Presidential Power and the Politics of RARG

Susan J. Tolchin

ONE EVENING in early May 1979, Stuart Eizenstat, head of the White House Domestic Policy Staff, called the Office of the Federal Register and, in a highly unconventional move, stopped publication of interim regulations about to be issued by the Department of Energy. The regulations in question were designed to implement the coal conversion provisions of the Power Plant and Industrial Fuel Use Act of 1978. There was no disagreement between the White House and the Department of Energy on the underlying aim of the statute—to encourage industry to convert to alternate fuels, like coal, where the price of those fuels did not "substantially" exceed the cost of using imported oil. But there was disagreement between them, as it turned out, on the appropriate definition of the key term "substantially." Though the spread between their respective targets might have seemed minuscule, the extra costs involved, in aggregate, could have given a nudge to the economy's chronic high inflation.

Stuart Eizenstat stopped the regulations because they had not gone through what has come to be known as the RARG process. "They had started to," said Eizenstat in a telephone interview, "but the process had not been completed. When I was alerted to the inflationary potential of those regs, I wanted more of a chance to study them in detail."

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The incident represented an important step in the Carter administration's program for managing the regulatory process. It also represented a breakdown in that effort.

Executive Order 12044, issued in March 1978, requires all federal agencies (except those formally independent of presidential control) to conduct economic impact analyses of their proposed regulations, whenever these may have a substantial impact on the economy. Though the order assigns the Office of Management and Budget the task of ensuring that such analyses are conducted, extensive review of their content is undertaken only by the Regulatory Advisory Review Group (RARG). It is a highly selective oversight, at that, for RARG is expected to consider no more than ten to twenty new regulations a year, chosen on the basis of their inflationary impact—that is to say, costing industry more than $100 million a year or establishing a precedent that may eventually produce costs on that scale if followed through.

Established in January 1978, the Review Group includes representatives of every cabinet department (except Defense, State, and Treasury) and top figures in the Office of Management and Budget (OMB), the Council of Economic Advisers (CEA), the Environmental Protection Agency (EPA), and the Office of Science and Technology Policy. An executive committee, whose members are drawn from OMB, CEA, and two other agencies (one regu-

latory, the other economic) on a rotating basis, selects the particular regulations that will be examined by the group; and officials of the Council on Environmental Quality and the Domestic Policy Staff serve in an advisory capacity. The bulk of the analytical staff work is undertaken by economists from the Council on Wage and Price Stability (COWPS). CEA Chairman Charles Schultze, the original architect of RARG, serves as its official chairman, and his CEA colleagues seem to play the principal role in directing its activities. Participation by the other official members of the Review Group has varied considerably from one regulatory review to the next.

For the most part, the RARG process has worked without producing open conflict within the executive branch. But there have been formidable challenges from elsewhere—from members of Congress, as well as from special interest groups that have publicized their criticisms through the media and have initiated several lawsuits as well.

Clearly, RARG's modest success to date has depended almost entirely on President Carter's continuing personal interest and his willingness to exert his political muscle on its behalf. Every two weeks, White House aides send the President a memo updating the progress of the administration's regulatory management effort. "The administration has found that the fact that RARG is there to monitor the quality of the analyses has helped to improve them," noted Charles Schultze in testimony before the Senate Judiciary Committee in May 1979. Over the past year the RARG process has allowed White House economic advisers, backed by the President, to subject the most costly new regulations to extensive review and, through quiet interventions, to bring about reductions in their cost.

The Tightrope of Regulatory Management

As a management system, then, the RARG process has much to commend it. But as a political institution, it is in deep trouble. Its political vulnerability reflects two enduring controversies: the scope of the President's authority over the executive branch and the compatibility of White House intervention with the requirements of the Administrative Procedure Act.

It is apparent that, through the RARG process, the President hopes to establish hegemony over the regulatory actions of disparate agencies. It is equally clear that the process has been arranged to shield the President from political controversy by leaving the formal responsibility for particular decisions with the agency heads themselves. The challenge for the White House is to make the process serve these often divergent goals simultaneously.

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President Carter learned the political cost of direct personal intervention in a regulatory decision from his experience with the cotton dust rule in May 1978. The President publicly interceded to relax the standards chosen by Secretary of Labor Marshall (on the basis of proposals from the Occupational Safety and Health Administration) for maximum permissible levels of cotton dust in textile mills. The new standard came under intense criticism from labor unions, health groups, and industry—and, not surprisingly, most of the fire was aimed at Carter himself. Since then he has not intervened in a regulatory decision without covering his tracks.

