactions to Cutler's appointment see Keith Richburg, "President Turns to Establishment for New Counsel," *The Washington Post,* Aug. 18th, 1979, pp. A1; and Steven Rattner, "Lloyd Cutler, Washington Lawyer, Is Named as White House Counsel," *The New York Times*, Aug. 18th, 1979, pp. 1

agency's ex parte contacts needed to be inserted into the administrative record and then exposed to public scrutiny. In this way, Kennedy's bill codified the procedural requirements announced in *Home Box Office* and long supported by environmental groups. Given the administration's secretive posture in the ozone hearings, this proposal was not an unpredictable outcome.[60]

Presidential advisers expressed immediate opposition to Kennedy's idea. In a memo to President Carter, Si Lazarus censured the proposed logging requirements, predicting they would inflict a range of detrimental effects. According to Lazarus, the burden of recording all informal contacts would "discourage" agencies from allowing them in the first place, preventing valuable intra-governmental dialogues. "Initiatives such as the RARG," Lazarus warned, "might not be feasible at all." Even if agencies did allow such contacts, Lazarus believed the Kennedy provisions would "reduce the candor" of the resulting discussions, undermining the president's ability to "exert effective supervision of regulatory decisions." Lazarus added that S. 1291 contravened the language of the *Vermont Yankee* decision, as it threatened to "turn rulemaking…into a kind of trial."[61]

Soon, the White House confronted a more alarming development at the Judiciary Committee. On September 7th, 1979, a "Watergate Baby" named Dale Bumpers (D-AR) unexpectedly passed a radical amendment. Previously, Bumpers had served as the Democratic governor of Arkansas. After two years in state government, he decided to run for Senate in the 1974 midterm elections, ultimately riding the Democratic wave that followed President Nixon's resignation. After joining the Senate Judiciary Committee in 1975, Bumpers began work on a pet

[60] See "Regulatory Reform Legislation Moves Ahead in Both Chambers of Congress," *Regulatory Eye*, Vol. 1 No. 4 (May 1979): pp. 1; and also "Memorandum from Simon Lazarus to the President: Restrictions on Intra-Governmental Communications in Regulatory Reform Legislation," Aug. 11th, 1979, "Regulations, 8/79" Folder, Box 104, Files of Lloyd Cutler, Records of the Counsel's Office, Jimmy Carter Presidential Library, pp. 1-8

[61] "Memorandum from Simon Lazarus to the President: Restrictions on Intra-Governmental Communications in Regulatory Reform Legislation," Aug. 11th, 1979, pp. 1-8

project – a brief but sweeping amendment to the Administrative Procedure Act that transformed how federal judges reviewed administrative action. During his first year in office, Bumpers attempted to schedule debate on this amendment but was not taken seriously. In 1976 and 1977, he tried again but with little success. An attempt to halt what Bumpers called the "trend of over-regulation," the amendment stipulated the following:

> There shall be no presumption that any rule or regulation of any agency is valid, and whenever the validity of any such rule or regulation is drawn in question in any court of the United States or any State, the court should not uphold the validity of such challenged rule or regulation unless such validity is clearly and convincingly shown.[62]

The Bumpers Amendment did not mince words. In the span of a single paragraph, it eliminated one of the long-standing principles of federal administrative law; that judges were generalists and should "check but not supplant" administrative action. In addition, the amendment eliminated one of the long-standing principles of the judicial process; that the party bringing a legal action bore the burden of proof. Instead, the amendment prohibited reviewing courts from ascribing any validity to administrative actions unless such validity was "clearly and convincingly shown."[63]

Until 1979, the amendment had not advanced legislatively. The Senate had never held hearings on the proposal and it had never come close to reaching the floor for a vote. During the 94th Congress, Bumpers himself had done little to promote his statutory overhaul of the scope of judicial review. Yet, even in relative obscurity, the proposal had attracted a number of critics who saw it as a dangerous remedy that was wildly disproportionate to the perceived problem. In

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[62] "Prepared Statement of Dale Bumpers," in "Administrative Procedure Act Amendments of 1976," *Hearings Before the Senate Subcommittee on Administrative Practice and Procedure*, 94th Cong., 2nd sess., May 3rd, 1976, pp. 150-165

[63] For background on early version of the Bumpers Amendment see Donald Woodward and Ronald Levin, "In Defense of Deference: Judicial Review of Agency Action," *Administrative Law Review*, Vol. 31 Issue 3 (1979): pp. 329-344

1977, Carl McGowan – one of the judges on the DC Circuit – published a law review article arguing the amendment was the product of an irrational anti-bureaucratic mood and threatened to permanently bastardize administrative law.[64] The following year, the Administrative Conference of the United States (ACUS) published a special report titled "In Defense of Deference" in response to the amendment. The report claimed Bumpers' proposal would invite a flood of new litigation, cripple agencies with frivolous legal challenges, and send the administrative process into disarray. "Nothing could be more wasteful and more deleterious to coherent administration," the conference wrote in its cautionary report.[65]

