DEREGULATION HQ

An Interview on the New Executive Order with Murray L. Weidenbaum and James C. Miller III

The day after his inauguration, President Reagan created the Presidential Task Force on Regulatory Relief, chaired by Vice-President Bush. Its other members are Treasury Secretary Regan, Attorney General Smith, Commerce Secretary Baldrige, Labor Secretary Donovan, Office of Management and Budget Director Stockman, Council of Economic Advisers Chairman Weidenbaum, and Assistant to the President Anderson. The central mechanism of the regulatory relief program, to be implemented by OMB under the direction of the task force, is Executive Order 12291, issued on February 17. In its major outlines the order provides (subject to any inconsistent requirements of particular statutes) as follows:

- *Agencies must apply cost-benefit analysis to all their rulemaking and adopt the least costly regulatory alternative.*
- *In the case of "major" rules (a defined term) agencies must publish, along with their proposed and final rules, preliminary and final regulatory impact analyses that set forth their conclusions regarding the cost-benefit balance and feasible alternatives. They must also submit these analyses and the rules to OMB before publication and consult with OMB regarding them if so requested.*
- *Agencies must review rules currently in effect and prepare regulatory impact analyses for those that are major.*
- *OMB is authorized to issue guidelines and standards for operation under the order (including standards for the development of regulatory impact analyses); to require agencies to obtain and evaluate additional data; to designate any rule as a major rule; and to schedule existing rules for agency review.*

Two of the architects of this program—Murray Weidenbaum, chairman of the Council of Economic Advisers, and James C. Miller III, executive director of the task force and OMB administrator of information and regulatory affairs—recently discussed prospects under the order with the editor and managing editor of Regulation.

Antonin Scalia: *As an appropriate prologue, let me quote from the President's remarks when he issued the executive order on regulatory reform.*

> I came to Washington to reorganize a Federal Government which had grown more preoccupied with its own bureaucratic needs than with those of the people. This executive order is an instrument for reversing this trend. It promises to make federal regulations clearer, less burdensome and more cost effective. . . . It directs that whenever a regulation may have a major economic consequence, the agency must conduct an early and rigorous examination of all alternatives of achieving a stated objective. This requirement will ensure that federal regulations are cost-effective and impose minimum economic burdens on the private sector.

Finally the President said:

> And very importantly, it requires every agency to undertake a systematic sunset review of existing regulations. The agencies are to eliminate those which are unnecessary and reform others to reduce the burden to the minimum.

Murray L. Weidenbaum: That's not bad.

Scalia: *Unfortunately, the statement was made not by President Ronald Reagan when he issued Executive Order 12291 last month, but by President Jimmy Carter on March 23, 1978, when he issued the executive order that this one replaces. And I don't doubt that Gerald Ford said something quite similar in 1974 (and again in 1976) when he issued his executive orders requiring inflation (and then economic) impact statements. My point is that this whole thing has a certain air of* déjà vu *about it. What is it about President Reagan's order that makes it a significant improvement over Carter's system?*

Weidenbaum: The man who signed it. That makes a world of difference. Just look at the actions President Reagan has taken since assuming office. In his second day, he established the Presidential Task Force on Regulatory Relief, a cabinet-level committee chaired by the Vice-President. And nine days later he ordered a comprehensive suspension of the "midnight regulations" issued at the tail end of the preceding administration.

Scalia: *That amounts to saying that personnel change is an important factor in regulatory reform—which is, of course, true. But is there anything in the new procedures that will significantly improve what was in place before?*

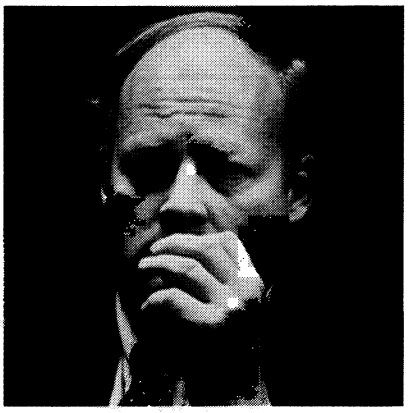
James C. Miller III: The difficulty with President Carter's Executive Order 12044 was that it depended wholly on hortatory means for achieving compliance. This order establishes a procedure whereby the Office of Management and Budget (OMB), under the direction of the task force, reviews new and existing regulations to ensure that they comport with the economic principles clearly set forth in section 2. Briefly, those principles require, to the extent permitted by law, that regulations be cost/benefit-justified, cost-effective, and designed to maximize net benefits to society. If, in a particular case, an agency and OMB disagree and fail to resolve their differences, the issue will be considered by the task force—of which Dr. Weidenbaum is a member. Executive Order 12044 contained no such statement of principles and no such decision mechanism.

