

STATEMENT
OF
JAMES C. MILLER III

*File
Reg Reform*

ADMINISTRATOR FOR INFORMATION AND REGULATORY AFFAIRS,
OFFICE OF MANAGEMENT AND BUDGET

AND

EXECUTIVE DIRECTOR,
PRESIDENTIAL TASK FORCE ON REGULATORY RELIEF

BEFORE THE

SUBCOMMITTEE ON REGULATORY REFORM OF THE
COMMITTEE ON THE JUDICIARY

OF THE

UNITED STATES SENATE

(May 14, 1981)

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here this morning, along with Chairman Weidenbaum, to discuss our mutual efforts to improve the regulatory process. With us today is C. Boyden Gray, Counsel to the Presidential Task Force on Regulatory Relief.

As you know, many efforts have been mounted over the past several years to improve the performance of the regulatory agencies, and this Subcommittee has performed a Herculean task in identifying problems of regulatory procedure and finding solutions. The bill before you, I know, is the product of extensive discussions involving Members of this Subcommittee, leaders of the private sector, and key officials in the Administration, including the Chairman of President Reagan's

Task Force on Regulatory Relief, Vice President George Bush. Moreover, we have had a close, cordial, and productive working relationship with you and your staff and look forward to its continuation in the future.

Before I discuss the details of S. 1080, the proposed "Regulatory Reform Act", I would like to review briefly the President's program of regulatory relief and discuss our early experience under Executive Order 12291, "Federal Regulation."

President's Program of Regulatory Relief

As one of the four cornerstones of President Reagan's economic recovery program, regulatory relief is clearly one of the top priorities of this Administration. The four cornerstones are:

- o A stringent budget policy to restrain federal spending and put more resources in the private sector where they are more productive;
- o A tax reduction program to encourage saving and investment;
- o A program of regulatory relief to achieve regulatory goals at lower costs in order to increase the supply of goods and services available for other pressing needs; and
- o A stable monetary policy to reduce uncertainty and encourage greater investment by businesses and more rational expenditures on the part of consumers.

The four components are complementary. They share the basic philosophy of increasing overall economic activity in order to increase productivity, reduce inflation and unemployment, and raise the real incomes of all Americans.

During his first months in office, the President took swift and positive action to eliminate excessive and ineffective regulations. Let me take just a minute to outline some of these actions for you.

On the day after the Inauguration, President Reagan asked the Vice President to chair a Cabinet-level Task Force on Regulatory Relief. The Task Force is responsible for reviewing new regulations, assessing existing regulations, and coordinating legislative policies in the regulatory area. As I mentioned, the Task Force is chaired by Vice President Bush, but it also includes as members: Treasury Secretary Regan, Attorney General Smith, Commerce Secretary Baldrige, Labor Secretary Donovan, Office of Management and Budget Director Stockman, Assistant to the President for Policy Development Anderson, and Council on Economic Advisers Chairman Weidenbaum. As the Vice President has noted, the charge given to his Task Force is not to study regulation or deregulation, but to provide regulatory relief.

Eight days later, on January 29, the President sent a memorandum to the heads of eleven cabinet departments and the Environmental Protection Agency, asking them to postpone for 60 days -- until March 30 -- the effective dates of all final regulations that had not yet taken effect. He also asked the agencies not to issue any additional final regulations during

this period. This action was taken to allow time for the President's appointees to familiarize themselves with the details of the so-called "midnight regulations" and other proposed new rules.

On February 17, President Reagan issued Executive Order 12291, "Federal Regulation," designed to improve regulatory performance and provide regulatory relief.

The President's program of regulatory relief goes beyond new regulations to include existing regulations. On March 25, building on the President's previous actions, Vice President Bush released a list of 27 existing regulatory programs which agencies had agreed to reassess. The Task Force and the agencies will continue to review and identify additional areas where review of existing rules and regulatory programs is necessary. The Vice President also asked the assistance of business, labor, consumer, and other groups in identifying regulations in need of rescission or modification. We have received over 200 detailed and sophisticated submissions in response to that request. In coordination with the responsible agencies, we intend to use these submissions to help establish the regulatory priorities of this Administration.

Almost every Cabinet department and agency has taken important steps to provide regulatory relief. For example, the Department of Transportation has proposed changes in a number of regulations, especially those affecting the automobile; the Department of Energy has targeted some 200 regulations for thorough review; the Department of Labor's own Regulatory Reform

Task Force has begun a careful review of regulatory proposals and existing programs to find ways of achieving health and safety goals at lower costs.

These actions are only a first step in achieving meaningful regulatory relief. Although it is too early to have final figures, preliminary results have been gratifying. I can assure you that the relief measures taken by the agencies amount to billions of dollars per year. And we are only beginning. Much more will be done in the coming months. Regulatory relief is essential to economic recovery. The President himself has made it clear that he expects real regulatory relief and we intend to carry out his mandate and that of the American people.

Executive Order 12291

Now let me address our experience under Executive Order 12291. I would like to point out that the Executive Order has only been in place since February 17, and our experience has understandably been too short to predict precisely what the final results will be. However, I can say with certainty that the first three months have been very encouraging.

The Executive Order consists of three major parts. First, it sets out the President's regulatory principles. Under these common-sense principles, an agency is directed not to regulate unless the benefits of the rule exceed the costs; the least costly alternative is chosen; and the regulation maximizes net benefits.

Second, the Presidential Task Force on Regulatory Relief is clearly established as the primary oversight body with regard to Executive-branch regulatory policy.

Third, the Executive Order creates a review process directing the Office of Management and Budget, under the direction of the Presidential Task Force, to review proposed regulations and consult with agencies about them. It calls for OMB to identify existing regulations which agencies should review and for OMB and the Task Force jointly to develop legislative proposals where needed in the regulatory area.

To date, over 658 rules have been submitted by 23 Executive and "independent" agencies:

<u>Department/Agency</u>	<u>Submissions</u>
Agriculture.....	101
Commerce.....	38
Community Services Administration.....	1
Education.....	34
Energy.....	17
Environmental Protection Agency.....	161
Federal Emergency Management Agency.....	5
Federal Inspector for Alaska Natural Gas Transportation.....	4
General Services Administration.....	13
Health and Human Services.....	15
Housing and Urban Development.....	37
Interior.....	22
Justice.....	15
Labor.....	31
National Foundation on the Humanities.....	5
Nuclear Regulatory Commission.....	1
Office of Personnel Management.....	10
Small Business Administration.....	2
State.....	2
Transportation.....	110
Treasury.....	1
U.S. Metric Board.....	3
Veterans Administration.....	30
Total.....	<u>658</u>

I might note that, taken together, the Departments of Transportation, Agriculture and the Environmental Protection Agency account for over half of these rules.

The rate at which regulations are being issued by agencies has slowed significantly as well. The number of new final and proposed regulations is down by more than a third since January, and the average number of pages published daily in the Federal Register has been cut by more than half.

With regard to our experience under the Executive Order, two points deserve particular emphasis. First, we have found that flexibility is crucial. It is simply not possible to anticipate all the issues that surface in the regulatory area. I believe that such unforeseeable situations demand flexibility on the part of the institutional arrangement assigned to address these issues. Second, the authority to waive regulations and to identify certain other regulations as "major" is another crucial element in the Executive Order. The authority granted under the order permitting us to exempt certain classes of regulations prevented the program from being brought literally to a standstill. The authority to designate rules as "major" keeps agencies on their toes and allows us to identify especially burdensome or controversial regulations for review, even if ordinarily they would not qualify as "major".

The Task Force is still learning how best to deal with the business of regulatory relief. It is important that hard and fast requirements not be imposed which could block new and effective regulatory relief measures.

Comments on S. 1080

Mr. Chairman and Members of the Subcommittee, we in the Administration heartily support the goals of S. 1080. As our Executive Order indicates, we believe it essential to perform analysis for major new and existing regulations and to choose the most cost-effective means of achieving a statutory goal. While we can achieve these goals under the Executive Order, there is a clear benefit to codifying these requirements in legislation. The basic concepts embodied in S. 1080, we believe, hold the potential for providing the long-lasting reform of the regulatory process that is vitally needed.

As with much legislation, an appropriate balance must be stuck between detailed legislative provisions and the need for flexibility. For the most part, I think S. 1080 achieves this goal.

The bill addresses the pervasive problems of agency reliance on undisclosed or questionable scientific data and the current inadequacies of rulemaking files. The bill would require an agency to disclose at the outset the studies on which it intends to rely and to make those studies and all other relevant material available for public comment. These are important provisions and we support them.

The bill also provides for what has come to be known as "hybrid rulemaking" for major rules. The opportunity for oral presentation and cross-examination in major rulemakings, we believe, can strengthen the regulatory process by providing close scrutiny of matters of material fact. As the sponsors of the

bill recognized, it is also important to limit the scope of judicial review on such procedural issues, and we in fact would suggest that the provision for judicial review be even more ~~carefully~~ carefully circumscribed.

The bill also contains important provisions eliminating the "race to the courthouse" problem that exists under the current venue provision and establishing a regulatory agenda and calendar. In both cases, the bill makes an important contribution towards improving administrative practice.

The centerpiece of the bill, from our perspective, is its provision requiring careful economic analysis of major rules. All too often in the past, rules were issued with little or no consideration of their economic consequences. That will not happen under this Administration, and it should not happen under any subsequent Administration. This is an area, however, where the balance between effective legislative prescriptions on the one hand and needed Executive-branch flexibility on the other is particularly difficult to accomplish. With just a few changes, we believe that S. 1080 can achieve that balance.

Essentially, what is required is an Executive-branch oversight mechanism that grants the President or his designees authority to designate major rules and to enforce compliance with provisions of the proposed legislation. This would reduce the role of the courts in these areas. We also believe that it would be simpler to put the new procedural provisions in a new Chapter 6 of the Administrative Procedure Act, rather than run the risk

of unintentionally complicating the well-understood provisions of existing Chapter 5. Finally, we think that the first definition of "major rule" should be limited to rules that would increase enforcement or compliance costs by \$100 million or more. As it now stands, a full economic impact analysis would be required for even minor changes in major existing rules.

Our concern here is two-fold. First, we want to ensure that enactment of the bill would not hamper the Administration's efforts to achieve regulatory relief. Second, we want to avoid the danger of creating opportunities for litigation -- particularly litigation over the adequacy of an agency's analysis -- that could be used to frustrate, rather than promote, regulatory relief. To the extent there is judicial review of whether a rule is "major", we believe it should be limited to the bright line test of the \$100 million increase in compliance and enforcement costs. The other two tests are too vague to permit useful judicial review.

