Constitutional and Statutory Limits for Cost-Benefit Analysis Pursuant to Executive Orders 12,291 and 12,498

Leon Rodriguez
CONSTITUTIONAL AND STATUTORY LIMITS FOR COST-BENEFIT ANALYSIS PURSUANT TO EXECUTIVE ORDERS 12,291 AND 12,498

Leon Rodriguez*

I. INTRODUCTION

Shortly after his inauguration in 1981, President Ronald Reagan presented his scheme for economic recovery before a joint session of Congress.1 In that presentation, the President identified the costs federal regulations impose on government and industry as one of the major causes of the nation’s economic woes.2 He quoted estimates that regulatory costs would ultimately reach nearly 100 billion dollars.3 As he told Congress, the Administration had already begun an assault on the volume of regulation. A day earlier, President Reagan issued Executive Order 12,291.4 Executive Order 12,291 provides for centralized oversight of agency rulemaking and requires that agencies issue regulations only where benefits exceed costs.5 Executive Order 12,291 requires that each federal agency prepare a “Regulatory Impact Analysis” to be submitted, along with proposed or final rules, to the Director of the

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2 Id. President Reagan also identified government spending and taxation as causes of inflation and economic stagnation. Id. at 131. The president asserted: “[W]e have no intention of dismantling the regulatory agencies, especially those necessary to protect the environment and assure the public health and safety. However, we must come to grips with inefficient and burdensome regulations, eliminate those we can and reform the others.” Id. at 136.
3 Id.
5 Exec. Order No. 12,291, supra note 4, § 2(a) and Preamble.

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Office of Management and Budget. 6 Under Executive Order 12,291, the Director of the Office of Management and Budget (OMB), under the direction of the Presidential Task Force on Regulatory Reform, reviews and comments on both rulemaking proposals and final rules prior to publication. 7

In 1985, shortly before his second term, the President issued Executive Order 12,498, adding a third clearance hurdle for federal regulations. 8 Executive Order 12,498 requires OMB review before any investigation of a rulemaking proposal. 9 The Order implements this scheme by requiring each agency to submit a “draft regulatory program” at the beginning of each year. 10 This program must discuss all the regulatory plans of the agency for the calendar year. 11 Under Executive Order 12,498, the Director of the Office of Management and Budget considers “the consistency of the draft regulatory program with the Administration’s policies and priorities and the draft regulatory programs submitted by other agencies.” 12 Because this Order merely supplements the 12,291 scheme, this Comment primarily uses the earlier Order as a model to examine the limits of the cost-benefit approach.

The Administration’s regulatory analysis scheme, as implemented in Executive Orders 12,291 and 12,498, can impair the aggressiveness of federal regulations substantially. The power to do so stems from both the provisions of the Orders and their ultimate impact. The OMB submits comments to agencies at critical stages in the life of a regulation: 1) before investigation; 2) when a notice of proposed rule making is issued; and 3) before final promulgation of a rule. 13 While the Orders require that the agencies incorporate OMB’s com-

6 Id. § 3(c)(2).
9 “There is hereby established a regulatory planning process by which the administration will develop and publish a Regulatory Program for each year. To implement this process, each Executive agency subject to Executive Order 12,291 shall submit to the director of the the Office of Management and Budget, each year starting in 1985, a statement of its regulatory policies’ goals and objectives for the coming year and information concerning all significant regulatory actions under way or planned . . . .” Exec. Order No. 12,498, supra note 8, § 1.
10 Id.
11 Id. § 2(a).
12 Id. § 3(a)(i).
13 Exec. Order No. 12,291, supra note 4, § 3(a)(2); Exec. Order No. 12,498, supra note 8, § 2(a).
ments into the rulemaking record, oral communications between the OMB and the agency are not included in the record. OMB's recommendations are exempt from public comment. Powers such as these provide the OMB with a ready channel through which to inject a President's agenda into the regulatory process.

Specifically, the Orders can intrude into the formulation of environmental and public health regulations. To some extent, this is an overt goal of the Orders. Reagan Administration pronouncements evidence the conviction that excessively cautious risk assessments are one cause for overly burdensome compliance costs for industry. The way in which this motive informs OMB's approach to regulatory analysis becomes apparent in statements by Administration officials suggesting that OMB only truly looks at cost rather than benefit in deciding whether to unleash its power on an agency.

The Order also threatens public health regulations in other ways. Public health and environmental regulations involve variables for which dollar values can only be assigned artificially. Some values, aesthetic and moral, simply do not submit to the type of empirical inquiry through which quantitative values might be assigned. In the case of health factors, quantification, while perhaps possible, presents a wide variety of practical and moral problems. To begin with, any assignment of values between human life and death is intuitively problematic, perhaps even morally offensive. But, more importantly, health regulations must choose not merely between life and death but also among comparative degrees of sickness and health.

The review of cost-benefit analyses by persons who are not familiar with the technical complexity of a field means that regulatory decisions will be treated differently. In assigning regulatory missions to agencies, Congress intended that these agencies apply their expertise and an independent sense of mission to their work. The intru-
sion in the rulemaking process of agencies without the needed technical expertise threatens congressional intent. This is a particular problem in cases where scientific evidence is sparse, and where statutes by necessity require risk judgments.

The scholarly controversy on the Executive Orders has revolved around both their constitutionality and their desirability. Those supporting the Orders urge that the increase in burdens imposed by federal regulations demands coordination of rulemaking among Executive Branch agencies and assurance of the cost-effectiveness of regulations. In arguing for the Orders' constitutionality, these writers cite to a line of Supreme Court decisions that validate the role of the president as an active manager of the executive branch. Supportive commentators assert that the "take Care" clause of the Constitution authorizes the president not only to oversee the execution of isolated statutes, but also to insure efficient enforcement of the "mass of legislation." Moreover, the observers assert that, on their face, the Orders run no risk of displacing congressional authority, because the Orders require specifically that their principles be carried out only "to the extent permitted by law." Commentary on the Orders focuses not only on their substantive impact but also on their necessity as a means to scrutinize the entire process of federal regulation, and to determine how resources will be allotted among the federal agencies.

20 Id.
25 U.S. CONST., art. II, § 3.
26 See HOUSE REPORT, supra note 22, at 81.
27 See id. at 82.
Opponents of the Orders find them to violate constitutional principles of separation of powers between the executive and legislative branches. They submit that the Orders interfere unlawfully with each agency's statutorily created mission. These commentators assert that the Orders' requirements are executive lawmaking of the type that the Supreme Court found unconstitutional in *Youngstown Sheet & Tube Co. v. Sawyer.* In essence, these opponents believe that the Executive Orders allow the Office of Management and Budget, as well as the President, to alter the substantive content of regulations, possibly in contradiction of statutory requirements or policies. The opponents also charge that the orders permit the President's centralized and formal involvement in the rulemaking process, a role that Congress had not contemplated when enacting the Administrative Procedure Act. Finally, they argue that the President is entitled to a formal opportunity to comment on regulations where a similar opportunity is not accorded to other parties.

that the institutional interest of a central budget office will always provide a precise counterweight to the interests of program administrators. Our claim is far weaker, though still ample to justify the review process; rulemakers should be accountable to the president before issuing their rules and should be obliged to demonstrate the costs and benefits of their rules as thoroughly as circumstances permit. Assessments of social costs and benefits force regulators to confront problems of covert redistribution and overzealous pursuit of agency goals, which experience has shown to be common in regulatory programs. OMB review subjects proposed rules to a "hard look" before they are issued and ensures that serious policy disagreements between a president's appointees (one with and the other without programatic responsibilities in the area in question) will be brought to his attention.