Scalia: *The establishment by executive order of a mechanism for centralized review of agency action is, indeed, new. However, President Carter had his Regulatory Analysis Review Group (RARG), which was established I believe by informal presidential directive and which performed somewhat the same function. It also was able, if it chose, to seek presidential resolution of its disagreements with the agencies. What powers does the task force have that RARG didn't?*

Miller: All that RARG was able to do was study regulatory proposals —ten or so a year—and file reports with the agencies *after* the proposals had already been published in

The key is that the task force at the top of the structure doesn't have any interest group constituency to protect. Its only constituency is the President.

WEIDENBAUM



To the extent that we who are administering the executive order have a problem, it is to get out of the way of reform initiatives the new regulatory appointees want to take.

MILLER

The agency head who disagrees with the task force about a proposed rule has the authority to issue it. But that action could be risky.

MILLER

the *Federal Register*. Under the new procedures, a regulatory proposal must be given to OMB *before* it is published. Then OMB, under the direction of the task force, reviews that proposal and consults with the agency on the degree to which the principles laid out by the President have been followed. Once consultation begins, the agency must delay action until that process has been completed. A similar procedure is required before a final regulation is issued. So there is a two-stage review and consultation process, with the first stage occurring *before* the agency gets publicly locked into a position.

RARG did not *have* to be consulted. Also, though it was chaired by the Council of Economic Advisers, most of its members were the regulatory agencies themselves. In contrast, the new oversight mechanism is firmly based in the Executive Office of the President.

Scalia: *The order provides that the OMB director, subject to the direction of the task force, "shall resolve any issues raised under this order or ensure that they are presented to the President." What is meant by "issues raised under this order"?*

Miller: Disagreements between the agency and OMB.

Scalia: *So that the order not only permits but positively requires the matter to be presented to the President when the agency and the task force disagree on the economic desirability of a regulation?*

Weidenbaum: Correct. But let me make a forecast—and that's what it has to be because we don't yet have any experience with the new mechanism. In the preceding administration there was considerable confrontation between the single-minded agency leaders and RARG reviewers, because the former were preoccupied with the benefits of regulation and the latter, of course, were concerned with relating those benefits to the costs. I expect there will be less of that sort of conflict in this administration—and the early appointments bear this out. There's every indication that the agency leaders themselves will be very concerned with minimizing the burdens they impose, with looking for the most cost-effective ways of proceeding. In fact, as we see it, the first line of defense against overregulation lies in the agencies themselves.

Miller: And the first line of *offense* in ferreting out ineffective and excessively burdensome regulations also lies in the agencies.

Scalia: *Assume the worst situation —that an agency head basically and strongly disagrees with the task force and insists that a certain rule ought to go through.*

Miller: He or she still has the legal authority to issue the regulation, but that action could be risky—meaning that the President of the United States might decide to remove such a person from office.

Anne Brunsdale: *If the task force chooses to elevate the dispute to the presidential level before the rule is issued, does the President have the power to order the agency to change the rule—to bring it into conformity with his policy?*

Miller: Yes, according to learned counsel. But that executive authority does not apply in the same way to the independent boards and commissions.

Let me say this, however. To the extent that we who are administering the executive order on a day-to-day basis have a problem today, it is to get out of the way of reform initiatives that the new regulatory appointees want to take. We are finding little need to prod them into taking such initiatives or to counsel them against a proposal that doesn't conform to the President's principles. Indeed, both the Vice-President and OMB Director David Stockman have admonished me to make sure that requests for waivers to shortcut the procedure in the case of clearly drawn reform initiatives are handled as quickly as possible.