In connection with judicial review, we should add one point about the Bumpers Amendment. We believe that the bill's provision eliminating any presumption of validity with respect to an agency's assertion of power or jurisdiction beyond its statutory authorization raises no serious problem. Indeed, under the Executive Order we are committed to achieving this same objective. But other presumptions not involving agency jurisdiction or power -- such as those relating to procedural regularity, statutory interpretation of technical or scientific

provisions, and an agency's own rules -- serve a useful purpose in focusing judicial review on the issues of significance. Moreover, elimination of those presumptions could create needless uncertainties and litigation.

With these and other minor changes, we believe that enactment of S. 1080 would result in a significant and enduring improvement in the substance and procedures of regulatory decisionmaking. The bill's approach is comprehensive and is based on a well-reasoned understanding of the nature of the regulatory problem and what can be done to correct it. In this regard, we are particularly pleased that the bill's major rulemaking provisions will not become effective until January 1, 1983. This delayed effective date does not undercut in any way the urgency of the problem, but rather evidences a realistic appreciation that it will require time for the agencies to adapt to the new demands being placed upon them. As I pointed out earlier, we are only in the initial stages of implementing the Executive Order. We are learning constantly. This bill would allow that learning process to continue, to the ultimate benefit of the regulatory process itself. Thus, we strongly support Section 8 of the bill.

Mr. Chairman, Members of the Committee, that completes my prepared statement. Mr. Weidenbaum, Mr. Gray, and I shall be happy to address any questions you might have.

5/4

Frank:

Would you please skim to make sure okay for me to send letter under JAB signature saying:

thanks for bringing this material to my attention, appreciate your support, will pass along to appropriate WH staff members, etc.

Thanks.

KC

- Jim Miller
- Good beginning
 - Want to work with harvest
 - Afraid of landing up
 - Testify next week
 - Testimony on Danielson bill

Thursday
Danielson
Horse
517
Sen Govt
5/12
Jud Clay
5114

PAUL LAXALT
NEVADA



United States Senate

WASHINGTON, D.C.

April 30, 1981

Jim
Dear Mr. ~~Baker~~:

Today I introduced the "Regulatory Reform Act" with the co-sponsorship of seventy-three of my colleagues in the Senate. I believe this legislation will be a major contribution to the President's program to bring regulatory relief to the productive sector of our economy. I am encouraged by the broad support this proposal has received, demonstrating that a majority of the Senate joins the President's commitment to limit the explosive growth of the federal government and to restore some rationality to the regulatory process.

For your review, I am enclosing a copy of the bill, a summary of its provisions and my introductory remarks.

Sincerely,


PAUL LAXALT
U.S. Senator

PL/cag
Enclosure

Mr. James Baker, III
Chief of Staff/Assistant to the President
The White House
Washington, D.C. 20500

STATEMENT OF
SENATOR PAUL LAXALT
INTRODUCING
THE REGULATORY REFORM ACT

MR. LAXALT. MR PRESIDENT, I RISE TODAY TO INTRODUCE THE "REGULATORY REFORM ACT" FOR MYSELF AND THE DISTINGUISHED SENATOR FROM VERMONT (MR. LEAHY), AND FOR A HOST OF OUR COLLEAGUES. AS THE BROAD SUPPORT FOR THIS BILL INDICATES, A MAJORITY OF THE SENATE, OF WHATEVER POLITICAL OR PHILOSOPHICAL STRIPE, BELIEVES THAT SIGNIFICANT CHANGES IN THE REGULATORY PROCESS ARE VITALLY NEEDED.

THOUGH THIS LEGISLATION IS STYLED AS A "REFORM" BILL, ITS PROPONENTS ARE ACTING -- UNFORTUNATELY -- WITHIN A TRADITION AS OLD AS THIS NATION. IN 1776, THE FOUNDERS COULD INDICT KING GEORGE III BECAUSE, IN THE WORDS OF THE DECLARATION OF INDEPENDENCE, "HE HAS ERECTED A MULTITUDE OF NEW OFFICES, AND SENT HITHER SWARMS OF OFFICERS TO HARASS OUR PEOPLE...."

MR. PRESIDENT, AT THE OUTSET I WISH TO ACKNOWLEDGE THE MAJOR CONTRIBUTION TO THIS BILL MADE BY THE SENATOR FROM VERMONT (MR. LEAHY) AND HIS CAPABLE STAFF. AS THE RANKING MINORITY MEMBER OF THE SUBCOMMITTEE ON REGULATORY REFORM, SENATOR LEAHY SHARES WITH ME A GENUINE COMMITMENT TO RESPONSIBLY DEALING WITH THE VERY SERIOUS PROBLEMS OF THE FEDERAL REGULATORY PROCESS. THOUGH WE EACH EMBRACE DIFFERENT PHILOSOPHIES OF GOVERNMENT, SENATOR LEAHY'S COOPERATION AND HIS DILIGENCE SERVED TO MAKE THE DRAFTING OF THIS BILL A TRUE PARTNERSHIP EFFORT.

UNDENIABLY, WE DIFFERED IN OUR APPROACH TO A NUMBER OF DISCRETE POLICY ISSUES. CONSEQUENTLY, THIS BILL EMBODIES A

SERIES OF REASONABLE COMPROMISES. I EXPECT THOROUGH DEBATE OF THESE ISSUES DURING BOTH COMMITTEE AND FULL SENATE CONSIDERATION OF THIS LEGISLATION. I STAND READY TO VIGOROUSLY PARTICIPATE IN THE AMENDMENT PROCESS AT EVERY LEVEL AS MAY BE NECESSARY.

MR. PRESIDENT, I MUST ALSO ACKNOWLEDGE THE LABORS OF OTHER COLLEAGUES IN THE DEVELOPMENT OF THIS BILL. THE DISTINGUISHED CHAIRMAN OF THE COMMITTEE ON GOVERNMENTAL AFFAIRS (MR. ROTH) AND HIS STAFF PLAYED A CENTRAL ROLE IN THE DRAFTING OF THE LEGISLATION. MY OWN CHAIRMAN ON THE JUDICIARY COMMITTEE, THE DISTINGUISHED SENATOR FROM SOUTH CAROLINA (MR. THURMOND), GUIDED OUR WORK AND ADVISED US AT EVERY STEP. UNDER THE LEADERSHIP OF THESE TWO CHAIRMEN, I ANTICIPATE NOT ONLY A FAIR AND ORDERLY AIRING OF DIFFERING VIEWS, BUT THE ULTIMATE PASSAGE OF REGULATORY REFORM LEGISLATION OF WHICH THE SENATE CAN BE PROUD.

IN A VERY REAL SENSE, THIS BILL IS A PRODUCT OF THE WHOLE SENATE. ITS PROVISIONS SPRING GENERALLY FROM THE EXTENSIVE DEBATES OF PAST CONGRESSES. ITS PROPOSALS HAVE BEEN SHAPED BY THE IDEAS ADVOCATED BY MANY OF OUR COLLEAGUES OVER THE YEARS. IN THE PROVISIONS FOR REGULATORY AND COST-EFFECTIVE ANALYSIS OF REGULATIONS WE SEE THE HANDIWORK OF THE DISTINGUISHED SENATORS FROM KANSAS (MR. DOLE), FROM ARIZONA (MR. DECONCINI), FROM WYOMING (MR. SIMPSON), FROM ALABAMA (MR. HEFLIN), AND FROM TEXAS (MR. BENTSEN). AND, OF COURSE, THE MODIFICATION TO THE LAW GOVERNING JUDICIAL REVIEW OF AGENCY ACTIONS HAS LONG BEEN PROPOSED BY OUR DISTINGUISHED COLLEAGUE FROM ARKANSAS (MR. BUMPERS).

FINALLY, MR. PRESIDENT, I WOULD BE REMISS NOT TO EXPRESS MY PERSONAL THANKS TO CONGRESSMEN KINDNESS, MCCLORY, AND MOORHEAD, TO THE HOUSE REPUBLICAN LEADERSHIP, AND TO THEIR EXTRAORDINARILY ABLE STAFF. TOO OFTEN, MEMBERS IN EITHER HOUSE OF THE CONGRESS TEND TO FORGET THE IMPORTANCE OF THE "OTHER BODY." FROM THE BEGINNING, WE WORKED WITH THESE GENTLEMEN TO TAKE ADVANTAGE OF THEIR IDEAS AND DRAFT A BILL WITH THE CONCERNS AND EXPERIENCE OF THE HOUSE IN MIND. CONSEQUENTLY, THIS BILL HAS BEEN SHAPED MOST BENEFICIALLY BY OUR LABORS TOGETHER. A HOUSE COMPANION TO THE BILL IS ALSO BEING INTRODUCED TODAY.

THE RATIONALE FOR REFORM

MR. PRESIDENT, AS WE INTRODUCE THE REGULATORY REFORM ACT AND BEGIN SENATE CONSIDERATION OF IT, WE MUST KEEP CLEARLY BEFORE US BOTH THE PROBLEMS THIS LEGISLATION ADDRESSES AND THE REMEDIES IT PROPOSES. "REGULATORY REFORM," AFTER ALL, IS A BROAD AND IMPRECISE TERM WHICH HAS BEEN APPLIED TO A VARIETY OF GOVERNMENT EFFORTS. CERTAINLY THE NEW POLICIES AND PROCEDURES FOR RULE MAKING IMPLEMENTED ADMINISTRATIVELY BY THE REAGAN ADMINISTRATION COMPRISE THE CUTTING EDGE OF REGULATORY REFORM, AS DOES THE APPOINTMENT OF NEW INDIVIDUALS TO FILL AGENCY POSTS. SIMILARLY, MODIFICATIONS TO THE VARIOUS ORGANIC STATUTES WHICH ESTABLISH THE AGENCIES AND AUTHORIZE THEIR RULE MAKING WILL BE THE MOST SIGNIFICANT LEGISLATIVE REGULATORY REFORM. FOREMOST AMONG SUCH EFFORTS WILL BE OUR WORK ON THE CLEAN AIR ACT UNDER THE LEADERSHIP OF THE DISTINGUISHED CHAIRMAN OF THE COMMITTEE ON THE ENVIRONMENT AND PUBLIC WORKS (MR. STAFFORD).

THIS BILL IS FOCUSED ON THE INFORMAL RULE MAKING PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT AND ON RELATED MATTERS. AS SUCH, THIS IS A PROCEDURAL MEASURE AND OCCUPIES ONLY A DISCRETE AREA OF THE REGULATORY REFORM LANDSCAPE. CONSEQUENTLY, THOUGH THE PROPOSALS IN THE BILL WILL GO FAR TO REMEDY SEVERAL SERIOUS PROBLEMS IN THE REGULATORY PROCESS, THIS BILL IS ONLY A FIRST STEP IN A BROAD REFORM MOVEMENT.