30 *Id.*


32 *See Rosenberg, supra note 29, at 1217.*

33 *Id.* at 1221–26.

34 *Id.* at 1227.

The scheme of Executive Order 12,291 commands the intervention of the President's closest advisors at the earliest possible moment in the agency rulemaking process. The order also makes available to non-governmental and political interests a valuable and vulnerable early point of access to the agency decision-making process. This may be its implicit purpose. The process is therefore redolent with possibilities for secret, undisclosed and unreviewable communications and contacts by parties interested in influencing the substance of an agency's actions. The order provides no safeguards whatsoever to protect the integrity of the policymaking process or the interest of the public from such influences. On its face, then, the order deprives interested persons, now and in the future, of the most essential elements of fair treatment embodied in the notion of due process and is therefore unconstitutional.

*Id.*
While assuming the overall legality of the Orders, this Comment nevertheless argues that application of the Orders must be limited based on the constitutional boundaries of executive power and on the potential substantive impact of regulatory analysis. The Comment traces the Supreme Court decisions that recognize the existence of a general managerial role for the President as well as decisions holding that there are certain capacities that are so essential to the execution of the presidential office, that they must be recognized as constitutional. This Comment explores a recent body of cases holding that executive orders cannot authorize the use of congressional means for the achievement of presidential policies. In determining whether statutes in the public health and environmental fields grant the authority to apply cost-benefit analysis to regulations, this Comment emphasizes that cost-benefit analysis is not a value-free decision-making tool, but rather one destined to reflect the biases of the decision-maker. This Comment superimposes law relating to cost-benefit analysis on judicial tests limiting executive action. This combination suggests possible modes for limiting the application of Executive Orders 12,291 and 12,498 within constitutional and statutory boundaries.

This Comment begins, however, by describing the history and nature of executive orders. Then, it considers previous executive branch schemes for regulatory reform. Finally, before analyzing the Orders, this Comment describes the Orders and their policy bases.

II. EXECUTIVE ORDERS GENERALLY

The term “executive order” has been used in different forms throughout American legal history, to describe actions that the executive branch has taken that are legislative in form and substance. James Hart included these activities within “the ordinance-making powers of the President of the United States.” These activities fall into two general categories: “hortatory and declarative” or legislative. The former category entails primarily ceremonial activities by the President such as the declaration of holidays. This Comment

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36 Id. at 47.
37 Id. Such “ordinances” have included the annual Thanksgiving Proclamation or Woodrow Wilson’s exhortations in support of the Boy Scout movement. Id.
will not address this category of activity. The latter, however, in­
volves the President in activities that an orthodox view of the Con­
stitution would find unconstitutional. 38 Nevertheless, since early in
American history, the President has exercised powers that would
fall into the legislative category. 39

The President has exercised this residual legislative power in all
aspects of policymaking, in both domestic and foreign matters. Pres­
ident Washington acquired, through congressional delegation, the
authority to issue a directive laying an embargo during the Con­
gress's recess and granting him the authority to issue orders for the
enforcement of that embargo. 40 President Lincoln's issuance of the
Emancipation Proclamation extinguishing legalized slavery in the
South, is an example of an executive order relating to domestic
policy. 41

These two examples also illustrate the two possible sources of
authority for presidential acts: the Constitution and individual stat­
dutes. 42 When the President acts strictly under the authority granted
to him in the Constitution, his lawmaking power extends to the point
where it conflicts with congressional intent in a specific field. 43 When
Congress delegates to the President the power to issue executive
orders, it vests its own legislative power in the President. To this
extent, it can neither exceed its own constitutional grant of author­
ity, nor can it grant the President power in excess of his constitu­
tional authority. It is thus not within the power of Congress to grant
the President legislative powers without including limits for the
exercise of that power. 44

38 See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 586–89 (1952) (Black, J.,
plurality opinion). Justice Black wrote: "In the framework of our Constitution, the President's
power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.
The Constitution limits his function in the lawmaking process to the recommending of laws
he thinks wise and the vetoing of laws he thinks bad." Id. at 587.
40 Id. at 54.
41 Id. at 52.
42 Id. at 51.
43 Youngstown Sheet & Tube Co., 343 U.S. at 636–38 (1952) (Jackson, J., concurring); see
generally A. Schlesinger, The Imperial Presidency viii (1973). While Schlesinger's dis­
cussion focuses chiefly on the war-making power of the President, it suggests strongly that
in practice, if not in law, the scope of the President's legislative powers has expanded consid­
erably in this century. Id.
III. PREVIOUS EXECUTIVE BRANCH REGULATORY REFORM SCHEMES

Over the years, other presidential administrations have implemented plans for reducing regulatory burdens.45 For example, under the Nixon, and then the Ford, Administrations, the Office of Management and Budget created the “Quality of Life” review process.46 “Quality of Life” review enabled agencies and departments throughout the executive branch to comment on proposed regulations.47 The OMB Director’s memorandum creating “Quality of Life” review included the requirement that review apply to regulatory actions that would “impose costs, or negative benefits, to nonfederal sectors” and “that would increase the demand for federal funds for programs or agencies which are beyond the funding levels provided for in the most recent budget requests submitted to the Congress.”48 When comments demonstrated conflict between the rule proposed by the issuing agency and the observations of the reviewing agency or office, the Office of Management and Budget would convene a meeting between the agency officials and other parties.49 Office of Management and Budget officials would preside at these dispute resolution meetings. OMB officials also possessed the authority to require additional meetings and additional review of rulemaking proposals.50

Although “Quality of Life” review addressed regulations concerning environmental quality, consumer protection, and occupational safety, the Environmental Protection Agency (EPA) bore the brunt of “Quality of Life” review.51 “Quality of Life” review revealed a “tendency for procedural techniques, such as interagency review, to pressure the agency toward substantive change, or to provide an opportunity for those opposed to statutory programs to delay their

45 See generally HOUSE REPORT, supra note 22, at 10–12 (summarizes earlier Executive Branch efforts to reform the regulatory process).


47 Id.

48 Id.

49 HOUSE REPORT, supra note 22, at 10. Often, the Commerce Department was a “hostile participant” in the review process. Apparently, the Department acted as a conduit for industry dissatisfaction with proposed rules. See also Bruff, Presidential Power and Administrative Rulemaking, 88 YALE L.J. 451, 464 (1979).

50 HOUSE REPORT, supra note 22, at 10.

51 Id. One reason for this may have been “the considerable impact many EPA regulations have on the economy, specific sectors of the economy and other federal agencies.” See OMB Plays Critical Part, supra note 46, at 693.
implementation."52 "Quality of Life" review succeeded in changing EPA's regulations, but not through exhortation and compromise as the review scheme contemplated.53 Rather, EPA would deliberately limit the coverage of regulations in order to avoid extensive review of its proposals.54 EPA officials complained that such reviews created substantial delays in the promulgation of regulations.55 To avoid these delays, the EPA would frequently submit regulations, that, in the words of one EPA official, were "more reserved, more scientifically aggressive, less environmentally aggressive."56 Thus, while "Quality of Life" could not directly compel specific rulemaking outcomes, it had the power to alter the vigor with which the agency conducted its mission.