Scalia: *If that's the case, one wonders whether the executive order was really necessary or desirable, because it does have its costs. I've done a rough chart of how long it will take to get out a rule under the new procedure. An agency cannot issue a notice of proposed rulemaking without first developing a regulatory impact analysis (RIA). For a significant rule, I would guess that takes at least 30 days. Then the agency has to submit it to OMB and wait for 60 days. Then it publishes the notice of proposed rulemaking and invites the public to comment; 30 days is almost an absolute minimum for that, if the public is to have the "reasonable opportunity for comment" that the law requires. Then the agency must consider the public comments, draft its final rule, and prepare a final RIA to support it; 30 days is probably a wild underestimate for that. Then the agency must submit this final rule and RIA to OMB and wait another 30 days.*

Miller: At the maximum. Those two waiting periods of 60 and 30 days are maximums. OMB might complete its reviews well ahead of schedule.

Scalia: *Right—though in my experience with agency processes, maximums tend to become the norm.*

And also, of course, the 60-day and 30-day waiting periods may be expanded if OMB and the agency disagree, so that the matter must go to the task force or even to the President. In any case, after all this the agency can finally publish the rule, but under the Administrative Procedure Act, the rule can't go into effect until 30 days after publication.

Miller: Unless there are special reasons.

Scalia: *Agreed. What all that adds up to is that—making very conservative assumptions with respect to time periods except (you would assert, and I would disagree) the 60-day and 30-day waiting periods—it will ordinarily take an agency at least seven months (210 days) to get a rule into effect—that's 90 days longer than under the previous system.*

Miller: All right. But look—on February 19, the day after the President delivered his economic message, the *New York Times* ran an editorial entitled "Who Has a Better Plan?" Do you have a better way for controlling regulatory excess? Besides, the 60-day and 30-day waiting periods apply only to major rules, for which RIAs are required. And in the past it has generally taken longer than seven months to develop major rules and put them into effect.

Regardless, we think the time is necessary—and well worth it—to make sure that new rules do more good than harm. Moreover, remember that the procedures of the executive order do not apply to emergency rules or rules subject to legislative or court-ordered deadlines—and also that OMB may waive the procedures for any rule. With these safeguards, we think the requirements for thorough deliberation—even if it takes 210 days—are all to the good.

Scalia: *I next have a definitional question. Only "major rules" are subjected to this process.*

Miller: No. All rules have to be submitted to OMB, and OMB's director has the authority, under the direction of the task force, to identify any rule as a major rule, even though the agency has not made that determination.

Scalia: *But only major rules are automatically subject to the requirement for regulatory impact analysis.*

Miller: Yes.

Scalia: *And a major rule is defined to be, among other things, "any regulation that is likely to result in . . . an annual effect on the economy of $100 million or more."*

Now, it's clear enough what that means in the case of a brand new rule. But what if, as one hopes would often be the case, what is at issue is a revision of an existing rule that cuts back regulation but doesn't eliminate it entirely? Is it only the increase that a new rule makes from the status quo that is to be considered for the $100 million criterion (in which case a rule reducing regulation would not be covered), or is it the absolute burden of the new rule (in which case such a rule would be covered)? For example, if a rule costing the economy $800 million is revised so that it will cost the economy only $200 million, is that the sort of a rule that is going to have to be put through the time-consuming RIA procedure?

Miller: If OMB, again under task force direction, were convinced on the basis of evidence, however sparse, that such a reduction would occur, a waiver would be granted immediately.

Scalia: *But that might be risky. Maybe the impact could have been cut back to zero.*

Weidenbaum: But if you sandbag the rule, you're stuck with the status quo—which is far more burdensome.

Scalia: *Well, what if the economic impact has been reduced from $800 million to $700 million? Wouldn't you want to investigate to see if it could have been cut in half?*

Any statute that embodies or is thought to embody the zero-risk concept cries out for congressional review.

WEIDENBAUM

Weidenbaum: Do you really want the review group, whether it's OMB or the task force, to run the departments and agencies?