White House officials claim that, before the Review Group was geared up, low-level bureaucrats were making the decisions but the White House itself—as the readiest focal point for public dissatisfaction—was being blamed for the consequences. The RARG process is designed to delineate the principal policy issues at stake in major regulatory initiatives as the White House economists see those issues. From there on, however, the idea is to keep public responsibility for decisions focused at the level of agency heads—thus shielding the President from subsequent political fallout.

One difficulty with the new strategy, though, comes when the agency head is as reluctant as the President to make an unpopular de-

cision. It is generally believed, for example, that Douglas Costle, EPA administrator, stalled the new coal emission standards in the hope that the President would personally make the decision. Eventually, when EPA finally announced a decision in late May of this year, it precipitated one of the most intense battles to date over a regulation subject to the RARG process. Taking up the fight for those who view the compromise formula as an unnecessary risk to health and safety, the Environmental Defense Fund has formally requested EPA to reconsider its decision—on the grounds that it reflected improper White House influence—and threatens to file suit as a last recourse. The claim is that off-the-record discussions with White House officials, continuing after the official public comment period had closed, violated the intent of the safeguard provisions for agency rulemaking in the Administrative Procedure Act.

The same argument has been used in two legal challenges to the formulation of strip mining regulations. In the first, environmentalists unsuccessfully sought an injunction to stop closed, off-the-record meetings between Charles Schultze and Secretary of the Interior Cecil Andrus (*Natural Resources Defense Council* v. *Charles Schultze*, U.S. District Court for the District of Columbia, January 26, 1979). Subsequently, in a case now pending in the same court, environmentalists are alleging that off-the-record consultations between CEA and Interior Department officials "significantly affected the decision-making process" (*National Wildlife Federation* v. *Cecil Andrus*).

RARG's Status

Defenders of the Regulatory Analysis Review Group argue that its interventions end at the close of the public comment period, at which time its report is filed and put on the public record. "The real oversight occurs when RARG is hammering out its report," said economist Tom Hopkins of the Council on Wage and Price Stability. "However, further intervention by presidential advisers such as the CEA or COWPS chairman [as distinct from RARG] is possible after the comment period."

"In the strip mining case," Hopkins continued, "RARG ended its involvement after filing its report, but the CEA felt the issue was important enough to warrant a follow-through on the three or four issues RARG had identified. CEA staff then worked with Department of Interior staff in the interest of seeing that the final result was in keeping with the RARG report."

It is clear that the RARG process is intended to end when the public comment period ends. But the evidence still suggests that it does not, since one could easily conclude that RARG actually operates as an arm of the CEA, staffed by COWPS. In that sense, RARG does indeed function after the comment period ends, despite its formal fade-out. Even those who argue the reverse admit that RARG is the foundation for White House involvement throughout the regulation-drafting process.

"Public interest" groups do not object to the fact of post-comment period meetings so much as to the secrecy of these meetings. If EPA and CEA officials are discussing the Clean Air Act, for example, environmentalists want to know what happened at those meetings—what new considerations were introduced—so that they can know whether to press for a reopening of the comment period and a full opportunity to respond. Moreover, they fear that legal challenges to the final decision will be much more difficult if all the considerations that went into it are not on the record available to the reviewing court. That is the basic reasoning behind the charge that such off-the-record meetings violate the standards of due process envisioned by the Administrative Procedure Act.

A different point is made by the Capitol Hill foes of RARG who frame the dispute in terms of an overextension of presidential power. "The Constitution never envisioned the President as super-regulator. Yet, now the President is rewriting the laws, by deciding which ones are important and which are not," argued one legislative aide. "Should the President have the power to rearrange national objectives? Can he decide not to enforce the Clean Air Act because of inflation and unemployment?"*

"Presidents who plead helplessness are not being entirely honest," said Jim Graham, a staff aide with the Senate Governmental Affairs Com-

*This quotation and others where the speaker is not identified come from officials who wished to remain anonymous.

mittee. "There are devices that enable the President to control the process. He can exert his influence through the budget or through hire-and-fire policy."

The White House, however, plainly finds these blunderbuss controls to be too unwieldy for the routine management of regulatory policy. But if the more extreme forms of control are legitimate, why should the subtler mechanisms of the RARG process be improper? In fact, the White House has discovered that there are very few legal precedents delineating the scope of direct presidential authority over the heads of executive branch agencies. Yet Carter would certainly not be the first President to claim authority to control the actions of all departments and agencies (except those with formal independent status). President Andrew Jackson, for example, dismissed two secretaries of the Treasury for refusing to carry out his policy toward the Bank of the United States. Jackson announced that he would continue to hire and fire secretaries of the Treasury until he found one who would do his bidding. "A Secretary," he said, "is merely an executive, an agent, a subordinate." In the end, Jackson had his way on banking policy, despite intense opposition from the Congress.