The Ford Administration augmented this regulatory review regime by issuing Executive Order 11,821, which required that federal agencies promulgating regulations prepare "Economic Impact Statements" and submit them to the Council on Wage and Price Stability (COWPS).57 The Order intended the statements to be a way of including inflationary impact among the factors considered in drafting regulations.58 As such, the agencies were to certify to the COWPS that they had considered inflationary impact in their promulgation process.59 The COWPS was also authorized to determine which proposals were major proposals and to prescribe general procedures for the evaluation of regulations.60 While the COWPS had the authority to review the statements, it could not require any changes in regulations.61

President Carter's Executive Order 12,044 repealed Executive Order 11,821.62 Executive Order 12,044, promulgated in 1978, sought to increase public participation in the rulemaking process,63 as a means of insuring that regulations "achieve legislative goals effec-

52 Bruff, supra note 49, at 464.
53 OMB Plays Critical Part, supra note 46, at 693.
54 Id.
55 Id.
56 Id.
58 Exec. Order No. 11,821, supra note 57, at § 1.
59 Id.
60 Id. § 2(a).
61 HOUSE REPORT, supra note 22, at 11.
63 HOUSE REPORT, supra note 22, at 11; see also Exec. Order No. 12,044, supra note 62, § 2(c).
tively and efficiently,"64 and do "not impose unnecessary burdens on the economy."65 Like previous and subsequent orders, 12,044 required the establishment of procedures for the identification of major rules and for analysis of regulations according to the Administration's policies.66 In addition, the Order required the publication of a semianual agenda of regulations in order to give the public adequate notice of significant regulations under development or review.67 Also, the Order required that each agency chief review regulations prior to issuance.68

The most significant aspect of Executive Order 12,044, however, was a series of provisions oriented toward increasing public participation in the rulemaking process.69 To this end, the Order required that each agency give the public an "early and meaningful opportunity to participate" in rulemaking.70 Among provisions designed to achieve this result were: a requirement for the publication of advance notice of proposed rulemaking, a requirement for public hearings, a requirement that notice of publication be sent to those likely to be affected, and the direct notification of interested parties.71 Additionally, the section required a minimum of sixty days for public comment on regulations.72 Like the Ford Order, Executive Order 12,044 gave no formal enforcement authority to any specific group,73 nor did it create a centralized structure to base clearance of regulatory proposals upon agency compliance with Executive Order 12,044.74

IV. EXECUTIVE ORDERS 12,291 AND 12,498: POLICIES, PROVISIONS, AND EFFECTS

A. Constitutional and Policy Bases for Executive Order 12,291

The stated goals and legal authority of Executive Order 12,291 do not appear inconsistent with the policies cited by the previous three

64 Exec. Order No. 12,044, supra note 62, § 1.
65 Id.
66 Id. §§ 2(d)-(e).
67 Id. § 2(a).
68 Id. § 2(b).
69 Id. § 2(c). This aspect of the Carter Order contrasts sharply with the Reagan Order which critics observe lessens the amount of public influence on rulemaking. See Rosenberg, supra note 29, at 1227-32.
70 Exec. Order No. 12,044, supra note 62, § 2(a).
71 Id.
72 Id.
73 Id.; see also Exec. Order No. 11,821, supra note 57.
74 See Exec. Order No. 12,044, supra note 62; Exec. Order No. 11,821, supra note 57.
schemes.\textsuperscript{75} The preamble locates the authority for Executive Order 12,291 in the Constitution and laws of the United States.\textsuperscript{76} It does not, however, elaborate this statement by citing either a specific constitutional provision or a statute that authorizes the President to implement a program such as that of Executive Order 12,291.\textsuperscript{77}

Shortly before the issuance of Executive Order 12,291, however, the Department of Justice prepared a legal memorandum outlining the legal authority for Executive Order 12,291.\textsuperscript{78} The memorandum locates the constitutional authority for the Executive Order in article II, section 3 of the Constitution, which authorizes the President to “take Care that the Laws be faithfully executed,”\textsuperscript{79} and also in the interpretation of that power set forth in \textit{Myers v. United States}\textsuperscript{80} and in the dissent in \textit{Youngstown Sheet & Tube Co. v. Sawyer}.\textsuperscript{81} In asserting the President’s regulatory oversight power, the memorandum states:

\begin{quote}
It is well established that this provision authorizes the President as leader of the Executive Branch to ‘supervise and guide’ Executive officers in ‘their construction of the statutes under which they act in order to secure the unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general Executive power in the President alone.’\textsuperscript{82}
\end{quote}

The Justice Department memorandum construes this phrase to recognize a general coordinating function for the President,\textsuperscript{83} to the extent that the President is suited uniquely as the representative of the nation as a whole to promote the broad public interest in the execution of laws.\textsuperscript{84}

The memorandum argues that Executive Order 12,291 is consistent with most regulatory statutes.\textsuperscript{85} According to the memorandum

\textsuperscript{75} See \textit{OMB Plays Critical Role}, supra note 29, at 693 (discussing Nixon’s “Quality of Life” Review); Exec. Order No. 11,821, supra note 57 (Ford Order); Exec. Order No. 12,044, supra note 62 (Carter Order).
\textsuperscript{76} Exec. Order No. 12,291, supra note 4, Preamble.
\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textit{House Report}, supra note 22, at 80.
\textsuperscript{79} \textit{Id.} at 80; U.S. Const., art. II, § 3.
\textsuperscript{80} 272 U.S. 52 (1926).
\textsuperscript{81} \textit{House Report}, supra note 22, at 81; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 687 (1952) (Vinson, C.J., dissenting).
\textsuperscript{82} \textit{House Report}, supra note 22, at 80 (citing \textit{Myers v. United States}, 272 U.S. 52, 135 (1926)).
\textsuperscript{83} \textit{Id.} at 80–81.
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} \textit{Id.} at 81.
"inquiry into Congressional intent in enacting statutes delegating rulemaking authority will usually support the legality of presidential supervision of rulemaking by Executive Branch agencies." From this hypothesis, the memorandum reasons that, on matters of both procedure and substance, the President presumptively possesses the power to supervise rulemaking, unless Congress seeks to delimit that power affirmatively. Moreover, the memorandum asserts that *Myers* leaves unclear the extent to which Congress "may insulate Executive branch agencies from supervision." According to the opinion, "it would be anomalous to attribute to Congress an intention to immunize from presidential supervision, those who are, by force of art. II, subject to removal when their performance in exercising their statutory duties displeases the President." The opinion appears to suggest that the "general administrative control" established by *Myers* should be construed broadly, to include not only the removal power, but also other unspecified supervisory powers.

The memorandum asserts that the President, therefore, possesses the authority to consult with those agencies with statutory decision-making power and require them to consider matters that the President deems relevant and appropriate. The memorandum rests this authority on the notion that the President's power is not coterminous with the fact that the President has both constitutional and implied statutory authority to supervise agencies. The President thus possesses constitutional authority to act beyond that which is accorded to him either implicitly in statutes or explicitly in the Constitution. As a result, the report urges that, except in those cases where cost-benefit analysis is precluded by statute, the President's power of "supervision" allows the President to require agencies to apply cost-benefit principles.