Scalia: *No. But I am having trouble understanding how an agency is supposed to know what's covered. Suppose the impact of the rule is* increased *from $800 million to $899 million. Does it have to go through the RIA process?*

Miller: The answer is that the agency head has to examine his or her conscience and determine whether the rule fits within the standards. That's one hurdle. The other hurdle for the agency head is the possibility that OMB may designate it as a major rule.

Scalia: *I'm really asking a straight interpretative question. Apart from whether OMB chooses to elevate it to a major rule—which it always can do—does an increase from $800 million to $899 million constitute a major rule under the definition? What I believe you're telling me is that so long as the incremental effect is less than $100 million, it would be a discretionary call for*

the agency, subject to task force intervention.

Miller: Right.

We think our discretionary review procedure will catch those cases you're worried about—cases in which the agency is reducing burden by $10 million but could reduce it by $100 million. In fact I think we have some instances of that right now—where the agency is saying, "Gee, here's a good idea," and our people are suggesting, "But you could make a bigger change if you did B instead of A."

Actually, OMB can identify a rule as major, and thus bring it into the review and consultation process, for reasons some may regard as wholly without merit. The $100 million definition of major rule is for the guidance of the agencies, not of OMB. There is no limit on what OMB can designate as major.

Scalia: *The executive order provides that the agency shall refrain from publishing its preliminary regulatory impact analysis and its final analysis until after OMB's review in each case, but that it shall publish them later. What is finally published? The RIA before the OMB-induced changes?*

Miller: No.

Scalia: *Only the analysis as changed by OMB?*

Miller: The OMB director does not change the analysis. He gives his comments to the agency, and the agency does whatever it wishes with those comments and then publishes the analysis.

Scalia: *As changed.*

Miller: As changed by the agency, after OMB's review has been completed.

Scalia: *Are you confident that the effectiveness of that no-publication provision is not going to be sapped by the Freedom of Information Act?*

Miller: No. The point about not publishing the earlier draft is to make sure that the public sees and comments on the best regulatory impact analysis that could have been prepared.

Brunsdale: *Under the previous administration, RARG's analyses of proposed rules were put on the record during the comment period—meaning they became public in time to permit discussion in the press of the shape the final rule should take. But under the new scheme there appears to be no way for OMB's views on a proposed rule to get to the public. Haven't you eliminated a useful characteristic of the old system?*

Weidenbaum: As a matter of fact, RARG's practice was to file analyses of proposed rules literally minutes before the comment period closed—which restricted somewhat their capacity for stimulating public dialogue. The new executive order does envision the filing of OMB comments in cases where OMB has reservations on the proposed rule that the agency has published [see section 3(f)(2)]. Where OMB and the agency agree, however—that is, where the proposed rule and preliminary RIA are in accord with OMB's views—there is nothing to be gained by an additional filing saying "me-too."

It is true that the public will not normally have an opportunity to respond to OMB's views in the pre-notice stage, before the proposed rule and preliminary RIA are published. But the same can be said about the views of others who advise the agency during this period, such as agency staff. The public's inability to respond at that stage is a problem that can't be eliminated without having, in effect, a pre-rule-making rulemaking—publishing a notice of notice of proposed rulemaking. On balance, we think the advantages of early OMB participation in the process are overwhelming.

Brunsdale: *After a rule is promulgated, will your office monitor it in an effort to find out how it's working, whether it's doing what was expected of it?*

Miller: You know, that's something that has not been done in the past as adequately as it should have been. Through a follow-up process, we can compare what actually happened with what was anticipated by the original draftsmen—so as to test the theory on which the rules were based and learn more about the degree to which we can predict regulatory effects. To an extent, that's what we'll be doing when we examine existing regulatory programs.

". . . and please grant me and the rest of the board the grace not to abuse deregulation."

Drawing by Donald Reilly; © 1981 The New Yorker Magazine, Inc.

Scalia: *The director is given authority under the order to prepare and promulgate uniform standards for identifying major rules and developing the analyses. When do you expect those standards to be issued?*

Miller: I think we'll start seeing the first of them coming out in early April.

Brunsdale: *The first? Will you be issuing the standards on an agency-by-agency basis?*

Miller: The order suggests uniform but tailored standards. Different types of agencies have different types of problems. So, for purposes of giving guidance, we may lump some agencies together.