WHAT ARE THE SERIOUS PROBLEMS WE SEE IN THE REGULATORY PROCESS? THE DATA DEVELOPED BY SCHOLARS AND OTHER EXPERTS AS THEY EXAMINE THE PERFORMANCE OF AGENCIES OVER THE LAST DECADE RAISES THE FUNDAMENTAL QUESTION OF WHETHER THE AGENCIES ARE SATISFACTORILY FULFILLING THEIR MANDATE. INDEED, AS A 1978

CONCLUDED:

THE SOCIAL REGULATORY AGENCIES HAVE BEEN HAVING THE SUBSTANTIAL EFFECT, BUT NOT THAT DIRECTLY INTENDED IN THE LEGISLATION ESTABLISHING THEIR MANDATE. THEY HAVE ADDED TO COSTS OF PRODUCTION AND PRICES TO CONSUMERS, WITHOUT SIGNIFICANTLY ADDING TO THE HEALTH AND SAFETY OF PRODUCTION AND CONSUMPTION.

SIMILARLY, ECONOMIST PAUL MACAVOY CRITICIZED THE OVERALL PERFORMANCE OF FEDERAL AGENCIES IN A PAPER PRESENTED LAST DECEMBER BEFORE THE AMERICAN ENTERPRISE INSTITUTE. AFTER DESCRIBING THE COSTS OF REGULATION, MACAVOY OBSERVED:

ALTHOUGH NOT EASILY ACCOUNTED FOR IN DOLLAR GROSS NATIONAL PRODUCT, THE QUALITY OF WORKING CONDITIONS, PRODUCTS, AND THE ENVIRONMENT COULD BE IMPROVED ENOUGH TO BE "WORTH" THE HIGHER COSTS OF GOODS AND SERVICES. IN FACT, SUCH BENEFITS AS INTENDED BY LEGISLATION HAVE NOT BEEN WIDELY ACHIEVED. WATER QUALITY HAS IMPROVED IN CERTAIN RIVERS, AND HIGHWAY MORTALITY RATES HAVE FALLEN PER MILLION PASSENGER MILES, BUT EVEN IN THESE CASES OTHER FACTORS BESIDES REGULATION PLAYED THE COMMANDING ROLE IN IMPROVING CONDITIONS. ON THE WHOLE, THE RESULTS FROM WIDESPREAD USE OF RULES HAVE BEEN EXTREMELY LIMITED. BY THE END OF THE 1970'S, THE CONTROL SYSTEM HAD NOT BROUGHT ABOUT IMPROVEMENTS IN GENERAL HEALTH, SAFETY, AND ENVIRONMENTAL QUALITY.

AS A FINAL EXAMPLE, TWO STUDIES FROM 1976, REVIEWING THE OPERATION OF OSHA, RAISE THE QUESTION OF AGENCY EFFECTIVENESS. IN HIS CRISIS IN THE WORKPLACE: OCCUPATIONAL DISEASE AND INJURY, NICHOLAS ASHFORD CONCLUDED, "THE OSHA ACT HAS FAILED THUS FAR TO LIVE UP TO ITS POTENTIAL FOR REDUCING JOB INJURY AND DISEASE.... OSHA HAS HAD LITTLE MEASURABLE IMPACT IN REDUCING INJURIES AND DEATHS." ROBERT SMITH, IN HIS MORE STATISTICAL STUDY, SIMILARLY REPORTED THAT "THE ESTIMATED EFFECTS [OF OSHA] ON INJURIES ARE

SO SMALL THAT THEY CANNOT BE DISTINGUISHED FROM ZERO."

LINKED TO THIS QUESTION OF AGENCY EFFECTIVENESS IS THAT OF EXCESSIVE COMPLIANCE COSTS. SIMPLY PUT, IT APPEARS THAT THE GROWING BODY OF FEDERAL REGULATIONS HAS BEEN ACCOMPANIED BY AN IGNORANCE OF THE COMPLETE RANGE OF EFFECTS PRODUCED BY SUCH REGULATION, AND THAT THIS IGNORANCE HAS OFTEN RESULTED IN UNEXPECTED COSTS AND OTHER ADVERSE EFFECTS WHICH THREATEN TO UNDERMINE THE SALUTORY GOALS TO BE ACHIEVED BY APPROPRIATE REGULATION.

SEVERAL ESTIMATES OF THE AGGREGATE COMPLIANCE COSTS OF FEDERAL REGULATIONS HAVE BEEN DEVELOPED. IN 1977, FOR EXAMPLE, THE CHASE MANHATTAN BANK ESTIMATED THAT FEDERAL REGULATIONS COST THE NATION'S ECONOMY MORE THAN \$100 BILLION. THAT FIGURE TRANSLATED TO \$470 FOR EACH PERSON THEN LIVING IN THE UNITED STATES, 5% OF THE G.N.P., 25% OF THE WHOLE FEDERAL BUDGET, AND 75% OF THE ANNUAL PRIVATE INVESTMENT IN PLANTS AND EQUIPMENT. IN THE SAME YEAR, THE OFFICE OF MANAGEMENT AND BUDGET ESTIMATED THE COST OF FEDERAL REGULATION TO BE \$130 BILLION, OR \$2,000 FOR EVERY AMERICAN FAMILY.

THE VERY MAGNITUDE OF SUCH SUMS IS SO BEYOND OUR COMMON EXPERIENCE THAT THEIR TRUE IMPACT IS LOST ON US. BUT MAKE NO MISTAKE -- THE IMPACT OF THESE COSTS IS NOT LOST ON THE HEALTH OF THE ECONOMY OR ON THE LIVES OF THE AVERAGE AMERICAN. HOW DO WE TRANSLATE THESE BARE FIGURES INTO MEANINGFUL FACTS? CERTAINLY, FEDERAL REGULATION AGGRAVATES OUR ALREADY EXTREME RATE OF INFLATION BY IMPOSING COSTS ON THE PRIVATE SECTOR WHICH RAISE PRICES WITHOUT A CORRESPONDING RISE IN PRODUCTIVITY. INDEED, AS DR. JAMES MILLER, HEAD OF OMB'S NEW OFFICE OF INFORMATION AND REGULATORY

AFFAIRS, HAS NOTED, "REGULATION OFTEN HAS A GREATER EFFECT UPON CONSUMER WELFARE [THAN OTHER INFLATIONARY FACTORS] BECAUSE IT OPERATES DIRECTLY UPON THE REAL SUPPLY OF GOODS AND SERVICES."

THE AMERICAN PUBLIC SPENDS APPROXIMATELY \$60 BILLION ON FEDERAL PAPERWORK, MEANING, ACCORDING TO OMB, THAT MEETING FEDERAL PAPERWORK REQUIREMENTS TAKES A WORK FORCE LARGER THAN THE WHOLE STEEL INDUSTRY. OF COURSE, IT IS EASY TO CRITICIZE REGULATION WHEN WE FOCUS ON THE UNIVERSALLY ANNOYING MATTER OF PAPERWORK. YET EVEN IN AREAS WHERE MOST WOULD RECOGNIZE THE NEED FOR SOME GOVERNMENT ACTIVITY, THE FEDERAL REGULATORY MACHINE HAS GONE TOO FAR, UNDERMINING THE GOALS THAT MACHINE WAS DESIGNED TO ACHIEVE.

DUE TO FEDERAL REGULATIONS, FOR EXAMPLE, IT IS NOW ESTIMATED TO TAKE \$54 MILLION AND TEN YEARS TO BRING A NEW DRUG TO MARKET. THIS RESTRAINT ON DRUG RESEARCH AND DEVELOPMENT PUT THE UNITED STATES BEHIND OTHER, SUPPOSEDLY LESS DEVELOPED NATIONS IN INTRODUCING NEW LIFE SAVING DRUGS. IN ADDITION, THIS REGULATION WAS RESPONSIBLE FOR ABOUT ONE-THIRD OF THE INCREASE IN COSTS FOR PHARMECEUTICALS BETWEEN 1960 AND 1975.

IN A MORE MUNDANE ARENA, FEDERALLY MANDATED SAFETY AND ENVIRONMENTAL FEATURES INCREASED THE PRICE OF THE AVERAGE CAR BY \$666 IN 1978. SIMILARLY, IT WAS ESTIMATED THAT IN 1977 GOVERNMENT REGULATIONS ADDED BETWEEN \$1,500 AND \$2,500 TO THE COST OF A NEW HOUSE.

YET THE BROAD AND SERIOUS CONSEQUENCES OF OUR REGULATORY POLICIES CANNOT BE ACCURATELY EXPRESSED BY ONE SET OF NUMBERS. EXAMINE THE IMPACT OF REGULATORY COMPLIANCE COSTS ON ENERGY PRODUCTION AND PRICES. ONE ILLUSTRATIVE STUDY BY THE COLORADO-

UTE ELECTRIC ASSOCIATION SHOWED THAT FOR THE TWELVE MONTH PERIOD ENDING ON JUNE 30, 1978, THE COST OF COMPLYING WITH FEDERAL REGULATION FOR ALL COLORADO-UTE'S STEAM GENERATING STATIONS WAS 34.6% OF THE TOTAL PRODUCTION COSTS FOR THOSE STATIONS. AND COLORADO-UTE'S EXPERIENCE IS REPEATED ALL ACROSS THE COUNTRY.

SUCH COSTS ARE OBVIOUSLY PASSED ON TO THE CONSUMER IN HIGHER ENERGY PRICES, WITH SERIOUS RESULTS. AS A JUNE 1980 REPORT OF DOE OBSERVED:

THE IMMEDIATE EFFECT OF RISING ENERGY COSTS HAS BEEN A LOSS OF INCOME TO PURCHASE THE OTHER NECESSITIES OF LIFE--SHELTER, FOOD, HEALTH CARE-- THE COSTS OF WHICH HAVE ALSO RISEN SHARPLY. THE CONTINUED ESCALATION OF HOME ENERGY COSTS HAS HAD A DRAMATIC IMPACT ON THE GENERAL PURCHASING POWER OF THE POOR....THUS, FOR THE PERIOD 1978-1980 NEARLY \$14 BILLION HAS BEEN TAKEN FROM THE POCKETS OF THE MOST ECONOMICALLY DISADVANTAGED SEGMENT OF OUR SOCIETY DUE SOLELY TO INCREASED ENERGY PRICES.

THIS REPORT GOES ON TO CONCLUDE THAT CONTINUING COST INCREASES "COULD JEOPARDIZE THE HEALTH AND SAFETY OF THE POOR AND ELDERLY OF OUR NATION."