Therefore, the tasks that the OMB would undertake would not displace an agency's statutory authority, as those tasks would be:

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86 Id.
87 Id.
88 Id. In arguing for this supervisory power, the *Humphrey's* Court writes: "Congress is also aware of the comparative insulation given to the independent regulatory agencies when it has sought to minimize presidential interference. By contrast, the heads of non-independent agencies hold their positions at the pleasure of the President who may remove them from office for any reason." See *Humphrey's Executor v. Rathbun*, 295 U.S. 602 (1935).
89 *Humphrey's Executor*, 295 U.S. 602.
91 Id. The Legal Opinion reasons that "supervision is more justified when it does not purport wholly to displace, but only to guide and limit, discretion which Congress has allocated to a particular subordinate official."
92 Id. at 82.
supplementation of factual data, the development and implementation of uniform systems of methodology, the identification of incorrect statements of fact and the placement in the administrative record of a statement disapproving agency conclusions that do not appear to conform to principles expressed in the President’s order.93

The memorandum concludes that these functions do not displace any agency authority and are well within the President’s authority.94

The preamble sets forth the Order’s specific policy objectives which are “to reduce the burden of existing and future regulations, increase agency accountability for regulatory action, provide for presidential oversight of the regulatory process, and issue well-reasoned regulations.”95

These objectives introduce no new policies beyond those of the prior orders,96 and only hint at the breadth of the President’s vision in issuing Executive Order 12,291. President Reagan’s issuance of Executive Order 12,291, as well as the issuance of Executive Order 12,498, reflects the Reagan Administration’s view that regulatory burdens on industry and commerce undermine the efficiency of the market.97 Thus, in unveiling his Program for Economic Recovery shortly after his election in 1981, President Reagan stated that his plan aimed at “reducing the growth in government spending and taxing, reforming and eliminating regulations which are unnecessary and unproductive or counterproductive.”98 According to the President, regulations impose three types of costs with potentially destructive effects on the economy as a whole.99 First, regulations create enormous costs for the federal bureaucracy charged with administering and enforcing statutory programs.100 Second, regulations impose costs on businesses, non-profit organizations, and state and local governments.101 Finally, regulations create hidden and indirect long-term effects on economic growth.102

93 Id.
94 Id. at 83.
95 Id. Preamble.
96 See OMB Plays Critical Role, supra note 46, at 693; Exec. Order No. 11,821, supra note 57; Exec. Order No. 12,044, supra note 62.
100 Id. at 151.
101 Id.
102 Id. The report does not identify these costs. However, § 1(b)(2) of Executive Order
The Regulatory Program of the United States Government identified other aspects of the Reagan Administration's regulatory philosophy that have come to inform the application of Executive Orders 12,291 and 12,498. In the Reagan Administration's view, certain tendencies of the regulatory process created the inefficiency that Executive Orders 12,291 and 12,498 sought to combat. As such, the Program asserted that "oversight provides the means to prevent inefficient rules from being adopted by bureaucratic momentum alone, or as the result of pressure of special interest groups or businesses that want to confer benefits on a few at the expense of the many." This statement seems to imply that in the Administration's philosophy, agencies should make public policy choices based upon aggregate impact, rather than on the impact on the intended beneficiaries of statutes.

The Administration also seeks to narrow the protected population by revising standards of acceptable risk. The Program contends that approaches to risk assessment tend to be excessively conservative. The report notes, for example, that the complexity of assessing cancer risk leads rulemakers to use upper-bound estimates rather than actual estimates of the risk of harm. The Program also focuses its attention on studies of prolonged, intense exposure to harmful agents, and argues that regulations employing these studies exaggerate actual risk. Such exaggerations result from the assumption of lifetime exposure and most extreme environmental conditions instead of average exposure and average environmental conditions. The Administration argues that environmental and health regulations based on this type of information "do not depict the national situation and will not maximize net benefits to society."

The report also identified a tendency to compound conservative assumptions and therefore regulate for risks that were yet more remote. According to the Program, the typical risk-assessment

12,291 suggests that they may include the reduction of investment, innovation, and the ability of American companies to compete with foreign companies. Executive Order No. 12,291, supra note 4, § 1(b)(2).

103 REGULATORY PROGRAM, supra note 15, at xi–xxxi.

104 See Program for Economic Recovery, supra note 98, at 130.

106 REGULATORY PROGRAM, supra note 15, at xi.

106 Id. at xxiii.

107 Id.

108 Id.

109 Id.

110 Id. at xxiv–xxv.

111 Id. at xxv.

112 Id. at xxv–xxvi.
includes ten separate sub-assessment stages at which analysts make independent determinations. As scientists will tend to err on the side of caution, each estimate will be overly conservative. These assumptions combine to exaggerate the level of risk.

Finally, the Regulatory Program reaffirms the federalist values of the Administration. While centralizing oversight, the Administration seeks to decentralize regulation away from federal control. The Administration intends to minimize regulations that increase costs to states and that cover fields over which the Administration believes the states should retain legislative and regulatory authority. The Program notes that Administration efforts have already saved states annual costs of four to six billion dollars.


The provisions of Executive Order 12,291 emphasize further the degree to which the Order implements the President’s personal policies. While previous review techniques were oriented primarily toward reviewing regulations and reducing costs, the present Order also involves measuring benefits and comparing them to costs. Other schemes, no doubt, considered benefits. Because of the greater difficulty in quantifying benefit variables, their formal inclusion, in the 12,291 scheme increases the possibility that value judgments as to acceptable risks may displace congressional authority.

The general requirements set forth in Section 2 demonstrate the extent of review under Executive Order 12,291. Like earlier ex-

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113 Id.
114 Id.
115 Id. at xiv.
116 Id.
117 Id. at xiv.
118 Compare Exec. Order No. 12,291, supra note 4, § 2, with Exec. Order No. 12,044, supra note 62.
119 See infra notes 308–345 and accompanying text.
120 Exec. Order No. 12,291, supra note 4, § 2. This section entitled General Requirements provides:

In promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulations, all agencies, to the extent permitted by law, shall adhere to the following requirements:

(a) Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action;

(b) Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society;

(c) Regulatory objectives shall be chosen to maximize the net benefits to society;
Executive branch regulatory reform schemes, requirements of 12,291 apply to promulgation of new regulations, the review of existing regulations, and the development of legislative proposals concerning regulations.\textsuperscript{121} The preamble to 12,291 requires that its provisions be applied "to the extent allowed by law."\textsuperscript{122} This phrase, along with other provisions of the Order, reinforces the Administration's intention that regulations remain within the authority delegated by the Administrative Procedure Act and enabling statutes.\textsuperscript{123} Both this phrase and the Justice Department Legal Opinion, however, leave unclear the Administration's construction of the "extent permitted by law."\textsuperscript{124}

Section 2 establishes five basic requirements that reflect the Order's overall goal of reducing regulatory burdens. First, the Order requires that administrative "decisions be based on adequate information concerning the need for and the consequences of proposed government action."\textsuperscript{125}

The next requirement is perhaps the centerpiece of Executive Order 12,291, and is the requirement that distinguishes most fully this order from any previous regulatory coordination scheme. This provision mandates that agencies not issue regulations where costs

\begin{itemize}
  \item \textbf{(d)} Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen; and
  \item \textbf{(e)} Agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by regulations, the condition of the national economy and other regulatory actions contemplated for the future.
\end{itemize}

\textit{Id.}
\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} See also id. § 3(f)(3) ("nothing in this subsection shall be construed as displacing the agencies' responsibilities delegated by law"); see also id. § 4, which provides:

Before approving any final major rule, each agency shall:

\begin{itemize}
  \item \textbf{(a)} Make a determination that the regulation is clearly within the authority delegated by law and consistent with congressional intent and include in the Federal Register at the time of promulgation a memorandum of law supporting that determination.
  \item \textbf{(b)} Make a determination that the factual conclusions upon which the rule is based have substantial support in the agency record, viewed as a whole, with full attention to public comments in general and the comments of persons directly affected by the rule in particular.
\end{itemize}

\textsuperscript{125} Exec. Order No. 12,291, \textit{supra} note 4, § 2(a).
to society exceed benefits.\textsuperscript{126} Consistent with this command is the OMB's authority to "prepare and promulgate uniform standards for the development of regulatory impact analyses (RIAs)."\textsuperscript{127} The Order thus authorizes the OMB to review not merely adherence to the cost-benefit requirements, but to determine the methods agencies may use to conduct cost-benefit analysis.\textsuperscript{128}

The third requirement of Section 2 of 12,291 is that agencies choose regulatory objectives that maximize net benefits to society.\textsuperscript{129} Conversely, the fourth general requirement is that in choosing among regulatory alternatives, the agency should choose those with the least net cost to society.\textsuperscript{130} While these two requirements appear contradictory on their face, it is important to note that the Order does not require the maximization of benefits and the minimization of costs. Rather, it requires that for any given regulatory objective the agency choose the least costly alternative.

The final general requirement of Executive Order 12,291 states that regulations should maximize net benefits to society "taking into account the condition of the particular industry affected by the regulation, the condition of the national economy and other regulatory action contemplated for the future."\textsuperscript{131}

Section 3 of the Order sets up the criteria for RIAs, which are to be included in the rulemaking record for every major rule.\textsuperscript{132} Section 1(b) designates as a "major rule" any regulation that is likely to result in:

(1) An annual effect on the economy of $100 million or more;
(2) A major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions, or
(3) Significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.\textsuperscript{133}

\textsuperscript{126} Exec. Order No. 12,291, \textit{supra} note 4, § 2(b); see generally Sagoff, \textit{At the Shrine of Our Lady of Fatima or Why Political Questions Are Not All Economic}, 23 \textit{Ariz. L. Rev.} 1283 (1981) (critiquing cost-benefit analysis under Exec. Order No. 12,291).

\textsuperscript{127} Exec. Order No. 12,291, \textit{supra} note 4, § 6(a)(2).

\textsuperscript{128} \textit{HOUSE REPORT}, \textit{supra} note 22, at 82.

\textsuperscript{129} Exec. Order No. 12,291, \textit{supra} note 4, § 2(c).

\textsuperscript{130} Id. § 2(d).

\textsuperscript{131} Id. § 2(e).

\textsuperscript{132} Id. § 3(a).

\textsuperscript{133} Id. § 1(b).
Additionally, Section 3(b) authorizes the Office of Management and Budget to prescribe other criteria for designating a rule to be a major rule and for ordering a rule or a set of related rules to be treated as a major rule.\textsuperscript{134} Section 3(c) requires that agencies submit RIAs for major rules along with a notice of proposed rulemaking or with a final rule.\textsuperscript{135} Section 3(d)(1)–(5) describes information that agencies should include in the Regulatory Impact Analysis, in order that the OMB may assess the agency’s compliance with the principles set forth in Section 2.\textsuperscript{136} Once an agency submits an RIA, the Director may either clear its issuance by making no comment, or may notify the agency of his intention to comment.\textsuperscript{137} Upon such notification, the agencies must refrain from issuing final rules until the OMB has completed review, and the agency has responded to that review. The rulemaking record should include both the review and the response.\textsuperscript{138}

Section 6 outlines the authority of the Director of the Office of Management and Budget,\textsuperscript{139} again stating that his authority is limited “to the extent permitted by law.”\textsuperscript{140} The first two requirements

\begin{itemize}
\item \textsuperscript{134} Id. § 3(b).
\item \textsuperscript{135} Id. § 3(c).
\item \textsuperscript{136} Id. § 3(d) provides:
\begin{itemize}
\item To permit each proposed major rule to be analyzed in light of the requirements stated in section 2 of this Order, each preliminary and final Regulatory Impact Analysis shall contain the following information:
\begin{itemize}
\item (1) A description of the potential benefits of the rule including any beneficial effects that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits;
\item (2) A description of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms, and the identification of those likely to bear the costs;
\item (3) A determination of the potential net benefits of the rule, including an evaluation of effects that cannot be quantified in monetary terms;
\item (4) A description of alternative approaches that could substantially achieve the same regulatory goal at lower cost, together with an analysis of this potential benefit, and costs and a brief explanation of the legal reasons, why such alternatives, if proposed, could not be adopted;
\item (5) Unless covered by the description required under paragraph (4) of this subsection, an explanation of any legal reasons why the rule cannot be based on the requirements set forth in Section 2 of this Order.
\end{itemize}
\end{itemize}
\item \textsuperscript{137} Id. §§ 3(e)(2) and (f)(1)–(2).
\item \textsuperscript{138} Id. § 6.
\item \textsuperscript{139} Id. § 6. At the time that Executive Order 12,291 was issued, the Office of Management and Budget was subject to oversight by the Presidential Task Force on Regulatory Relief. In 1984, the Task Force was disbanded, leaving the regulatory review function in the hands of the Office of Management and Budget. See Olson, \textit{supra} note 14, at 31–32.
\item \textsuperscript{140} Exec. Order No. 12,291, \textit{supra} note 4, § 6(a).
in Section 6 grant the OMB authority to identify major rules,\textsuperscript{141} and to issue uniform standards for the identification of such rules.\textsuperscript{142} Section 6(a)(3) authorizes the OMB to require agencies to consider "any additional data from any appropriate source."\textsuperscript{143} Nevertheless, in all cases it raises a troublesome problem. Since RIAs are required for rulemaking proposals and for final rules, the requirement for additional information comes at stages in the rulemaking process where there is no public participation in the process. Hence, the information required, especially at the final rule, stage will not encounter scrutiny, opposition, or interpretation by anybody other than the agency itself.

Finally, Section 6(a)(6) authorizes the OMB to develop procedures for estimating the annual costs and benefits of regulations for the purpose of compiling a regulatory budget.\textsuperscript{144} Such estimates should be based either "on aggregate and economic or industrial sector bases."\textsuperscript{145}

\section*{C. Executive Order 12,498: Policies and Provisions}

The same policies that underlie Executive Order 12,291 underlie Executive Order 12,498.\textsuperscript{146} Chiefly, Executive Order 12,498 augments the previous order by creating another level of OMB clearance.\textsuperscript{147} Executive Order 12,498 requires the OMB to compile a Regulatory Program that includes each agency's regulatory plans.\textsuperscript{148} Under Executive Order 12,498, each agency must submit an overview to the OMB which discusses the agency's policies, goals and objectives, as well as explaining how these are consistent with the Administration's regulatory policy.\textsuperscript{149} The overview should also con-