Nevertheless, in September, 1979, the Senate abruptly voted in favor of the amendment. On Sept. 6th, Bumpers had approached Ted Kennedy about offering his amendment to a bill under consideration called the Federal Courts Improvement Act. At first, Kennedy was unsure how to accommodate Bumpers' request. The Courts Improvement Act was high on Kennedy's list of priorities as chairman. But the Senate had never held hearings on the Bumpers Amendment, meaning that if Kennedy allowed it to move forward, the Senate could potentially vote before a thorough airing of the issues. However, Bumpers' congressional staff assured Kennedy the amendment would not actually pass, and that the Arkansas senator was merely using it to gain a new talking point ahead of his 1980 reelection bid. Ultimately, Kennedy allowed debate to move forward, but limited Bumpers to a strict time agreement in order to

[64] See Carl McGowan, "Congress, Court, and Control of Delegated Power," *Columbia Law Review,* Vol. 77 Issue 8 (1977): pp. 1162-1168; and also Donald Woodward and Ronald Levin, "In Defense of Deference: Judicial Review of Agency Action," *Administrative Law Review,* Vol. 31 Issue 3 (1979): pp. 329-344

[65] "Memorandum from Chuck to Simon Lazarus, Wayne Granquist, Richard Neustadt, John M. Harmon and Judy Areen: Post Mortem on the Bumpers Amendment," Sept. 11th, 1979, "Regulatory Reform—Bumpers Bill (Judicial Review)" Folder, Box 69, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-5

constrain what he could accomplish on the Senate floor. In all likelihood, the chairman hoped senators would hear Bumpers out, promptly reject his proposal, and move on.[66]

Kennedy was gravely mistaken. On September 7th – after only four hours of debate and no input from the agencies themselves – the Senate voted 51-27 in favor of the Bumpers Amendment. During floor debate, senior members warned of cataclysmic institutional consequences. "The amendment…could stop the federal government in its tracks," Sen. Ed Muskie cautioned, "it says that federal regulations are not worth the paper they are written on." "This proposal," added Sen. John Culver (D-IA), "would do away with the administrative process as we know it…The disruption is almost impossible to foresee." A number of prominent Republicans shared these trepidations. Sen. Robert Dole (R-KS) implored his colleagues to reject Bumpers' idea, claiming it would result in the "whole rulemaking process [being] repealed in federal court." During his allotted time on the floor, Bumpers reiterated the false premise that courts blindly deferred to federal agencies and that he was simply trying to "bring about a balance" by recalibrating the scope of review. Notwithstanding pleas from both sides of the aisle, naked anti-government hostility carried the day. According to one White House aide who was in contact with multiple senators, there was a dangerous and "irrational mood" prevailing on Capitol Hill ahead of the vote. The aide described a cohort of senators who were "anxious to blame the agencies"; who had "no understanding" of the administrative process and who were eager to vote for a "punitive proposal" ahead of the 1980 election.[67]

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[66] "Memorandum from Chuck to Simon Lazarus, Wayne Granquist, Richard Neustadt, John M. Harmon and Judy Areen: Post Mortem on the Bumpers Amendment," Sept. 11th, 1979, "Regulatory Reform—Bumpers Bill (Judicial Review)" Folder, Box 69, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-5

[67] See 125 Cong. Rec. (1979): pp 12116-12119, 121150-121164; and also "Memorandum from Chuck to Simon Lazarus, Wayne Granquist, Richard Neustadt, John M. Harmon and Judy Areen: Post Mortem on the Bumpers Amendment," Sept. 11th, 1979, "Regulatory Reform—Bumpers Bill (Judicial Review)" Folder, Box 69, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-5

The unexpected passage of the Bumpers Amendment did not bode well for Carter's recently-introduced Reform Act. While the amendment's immediate impact was on the Court Improvements Bill, it was also a barometer for congressional attitudes on the broad subject of administrative procedure. If, on a political whim, the Senate was willing to upend the traditional relationship between federal agencies and reviewing courts, there was no telling what legislators might do with the administration's omnibus package. "The vote is not a good indicator of how we'll fare on our bill," Lloyd Cutler soberly observed following the amendment's passage. "It must give us pause," Si Lazarus added, "on proceeding to mark-up and report our regulatory reform legislation." Later that fall, Ralph Nader's flagship group Public Citizen wrote directly to President Carter, predicting the Bumpers Amendment would be the first of many dangerous amendments inspired by "anti-regulatory overkill." Accordingly, Public Citizen recommended Carter withdraw the bill or work behind the scenes to bury it politically. Otherwise, the group warned, Congress might permanently cripple the regulatory apparatus.[68]

Irrespective of the warning signs, the White House proceeded to steer the Reform Act through Congress. Though Cutler, Lazarus, and Neustadt each admitted concern about the Kennedy logging provisions and the passage of Bumpers' proposal, they ultimately saw both developments as affirmation of the need for a preventative strategy. "We cannot control such schemes on the Hill," Neustadt wrote after the Bumpers vote, "unless we have our own plans on the table." "We think the best defense," Lazarus added, "is a good offense." It was possible to understand their perspective, but only with tortuous reasoning. On the one hand, one could see