YET, MR. PRESIDENT, IN TRACKING DOWN THE PERVASIVE EFFECTS OF REGULATION WE CANNOT STOP AT SUCH QUANTIFIABLE COSTS, FOR WHAT ARE TERMED THE "INDUCED" EFFECTS OF REGULATION HAVE SERIOUS IMPLICATIONS FOR THE FUTURE WELL-BEING OF THIS COUNTRY. IN HIS COSTS OF REGULATION AND BENEFITS OF REFORM, DR. MURRAY WEIDENBAUM, CHAIRMAN OF THE COUNCIL OF ECONOMIC ADVISORS, DISCUSSES THESE INDUCED EFFECTS, SUCH AS THE REDUCED RATE OF NEW PRODUCT INTRODUCTION DUE TO THE INCREASED USE OF PRIVATE RESEARCH AND DEVELOPMENT BUDGETS TO MEET REGULATORY REQUIREMENTS. LIKEWISE, THE DIVERSION OF FUNDS FROM NEW CAPITAL INVESTMENT TO COMPLIANCE

WITH GOVERNMENT-MANDATED SOCIAL REQUIREMENTS HAS A SIGNIFICANT IMPACT ON PRODUCTIVITY. FOR EXAMPLE, EDWARD DENISON OF THE DEPARTMENT OF COMMERCE ESTIMATED THE LOSS OF PRODUCTIVITY DUE TO INVESTMENTS IN ENVIRONMENTAL AND JOB SAFETY REQUIREMENTS AT ABOUT ONE-FOURTH OF THE POTENTIAL AVERAGE ANNUAL INCREASE IN PRODUCTIVITY.

ALL THIS IS NOT EVEN TO BEGIN TO ADDRESS THE EFFECTS OF GOVERNMENT REGULATION ON THE BASIC ENTREPRENEURIAL NATURE OF THE PRIVATE ENTERPRISE SYSTEM. IN THE WORDS OF DR. WEIDENBAUM,

THE ULTIMATE COSTS OF EXCESSIVE GOVERNMENT INVOLVEMENT IN THE ECONOMY ARE NOT ALWAYS VISIBLE BUT SURELY ARE POWERFUL--THE FACTORIES THAT ARE NOT BUILT, THE JOBS THAT ARE NOT CREATED, THE GOODS AND SERVICES THAT ARE NOT PRODUCED, AND THE INCOMES THAT ARE NOT GENERATED. THESE EFFECTS HAVE FORMIDABLE IMPACT ON OUR STANDARD OF LIVING AND OUR QUALITY OF LIFE.

ON TOP OF ALL THESE CONCERNS, WE, AS GOVERNMENT OFFICIALS, MUST APPRECIATE THE EFFECT OF REGULATION ON THE CONFIDENCE AMERICAN CITIZENS PLACE IN THEIR GOVERNMENT AND ON THE RESPECT WHICH THEY ACCORD TO IT. OVER 2.2 MILLION PEOPLE RESPONDED TO A RECENT QUESTIONNAIRE DEVELOPED BY THE CONGRESSIONAL RESEARCH SERVICE ON ATTITUDES TOWARD FEDERAL REGULATION. EIGHTY-TWO PERCENT FELT THAT FEDERAL REGULATIONS WERE NOT FAIR TO THE PEOPLE AFFECTED BY THEM. OVER NINETY-FOUR PERCENT AGREED THAT PRODUCTS "COST MORE" BECAUSE OF FEDERAL REGULATIONS. NINETY-FIVE PERCENT FELT THAT MOST FEDERAL REGULATIONS ARE "COMPLICATED AND CONFUSING" AND OVER SEVENTY-FIVE PERCENT BELIEVED THAT THE COST OF DEVELOPING AND ENFORCING FEDERAL REGULATIONS WAS "SELDOM" JUSTIFIED. FINALLY, EIGHTY-TWO PERCENT OF THOSE RESPONDING WERE NOT CONFIDENT THAT WHEN NEW

REGULATIONS WERE ISSUED THEY WERE BASED ON PROVEN FACT.

THE "ROAD TO REFORM"

SO WHAT ARE WE, AS THE FUNDAMENTAL POLICY MAKERS OF THIS NATION, TO DO? I WOULD FIRST OBSERVE THAT MY DISCUSSION OF THE INEFFECTIVENESS AND COSTS OF FEDERAL REGULATION IS NOT BY ANY MEANS AN INDICTMENT OF ALL GOVERNMENT INVOLVEMENT IN THE "PRIVATE" SECTOR NOR DOES IT IMPUGN THE REAL BENEFITS ACHIEVED BY APPROPRIATE REGULATION. YET FOR OVER A DECADE PUBLIC DEBATE HAS FOCUSED ON THE PUTATIVE BENEFITS OF REGULATION. AS THE PRICE TAG FOR THE POLICIES OF THE PAST COMES DUE, WE MUST ASK WHETHER THE AMERICAN PEOPLE HAVE BEEN WELL-SERVED BY THOSE POLICIES. MERELY HAULING OUT SLOGANS TO BERATE AND INTIMIDATE THOSE ENGAGED IN PUBLIC DISCOURSE ON THIS MATTER ONLY FORCES OUR PUBLIC POLICY TO ACT AS IF EXISTENCE ON THIS PLANET IS NOT ENCUMBERED BY SCARCE RESOURCES, BUT DOES NOT CHANGE THAT CRUEL FACT. THE SOCIAL GOALS OF OUR POLICIES CAN ONLY BE UNDERMINED BY A FAILURE TO USE OUR RESOURCES WISELY.

THIS CATALOG OF WOES DOES REMIND US THAT REGULATION BY ADMINISTRATIVE AGENCY IS NOT THE ONLY, OR EVEN THE UNIVERSALLY PREFERRED MECHANISM OF GOVERNMENT INVOLVEMENT IN THE PRIVATE SECTOR. THAT FUNDAMENTAL POLICY MATTER IS BEYOND THE COMPETENCE OF THE SUBCOMMITTEE ON REGULATORY REFORM, BUT MUST BE ADDRESSED BY OTHER BODIES OF THE SENATE WHEN WE CONSIDER CHANGES TO VARIOUS ORGANIC STATUTES.

YET THESE OBSERVATIONS OF THE PERFORMANCE OF OUR REGULATORY SYSTEM DO SUGGEST SOME CRITICAL WEAKNESSES IN THAT SYSTEM. AS FRED THOMPSON AND LARRY JONES, WRITING IN THE WINTER 1980 NUMBER OF THE CALIFORNIA MANAGEMENT REVIEW, NOTED:

IT IS LIKELY THAT FEDERAL REGULATORY DECISIONS ARE WORSE, PERHAPS MUCH WORSE, THAN OTHER KINDS OF GOVERNMENT DECISIONS. THIS IS BECAUSE THE COST OF REGULATION IS A COST OF GOVERNMENT, BUT IT IS NOT TREATED AS A COST TO GOVERNMENT. CONSEQUENTLY, THE INTERNAL CHECKS THAT WORK TO PROMOTE EFFICIENCY AND EFFECTIVENESS IN GOVERNMENT ARE NOT FULLY OPERATIVE WHERE REGULATION IS CONCERNED; IN SOME CASES, THEY MAY EXACERBATE THE PROBLEM.

I BELIEVE THAT THE BASIC POLICY WE MUST EMBRACE IS CLEAR. I CAN FIND NO BETTER ARTICULATION OF THAT POLICY THAN THE WORDS OF OUR COLLEAGUE, THE DISTINGUISHED SENATOR FROM TEXAS (MR. BENTSEN), WRITING AS CHAIRMAN OF THE JOINT ECONOMIC COMMITTEE IN A JUNE 1980 STAFF STUDY PUBLISHED BY THAT COMMITTEE. AS THE SENATOR LUCIDLY OBSERVED:

GOVERNMENT REGULATION FOR TOO LONG HAS BEEN CAST IN A PURELY SOCIAL ROLE AS THOUGH IT SHOULD BE QUARANTINED FROM ECONOMIC SCRUTINY. NO PART OF THE AMERICAN EXPERIENCE CAN BE AFFORDED THAT LUXURY OF DISREGARDING OTHER CRUCIAL ELEMENTS OF THIS NATION'S QUALITY OF LIFE.

REGULATION CANNOT ABIDE APART FROM ALL OTHER CONSIDERATION; IT MUST BE A PART OF THE OVERALL STRATEGY TO IMPROVE LIVING STANDARDS. LEFT AS A DETACHED FEATURE OF GOVERNMENT, THE REGULATORY NETWORK SMOTHERS ECONOMIC OPPORTUNITY.

TO PROPERLY EVALUATE ITS TOTAL IMPACT, GOVERNMENT REGULATION MUST BE VIEWED AS BOTH A SOCIAL AND ECONOMIC ISSUE; SOCIAL BECAUSE MOST REGULATION WAS DESIGNED TO BRING ABOUT CLEANER AIR AND WATER, SAFER JOBS, AND AN IMPROVED QUALITY OF LIFE; ECONOMIC BECAUSE THESE SOCIAL AMIBITONS COMMAND HUGE AND PREVIOUSLY UNCOUNTED AMOUNTS OF THE NATION'S RESOURCES.

THE "REGULATORY REFORM ACT" EMBODIES THIS POLICY. ITS PROVISIONS ARE DESIGNED TO CONSTRUCT WITHIN THE REGULATORY PROCESS A MECHANISM BY WHICH REGULATORS WILL RATIONALLY EVALUATE ALL ASPECTS OF A PROPOSED REGULATION. THIS LEGISLATION IS INFORMED BY A CONCLUSION AKIN TO THAT MADE BY ROBERT CRANDALL, A SENIOR FELLOW AT THE BROOKINGS INSTITUTION, WRITING IN THE WINTER 1979 NUMBER

THE BROOKINGS BULLETIN:

THE SINGLE MOST IMPORTANT PROBLEM THAT PERVADES HEALTH, SAFETY, AND ENVIRONMENTAL REGULATION IS THE ABSENCE OF A MECHANISM TO COMPEL THE REGULATORS TO EXAMINE THE ECONOMIC TRADEOFFS AMONG DIFFERENT WAYS OF ACHIEVING A GIVEN REGULATORY GOAL.....

SINCE FEW CITIZENS CAN POSSIBLY KNOW HOW MUCH ALTERNATIVE POLICIES WILL COST THEM IN TERMS OF REDUCED RESOURCES FOR BUYING FOOD, SHELTER, OR MEDICAL CARE, THE DECISION THAT WOULD MINIMIZE THE ECONOMIC COST OF SOCIAL REGULATION IS SELDOM THE ONE THAT APPEARS POLITICALLY MOST PRUDENT TO THE AGENCY ADMINISTRATOR. HE OFTEN ENDS UP CHOOSING A NEEDLESSLY EXPENSIVE REGULATION OR A VERY TIGHT STANDARD THAT COULD NOT BE JUSTIFIED BY ITS BENEFITS AND COSTS. ONLY BY CHANGING THE INCENTIVES FACING AN ADMINISTRATOR, OR BY INFORMING THE ELECTORATE OF HIS PROFLIGACY, CAN MORE SENSIBLE REGULATION BE ACHIEVED.