\textsuperscript{141} Id. § 6(a)(1).
\textsuperscript{142} Id. § 6(a)(2).
\textsuperscript{143} Id. § 6(a)(3).
\textsuperscript{144} Id. § 6(a)(6).
\textsuperscript{145} Id.
\textsuperscript{146} Exec. Order No. 12,498, \textit{supra} note 8, Preamble provides:
By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to create a coordinated process for developing on an annual basis the Administration's Regulatory Program, establish Administration regulatory priorities, increase the accountability of agency heads for the regulatory actions of their agencies, provide for Presidential oversight of the regulatory process, reduce the burdens of existing and future regulations, minimize duplication and conflict of regulations, and enhance public and Congressional understanding of the Administration's regulatory objectives.
\textsuperscript{147} See id. § 2(a).
\textsuperscript{148} Id.
\textsuperscript{149} Id. § 2(b).
tain information as to all regulatory action that the agency plans for the coming year.\textsuperscript{150} In preparing the program, each agency must adhere to the principles of Executive Order 12,291.\textsuperscript{151}

The Director of the Office of Management and Budget has authority to consider the draft provisions' consistency with the Administration's policies and priorities,\textsuperscript{152} and to identify any further regulatory or deregulatory action that may be deemed to be consistent with the Administration's regulatory policies.\textsuperscript{153} In the event of disagreement, either the agency head or the Director may raise the issue before a cabinet council or before the President.\textsuperscript{154}

Essentially, Executive Order 12,498 allows the OMB to realize the goals of Executive Order 12,291 as early as possible in the regulatory process.\textsuperscript{155}

\textbf{D. Executive Orders 12,291 and 12,498: Effects on the Regulatory Process}

Through these various provisions, the Orders aim to standardize regulatory analysis throughout the executive branch.\textsuperscript{156} Executive Order 12,291 does not, however, authorize the Office of Management and Budget to compel a specific rulemaking outcome.\textsuperscript{157} Nevertheless, the Orders can affect the character of regulations significantly. It has adopted all the elements of the earlier orders, added new ones, and applied them broadly to all executive branch agencies.

Executive Order 12,291 grants two significant powers to the Office of Management and Budget, that permit it to determine which rules will be subject to the Order, and which will not. The OMB may

\textsuperscript{150} \textit{Id.} § 2(a).

\textsuperscript{151} Id. § 1(d); see Exec. Order No. 12,291, supra note 4, § 2.

\textsuperscript{152} Exec. Order No. 12,498, supra note 8, § 3(a)(i).

\textsuperscript{153} Id. § 3(a)(ii).

\textsuperscript{154} \textit{Id.}

\textsuperscript{155} See \textit{Morrison}, supra note 16, at 1063.

\textsuperscript{156} \textit{HOUSE REPORT}, supra note 21, at 80, 82.

\textsuperscript{157} See \textit{id.} § 3(f)(1). The Order's only requirements at final rulemaking are that comments from the OMB be responded to and that these comments and responses to them be included in the rulemaking record. Nevertheless, the lessons of "Quality of Life" Review may apply to Executive Order 12,291. \textit{See supra} notes 45–56 and accompanying text. All but one of the decisions involving Exec. Order No. 12,291 concerned delay in promulgation of regulations because of review under Exec. Order No. 12,291. \textit{See, e.g.}, Environmental Defense Fund v. Thomas, 627 F. Supp. 566, 571 (D.D.C. 1982) (Exec. Order No. 12,291 cannot be used to violate deadlines in the 1984 Resource Conservation and Recovery Act); Natural Resources Defense Council v. Ruckelshaus, 14 Envtl. L. Rep. (Envtl. L. Inst.) 20817 (D.D.C. 1984) (OMB review cannot take place where agency has bypassed congressional timetable for promulgation).
designate major rules\(^\text{158}\) and has the power to waive the Order's requirements.\(^\text{159}\) Second, the Order grants the OMB the power to determine procedures for Regulatory Impact Analyses\(^\text{160}\) and for the estimation of costs and benefits.\(^\text{161}\) By standardizing analytical procedures, the Order may, in specific cases, preempt the particular equation of costs and benefits that the specific statute contemplates.\(^\text{162}\)

By creating the presumption that cost-benefit analysis should be applied to all regulations, the Order goes further than any previous order.\(^\text{163}\) Unlike economic costs, which are either quantifiable, or at the very least, amenable to projection, benefits involve criteria that are more abstract, and more difficult to valuate.\(^\text{164}\) Any quantification of values is necessarily arbitrary, relying more on intuition or individual values rather than objective measures.\(^\text{165}\) For example, the Regulatory Program's argument that agencies should regulate to prevent typical risk rather than worst case risk\(^\text{166}\) is one way in which intuitive preferences will dictate which quantitative benefit (risk reduction) will be chosen.

By imposing the review process on agencies, the Orders create a clearance procedure which can be used to manipulate rulemaking or at the very least to delay promulgation.\(^\text{167}\) In cases where delay causes the rulemaking process to continue beyond a statutorily imposed effective date, courts have held that regulatory review must either be discontinued\(^\text{168}\) or at the very least accelerated.\(^\text{169}\) Never-

\(^{158}\) Exec. Order No. 12,291, \textit{supra} note 4, § 3(b).

\(^{159}\) \textit{Id.} § 6(a)(4).

\(^{160}\) \textit{Id.} § 6(a)(2).

\(^{161}\) \textit{Id.} § 6(a)(6).


\(^{163}\) Of course, cost-benefit analysis is not a new feature in the regulatory process. Rather, it is the first time this type of weighing is specifically required in regulatory review procedures. See \textit{Note, The Inflation Impact Statement: An Assessment of the First Two Years}, 26 \textit{AM. U.L. REV.} 1138, 1139 (1976).


\(^{165}\) \textit{Id.}

\(^{166}\) \textit{Regulatory Program, supra} note 15, at xxiii.

\(^{167}\) Again, the experience of "Quality of Life" review is informative. In response to "Quality of Life" review, the EPA issued regulations which were "scientifically aggressive" as opposed to "environmentally aggressive" in order to avoid prolonged review. See \textit{OMB Plays Critical Part, supra} note 46, at 693.

\(^{168}\) See \textit{Natural Resources Defense Council v. Ruckelshaus}, 14 \textit{ENVTL. L. REP. (Envtl. L. Inst.)} 20817 (D.D.C. 1984). No courts have addressed situations where delay was argued to be unreasonable, rather than in excess of the statutory deadline.

\(^{169}\) See \textit{supra} note 157.
theless, the Orders discourage agencies from regulating aggressively, by encouraging them to tailor regulation in such a way as to avoid lengthy review.\textsuperscript{170}

V. LIMITING THE APPLICATION OF EXECUTIVE ORDERS 12,291 AND 12,498: SEPARATION OF POWERS MEETS COST-BENEFIT ANALYSIS

A. Constitutional Boundaries of Executive Action

An examination of the relationship between Executive Orders 12,291 and 12,498 and regulatory statutes must begin with an analysis of the allocation of legislative powers. Legislation, in this context, means not only the product of the Congress, but any enactments which may be, even in the broadest sense, the creation of a law. While the bulk of legislative powers is constitutionally granted to Congress, the Executive possesses certain residual legislative powers.\textsuperscript{171} The Constitution, with several exceptions, does not permit the President to exercise that power spontaneously.\textsuperscript{172} Rather, that power must be delegated to him either by Congress or explicitly by the Constitution.\textsuperscript{173}

With the growth of power of the executive branch, judicial analysis has begun to outline the boundaries of presidential power.\textsuperscript{174} The 1890 case of \textit{In re Neagle} first established the legal power of the President's quasi-legislative acts.\textsuperscript{175} In \textit{Neagle}, an officer of the United States Attorney General's Office, assigned as a bodyguard to Supreme Court Justice Stephen J. Field, killed David Terry because he believed Terry was about to attempt to kill Field.\textsuperscript{176} Al-

\textsuperscript{170} Olson, supra note 14, at 50; see OMB Plays Critical Role, supra note 46, at 693.