[68] See "Memorandum from Chuck to Simon Lazarus, Wayne Granquist, Richard Neustadt, John M. Harmon and Judy Areen: Post Mortem on the Bumpers Amendment," Sept. 11th, 1979, "Regulatory Reform—Bumpers Bill (Judicial Review)" Folder, Box 69, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-5; and also "Letter from Public Citizen to President Carter," Nov. 2nd, 1979, "Briefing Book: Regulatory Reform 11/79 [2]" Folder, Box 130, File of Charles L. Schultze, Records of the Council of Economic Advisers, Jimmy Carter Presidential Library, pp. 1-5

why the White House might push forward with the Reform Act. Theoretically, it could channel debate around the administration's goals and function as a counterweight to noxious proposals. However, in the new-look congressional environmental of the 1970s, it became a vessel for those very noxious proposals. By ultimately choosing to stay the course, Carter aides presumed a degree of control over the legislative process that was rapidly dissipating.[69]

By the spring of 1980, the Reform Act was all but dead. In April, the House Judiciary Committee reported a version of the White House proposal that included a two-house legislative veto and in May the Senate Government Affairs Committee reported a version that included a modified Bumpers Amendment (referred to as "Baby Bumpers"). While Cutler remained eager to compromise in order to codify E.O. 12044, other members of the administration admitted defeat after the failed mark-up sessions. In late May, Si Lazarus circulated a memo informing other cabinet members that he and Stu Eizenstat were preparing to quietly "inter" the Reform Act. After a series of meetings on the Hill, Lazarus and Eizenstat convinced Rep. Peter Rodino (D-NJ) – the chairman of the House Judiciary Committee who Carter had nearly selected as his running mate in 1976 – to prevent the bill from advancing any further. A long-time ally of the president, Rodino quickly obliged the administration, bottling up the failed Reform Act at the House Judiciary Committee.[70]

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[69] See "Memorandum from Richard Neustadt to Bert Carp: Regulatory Reform Bill," Feb. 18th, 1980, "Regulatory Reform, 3/79 – [8/20/79-2/22/80]" Folder, Box 67, Files of Richard Neustadt, Records of the Domestic Policy Staff, pp. 1-2; and also Timothy Clark, "It's Still No Bureaucratic Revolution, but Regulatory Reform Has a Foothold," National Journal, Sept. 29th, 1979, pp. 1596-1601

[70] See "Pres. Memo," Apr. 17th, 1980, "Regulatory Reform [2]" Folder, Box 169, Files of Staff Office Counsel Bergman, Records of the Counsel's Office, Jimmy Carter Presidential Library, pp. 1; "Memorandum from Simon Lazarus to Stu Eizenstat: Meeting with Senator Bumpers," May 16th, 1980, "Bumpers Amendment, 5-9/80" Folder, Box 51, Files of Lloyd Cutler, Records of the Counsel's Office, Jimmy Carter Presidential Library, pp. 1-3; Timothy Clark, "Regulatory Reform May Lose to Regulatory Revolution Advocates," *National Journal*, Jun. 14th, 1980, pp. 969-973; "Memorandum from Stu Eizenstat to the President: Lloyd Cutler's recommendation to accept a government-wide legislative veto to the regulatory reform bill," Aug. 25th, 1980, "Regulatory Reform, 3/79 – 2/25/80-10/20/80" Folder, Box 67, Files of Richard Neustadt, Records of the Domestic Policy Staff, Jimmy Carter Presidential Library, pp. 1-7; and also "Benefits of Omnibus Regulatory Reform Bill," Sept. 10th, 1980, "Regulatory

There would be no congressional buy-in on the subject of presidential control.

Reform, 9-10/80" Folder, Box 105, Files of Lloyd Cutler, Records of the Counsel's Office, Jimmy Carter Presidential Library, pp. 1-2

Conclusion: Jim Miller, *Sierra Club v. Costle* and the Road to the Reagan Era

Fig. 6: James C. Miller III, pictured in 1987 during his tenure as Director of the Office of Management & Budget (OMB).[1]

James C. Miller III lives on a 100-acre property outside "Little Washington," a small town at the northern end of Shenandoah where many DC elites retire. The approach to Miller's property is wooded and scenic. The one-lane gravel road winds past streams, limestone outcrops, and historic farm buildings before moving up a small incline. At the top of the hill is Miller's home (which bears some resemblance to a Western ski lodge). In addition to a barn and 4-car garage, Miller has a spectacular view of the nearby Blue Ridge mountains. After greeting me at the door, Miller – now in his mid-70s – proceeds to give me a brief tour of the premises. Eventually, he shows me into his private study (where a TV playing Fox News Channel looms in the background). Miller's study is filled with mementos from his long career in the federal