MR. PRESIDENT, AT THIS TIME I WILL NOT DETAIL ALL OF THE PROVISIONS OF THIS BILL. IN ESSENCE, IT MANDATES A PROCEDURE, AS PART OF THE RULE MAKING PROCESS, WHICH WOULD REQUIRE AGENCIES TO IDENTIFY AND EVALUATE THE TRADEOFFS INHERENT IN ANY REGULATION. THIS SORT OF ANALYSIS HAS ITS ANTECEDENT IN AN EXECUTIVE ORDER FIRST PROMULGATED IN THE FORD ADMINISTRATION REQUIRING AGENCIES TO PUBLISH AN "INFLATION IMPACT STATEMENT" WITH EACH NEW REGULATION. PRESIDENT REAGAN'S RECENT EXECUTIVE ORDER 12291, MANDATING A "REGULATORY IMPACT ANALYSIS" FOR REGULATIONS, IS THE MOST CURRENT ADMINISTRATIVE EXPRESSION OF THIS DEVICE. TO A GREAT DEGREE THIS LEGISLATION CODIFIES AND GIVES UNIFORM APPLICATION TO THE POLICIES EMBODIED IN EXECUTIVE ORDER 12291. FURTHERMORE, BY ENACTING THIS PROCEDURE IN A STATUTE, WE ENSURE AGENCY COMPLIANCE TO AN EXTENT NOT ACHIEVED BY EXECUTIVE FIAT.

THE KEY TO THIS BILL IS THE REQUIREMENT THAT AGENCIES DESCRIBE AND ANALYZE THE BENEFITS, COSTS, AND OTHER ADVERSE EFFECTS OF

EACH NEW REGULATION. IN SPITE OF THE USE OF THE WORDS "BENEFITS" AND "COSTS," IT IS IMPORTANT TO NOTE THAT THIS REQUIREMENT IS NOT IN ANY SENSE A "STRICT COST-BENEFIT ANALYSIS." THESE PROVISIONS HAVE TRADITIONALLY BEEN TERMED A "REGULATORY ANALYSIS" BECAUSE, UNLIKE "COST-BENEFIT ANALYSIS," THEY DO NOT REQUIRE AGENCIES TO QUANTIFY EVERY EFFECT OF REGULATION. RATHER, AN AGENCY IS REQUIRED TO IDENTIFY AS PRECISELY AS POSSIBLE THE BROAD RANGE OF EFFECTS OF A REGULATION, INCLUDING THOSE WHICH CANNOT BE DESCRIBED IN NUMBERS. THUS, THIS PROVISION RECOGNIZES THAT MANY OF THE THINGS WE HOLD MOST DEAR, AND SEEK TO PROTECT BY FEDERAL REGULATION, ARE NOT READILY SUSCEPTIBLE TO EXPRESSION IN QUANTATIVE TERMS.

CERTAINLY, IDENTIFYING THE LIKELY EFFECTS OF A REGULATION IS A DIFFICULT EXERCISE. YET AS PROFESSOR WILLIAM RODGERS WRITES IN A RECENT ISSUE OF THE HARVARD ENVIRONMENTAL LAW REVIEW, "DESPITE THESE DIFFICULTIES, IDENTIFICATION AND CLASSIFICATION OF THE EXPECTED EFFECTS IF A USEFUL EXERCISE, AND ARGUABLY ESSENTIAL TO RATIONAL DECISION MAKING."

REGULATORY ANALYSIS IS NOT EASY, IT IS TRUE; BUT THE ALTERNATIVE IS FOR REGULATORY DECISIONS TO BE MADE IN SECRET OR IN IGNORANCE. THESE ANALYTICAL REQUIREMENTS ARE A RESPONSE TO A COMMON CRITICISM OF THE REGULATORY PROCESS, SUCH AS THAT RECENTLY VOICED BY DR. LESTER LAVE OF THE BROOKINGS INSTITUTION:

"INDEED, REGULATORY DECISIONS HAVE BEEN TREATED FAR TOO CASUALLY TO DATE, WITH GUESSES BEING SUBSTITUTED FOR OBSERVABLE FACTS AND LITIGATION BEING USED TOO OFTEN AS A DEVICE FOR DELAY OR THE FORUM FOR CLARIFYING SCIENTIFIC ISSUES."

YET SAYING THIS IS NOT TO CLAIM THAT REGULATORY ANALYSIS

WILL REMOVE ALL UNCERTAINTY FROM THE REGULATORY PROCESS. MANY REGULATORY DECISIONS IN ESSENCE MUST BE BASED ON THE PERSONAL STANDARDS OF RISK AVERSION OF THE DECISION MAKERS. BUT AGENCIES ARE DESIGNED, AND THIS ANALYSIS AIMS, TO ENSURE THAT THE PUBLIC POLICIES PROMULGATED IN REGULATIONS ARE BASED ON GENUINELY EXPERT AND UNBIASED JUDGMENTS FAIRLY RENDERED IN A PUBLIC PROCESS. AGAIN QUOTING DR. LAVE:

ALL OF THE UNCERTAINTY MUST BE DESCRIBED AND DISPLAYED IN THE FINAL ESTIMATES OF RISK. BY DOING THIS, DECISION MAKERS CAN DECIDE HOW PRUDENT THEY WOULD LIKE TO BE. FURTHERMORE, THIS PROCEDURE IDENTIFIES THE MOST IMPORTANT UNCERTAINTIES, PROVIDING A FOCUS FOR FUTURE RESEARCH AND INDICATING HOW NEW RESULTS CAN BE INTEGRATED INTO EXISTING EVIDENCE.

IN ADDITION TO THE TECHNICAL BENEFITS TO BE GAINED BY SUCH ANALYSIS, IT IS VITALLY IMPORTANT THAT REGULATION MAKING, WHICH IS LAW MAKING WITH THE SAME PRACTICAL EFFECT AS THE LEGISLATING DONE BY CONGRESS, BE A SUBJECT OF PUBLIC SCRUTINY. REGARDLESS OF HOW WELL-MEANING THEY MAY BE, AGENCY BUREAUCRATS ARE UNELECTED OFFICIALS. THOUGH THEORETICALLY THEY ARE ACCOUNTABLE TO THE CONGRESS, AND THROUGH CONGRESS TO THE AMERICAN PEOPLE, THE MORE DIRECT PUBLIC ACCOUNTABILITY WHICH WOULD RESULT FROM THE PROCEDURES OF THIS BILL IS APPROPRIATE IN REPUBLICAN GOVERNMENT, AND SERVES TO INCREASE CONFIDENCE OF ALL CITIZENS IN THEIR GOVERNMENT.

THE REGULATORY ANALYSIS REQUIRED BY THIS BILL PROVIDES FOR THE FULL PARTICIPATION OF INTERESTED MEMBERS OF THE PUBLIC IN BOTH IDENTIFYING THE EFFECTS OF A PROPOSED REGULATION AND IN FORMULATING ALTERNATIVES TO IT. BASED ON THE INFORMATION GATHERED IN THIS PROCESS, AND AS PART OF THE WHOLE RULE MAKING, THE AGENCY MUST PUBLISH WITH THE FINAL RULE ITS DETERMINATION THAT THE BENEFITS

OF THE RULE WILL JUSTIFY ITS COSTS, AND THAT, OF ALL THE ALTERNATIVES CONSIDERED DURING THE RULE MAKING, THE RULE IS THE MOST COST-EFFECTIVE MEANS OF ACHIEVING THE REGULATORY OBJECTIVES. THIS DETERMINATION IS AN IMPORTANT PART, BUT ONLY ONE PART, OF THE PROCESS OF RULE MAKING CONTEMPLATED UNDER THIS BILL. THE INFORMATION PUBLISHED DURING THE RULE MAKING ILLUMINATES THE PROBLEMS WHICH CONFRONT AN AGENCY IN REGULATING AND THE PROCESSES BY WHICH IT GOES ABOUT TO RESOLVE THOSE PROBLEMS.

THE WORD "JUSTIFY" WAS CHOSEN TO PRESERVE A CERTAIN FLEXIBILITY FOR AGENCY DECISION MAKING AND TO ENSURE THAT THE JUDGMENT OF THE AGENCY COULD EMBRACE THE BROAD VARIETY OF ELEMENTS INHERENT IN ANY REGULATORY DECISION. BY THE SAME TOKEN, THE AGENCY'S DETERMINATION CONCERNING THE RELATIONSHIPS OF THE EFFECTS OF REGULATION IS TO BE BASED ON THE REASONABLE JUDGMENT OF THE AGENCY. THIS FORMULATION IS AKIN TO THE VERY FAMILIAR "REASONABLE MAN" STANDARD IN TORT LAW APPLIED BY THE COURTS TO DETERMINE IF A PERSON HAS ACTED NEGLIGENTLY. THUS, IN EVALUATING AN AGENCY DETERMINATION UNDER THE PROVISIONS OF THIS BILL, ONE WOULD ASK: WOULD A REASONABLE PERSON LOOKING AT THE RECORD BEFORE THE AGENCY AGREE WITH THE AGENCY THAT THE BENEFITS OF A PROPOSED REGULATION WERE WORTH ITS COSTS? ?

CERTAINLY, THIS PROVISION IS HARDLY A DRACONIAN BURDEN ON AGENCIES. THE WEIGHING OF TRADEOFFS IS A PROCESS WHICH ANY RATIONAL PERSON, WHETHER AN INDIVIDUAL OR A BUSINESS, GOES THROUGH TO CHOOSE BETWEEN ALTERNATIVE COURSES OF ACTION. UNLESS ONE WOULD SAY THAT ALL AGENCIES BEHAVE IRRATIONALLY, FEDERAL AGENCIES AT PRESENT IMPLICITLY IDENTIFY AND ASSESS AT LEAST SOME OF THE EFFECTS OF PROPOSED REGULATIONS. PARAPHRASING THE TESTIMONY

OF DR. MILLER BEFORE THE HOUSE DURING THE LAST CONGRESS, THE IMPORTANT THING TO BEAR IN MIND IS THAT AGENCIES ONE WAY OR ANOTHER MUST MAKE DECISIONS. THE QUESTION IS WHETHER THE ANALYSIS PROPOSED IN THIS BILL CAN BE USED TO IMPROVE THE QUALITY OF THOSE DECISIONS. INFORMATION IS NEVER PERFECT, BUT THIS IS NOT TO SAY THAT LESS INFORMATION IS PREFERABLE TO MORE.