\textsuperscript{171} See U.S. CONST. art. I; see Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 639 (1952) (Jackson, J., concurring) (suggesting a "zone of twilight" where both the executive and legislative branches may act).

\textsuperscript{172} See Youngstown Sheet & Tube Co., 343 U.S. at 587 (Black, J., plurality opinion).

\textsuperscript{173} See generally HART, supra note 35; see, e.g., U.S. CONST. art. II, § 2[1] (making President commander in chief of the armed forces); U.S. CONST. art. II, § 2[2] (granting the treaty-making power).

\textsuperscript{174} In re Neagle, 135 U.S. 1, 58–59 (1890). See also In re Debs, 158 U.S. 563 (1896).

\textsuperscript{175} 135 U.S. 1 (1890).

\textsuperscript{176} Id. at 44–46. The United States Attorney General had assigned David Neagle to protect Justice Field, after Terry had threatened his life. Upset over an unfavorable verdict that Field had returned against him, Terry had threatened Field on numerous occasions. In the incident leading to the killing, Justice Field was traveling to ride circuit in California along with Officer Neagle. While Justice Field was breakfasting on the train, Terry approached the
though he was acting to protect the judge, Neagle was taken into custody and charged with murder. A circuit court ordered the release of Neagle on a writ of habeas corpus, and the arresting sheriff appealed to the Supreme Court which upheld the writ.

The court found that a federal statute authorized circuit courts to grant writs of habeas corpus to persons in custody for acts committed pursuant to the laws of the United States. The court found further that "any obligation fairly and properly inferable from the Constitution, or any duty of a United States officer is to be deemed a law" within the meaning of the statute. The court held that the attorney general's order that Neagle protect Justice Field was such a law, even though it was not directly authorized by the legislature. The court reasoned that as the attorney general is an officer whose power originates from his appointment by the President, he possesses authority to act in the shoes of the President. The Court ruled that article II, section 3 of the Constitution, the "take Care" clause, authorized the issuance of such a "law." Neagle teaches that the executive's obligation under the "take Care" clause, enables, indeed requires the President to exercise power that is legislative in form.

Neagle also implicitly suggests that the "take Care" clause incorporates the liberal grant of managerial power to the President, in his capacity as chief officer of the Executive Branch. With the growth of the federal bureaucracy, the Supreme Court has considered the notion that the Constitution grants the President managerial authority as part of the "take Care" clause. Decisions in the century following Neagle firmly established two themes in constitutional analysis of presidential power. First, in order to exercise this managerial function, the President would have to perform functions, which while pursuant to statutory or constitutional authority would be legislative in form. More generally, the President's

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177 Id. at 3–4, 53.
178 Id.
180 In re Neagle, 135 U.S. at 58–59.
181 Id. at 63.
182 Id.
183 Id. at 63–64.
184 Id.
186 See generally Myers v. United States, 272 U.S. at 52.
agerial authority included a number of specific and potent powers which were not specifically granted. 187

Both of these themes underlie the Supreme Court’s opinion in Myers v. United States. 188 The Supreme Court found that as a logical incident of his power to appoint federal officers, the President could remove them. 189 In that case, Myers had been appointed postmaster of the first class in Portland, Oregon. 190 In 1920, the Postmaster General demanded his resignation, which Myers refused to give. Soon after, the Postmaster General removed Myers, acting at the President’s direction. 191 Myers’ successors sued the Postmaster General, asserting that the President could not order his removal without the Senate’s consent. 192

The Myers court found that the President’s discretion in “determining the national public interest and in determining the acts to be taken,” gave him the power to remove executive branch officers as he wished. 193 The Court found this power implicit in the “take Care” clause of article II. The Court wrote:

The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article 2 of the Constitution evidently contemplated in vesting general executive power in the President. . . . The ability and judgment manifested by an official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider and supervise in his administrative control. Finding such officers to be negligent and inefficient, the President should have the power to remove them. 194

While the Court’s analysis identifies the existence of “the general administrative control of the President,” it goes no further in stating what implicit authority, other than the removal power, might lie within the rubric of “general administrative control.” 195 Nor does Myers give a clear statement defining the point at which the Exec-

187 See id. at 135.
188 Id.
189 Id. at 118.
190 Id. at 106.
191 Id.
192 Id. at 107.
193 Id. at 134.
194 Id. at 135.
195 See id.
utive would surpass constitutional boundaries in exercising such power. Nevertheless, *Myers* is directly relevant to Executive Orders 12,291 and 12,498, because of their stated goal to improve the internal management of the executive branch, and because of the Orders' joint goal of avoiding duplicative regulations and of fostering inter-agency communication.

Other cases have accorded other privileges to the executive branch not explicitly set forth in the Constitution. In *Nixon v. United States*, the Supreme Court recognized the existence of an executive privilege to protect communications within the executive branch. For the unanimous Court, Chief Justice Burger reasoned that certain presidential powers and privileges flow from the enumerated constitutional powers and that consequently the protection of the confidentiality of presidential communications had similar constitutional underpinnings. The privilege for executive communications is an instance of another power that is essential to the orderly function of the executive branch and is thus accorded constitutional status.

The case of *Humphrey's Executor v. Rathbun* concerned facts very similar to those in *Myers v. United States*. In *Humphrey's Executor*, however, President Roosevelt had ordered the removal of a member of the Federal Trade Commission, an agency not under the executive branch's direction. The government asserted that the court should extend the removal power recognized in *Myers* to the situation in *Humphrey's Executor*. The *Humphrey's Executor* court distinguished the situations, stating that the office of the Postmaster General was a unit of the executive branch, inherently subject to its power, whereas the nature of the Federal Trade Commission made it essential that it be free of executive control.

The decision also stated that, as between purely executive and purely independent agencies, it was unclear what would happen in cases where an agency was not clearly one or the other. This lack of

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196 HOUSE REPORT, supra note 22, at 81.
200 Id. at 705–06.
201 295 U.S. 602 (1935).
202 Id. at 618.
203 Id. at 626.
204 Id. at 627–28.
205 Id. at 631–32 ("To the extent that between the decision in the Myers case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall...")
clarity may mean that agencies with greater expertise should be treated as more independent from presidential control. 206

While Myers and Nixon suggest an expansive reading of executive power, their holdings must co-exist with the limitations on presidential power inherent in the “take Care” clause. When the President acts, in his managerial capacity or otherwise, he must do so pursuant to constitutional or statutory authority. The source of most of the President’s implied power in the domestic sphere 207 is the mandate that the “President take Care that the laws be faithfully executed.” 208 Clearly implicit in that mandate is the requirement that the President’s powers be used to achieve only Congressional ends. 209

Of course, executive acts relying on the managerial authority of the President, must remain within the boundaries created by the constitutional separation of powers between the legislature and the executive. 210 Since Congress is the primary repository of legislative power, executive action must remain within the scope set by the legislature or it must involve the exercise of a constitutional function that Congress has not chosen to either limit or shape.