Scalia: *Are the standards going to grapple with some of the more difficult problems, such as how to quantify benefits?*

Miller: Yes.

Scalia: *How do you propose to value human life?*

Weidenbaum: Very carefully.

Scalia: *Suppose a small businessman knows that an agency is about to issue a final rule—the draft has been sent over to OMB—and also knows or strongly suspects that the rule will be, in his view, very foolish. How does he go about contacting you if he would like to advise you that this is a dumb rule and that you should jump on it?*

Miller: Those who are interested will try many ways of making contact. The best way, of course, is to submit written material. Another is to arrange a personal visit. A third is to sit in front of the office door—which I've had some people do. (This last is the least favored alternative.)

Scalia: *Does the task force contemplate including, among the guidelines that it's going to be issuing for the implementation of this executive order, some guidelines on how that process of calling your attention to particular atrocities might be conducted?*

Miller: Yes.

Weidenbaum: Not only that, but the task force has embarked on an outreach program of bringing in individuals and groups from the private sector to provide information on regulatory problems that particularly need our attention. The Vice-President strongly believes that the reservoir of knowledge on these problems extends beyond the federal government.

Miller: We're also seeking inputs from state and local governments. In our meetings with mayors, governors, and state legislators, it's been clear that federal regulation is high on their agenda of concerns. In fact, officials of New York City have already made proposals to the task force staff for regulatory changes that would allow them to save hundreds of millions of dollars.

Scalia: *Although some courts, notably some panels of the D.C. Circuit, might disagree, it is thought to be perfectly legal and not in violation of the Administrative Procedure Act for a private individual to make an ex parte (off the record) contact with an agency staff member regarding a rulemaking. However, some agencies have voluntarily adopted, for their rulemakings, the restriction that individuals must make their contacts on the record. It would obviously subvert such a restriction if the ex parte contact that couldn't be made directly with agency staff could be made indirectly, through the task force staff. Do you envision requiring all contacts with the task force to be on the record for agencies having ex parte restrictions? Or will you require contacts to be on the record for all agencies?*

Miller: In the case of an agency rulemaking, I see no problem in off-the-record contacts with us—although for appearance' sake it might be good for all formal written presentations to be made public, and maybe notes of any particular business as well. It would not be proper, however, for us to act solely as conduits for a private party in situations where it would not be permissible for that party to make a direct contact with the agency.

If you're the toughest kid on the block, most kids won't pick a fight with you. The executive order establishes things quite clearly.

MILLER

Scalia: *I gather, then, that you are anxious to keep the whole process as informal as possible.*

Miller: Yes, and as flexible as possible. The less paperwork and formality, the better.

Scalia: *The executive order gives the director authority, subject to the direction of the task force, to "develop procedures for purposes of compiling a regulatory budget." This refers, I presume, to what might be termed an imposition budget as distinct from a fiscal budget—that is, a budget limiting the cost each agency can impose upon the private sector in a given period. How far along is the task force on this project?*

Miller: Not very far.

Regulatory reform is one of the few tools we have for reducing inflation and unemployment simultaneously.

WEIDENBAUM

Scalia: *Do you expect to be working earnestly on that in the near future or is this a more long-range objective?*

Weidenbaum: We have had a set of priorities imposed on us by virtue of various deadlines for action. Those midnight rulemakings—that was the first fire to put out, quite clearly, and that was done. Several other regulatory actions were taken right off the bat—the decontrol of petroleum, the secretary of education's withdrawal of proposed bilingual education regulations, the secretary of interior's initiative in restoring economic balance to strip-mining regulation, and a number of actions by the secretary of labor, for example. Then came the executive order that Dr. Miller has described so clearly.

As I look at our agenda for the rest of the year, I see the hearings on Clean Air Act revision looming very large. Substantively that is going to be an important event for the future direction of all safety, health, and environmental regulation, because many of the major questions that are common to all regulation in those areas will be met in developing proposals for the Clean Air Act. Also there's a statutory deadline on that, so it's quite clearly the kind of question that merits the task force's high priority and attention.