[1] "White House Press Briefing," Oct. 20th, 1987, *C-SPAN.com*, available at https://www.c-span.org/video/?189557-1/white-house-briefing

government. His favorite item, he tells me, is a bar graph that illustrates his accomplishments as the first Administrator of the Office of Information and Regulatory Affairs (OIRA). The graph, which he takes down from a mount on the wall, displays the total number of pages in the *Federal Register* between 1936 and 1991. A testament to the aggregate amount of government red tape, the graph slopes upward for the majority of the twentieth century, but then takes a giant plunge in the early 1980s, when Miller joined OIRA as President Reagan's "deregulation czar." This dip on the graph, Miller explains to me, is his single proudest achievement.[2]

Growing up in Georgia, Miller initially wanted to become a physicist. At a young age, his mother had taken him to nearby Emory University for an aptitude test, and he had scored exceptionally high in the field of mathematics. According to Miller, this "propensity for things quantitative" led him to take an early interest in the natural sciences, and once in college at the University of Georgia, he officially declared a physics major. Over his college career, however, he became increasingly interested in public policy, and came to see the field of economics as a way to bridge his penchant for quantitative analysis with his emergent interest in policy questions. Ultimately, he abandoned physics, completed a degree in business administration, and then began work on an M.A. in the UGA economics department. There, he worked with Profs. George Horton and Aubrey Drury; both graduates of the University of Virginia's Ph.D program. At Horton and Drury's urging, Miller applied to UVa for additional graduate work. After his acceptance in 1965, he moved to Charlottesville to begin work on a Ph.D.[3]

At UVa, Miller joined a vibrant academic community at the forefront of the neoclassical revolution. Under the leadership of Leland Yeager, James Buchanan, and later Gordon Tullock,

[2] Miller once remarked that he had so often been referred to as Reagan's deregulation czar that "some folks figured it was part of my name"; see Margaret G. Warner, "Mr. Miller of the FTC Takes on the Doctors," *The Wall Street Journal*, Aug. 19th, 1982, pp. 16

[3] James C. Miller III, (Jul. 12th, 2018), Personal Interview, Washington, VA

the Virginia economics department emerged alongside UChicago as an epicenter of free-market ideas. Over the 1950s and 1960s, the department played an especially formative role in the creation of a new field called "public choice."[4] For a young Jim Miller, this made for an exhilarating and rigorous graduate education. "We all read Milton Friedman's *Capitalism and Freedom*," Miller told me. "It was very stimulating," he fondly remembered, "you woke up every morning thinking about economics and you went to bed thinking about economics."[5]

By virtue of his graduate work, Miller became involved in the early debates on deregulation. After receiving his Ph.D in 1969, he entered the professoriate, accepting a teaching position in his home state at Georgia State University. Quickly, however, his research attracted the interest of government economists. Miller's dissertation – a roadmap to maximize the efficiency of airline scheduling by the Civil Aeronautics Board (CAB)[6] – piqued the interest of officials at the brand-new Department of Transportation (DOT) who were beginning to advocate for airline deregulation. In the early 1970s, Miller left Georgia State to become an analyst at DOT's Office of Planning and Policy Evaluation. Among his first tasks at the agency was to appear as a witness in something called the Domestic Passenger Fare Investigation, one of the CAB's first internal reviews of its pricing policies.[7] As part of the investigation, the board had

[4] For secondary materials on the neoclassical revolution see Angus Burgin, *The Great Persuasion: Reinventing Free Markets Since the Depression*, (Cambridge, MA: Harvard University Press, 2012); Jennifer Burns, *Goddess of the Market: Ayn Rand and the American Right*, (New York: Oxford University Press, 2009); Daniel Stedman Jones, *Masters of the Universe: Hayek, Friedman, and the Birth of Neoliberal Politics*, (Princeton: Princeton University Press, 2012); Philip Mirowski and Dieter Plehwe, eds., *The Road from Mont Pelerin: The Making of the Neoliberal Thought Collective*, (Cambridge, MA: Harvard University Press, 2009); Daniel T. Rodgers, *Age of Fracture*, (Cambridge, MA: Belknap Press of Harvard University Press, 2011), pp. 41-76; and Mark Blythe, *Great Transformations: Economic Ideas and Institutional Change in the Twentieth Century*, (New York: Cambridge University Press, 2002); and for a recent examination of UVa's role see Nancy MacLean, *Democracy in Chains: The Deep History of the Radical Right's Stealth Plan for America*, (New York: Viking Press, 2017)

[5] James C. Miller III, (Jul. 12th, 2018), Personal Interview, Washington, VA

[6] James Clifford Miller, "Scheduling and Airline Efficiency" University of Virginia, Thesis/Doctoral Dissertation, Charlottesville, VA, 1969

[7] For background see George W. Douglas and James C. Miller III, "The CAB's Domestic Passenger Fare Investigation," *Bell Journal of Economics and Management Science*, Vol. 5 No. 1 (1974): 205-222

requested comments from other federal agencies, giving Miller a chance to present findings from his dissertation research. During the ensuing hearings, Miller attacked the CAB's anti-competitive policies, arguing they established a government-run cartel, defied economic sense, and should be largely eliminated in order to increase competition. When the hearing adjourned, Miller went to the bathroom and overhead a conversation that gave him an enormous boost of confidence. Several of the CAB's administrative law judges (who had been running the hearing) had entered the bathroom shortly after him. According to Miller, one of them said the following about his recent testimony, "I'm not sure I understand everything he says, but that is one smart witness." From that point on, Miller knew he had found a niche scrutinizing what he called the "self-defeating" policies of federal regulators.[8]