MR. PRESIDENT, I AM CONVINCED THAT THE PROCEDURES SET OUT IN THIS LEGISLATION WILL HELP AGENCIES TO MORE EFFECTIVELY USE OUR NATIONAL RESOURCES TO SATISFY THEIR STATUTORY MANDATES AND THEREBY DECREASE THE EXCESSIVE REGULATORY BURDENS WHICH CONSTRAIN OUR ECONOMIC PRODUCTIVITY. ROUGHLY BORROWING A COMMENT MADE BY A PRIVATE ATTORNEY, EXPERT IN ADMINISTRATIVE LAW, I WOULD CONCLUDE THAT RULES FORMULATED THROUGH THE PROCEDURES OF THIS LEGISLATION WILL BE BASED ON SOUNDER REASONING, SUSTAINED BY ECONOMIC ANALYSIS, WELL VENTILATED BEFORE THE PUBLIC, AND THUS LESS VULNERABLE OVER THE LONG-RUN TO THE CHANGING WHIMS OF POLITICAL EXPEDIENCY.

MR. PRESIDENT, I ASK UNANIMOUS CONSENT THAT THE SUMMARY OF THE PROVISIONS OF THIS BILL AND THE FULL TEXT OF THIS BILL APPEAR IN THE RECORD IMMEDIATELY FOLLOWING THESE REMARKS.

Summary of The Regulatory Reform Act

Introduction

The "Regulatory Reform Act of 1981" contains a series of amendments to certain provisions of the Administrative Procedure Act. This legislation is not intended to be a comprehensive "regulatory reform" bill, but is focused on the procedures for rule making and for judicial review of agency actions. It is expected that legislation addressing such areas as agency adjudication, agency subpoena power, and the role of administrative law judges will be developed for future consideration.

Overview

In brief, the major changes to the A.P.A. proposed in this bill--

- require agencies to evaluate on a non-mathematical basis the trade-offs of "major rules" and to determine that such rules are worth their costs and are cost-effective;
- allow oral presentations in major rule makings, including cross-examination where needed to resolve factual issues;
- require agencies to review major rules every ten years to determine if they should be revised or withdrawn;
- prohibit the courts from presuming that agency interpretations of law are valid and require agency factual determinations in rule making to have substantial support;
- address the "race-to-the-courthouse" problem in review of agency action by assigning a case randomly where review proceedings have been instituted in different courts within ten days of each other; and
- require agencies to publish a semi-annual agenda of regulatory actions.

Rule Making Provisions

Sections 2 and 3 of the bill amend the definitions and the "informal rule making" provisions of the A.P.A. (5 U.S.C. §§551, 553). The major amendments are:

- *Miller wld confine to this.* A "major rule" is defined as a rule, or a series of related rules, which will impose compliance costs of \$100 million, which will substantially increase prices or costs for wage earners, consumers, etc., or which will have significant adverse effects on employment, productivity, etc. (Bill pp. 2-3)
- "Benefit" and "cost" are defined to mean significant benefits and costs, including direct and indirect social benefits and costs. (Bill p. 3)

- In the notice of proposed rule making an agency must include:
 - a statement of the objectives of the rule,
 - a description of the substantive material on which the rule is based, and
 - a solicitation of proposals for alternatives to the rule. (Bill pp. 3-4)

- For a major rule making, the notice shall also include:
 - a description of the quantifiable and nonquantifiable benefits and costs of the proposed major rule;
 - a description of alternatives to the rule; and
 - except where another statute directs otherwise, an explanation of how the agency expects the benefits of the rule to justify its costs and why the rule is more cost-effective than the alternatives. (Bill pp. 5-6)

(Agency evaluations of the effects of a major rule are explicitly not required to be done mathematically.) (Bill p. 6)

- Interested persons are given sixty days to submit written comments on the proposed rule. For a major rule making, interested persons are also given an opportunity to make oral presentations. This may include cross-examination if requested to resolve a material issue of fact and if other procedures are inadequate to resolve such issue. (Bill pp. 6-7)

- In promulgating the final rule, the "statement of basis and purpose" must include:
 - a statement of the objectives of the rule;
 - a description of alternatives considered and the reasons for their rejection;
 - a legal memorandum showing that the rule is within the authority of the agency;
 - an explanation of the agency's factual conclusions; and
 - a description of the material on which the rule is based. (Bill p. 8)

- For a major rule, the statement of basis and purpose also includes:
 - a description and comparison of the benefits and costs of the rule; and
 - except where another statute directs otherwise, the agency's determination that the benefits of the rule justify its costs, and that the rule is more

cost-effective than the alternatives considered.
(Bill pp. 8-9)

- The analysis of the effects of a major rule cannot be contracted outside of the agency. However, data gathering can be contracted if the source is identified. (Bill p. 9)
- A file of the rule making, which is the record for review, must be maintained. The file includes the notice of proposed rule making, the statement of basis and purpose, and other documents of the rule making. (Bill pp. 9-10)
- Judicial review of the agency's descriptions and analyses of the effects of the rule and of the use of cross-examination is limited. A rule can be set aside only if an error in these areas violates three of the present standards for review (i.e., such error renders the rule "arbitrary;" such error violates a constitutional right; or such error amounts to the agency exceeding its statutory jurisdiction). (Bill pp. 10-11)

Regulatory Review Provisions

Section 4 of the bill adds a new section to the A.P.A. requiring agencies to review major rules every ten years. The major features of Section 4 are:

- One year after the effective date of this section, each agency must publish a schedule for review of existing major rules within a ten-year period. (Bill pp. 12-13)
- New major rules must be reviewed within ten years of their effective date. Amended major rules and major rules which have been reviewed must be reviewed ten years after their amendment or review. (Bill p. 13)
- The review is initiated by a notice which explains the proposed agency action, assesses the effects of the rule while it was in operation, determines if the rule is still a major rule, and invites suggestions for improvements in the rule. (Bill pp. 13-14)
- Pursuant to the review, the agency amends, rescinds, or renews the rule.
 - If the agency plans to amend or rescind the rule, the normal rule making procedures apply. (5 U.S.C § 553.)
 - If the agency plans to renew the rule without change, it must allow sixty days for public comment and publish the renewed rule with a determination that the rule continues to comply with the rule making provisions (5 U.S.C. § 553). (Bill p. 14)
- If it is impracticable for the agency to review a rule within ten years, the President or his designee may grant an extension for up to an additional 5 years. (Bill p. 15)

- If an agency fails to review a rule within the prescribed period, it must immediately publish a notice proposing to withdraw or renew the rule and complete rule making proceedings within 180 days. (Bill p. 15)

Judicial Review Provisions

Section 5 of the bill makes two major changes in the A.P.A. provision outlining the scope of judicial review of agency actions. They are:

- A court is prohibited from presuming that agency interpretations of law are valid. No burden of proof is shifted. (Bill p. 17)
- Agency factual determinations made during informal rule making must have substantial support in the rule making record. (Bill p. 16)

Venue ("Race-to-the-Courthouse") Provisions

Section 6 of the bill amends the venue provisions of the U.S. Code to deal with the so-called "race-to-the-courthouse" problem. Title 28 U.S.C. §2112 provides that when proceedings to review an agency order have been filed in two or more courts of appeals, the agency must file the record for review in the court where such proceedings were first filed. Though the filing of the record is not legally determinative of where venue lies, as a practical matter proceedings are rarely transferred from the court where the record has been filed.

Thus, parties often "race" to file a review proceeding in what they consider to be a favorable court. This bill essentially adopts a proposal of the Administrative Conference of the U.S. to randomly select a court when review proceedings have been instituted in two or more courts of appeals within ten days of each other. (Bill pp. 17-18)

Regulatory Agenda and Calendar Provisions

Section 7 of the bill adds a new section to the A.P.A. requiring agencies to publish an agenda of regulatory actions they expect to take.

- Each agency must publish an agenda in April and October of rules that the agency will be acting on during the following twelve months. (Bill p. 18-19)
- In May and November, the President or his designee must publish a calendar of major rules on which agencies will be acting in the following twelve months. (Bill p. 19)
- An agency may propose a major rule that was not included in an agenda if it publishes an explanation for the omission. (Bill p. 19)
- The provisions of this section are not subject to judicial review. (Bill p. 19)

S.

(NOTE.—Fill in all blank lines except those provided for the date, number, and reference of bill.)

*Paul
Lund*

IN THE SENATE OF THE UNITED STATES

Mr. Laxalt (for himself, Mr. Leahy, Mr. Thurmond, Mr. Roth, Mr. Biden, Mr. Eagleton, Mr. Robert C. Byrd, Mr. Bentsen, Mr. Mathias, Mr. Hatch, Mr. Dole, Mr. Simpson, Mr. East, Mr. Grassley, Mr. Denton, Mr. Specter, Mr. Percy, Mr. Stevens, Mr. Durenberger, Mr. Mattingly, Mr. Kennedy, Mr. Metzenbaum, Mr. DeConcini, Mr. Baucus, Mr. Heflin, Mr. Chiles, Mr. Nunn, Mr. Sasser, Mr. Fryor, Mr. Levin, Mr. Schmitt, Mr. Helms, Mr. Tower, Mr. Hatfield, Mr. Domenici, Mr. Weicker, Mr. Garn, Mr. Bumpers, Mr. Harry F. Byrd, Jr., Mr. Huddleston, Mr. Dodd, Mr. Goldwater, Mr. Lugar, Mr. Cochran, Mr. Jepsen, Mr. Kasten, Mr. Humphrey, Mrs. Kassebaum, Mr. Burdick, Mr. Hollings, Mr. Pell, Mr. Armstrong, Mr. Pressler, Mr. Wallop, Mr. Abdnor, Mr. D'Amato, Mr. Andrews, Mr. Symms, Mrs. Hawkins, Mr. Quayle, Mr. Hayakawa, Mr. Ford, Mr. Riegle, Mr. Dixon, Mr. Mitchell, Mr. Zorinsky, Mr. Johnston, Mr. Boren, Mr. Boschwitz, Mr. Heinz, Mr. Inouye, Mr. Nickles, and Mr. Matsunaga.)

introduced the following bill; which was read twice and referred jointly, by unanimous consent, to the Committees on the Judiciary and Governmental Affairs, with instructions that after one Committee orders the bill reported, the other shall have 30 days in which to report or be deemed discharged from further consideration.

A BILL

To amend the Administrative Procedure Act to require federal agencies to analyze the effects of rules to improve their effectiveness and to decrease their compliance costs; to provide for a periodic review of regulations; and for other purposes.