On the other hand, we have important programs of an essentially longer-run nature where a good deal of basic development has yet to be done. The regulatory budget falls in that category. It's a highly desirable type of regulatory reform, but one very frankly where advances in the state of the art are needed. And that will require considerable research and analysis by OMB staff, with the agencies represented on the task force contributing their expertise.

Scalia: *The executive order authorizes the OMB director to recommend needed changes in agency's statutes to the President. What statutes, in addition to the Clean Air Act, did you have in mind when that provision was drafted?*

Weidenbaum: I look at it the other way around. I think of that provision as a comprehensive charter to examine everything—with no sacred cows.

Scalia: *But what statutes would you like to look at first?*

Weidenbaum: Any statute that embodies or is thought to embody the zero-risk concept cries out for congressional review in my personal opinion. I'm thinking of the Delaney amendment to the Food, Drug, and Cosmetic Act, the zero-discharge provision of the Clean Water Act, the interpretation of the Occupational Safety and Health Act that leads OSHA to promulgate a generic carcinogenic standard incorporating a zero-risk approach. Granted, in some areas the problem may lie mostly in administrative interpretation, not in the wording of the statute. However, in all cases where there are laws restricting agency discretion to implement cost-effective approaches to regulation, statutory remedies are certainly required.

Scalia: *What about simply tightening up and clarifying the standards in various legislation? When you gentlemen were out of government, you generally agreed that there are too many vague and standardless statutes on the books and that Congress ought to say with more precision what it means. Now that you're in power, do you feel any differently?*

Weidenbaum: For me, there is a prior problem—the fact that there are, if anything, too many statutes in the regulatory field. Perhaps we need fewer. In reviewing the statutes, we shouldn't take for granted the inherent desirability of keeping any particular one.

Scalia: *Take the example of the Federal Trade Commission. Even if it were thought desirable, I don't think it's politically possible to eliminate all FTC authority in the field of consumer protection. Are there plans to try to give more precise substantive content to what is meant by an "unfair" or "deceptive" trade practice?*

Miller: As I wrote in *Regulation* magazine recently, the problem is that in many cases agencies have too little discretion, that is, the statutes direct them to pursue goals or adopt regulatory approaches that don't make sense, and in other cases they have too much discretion because the statutes are too broad, in which case they use that discretion unwisely because they follow their own set of incentives. So what is needed is for the administration and Congress to address the statutes and provide the appropriate amount of discretion, which may be more for some and less for others.

Scalia: *The executive order appears well designed to ensure that each individual rule is cost/benefit-justified. But isn't there another problem? Take the example of a homeowner who is seeking to be prudent in his purchase of gardening equipment. He easily decides it would be foolish to buy a $1,500 riding lawnmower for his little yard. But it*

wouldn't be foolish to spend $75 on a hand-pushed lawnmower—

Weidenbaum: It's $75 only because the Consumer Product Safety Commission's lawnmower standards are in abeyance.

Scalia: *—plus $75 on electric hedge clippers and $75 on an electric edger. However, he only has $150 to spend on his garden.*

What I'm driving at is that each one of the purchases makes sense, but the three together don't. How does this executive order get at the problem that each of the many different rules coming before the task force may be cost/benefit-justified, but their aggregate cost may be too large?

Weidenbaum: You're providing a rationale for a rapid movement towards a regulatory budget. There is compelling logic in that concept, and personally I believe we'll begin moving toward it as soon as the necessary spadework is done.

Miller: It is very difficult to get regulators to understand the idea of opportunity costs. The real cost of something is not what you spend to acquire it, but the opportunities you forgo by having acquired it. The real cost of going to a movie is the satisfaction you could have gotten from spending your time and money in some other way—going to a play, for instance. The principle applies to regulation as to everything else. So if limited resources make it impossible to issue every desirable regulation at the same time, then the real cost of issuing one regulation is the value of the regulation that you have to forgo for the time being.