Over the 1970s, Miller bolstered his deregulatory profile. After stints at Texas A&M and President Ford's Council of Economic Advisers, he joined a conservative Washington think tank called the American Enterprise Institute (AEI). Founded in 1938 in opposition to the New Deal, AEI had recently emerged as one of the leading organs of conservative economic thought. Buoyed by infusions of corporate money in the 1950s and 1960s, the institute began publishing monographs by many of Miller's UVa mentors and began promoting their findings inside the beltway.[9] In addition, AEI had recently become a landing place for many prominent Republican officials, including Gerald Ford, Robert Bork, Antonin Scalia, and Herbert Stein. In 1977, Miller joined this growing Republican cohort as a resident scholar, and was subsequently appointed to direct the institute's Center for the Study of Government Regulation. In this capacity, he oversaw

[8] James C. Miller III, (Jul. 12th, 2018), Personal Interview, Washington, VA

[9] For the growth of conservative think tanks in the late twentieth-century see Gregg Easterbrook, "Ideas Move Nations: How Conservative Think Tanks Have Helped Transform the Terms of Political Debate," *The Atlantic*, Vol. 257, No. 1 (1986): 66-80; Benjamin Waterhouse, *Lobbying America: The Politics of Business from Nixon to NAFTA*, (Princeton: Princeton University Press, 2014); Andrew Rich, *Think Tanks, Public Policy, and the Politics of Expertise*, (Cambridge: Cambridge University Press, 2004), pp. 34-41; and also Olivier Zunz, *Philanthropy in America: A History*, (Princeton: Princeton University Press, 2012), pp. 104-110

a broad-based research program with deregulation and supply-side economics at its center. During the 1980 presidential election, the Reagan campaign reached out to Miller and his staff, requesting they help refine the candidate's policy platform. After the election, the Reagan transition team again enlisted Miller; this time, to produce a comprehensive advisory report on the direction of the Federal Trade Commission (FTC). After completing the report 3 days before Christmas, Miller and his wife flew home to Georgia for the holidays. However, members of the transition were so impressed with Miller's analysis they requested he immediately return to Washington and begin work as the administration's point-person on deregulation.[10]

As Executive Director of Reagan's Task Force on Regulatory Relief, Miller worked on the centerpiece of the president's deregulatory offensive – a new executive order on regulatory review. While Miller's order bore some resemblance to that of the Carter Administration, its underlying objectives were very different. As published in mid-February, Executive Order 12,291 required executive branch agencies to draft Regulatory Impact Analyses (RIAs) for all "major rules." This requirement largely mirrored an earlier provision from Carter's. However, Miller's also stipulated that agencies submit RIAs to the Office of Management & Budget (OMB) *before* making them publicly available. Crucially, the order established a similar "pre-clearance" requirement for final rules, effectively making OMB the clearinghouse for executive branch rulemaking. In addition, E.O. 12,291 outlined general principles for agencies to follow in order to surmount OMB reviews. Herein lay the greatest points of divergence from the Carter White House. Miller's order directed agencies to abstain from regulating whenever a rule's economic costs exceeded its economic benefits, in turn suggesting OMB would wield its authority to block regulations that failed a rigid cost-benefit test. Lastly, the order instructed

[10] James C. Miller III, (Jul. 12th, 2018), Personal Interview, Washington, VA

executive agencies to suspend all pending rulemakings. The writing on the wall was clear. Miller designed the order, above all, to stem the flow of federal regulations, not ensure they embodied an economic perspective before being implemented. "You got to have Mr. No," Miller explained to me, when asked about his central goal in drafting E.O. 12,291.[11]

Over the ensuing several months, Miller engineered regulatory rollbacks that are still the subject of Republican-Party legend. In his first 9 months as director of the Task Force and Administrator of OIRA, Miller and his staff reviewed and modified hundreds of proposed rules – including standards for diesel exhaust, toxic chemicals, and sex discrimination – and also blocked nearly 60 regulations from ever being implemented. "From the very first day," Miller recounted, "I adopted the attitude of…I'm the meanest son of a bitch in the valley." "We were going great guns," he added about his early days at OIRA. In Miller's ferocious new use of regulatory review, pundits saw a revolutionary transformation. In a front-page article titled "OMB Now a Regulator in Historic Power Shift," a *Washington Post* columnist described the administration's use of executive power as a "Charles Atlas transformation." In another article in the *Post,* Sen. Carl Levin (D-MI) portrayed E.O. 12,291 as an earth-shattering development for the administrative state. "An extraordinary but almost hidden centralization of power is taking place in Washington," Levin wrote in 1981. "Less than a month after his inauguration," Levin continued, "President Reagan issued an executive order that overturned some 35 years of practice under the Administrative Procedure Act and was a radical act in the field of government