The argument can be readily applied to the current controversy over RARG. Since all agency decisions are ultimately made behind closed doors, and since agencies are part of the executive branch of government, what difference does it make whether the President intercedes early or late in the process of executing the laws? Among White House advocates of presidential power in the regulatory process, this is informally referred to as the "one big happy family theory." Those who subscribe to it argue that post-comment meetings need not be public because White House advisers and agency heads are part of the same team.

An unpublished memorandum from the Justice Department's Office of Legal Counsel, prepared in January 1979 for Interior Secretary Andrus, supports this view. The memo deals with the legality of consultations between the CEA and the Department of the Interior over rulemaking hearings under the Surface Mining Control and Reclamation Act (the strip mining act). It concludes—not surprisingly, since the Justice Department is also part of the executive branch—that in rulemaking hearings there is "no prohibition against communications within the Executive Branch after the close of the comment period on these proposed rules. Nothing in the relevant statutes or in the decisions of the D.C. Circuit suggests the existence of a bar against full and detailed consultations between those charged with promulgating the rules and the President's advisers."

The Policy Impact of RARG

Until a full-fledged court case puts the RARG process to the test, it is unlikely that we will know the full extent of White House involvement in agency decisions. But it is already clear that the pattern has varied somewhat according to the responsiveness of the agency involved. In some cases, it seems that the mere awareness of White House interest has been sufficient to influence a decision; in others, more solid brokering has had to go on to affect the outcome; and in still others (as with the Department of Energy), RARG has been ignored until a direct contest of power has occurred.

Even agencies that are influenced by the RARG process nevertheless point out that the influence may not be so great as it appears. Roy Gamse, an EPA staff analyst, argues that although RARG flagged the ozone emission standards for review, the group had virtually no impact on EPA's final decision of last January—despite a widespread public perception to the contrary. "The environmentalists think we caved in to White House pressure," said Gamse, "but the decision was our own and was based on scientific data, not the RARG report." Still, the standard was relaxed in the end, and many people insisted that the economic concerns of the White House were responsible.

Buffeted by competing claims and political pressures, RARG staffers have begun to soft-pedal the group's function, carefully using words such as "review," "coordinate," and "analyze" to describe RARG's oversight of economic/inflationary impact analyses. Strict cost-benefit analysis has given way in many instances to other forms of analysis, formulated in terms of the "most efficient" compromise, the solution that will bring about the least risk, and the "least cost" way of achieving it. In part this reflects technical difficulties in quantifying benefits and balancing the equation. But it also

helps to deflect the criticism that decisions are dominated by cost factors at the expense of social concerns.

Nonetheless, the professional training of the White House economists clearly shapes their approach to regulatory oversight. And in private interviews they often do not conceal their disdain for the rigid approaches adopted by many of the agencies. "The first time an agency is 'RARGed,' it is like a cold shower," reported one CEA staffer. "Many have never done cost-benefit analysis and OSHA, for example, had at most only one economist in the whole agency." In general, the economists tend to favor the more flexible approaches that allow room for economic incentives without necessarily lowering standards. The modifications in OSHA's exposure standards for acrylonitrile, a carcinogen used in the manufacture of acrylics, are a good example. According to Bob Litan, who worked on this regulation at the CEA, OSHA had picked an exposure standard that was as high as possible without posing serious cancer risk. "We made the standard stricter," he said, "but used marketplace incentives and introduced flexibility so as to achieve the most cost-effective result." Critics insist, however, that cost-consciousness sometimes does mean a reduction in health and safety standards. And they warn that cost-benefit analysis often misleads by failing to include costs of inaction—in terms of increased illness, for example, with its ensuing costs in lowered productivity and increased medical expense.

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The Broader Context

To ease the tension between the White House and the regulators and to bring the agencies closer to the administration's policy perspective, President Carter created the Regulatory Council in October 1978. Composed of top officials of both the cabinet departments and the leading regulatory agencies and chaired by EPA Administrator Douglas Costle, the council operates independently of RARG. Its principal function is to coordinate common regulatory approaches among agencies with overlapping responsibilities. Among its responsibilities is the publication of a semiannual calendar listing major forthcoming regulations—which, incidentally, RARG then uses to help identify its own candidates for review.