Scalia: *Frankly, I'd expected a more encouraging answer. I thought you'd say that the new oversight scheme* does *contemplate making what might be called an aggregate cost-benefit analysis. I thought the major purpose of taking the judgment out of the unguided discretion of the agency and subjecting it initially to consultation with the task force and ultimately (if it comes to that) to the President is to enable somebody to participate in the decision who can judge not only whether it is worthwhile in isolation to extract $1 billion from the economy to get the air x-percent cleaner but also whether that cost is worthwhile in light of the total burden the economy can currently bear, and of the other regulations that are currently in force or contemplated.*

Miller: I do not mean to disabuse you of that notion. Indeed, the executive order makes it quite clear that what you have called "aggregate cost-benefit analysis" is the ultimate objective. Section 2(e) provides that, in setting regulatory priorities, agencies shall take into account "the condition of the particular industries affected by the regulations, the condition of the national economy, and other regulatory actions contemplated for the future."

Scalia: *But I had assumed that only refers to other regulatory actions the agency itself expects to take. It doesn't know what other agencies are contemplating.*

Miller: No. The order says "other regulatory actions contemplated for the future." It is incumbent upon an agency to identify regulations affecting the same industrial sector to be issued by other regulatory agencies, and that is relatively easily done by consulting the regulatory calendars that each agency is required to publish twice a year.

Scalia: *How many people do you currently have?*

Miller: As of April 1, we will have positions for about forty-five OMB staffers and for the twenty-person regulatory analysis group we inherited from the Council on Wage and Price Stability, plus twenty-five more positions from the Commerce Department's statistical policy office (which comes to OMB under the provisions of the Paperwork Reduction Act of 1980). That's a total of some ninety.

Scalia: *To me it is almost unthinkable that, with a staff of that size, you'll be able to do a thoroughgoing review of proposed regulations, not to mention the more long-range tasks of reviewing existing regulations, considering what statutes should be amended, developing a regulatory budget, and maybe working up a system for follow-up monitoring. I cannot imagine how just ninety men and women strong and true can do all of that.*

Brunsdale: *And particularly when you're cutting the agency budgets so that they'll have fewer people to do their part of the job.*

Miller: There's plenty of fat in agency budgets for that.

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I agree our task could be difficult —if we don't turn bureaucratic incentives around. You know, if you're the toughest kid on the block, most kids won't pick a fight with you. The executive order establishes things quite clearly. Among the people whose behavior we're trying to influence are the GS-13s and -14s who draft the rules. The executive order says to them: even if you get a nonconforming proposal past your agency heads, even if you've captured them or just plain fooled them, that proposal is likely to be caught at OMB—and there's not a chance in Hades of your capturing those people. So if you want to get ahead, you're going to have to have to write new rules and review existing rules in conformance with the principles set forth by the President in the executive order. I believe that as internal agency procedures and the mechanism for centralized review settle into place, agency personnel will voluntarily comply. And they'll find the resources to do the job.

Weidenbaum: The key here is that the task force at the top of the structure doesn't have any interest group constituency to protect and defend. Its only constituency is the President and the President's program for rationalizing regulation.

Miller: In other words, the very existence of the task force can stiffen the back of an agency head who's being pressured by a constituent. He or she can say: "I'd like to do it for you, but there's no chance the task force members would go along —and they'd be right. The President set the principles and I've got to follow them."

Scalia: *In the case of the thoroughly unjustified regulatory imposition, that all makes sense. But there will be a lot of proposed rules in areas where the alternatives are numerous, and it will be quite complicated figuring out whether the agency has chosen the best.*

Miller: We'll make some mistakes—and so will the agencies.

Scalia: *I'm suggesting that it's going to be an enormous job for such a small operation and that, in the long run, the effectiveness of your program depends to a significant degree on how thoroughly you do the initial reviews.*

Weidenbaum: That was one of the compelling reasons why Jim Miller's function of initial review was properly placed within OMB. In its other functions, OMB also monitors a very large flow of reports with a very small staff. Standards, criteria, deterrent sanctions—all those are significant factors in enabling a small clearance staff to function effectively. The system works. After all, OMB is the agency that sits astride proposed legislation, proposed budgets, proposed executive orders, and now also proposed regulations.

Miller: As an example, I've noticed that sometimes when an agency sends a communication to me, it also sends a copy to the associate director of OMB who is in charge of its budget.

Scalia: *Are you gentlemen aware that the last time there was such centralized authority—and then also it was applied through OMB—the net result was to make Roy Ash the most hated man on Capitol Hill? Although you may indeed cow the bureaucrats in the executive branch, you may well enrage those who occupy the other point of the iron tri-*

angle, the substantive committees in Congress.