[11] See Exec. Order 12291, "Federal Regulation," 46 *Federal Register* 13193, (Feb. 17th, 1981); "Deregulation HQ: An Interview on the New Executive Order with Murray L. Weidenbaum and James C. Miller III," *Regulation Magazine*, Vol. 5 Issue 2 (March/April 1981): 14-23; Clyde Farnsworth, "Reagan Signs Order to Curb Regulations," *The New York Times*, Feb. 18th, 1981, pp. D13; and also James C. Miller III, (Jul. 12th, 2018), Personal Interview, Washington, VA

rulemaking." According to Sen. Levin and many others, the Reagan Revolution was underway and Jim Miller was aggressively leading the charge.[12]

In reality, Miller stood on the shoulders of Lloyd Cutler, the Regulatory Analysis Review Group (RARG), and other outgoing members of the Carter White House. Nothing illustrated this fact more clearly than Miller and his staff's reliance on a recent decision of the DC Circuit called *Sierra Club v. Costle* (1981) – the first federal case to explicitly ratify presidential directives. Notwithstanding the failure of Carter's regulatory reform bill, RARG had continued to act independently during the final years of Carter's presidency. Throughout 1979 and 1980, as the economic crisis progressively worsened, the group continued intervening in rulemaking proceedings in the absence of direct congressional authorization. Frequently, the group did so on an ex parte basis according to its new reading of *Vermont Yankee* (1978). One of these late interventions culminated in the DC Circuit's groundbreaking *Sierra Club* decision. Ironically, this decision proved of great use to Miller and other advisers to President Reagan.[13]

At issue in *Sierra Club* were a series of private meetings between Carter's economic advisers and EPA Administrator Doug Costle that had occurred in April and May of 1980. This "ex parte blitz," in the words of the plaintiffs, concerned an EPA regulation affecting coal-fired power plants and electric utilities. In addition to developing national standards for ambient air, EPA was charged with promulgating rules for "new sources" of air pollution, i.e. for specific industrial facilities (such as power plants) constructed after the passage of the Clean Air Act. In the 1970s and 1980s, power plants still relied on coal as their primary energy source, and because the burning of coal emits the dangerous pollutant sulfur dioxide (SO_2), EPA regulators

[12] James C. Miller III, (Jul. 12th, 2018), Personal Interview, Washington, VA; Peter Behr, "OMB Now a Regulator in Historic Power Shift," *The Washington Post,* May. 4th, 1981, pp. A1; and Carl Levin, "A Radical Transfer of Power," *The Washington Post,* Nov. 1st, 1981, pp. C7

[13] *Sierra Club v. Costle,* 657 F.2d 298 (1981)

had long kept a watchful eye on coal-fired facilities. In 1971, the agency published the first federal standard for these industrial sources – a uniform requirement that all coal-fired plants limit their sulfur emissions to 1.2 pounds per million British thermal units (MBtu). To this end, the standard required that firms install "scrubbers" – a type of industrial technology that removes or "scrubs" the sulfur from coal before it is burned, thus helping limit emissions. However, different coal deposits contain varying amounts of SO_2. Coal mined in the Eastern United States, for instance, contains higher concentrations of sulfur than coal mined in the West. Due to this regional discrepancy, power plants and electric utilities responded to EPA's initial standard by burning greater amounts of Western coal in order to avoid installing expensive scrubbers. This operated to the disadvantage of Eastern mining states such as West Virginia, creating a number of distributional problems.[14]

In 1978, EPA revisited the standard in response to the recent amendments to the Clean Air Act. To ensure Eastern states did not bear an outsized burden for cleaning the air, the agency published a new standard that retained the 1.2 MBtu limit but added a new requirement that 85 percent of the remaining, uncontrolled sulfur be removed or "scrubbed." In theory, this would mitigate the distributional problems of the initial standard and ensure that all coal-fired plants installed scrubbers. However, RARG immediately approached EPA and began lobbying the agency to incorporate a "sliding scale" for emission reduction. In place of a uniform 85 percent requirement, the group pressured regulators to adjust the emission cap based on the respective amount of SO_2. This would ensure all new plants installed scrubbers while accounting for the different concentrations of sulfur in coal itself. Initially, RARG made this argument in a public comment in the fall of 1978; alongside 1,400 other interested members of the public. In March,

[14] Dirk Kirschten, "Politics at the Heart of the Clean Air Debate," *National Journal*, May. 19th, 1979, pp. 812-816

1979 – after the comment period ended but before the agency issued the final rule – RARG held its first private meeting with EPA administrators. Additional private meetings occurred over the spring. On April, 23rd, 1979, the agency met for a half hour with Stuart Eizenstat without providing public notice. Four days later, the agency met with members of the Domestic Policy Staff (DPS) without giving notice. Three days after that, the agency met with President Carter, and later that day in a second meeting, with other high-ranking presidential advisers. For some of these meetings, EPA published brief summaries in the administrative record and allowed opportunities to respond. For others, the agency made no such transparency gestures. In the end, EPA incorporated the "sliding scale" for emission reduction as requested by RARG.[15]