(Insert title of bill here)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. This Act may be cited as the "Regulatory Reform Act."

RULEMAKING PROCEDURES

Section 2. Section 551 of title 5, United States Code, is amended by adding at the end thereof the following new paragraphs:

"(15) 'emergency rule' means a rule that may be temporarily effective according to the provisions of subsection (b) of section 553 of this title without prior compliance with the provisions of subsections (c) through (g) of section 553 if the agency finds that a delay in the effective date of the rule would--

"(A) seriously injure an important public interest; or

"(B) seriously damage a person or class of persons without serving any important public interest;

"(16) 'major rule'--

"(A) means a rule or a series of closely related rules that causes or is likely to cause--

"(i) an annual effect on the economy of \$100,000,000 or more in direct and indirect enforcement and compliance costs;

"(ii) a substantial increase in costs or prices for wage earners, consumers, individual industries, Federal, State or local government agencies, or geographic regions; or

"(iii) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of enterprises whose principal places of business are in the United States to compete in domestic or export markets;

"(B) but does not mean --

"(i) a rule of particular applicability that approves or prescribes for the future rates, wages, prices, services or allowances therefor, corporate or financial structures or reorganizations therefor or accounting practices bearing on any of the foregoing, or a rule that involves the internal revenue laws of the United States;

"(ii) a rule that authorizes the introduction into commerce or recognizes the marketable status of a product or service that, pursuant to statute, could not lawfully be introduced into commerce

or marketed in the absence of the rule; or

"(iii) a rule that relates to the property or contracts of the Tennessee Valley Authority;

"(17) 'cost' or 'costs' means potential significant costs, including direct and indirect social costs and effects;

"(18) 'benefit' or 'benefits' means potential significant benefits, including direct and indirect social benefits and effects."

Section 3. Section 553 of title 5, United States Code, is amended to read as follows:

"(a) This section applies to every rule making except as provided in subsection (b).

"(b) (1) This section does not apply, except when notice or hearing is otherwise required by statute, to any--

"(A) rule to the extent that such rule involves a military or foreign affairs function of the United States;

"(B) rule relating exclusively to internal personnel rules and personnel practices of an agency;

"(C) interpretive rule, general statement of policy, or rule of agency organization, procedure, or practice, other than an interpretive rule or general statement of policy that has general applicability and would have a substantial impact on the substantive rights or obligations of persons outside the agency;

"(D) rule for which the agency for good cause finds that notice and public comment are unnecessary due to the routine nature of the matter or the insignificant impact of the rule; or

"(E) emergency rule.

"(2) In the case of a rule for which an agency makes a finding under subparagraph (D) of paragraph (1) of this subsection, the agency

shall publish the rule in the Federal Register with a statement of the finding of the agency under such subparagraph and the reasons therefor.

"(3) In any case in which an agency promulgates an emergency rule--

"(A) the agency shall publish the rule in the Federal Register with a statement which describes the emergency necessitating the promulgation of the rule, the reasons why the agency chose the rule promulgated as a response to the emergency, and the reasons why the agency was unable to comply with the provisions of subsections (c) through (g) of this section prior to the promulgation of the rule;

"(B) the agency shall comply with the provisions of subsections (c) through (g) of this section as soon as practicable after the promulgation of the emergency rule; and

"(C) the emergency rule may not be effective longer than a reasonable period necessary to complete agency compliance with subsections (c) through (g) of this section.

"(c) (1) Notice of proposed rule making shall be published in the Federal Register, unless each person subject thereto is named and personally served with notice or otherwise has actual notice thereof in accordance with law. Such notice shall include--

"(A) a statement of the time, place, and nature of the public rule making proceedings;

"(B) a statement of the specific statutory authority under which the rule is proposed and the specific Congressional intent sought to be achieved by the rule;

"(C) the proposed provisions of the rule, including a succinct statement of the need for, and the objectives of, the rule;

"(D) a statement that the agency seeks proposals from the public for alternative ways to accomplish the objectives of the proposed rule that are more effective or less burdensome than the

approach used in the proposed rule;

"(E) a description of the data, methodology, reports, studies, or other information upon which the agency plans to substantially rely in the rule making, and of the purposes for which the agency plans to rely on such information, including an identification of the authors or sources of such information;

"(F) a statement of where the file of the rule making proceeding maintained pursuant to subsection (f) of this section may be inspected or copies of the file may be obtained at a reasonable cost; and

"(G) a determination of whether the proposed rule is or is not a major rule and a short statement of the basis thereof.

"(2) When the agency publishes a notice of proposed rule making for a major rule, the agency shall also publish--

"(A) a description of the benefits of the proposed rule, including any beneficial effects that cannot be quantified; and an explanation of how the agency anticipates each such benefit will be achieved by the proposed rule, including a description of the persons or classes of persons likely to receive such benefits;

"(B) a description of the costs of the proposed rule, including any adverse effects that cannot be quantified; and an explanation of how the agency anticipates each such cost or adverse effect will result from the proposed rule, including a description of the persons or classes of persons likely to bear such costs or adverse effects;

"(C) a description of reasonable alternatives for achieving the identified benefits of the proposed rule, including alternatives that require no government action; that will accommodate differences between geographic regions; and that employ standards which permit the greatest flexibility in achieving the identified benefits of the proposed rule; and

"(D) except where the enabling statute pursuant to which the agency is acting directs otherwise, an explanation of how the benefits of the proposed rule are likely to justify the costs and adverse effects of the proposed rule, and an explanation of why the proposed rule is likely to substantially achieve the rule making objectives in a more cost-effective manner than the alternatives to the proposed rule.

"(3) An agency shall describe the nature and extent of the non-quantifiable benefits, costs, and effects of the proposed rule required to be described under paragraph (2) in as precise and succinct a manner as possible. The description of the benefits, costs, and adverse effects of a proposed rule required under paragraph (2) shall include a quantification or numerical estimate of the quantifiable benefits, costs, and effects. Such quantification or numerical estimate shall include an explanation of the margins of error involved in the quantification methods and in the estimates used. The agency evaluations of the relationship of the benefits of a proposed rule to its costs and adverse effects required by this section shall be clearly articulated in accordance with the provisions of this section. An agency is not required to make such evaluation primarily on a mathematical or numerical basis.

"(4) Any supplement to or modification or revision of the notice of proposed rule making that is significant shall be published by the agency in the Federal Register and shall contain the information required by this section.

"(d) (1) After publishing the notice of proposed rule making required by subsection (c) of this section, the agency shall give interested persons not less than sixty days to participate in the rule making through the submission of written data, views, arguments, and statements. The agency may use such other procedures as it determines are appropriate for

a particular rule making.

"(2) The agency, by timely notice in the Federal Register, shall extend the time for participation in the rule making for a period of not less than thirty days if--

"(A) such an extension is requested in writing by a participant whose personal rights or economic interests are directly and adversely affected by the proposed rule; and

"(B) such request is received by the agency no less than ten days before the sixty-day period for participation in the rule making has expired, unless this limitation is waived by the agency; provided that no extension of time need be granted if the administrative officer responsible for orderly participation in the proceeding makes a written finding that an extension of time is contrary to the public interest, transmits that finding to the participant requesting the extension, and publishes that finding in the Federal Register within ten days of the receipt of the request for an extension.

"(3) When the agency publishes a notice of proposed rule making for a major rule, the opportunity for participation in the rule making provided by paragraph (1) shall also include an opportunity to make oral presentations of data and information relevant to a significant controversy in the rule making. This opportunity for oral presentations shall include an opportunity for cross-examination only (i) when requested by interested persons for the resolution of material issues of fact and (ii) when other available procedures for the resolution of such issues, including oral and written rebuttal, are determined to be inadequate. The agency may establish reasonable procedures to regulate the course of oral presentations to ensure an orderly and expeditious proceeding.

"(4) When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

"(5) Nothing in this section authorizes the use of appropriated funds available to any agency to pay the attorney's fees or other expenses of persons participating or intervening in agency proceedings.

"(e)(1) Except for rules which grant or recognize an exemption or relieve a restriction, a final rule shall be published in the Federal Register not less than thirty days before its effective date. Publication of a final rule shall be accompanied by a statement of its basis and purpose, which shall include--

"(A) a statement of the need for, and the objectives of, the rule;

"(B) a description of each of the alternatives to the rule which were considered by the agency, and a statement of reasons why each alternative was rejected;

"(C) a memorandum of law supporting the determination of the agency that the final rule is within the authority delegated by law and consistent with Congressional intent;

"(D) a succinct explanation of how the factual conclusions upon which the rule is based are substantially supported in the rule making file, including a summary of the assessment made by the agency of the comments presented by the public; and

"(E) a description of the data, methodology, reports, studies, or other information upon which the agency is substantially relying in promulgating the final rule, and of the purposes for which the agency is relying on such information, including an identification of the author or sources of such information.

"(2) When a final major rule is published, the statement of basis and purpose shall also include--

"(A) a description and comparison of the benefits, costs, and adverse effects of the rule; and

"(B) except where the enabling statute pursuant to which the agency is acting directs otherwise, a reasonable determination, based

upon the rule making file considered as a whole, that the benefits of the rule justify the costs and adverse effects of the rule, and that the rule will substantially achieve the rule making objectives in a more cost-effective manner than the alternatives described in the rule making.

"(3) The preparation of the notice required by subsection (c), and the preparation of the statement of basis and purpose required by this subsection, including any description or analysis of the benefits, costs, and adverse effects of a proposed rule, shall only be performed by an officer or full-time employee of the agency. This requirement shall not apply to the gathering of information to be used in such notice or statement. If such information is gathered by a source outside of the agency, the agency shall specifically identify, in the notice of proposed rule making or in the statement of basis and purpose, the information gathered and such source, and shall describe the arrangement by which the information was procured by the agency, including the total amount of funds expended for such procurement.

"(4) In promulgating a final rule, the agency may not rely on any written material that was not identified in the notice of proposed rule making unless--

"(A) such material was placed in the rule making file; or

"(B) notice was otherwise given that the agency intends to take notice of information appearing elsewhere, and interested persons were given an adequate opportunity to comment upon such material prior to promulgation of the final rule.

"(f) (1) The agency shall maintain a public file for each rule making proceeding. The file and the material excluded from the file pursuant to paragraph (2) of this subsection shall constitute the rule making record for purposes of judicial review. Except as provided in paragraph (2) of this subsection, the file shall contain all the relevant matter before

the agency as a result of the rule making, including--

"(A) the notice of proposed rule making and any supplement to or modification or revision of such notice;

"(B) copies, or an identification of the place at which copies may be obtained, at a reasonable cost, of all studies and documentary material upon which the agency substantially relied in formulating the rule;

"(C) all written comments received on the proposed rule;

"(D) transcripts of any oral presentation or cross-examination taking place in the rule making;

"(E) all material that the agency by law is required to make public in connection with the rule making; and

"(F) any statement, description, or analysis required to be prepared by the agency in formulating the rule, including the statement of basis and purpose published by the agency with a final rule pursuant to subsection (e).