Weidenbaum: I don't think that has to happen. We realize—and Congress realizes—that regulatory reform must be a cooperative venture. Without overly generalizing from one experience, let me say that when I testified at my confirmation hearing before the Senate Committee on Banking, Housing, and Urban Affairs, the distinguished chairman indicated a strong concern about the regulatory burdens on housing. That's one very good sign.

Miller: Many of the committees are very much in favor of what we are doing. But I'm sure there will be some—especially in the House—that take the administration to task. I fully expect to have to face the music from time to time.

Scalia: *Your new procedures apply only to the executive branch agencies. But there is a substantial amount of regulation that issues from the independent boards and commissions—the Federal Trade Commission, the Federal Communications Commission, the Nuclear Regulatory Commission, et cetera. What are you going to do about them?*

Miller: The first answer is that the President is appointing people to those commissions who share his regulatory philosophy.

Scalia: *You could have said the same about the executive branch agencies, but in their case you weren't willing to settle for just the appointment power.*

Miller: The second is that the President will use a bit of moral suasion with the independent agencies. And I suspect that, because there will be a great deal of congressional support for this executive order and for legislation applying some version of it to the independents, many of them will get religion in the next few months. Finally, there is the real possibility of change in the organic statutes of the independents.

Scalia: *Does the administration intend to propose either legislation giving the President authority to impose this executive order on the independents or legislation altering the organic statutes?*

Miller: There's a good possibility of one or the other. Well, let me just say flat out that it's doubtful the administration will want to codify the precise language of this executive order and apply it to the independent agencies; however, it's highly likely that the administration will, within two years, approach Congress for changes in the organic statutes of many of those agencies.

Scalia: *Does the administration concede that it doesn't now have the authority to extend the order to the independents?*

Miller: No, it does not so concede. It chose not to apply the order to the independents for policy—not legal—reasons.

Brunsdale: *Do you expect the new Paperwork Reduction Act to be useful in roping in the independents?*

Miller: Yes, with respect to the paperwork and information requirements they impose. You see, nearly every substantial regulation involves, as part of its enforcement mechanism, a requirement for filling out forms or maintaining specific records. And under the new paperwork act, all agencies, including the independents, must clear all the forms they wish to use with OMB—specifically, by delegation, with the administrator of the Office of Information and Regulatory Affairs, which means me. The only difference between the executive branch agency and the independent agency in this process is that the latter can, by a public vote of its commissioners, override OMB's disapproval—an unlikely action if the disapproval is reasonable. So the act does give OMB considerable authority.

Brunsdale: *Murray, are you optimistic that all this regulatory reform we've been talking about can significantly affect investment and productivity?*

Weidenbaum: Yes, I am. In fact, when I think of the potential for stimulating new investment through a comprehensive program of regulatory relief, without being caught in the traditional trade-off between inflation and unemployment, such a program has very special charm. It is one of the few tools we have for reducing inflation and unemployment simultaneously. With regulatory reform, it's a matter not of creating jobs through higher government spending, but of reducing the burdens imposed on the private sector in order to free manpower and capital for productive effort.

The amount of capital that is tied up in unnecessary regulatory requirements and that could be used instead for productivity-improving investment is staggering. Judging from figures I've recently seen, we are talking about billions of dollars in the automobile industry alone. If that money is freed for more productive uses, it will benefit both the industry and the economy. But remember: President Reagan's economic program has four parts—each of them a necessary but not, by itself, sufficient step toward a healthy economy. So it will be very difficult, as we move ahead, to determine exactly how much of the recovery comes from regulatory reform and how much from tax cuts or monetary restraint or reductions in spending.

Brunsdale: *Do you believe you will be able to lower the overall regulatory burden in the near term?*

Weidenbaum: You know, in answering that question in the past, I've said that probably the best that can be done in the near term is to slow the rate of increase. The problem, of course, is the many new regulations about to come out of the pipeline—massive programs to implement laws passed by Congress in recent years. But now, having seen how the administration's new approach is working, I believe we'll actually be able to reduce the overall regulatory burden in the next few years. ■