These meetings led to the DC Circuit's ensuing decision in *Sierra Club*. In response to the spring "ex parte blitz" by the White House, the Sierra Club and Environmental Defense Fund brought a procedural challenge against EPA, arguing the meetings were an affront to administrative due process under *Home Box Office* (1977) and thus should compel the court to reverse. Representing Doug Costle and the administration, lawyers from the Justice Department responded that the president and his agents were not ex parte to the decision-making process and that *Vermont Yankee* limited the scope of due process, thereby permitting the secret meetings.[16]

In a mammoth, 253-page opinion, Judge Patricia Wald roundly rejected the procedural challenge by environmentalists, handing the Carter Administration a belated legal victory. A graduate of Yale Law School and former public interest lawyer for the Center for Law and Social Policy, Wald had recently served as an Assistant Attorney General in the Justice Department, working in its Office of Legislative Affairs over the mid and late 1970s. In 1979 – as part of his

[15] Michael Sohn and Robert Litan, "Sierra Club v. Costle: Regulatory Oversight Wins in Court," *Regulation Magazine*, Vol. 5 Issue 4 (1981): 17-24, pp. 17-19
[16] *Sierra Club v. Costle*, 657 F.2d 298 (1981), pp. 386-392

effort to increase the number of women on the federal bench – President Carter nominated Wald to the ever-important DC Circuit. After being confirmed by the Senate and receiving her commission that July, Wald became the first woman to ever serve on the court. Quickly into her tenure, Wald issued her lengthy *Sierra Club* opinion.[17]

Wald's ruling amounted to a sweeping affirmation of presidential directives. Having recently served in the executive branch, Wald roundly rejected the claim that secret meetings between the White House and federal agencies were legally impermissible. Her argument proceeded in a number of distinct parts. First, she addressed the question of whether congressional statutes expressly forbade ex parte contacts in administrative rulemaking. Dealing first with the Clean Air Act, Wald determined, "The statute does not explicitly treat the issue of post-comment period meetings with individuals outside EPA." "Oral face-to-face discussions are not prohibited anywhere, anytime, in the Act," she added. Like previous commentators, Wald concluded the same for the Administrative Procedure Act, finding no express statutory restrictions.[18] Next, she addressed the question of whether the federal courts, in the absence of legislative prohibitions, could overturn rules on the basis of ex parte contacts and impose their own additional disclosure procedures. Relying on the Supreme Court's *Vermont Yankee* decision, Wald argued for judicial restraint. "In its unanimous opinion," she observed, "the Supreme Court unambiguously cautioned this court against imposing its own notions of proper procedures upon an administrative agency." Here, Wald echoed the principal insight of Justice Rehnquist, recognizing the informality of notice-and-comment rulemaking and the need to shield

[17] For more on Wald's personal background see "Selection and Confirmation of Federal Judges: Part 2," *Hearing Before the Senate Judiciary Committee*, 96th Cong., 1st sess., June. 18th, 1979, pp. 131-145; and also Harry T. Edwards, "Tribute to Hon. Patricia M. Wald," *New York University Annual Survey of American Law*, Vol. 66 Issue 1 (2010): 1-6

[18] *Sierra Club v. Costle*, 657 F.2d 298 (1981), pp. 393-396

it from the procedural features of the judicial process. "We must refrain," she wrote, "from the easy temptation to look askance at all face-to-face lobbying efforts, merely because we see them as inappropriate in the judicial context." "Where agency action involves informal rulemaking, of a policymaking sort," Wald explained, "the concept of ex parte contacts is of more questionable utility." In this way, Wald overturned the central holding of *Home Box Office*. According to this section of her opinion, there was no basis for judges to overturn rules because of ex parte contacts or foist procedural strictures onto the rulemaking device.[19]

Wald then addressed the proper role of the White House in the regulatory process. As long as they were not expressly barred by an agency's statute, Wald believed presidential directives were perfectly consistent with Article II of the Constitution. Citing *Myers v. United States* (1926) as well as Harold Bruff's published article on presidential power,[20] she wrote:

> The executive power under our Constitution, after all, is not shared; it rests exclusively with the President. The idea of a "plural executive," or a President with a council of state, was considered and rejected by the Constitutional Convention. Instead the Founders chose to risk the potential for tyranny inherent in placing power in one person, in order to gain the advantages of accountability fixed on a single source. To ensure the President's control and supervision over the Executive Branch, the Constitution and its judicial gloss vests him with the powers of appointment and removal and the power to demand written opinions from executive officers. In the particular case of EPA, Presidential authority is clear since it has never been considered an "independent agency," but always part of the Executive Branch.[21]

With this resounding statement in favor of a unitary executive, Wald collapsed any outstanding distinctions between the policies of the White House and those of federal departments within the executive branch. Though she conceded executive power might not extend to independent

[19] *Sierra Club v. Costle*, 657 F.2d 298 (1981), pp. 392, 400-401
[20] Harold H. Bruff, "Presidential Power in Administrative Rulemaking," *Yale Law Journal*, Vol. 88 Issue 3 (1979): 451-509
[21] *Sierra Club v. Costle*, 657 F.2d 298 (1981), pp. 405

commissions such as the National Labor Relations Board (NLRB), her opinion nevertheless affirmed the Carter Administration's bold new vision of the president's administrative powers.[22]