"(2) The file required by paragraph (1) of this subsection need not include any material that is exempt from public disclosure under section 552 (b) of this title if the agency includes in such file a statement that notes the existence of such material and the basis upon which such material is exempt from public disclosure under such section.

"(3) No court shall hold unlawful or set aside an agency rule because of--

"(i) an inadequacy in the statement required to be published pursuant to paragraphs (2) and (3) of section 553 (c) and paragraph (2) of section 553 (e), or

"(ii) a failure by the agency to afford an opportunity for cross-examination pursuant to subsection (d) (3) of this section, unless the court finds, upon review of the whole rule making record, that such inadequacy or failure renders the rule unlawful under Section 706(a)

(2) (A), (B), or (C) of this title.

"(4) Any analysis of a proposed or a final rule required by another provision of this title or by another statute may be included in the notice of proposed rule making and in the statement of basis and purpose published with a final rule under this section to the extent that such analysis satisfies, or is not inconsistent with, the requirements of this section.

"(g) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

REGULATORY REVIEW

Section 4. (a) Subchapter II of chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following new section:
"§560. Review of agency rules.

"(a)(1) Not later than nine months after the effective date of this section, each agency shall prepare and publish in the Federal Register for comment by interested persons a proposed schedule for the review, within a ten-year period beginning on the effective date of this section, of each major rule in effect on such date.

"(2) At least ninety days before publishing the proposed schedule in the Federal Register, each agency shall make the proposed schedule available to the President or an officer designated by him. Each proposed schedule shall contain a brief explanation of the reasons the agency considers each rule on the schedule to be a major rule and shall include a date set by the agency for the completion of the review of each such rule. The agency shall set a date for initiation of review of each item on the schedule in a manner to ensure the simultaneous review of related items and to achieve a reasonable distribution of reviews over the period of time covered by the schedule. The President or an officer designated by him may select additional rules to be reviewed pursuant to subsection (c) of this section.

"(3) Not later than one year after the effective date of this section, each agency shall publish in the Federal Register a final schedule for the review of the rules referred to in paragraphs (1) and (2). Each agency shall publish the response of the agency to comments received concerning the proposed schedule with the final review schedule.

"(4) Except where explicitly provided otherwise by statute or where an extension has been granted pursuant to subsection (f), each major rule that is in effect on the date of enactment of this section shall be

reviewed by the agency within ten years of the date of enactment of this section. Pursuant to such review, the agency shall determine to renew, amend, or rescind that rule.

"(b) (1) Except where explicitly provided otherwise by statute or where an extension has been granted pursuant to subsection (f), each major rule promulgated, amended, or otherwise renewed by an agency after the date of enactment of this section shall be reviewed by the agency within ten years of the date on which such a rule becomes effective. Pursuant to such review, the agency shall determine to renew, amend, or rescind that rule.

"(2) The President or an officer designated by him may select additional rules that were promulgated by an agency after the date of enactment of this section to be reviewed pursuant to subsection (c) of this section.

"(c) An agency shall publish in the Federal Register a notice of its proposed action regarding a rule being reviewed. The notice shall include--

"(1) an identification of the specific statutory authority under which the rule was promulgated and a determination of whether the rule continues to fulfill the intent of Congress enacting that authority;

"(2) an assessment of the benefits, costs, and adverse effects of the rule during the period in which it has been in effect;

"(3) an explanation of the proposed agency action with respect to the rule;

"(4) for a rule that the agency determines no longer falls within the definition of a major rule, or for a rule

that the agency proposes to renew with modifications that would exclude the rule from the definition of a major rule, an explanation of the determination or proposal; and

"(5) a statement that the agency seeks proposals from the public for modifications or alternatives to the rule which may accomplish the objectives of the rule in a more effective or less burdensome manner.

"(d) If an agency proposes to rescind or amend the rule, after issuing the notice required by this subsection the agency shall comply with the provisions of section 553 of this chapter; and the requirements of that section and related requirements of law shall apply to the same extent, and in the same manner, as in the case of a proposed agency action which is not taken pursuant to the review required by this section.

"(e) If an agency proposes to renew the rule without amendment, the agency shall--

"(1) give interested persons not less than sixty days after the notice required by this subsection to comment on the renewal; and

"(2) publish the renewed rule in the Federal Register at least thirty days prior to the date on which the renewal of the rule is to become effective with an explanation of the reasonable determination of the agency that the rule continues to comply with the provisions of subsection (e)(2)(B) of section 553.

"(f) (1) Any agency, which for good cause finds compliance with this section with respect to a particular rule to be impracticable during the period provided in subsection (a) or (b), may request the President, or an officer designated by him, to establish a period longer than ten years for the completion of the review of such rule. The President

or an officer designated by him may extend the period for review of a major rule to a total period of not more than fifteen years. Such extension shall be published in the Federal Register with an explanation of the reasons therefor.

"(2) An agency may, with the concurrence of the President or an officer designated by him, amend any schedule required by this section for the review of rules if such amendment is published in the Federal Register.

"(g) In any case in which an agency has not completed the review of a major rule within the period prescribed by subsections (a), (b), or (f), the agency shall immediately publish a notice proposing to withdraw or renew the rule under subsection (c), and shall complete proceedings pursuant to subsection (d) within 180 days of the date on which the review was required to be completed under subsections (a), (b), or (f)."

(b) The table of sections for such chapter is amended by inserting after the item relating to section 559 the following new item:

"560. Review of agency rules."

JUDICIAL REVIEW

Section 5. Section 706 of title 5, United States Code, is amended to read as follows:

"§706. Scope of review

"(a) To the extent necessary to decision and when presented, the reviewing court shall independently decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

"(1) compel agency action unlawfully withheld or unreasonably delayed; and

"(2) hold unlawful and set aside agency action, findings and conclusions found to be--

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

"(D) without observance of procedure required by law;

"(E) unsupported by substantial evidence in a proceeding subject to sections 556 and 557 of this title or otherwise reviewed on the record; or

"(F) without substantial support in the rule making file, viewed as a whole, for the asserted or necessary factual basis, as distinguished from the policy or legal basis, of a rule adopted in a proceeding subject to section 553 of this title; and

"(G) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

EFFECTIVE DATE

Section 8. (a) The amendments made by sections 2, 3, and 5 of this Act shall take effect on January 1, 1983, and shall apply to any rule making proceeding for which a notice of proposed rule making has been issued after such date.

(b) The amendment made by section 4 of this Act shall take effect six months after the date of enactment of this Act and shall apply according to the provisions thereof.

(c) The amendment made by section 6 of this Act shall take effect three months after the date of enactment of this Act and shall apply, according to the provisions thereof, to review proceedings instituted after such date.

(d) The amendment made by section 7 of this Act shall take effect six months after the date of enactment of this Act and shall apply according to the provisions thereof.

"(b) In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

"(c) In making determinations under clause (2)(C) of subsection (a) of this section, the court shall require that action by the agency is within the scope of the agency jurisdiction or authority on the basis of the language of the statute or, in the event of ambiguity, other evidence of legislative intent. In making determinations on other questions of law, the court shall not accord any presumption in favor of or against agency action."

VENUE

Section 6. Section 2112 of title 28, United States Code, is amended by deleting the last three sentences of subsection (a); redesignating subsections (b), (c) and (d) as subsections (c), (d) and (e), respectively; and inserting the following as new subsection (b):

"(b) (1) If proceedings have been instituted in two or more courts of appeals with respect to the same ~~order and the first such proceeding~~ proceeding was instituted more than ten days before the second, the record shall be filed in that court in which the proceeding was first instituted. If the first such proceeding was not instituted more than ten days before the institution of a second proceeding with respect to the same ~~order,~~ the agency, board, commission, or officer concerned shall promptly advise in writing the Administrative Office of the United States Courts that such multiple proceedings have been instituted. Pursuant to a system of random selection devised for this purpose, the Administrative Office thereupon shall select the court in which the record shall be filed. Upon notification of such selection, the agency, board, commission, or officer concerned shall promptly file the record in such court.

"(b) (2) Where proceedings have been instituted in two or more courts of appeals with respect to the same order and the record has been filed in one of such courts pursuant to paragraph (1), the other courts in which such proceedings are pending shall promptly transfer such proceedings to the court of appeals in which the record has been filed. Pending such transfer, any court in which a proceeding has been instituted shall have jurisdiction to grant preliminary relief. Any order granting such relief shall be subject to reconsideration in the court to which the proceeding is transferred.

"(b) (3) Any court in which a proceeding with respect to any order is pending, including any court selected pursuant to paragraph (1), may transfer such proceeding to any other court of appeals for the convenience of the parties or otherwise in the interest of justice."

REGULATORY AGENDA AND CALENDAR

Section 7. (a) Subchapter II of chapter 5 of title 5, United States Code, is further amended by adding at the end thereof the following new section.

"§561. Regulatory Agenda and Calendar

"(a) Each agency shall publish in the Federal Register in April and October of each year an agenda of the rules that the agency expects to propose, promulgate, renew, or withdraw in the succeeding twelve months. For each such rule, the agenda shall contain, at a minimum, and in addition to any other information by law--

"(1) a general description of the rule, including a citation to the authority under which the action is to be taken, or explanation of the specific Congressional intent to which its objectives respond;

"(2) a statement of whether or not the rule is a major rule within the meaning of paragraph 16 of Section 551 of this title;

"(3) an approximate schedule for the significant action dates relating

to the rule, including the dates for any notice of proposed rule making, hearing, and final action on the rule; and

"(4) the name, address, and telephone number of an agency official responsible for answering questions from the public concerning the rule.

"(b) The President or his designee shall publish in the Federal Register in May and November of each year a Calendar of Federal Regulations listing each of the major rules identified in the regulatory agendas published by agencies in the preceding months. Each rule listed in the Calendar shall be accompanied by a summary of the information relating to the rule that appeared in the most recent regulatory agenda in which the rule was identified.

"(c) An agency may propose or promulgate a major rule that was not listed in the regulatory agenda required by subsection (a) of this section only if it publishes with the rule an explanation of the omission of the rule from such agenda and otherwise complies with this section with respect to that rule.

"(d) Any determination by an agency concerning the applicability of this section to any action of the agency shall not be subject to judicial review."

(b) The table of sections for such chapter is amended by inserting at the end thereof the following new item:

"561. Regulatory Agenda and Calendar."