Initially, the creation of the Regulatory Council increased the conflict between White House advisers and the regulators. The economists at COWPS and CEA objected to being excluded from the council. But they soon realized that, if RARG was to function effectively, it needed at least the grudging support of key regulators. Bringing them formally into the process through the Regulatory Council seemed a good way to obtain their support. So far, in any case, the council does not appear to have posed a political threat to RARG and has, in fact, served as an important resource for RARG's staff. The council's staff director, Peter Petkus, a young lawyer who began his career in a Nader-affiliated public interest law group, claims that "since last fall there has been a much more cooperative spirit."

The most curious square in the patchwork of groups involved in regulatory management is OMB, originally cited in Executive Order 12044 as the agency principally responsible for overseeing compliance with its provisions. Yet according to staffers at COWPS, CEA, the Domestic Policy Staff, and at other agencies, OMB has had virtually no role at all. OMB officials become defensive when queried on the point. "I want to make perfectly clear that OMB has no intention of involvement in agencies," said Wayne Granquist, associate director for management and regulatory policy at OMB. "We wrote the executive order. We just want to make sure the tools are in place. We want the agencies to manage. We want the secretary of the interior not to file on the record in his own behalf, but as part of the administration."

To some extent, regulatory management is still a fragmented process, with power shared by the Domestic Policy Staff, COWPS, RARG, CEA, OMB, selected regulators, and—to the extent that information is power—the Regulatory Council. Although the President has put himself firmly behind the process, he has carefully avoided committing himself as to which of these groups (if any) should have predominant

influence. In this connection, it is significant to note that the President's regulatory reform bill (S. 755) provides no central monitoring role for either OMB or CEA, although the bill extends the executive order in many other respects. Indeed, the administration has been relatively silent on the oversight issue generally.

The Political Prospects

"You have to realize that this is not a management or an engineering process," explained Peter Petkus, "but a political one." Whether the process survives at all will depend on how well its political difficulties are handled, for these clearly are more threatening to its effectiveness than are its legal vulnerabilities—at least in the short run. Though some of RARG's difficulties reflect relatively recent trends on the political scene, others can be traced to long-established patterns in national politics.

The older problems involve the traditions of congressional oversight. The sponsors of new regulatory statutes in Congress often feel an almost proprietary stake in the administrative or enforcement policies developed under "their" programs. Senator Edmund Muskie (Democrat, Maine), for example, as one of the authors of the Clean Air Act and the several clean water statutes, has continued to display a keen concern for the activity of EPA and has often exerted himself to defend the agency against pressures for compromise. In any case, with Congress having the last word on the budgets and legislative authorizations (or restrictions) of the regulatory agencies, the views of leading figures on a congressional oversight committee can often be more influential than the preferences of the White House. Conversely, when an agency does not like the direction in which it is being prodded by the President's staff, it can flee to congressional patrons for sympathy and support.

This situation often forced past administrations to engage in quiet bargaining with congressional "barons" to effect a change in regulatory policy or to develop a new rule along particular lines. These efforts were not always successful but defeat at least could be accepted without humiliation in most cases. In recent years, however, with the rising potency of single-interest advocates having ready access to the media, disagreements over regulatory policy may suddenly develop into heated public controversies. Clearly the setting within which the White House operates is harsher, more inflammatory, and more public now than it used to be. A President who presses EPA to take fuller account of economic costs, for example, may soon be branded an "enemy of the environment." Many critics insist that President Carter has compounded these inherent problems with his antiseptic and apolitical style of leadership. Taken together, these factors help create a political climate in which agency leaders may not be much inclined to antagonize special interest spokesmen or key figures in Congress simply to meet the suggestions of the President's economists.

White House officials claim it is unrealistic to expect dramatic changes at the outset from the new regulatory management efforts. As White House regulation expert Rick Neustadt says, the whole process is "like steering a supertanker. You may put the wheel over hard, but it's still not going to turn on a dime." But outsiders are inclined to be less patient. The criticism continues, the government is still frequently sued, and agencies like EPA or OSHA are regularly attacked for overzealousness or for selling out.

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Ultimately, the problem with regulatory management is that the stakes are so high. With so many fields of activity now subject to intense federal regulation, the direction of policy may have a noticeable effect on the lives of millions of citizens and the disposition of many millions of dollars in economic resources. It is hard to imagine that any President would be able to make decisions of this magnitude in a management framework entirely isolated from political bargaining.

To its credit, the White House has made an ambitious start within the executive branch toward the redirection and closer management of the regulatory system. But whether it can in the long run solidify these gains and overcome the formidable political obstacles in its path still remains to be seen. ■