Moreover, Wald recognized the functional advantages of presidential control. In an era of interdependent policy choices, she argued the federal government required a central administrative authority that could supervise the disparate policies of federal agencies. Here, Wald cited Lloyd Cutler's original *Yale Law Journal* article as well as the recent reports of the ABA Commission supporting presidential directives. By grounding this part of her argument as such, she put the full weight of the DC Circuit behind Cutler's intellectual project. Toward the end of the opinion, Wald echoed the insights of "Regulation and the Political Process":

> The desirability of such [presidential] control is demonstrable from the practical realities of administrative rulemaking. Regulations such as those involved here demand a careful weighing of cost, environmental, and energy considerations. They also have broad implications for national economic policy. Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. Single mission agencies do not always have the answers to complex regulatory problems. An overworked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policymakers in the White House.[23]

Combined with her earlier reading of *Vermont Yankee,* Wald's opinion represented a full-throated endorsement of presidential power in the field of regulatory policy.

Handed down in late April, 1981, the *Sierra Club* decision attracted immediate attention from regulation and administrative law experts. Bernard Schwartz – an NYU law professor and the author of multiple administrative law treatises – noted that Wald's decision signaled an end to judicial scrutiny of ex parte contacts. "What the decision comes down to," Schwartz wrote, "is a rejection of the *Home Box Office* approach to ex

[22] *Sierra Club v. Costle,* 657 F.2d 298 (1981), pp. 404-406
[23] Ibid, pp. 406

parte contacts in rulemaking cases." Other commentators went further, linking *Sierra Club* to the present initiatives of Jim Miller and the Reagan Administration. Two authors in *Regulation* magazine noted that the timing of Wald's decision was incredibly felicitous for the new Republican occupants of the White House. "The opinion provides timely judicial support," the authors wrote, "for the concept of Office of Management and Budget oversight…under Executive Order 12291." Another observer in a law journal portrayed the decision as a great windfall for conservatives, writing, "While the case arose during the Carter administration, it is of vital importance to the Regulatory Relief program established by Reagan."[24]

Sierra Club immediately became Jim Miller and his colleagues' most prized legal precedent. Following the decision, OMB Director David Stockman sent a memorandum to the heads of executive branch agencies, informing them that regulatory review had been explicitly authorized by the federal courts and thus attained a new degree of legitimacy. "Our procedures," Stockman notified regulators, "are consistent with the holding in *Sierra Club v. Costle*." In addition, the ruling provided much-needed cover to members of OIRA, who were summoned to Capitol Hill that summer. In June, 1981, Miller and several OIRA analysts appeared before a House subcommittee to face questions about their use of executive power over the first several months of the administration. At each stage, Miller and his staff invoked *Sierra Club* as their primary defense. "The Court of Appeals," Miller declared in his opening statement, "recently rejected a challenge to an Environmental Protection Agency rule based in part upon off-

[24] Bernard Schwartz, "Administrative Law Cases During 1981," *Administrative Law Review,* Vol. 34 Issue 2 (1981): 83-108, pp. 88; Michael Sohn and Robert Litan, "Sierra Club v. Costle: Regulatory Oversight Wins in Court," *Regulation Magazine,* Vol. 5 Issue 4 (1981): 17-24, pp. 17; and also "Recent Legal Developments of Note," *Administrative Law News,* Vol. 7 (1981): 1-6, pp. 3

the-record contacts with the rulemaker by representatives of the President." "The relevant law is quite clear," Miller insisted. Facing questions from the subcommittee's chief counsel, C. Boyden Gray – one of Miller's partners at OIRA – proceeded to exploit Cutler and Carter's belated legal victory. "This case," Gray argued under pressure from counsel, "stands for the proposition that the president or his agents not only have a right…but an obligation to discuss policy issues with agency officials." "It is on that basis," Gray emphasized, "that we say that our executive order is quite valid."[25]

Conservatives had found a hook for their political revolution. "We stole everything" Miller admitted to me, when asked about the work of his Democratic predecessors.[26]

[25] See "Memorandum from David A. Stockman for Members of Executive Departments and Agencies: Certain Communications Pursuant to Executive Order 12,291, 'Federal Regulation,'" Jun. 11th, 1981, published in "Role of OMB in Regulation," *Hearing Before the House Subcommittee on Oversight and Investigations*, 97th Cong., 1st sess., Jun. 18th, 1981, pp. 17; "Testimony of James C. Miller III," in "Role of OMB in Regulation," *Hearing Before the House Subcommittee on Oversight and Investigations*, 97th Cong., 1st sess., Jun. 18th, 1981, pp. 47; and also "Testimony of C. Boyden Gray," in "Role of OMB in Regulation," *Hearing Before the House Subcommittee on Oversight and Investigations*, 97th Cong., 1st sess., Jun. 18th, 1981, pp. 104

[26] James C. Miller III, (Jul. 12th, 2018), Personal Interview, Washington, VA