A.L.A. Schechter Poultry Co. v. United States 211 discusses the degree of legislative authority Congress can delegate to the executive. In Schechter, section 3 of the National Industrial Recovery Act authorized the President to approve “codes of fair competition.” 212 The President could approve such codes for individual trades or industries, upon submission from an industry’s representative association. 213 The only restrictions Congress placed on the codes were that they place “no inequitable restrictions on membership” and that such codes not operate to create monopolies or to “oppress or eliminate small enterprises.” 214 The President, acting under authority of

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206 See Olson, supra note 14, at 18 (“Congress has frequently expressed its intent that the Administrator apply his or her own expertise and that of the agency, in regulating technically sophisticated endeavours.”).

207 It is generally recognized that the power of the President to invade the legislative prerogative is greater in matters of foreign policy than in domestic policy. See generally Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

208 U.S. CONST. art. II, § 3.

209 See Youngstown, 343 U.S. at 583.

210 Id.

211 295 U.S. 495 (1935).

212 Id. at 521–22.

213 Id. at 522.

214 Id.
the NIRA, issued by executive approval the Live Poultry Code in the New York City area.\textsuperscript{215}

In holding that a conviction under the code should be overturned, the Supreme Court stated: "Congress cannot delegate legislative powers to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or business or industry."\textsuperscript{216} The Court expressed the fear that because the statute gave the Executive only the most limited instruction, the President had the power to make whatever laws he could include within the broad criteria set by the NIRA.\textsuperscript{217} Schechter establishes that Congress cannot grant unrestricted legislative power to the President.\textsuperscript{218} By implication, it also establishes that the President cannot make laws that are not within statutory authority subject to judicial review.

Youngstown Sheet & Tube Co. v. Sawyer considered the situation where Executive Orders contradict congressional enactments in the same field.\textsuperscript{219} In Youngstown, a national dispute between steelworkers and their employers brought the nation's steel industry close to a strike.\textsuperscript{220} The threatened strike came at the height of the Korean war, jeopardizing the continued supply of war materiel to American troops.\textsuperscript{221} On this basis, President Truman issued an Executive Order authorizing the seizure of the nation's steel mills and setting guidelines for their continued operation.\textsuperscript{222} A group of steel manufacturers sued the government, claiming that the Order was an unconstitutional exercise of executive power.

Despite finding the Order \textit{ultra vires}, the Youngstown decision failed to clearly define the boundaries of presidential power. The opinion remains problematic in light of a plurality containing six separate concurrences. The first two opinions, those of Justices Black and Jackson, are cited most frequently and best articulate the debate on the scope of presidential power.

\begin{itemize}
  \item \textsuperscript{215} \textit{Id.} at 523. The Schechter family operated whole poultry slaughterhouse markets in the New York City area. They were convicted of eighteen violations of the Live Poultry Code. The Schechters sought to have their conviction overturned, basing their case on the argument that the National Industrial Recovery Act was an unconstitutional overdelegation of power to the President.
  \item \textsuperscript{216} \textit{Id.} at 537–38.
  \item \textsuperscript{217} \textit{Id.} at 539.
  \item \textsuperscript{218} \textit{Id.} at 537.
  \item \textsuperscript{219} 343 U.S. 579 (1952).
  \item \textsuperscript{220} \textit{Id.} at 582–83.
  \item \textsuperscript{221} \textit{Id.} at 583.
  \item \textsuperscript{222} \textit{Id.}
\end{itemize}
Justice Black’s opinion for the Court adopts a clearer—but, perhaps oversimplified and unrealistic—view of the separation of power between the executive and the legislature.223 Black reasoned that “the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”224 Black construed the President’s role literally, stating that the Constitution limits his function to recommending legislation to Congress and vetoing laws.225 Black’s analysis seems to accord no presidential power of interstitial lawmaking. Black’s opinion, however, suggests that it was not the President’s methods that were unconstitutional, but rather that Congress did not mandate the President’s policy.226 Black reasoned that “the President’s order does not direct that a Congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President.”227 Black’s opinion does not signify, however, whether it would be constitutional for the President, in the absence of applicable congressional instructions, to carry out stated congressional policies according to his own means.

Justice Jackson’s concurrence in Youngstown differs from Black’s opinion in that it does not address presidential lawmaking authority as literally as Black’s opinion.228 He suggests the existence of a “zone of twilight” in which both the President and Congress may act.229 In this zone, however, the President may exercise power only in the absence of inconsistent congressional action in the same field.230 Jackson asserted that when the President issues “measures incompatible with the express or implied will of Congress, his power is at its lowest ebb.”231 Executive actions may have the “force and effect of law” and may be subject to the broad interpretation necessary to make the executive effective.232 The inherent separation of powers between the executive and the legislature, however, necessarily limits executive action.233 The President’s supervisory rights are limited: 1) where

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223 See Bruff, supra note 49, at 472.
224 Youngstown, 343 U.S. at 587.
225 Id. at 587.
226 Id. at 588.
227 Id.
228 See id. at 592–634 (Jackson, J. concurring).
229 Id. at 637.
230 See id. at 635–38.
231 Id. at 637.
232 See In re Neagle, 135 U.S. 1, 72 (1890); Myers v. United States, 272 U.S. 52, 135 (1926).
233 Youngstown, 343 U.S. at 538.
they involve the exercise of naked lawmaking;\(^{234}\) 2) where they involve independent agencies;\(^{235}\) and 3) where the President’s action clearly contradicts the intent of Congress.\(^{236}\)

As the Legal Opinion supporting Executive Order 12,291 suggests, the Executive Order is an exercise of the “general administrative control” described in *Myers v. United States*.\(^{237}\) *Myers* clearly holds that the “take Care” clause contemplated the “unitary and uniform execution of the laws.”\(^{238}\) To the extent that the Order centralizes regulatory oversight and seeks to insert certain general regulatory principles into the administrative process, it is indeed aiming, at a “unitary and uniform execution of the laws.”\(^{239}\) *Myers* may not simply be limited to the removal power. In holding that there is an “executive privilege” to “consultative privacy,” *Nixon* similarly recognizes that there are other powers whose centrality to the executive function accords them constitutionality.\(^{240}\)

*Youngstown*, however, holds that the Constitution limits the President’s authority to engage in lawmaking.\(^{241}\) Although the *Youngstown* plurality could not ultimately agree on the extent of the President’s quasi-legislative power, certain extremes of presidential action do plainly lie outside the article II, section 3 grant of executive power.\(^{242}\) Clearly, where executive action contradicts either the terms or the intent of a statute, a court may invalidate that action.\(^{243}\)

What *Youngstown* leaves unaddressed is the relationship between an executive order and a statute under which that order purports to act.\(^{244}\) Executive Orders 12,291 and 12,498 apply to the mass of regulatory legislation, making this inquiry essential in evaluating the relationship between application of Executive Order 12,291 to the rulemaking process and enabling statutes. Frequently, statutes, while not precluding cost-benefit analysis, may dictate the specific formula by which agencies will balance costs and benefits.\(^{245}\) As a

\(^{234}\) *Schechter*, 295 U.S. at 846.


\(^{236}\) *Youngstown*, 343 U.S. at 637–38.

\(^{237}\) HOUSE REPORT, supra note 22, at 81.

\(^{238}\) *Myers* v. United States, 272 U.S. 52, 135 (1926).

\(^{239}\) Id.


\(^{241}\) *Youngstown*, 343 U.S. 579.

\(^{242}\) Id. at 581–92 (Black, J., plurality opinion); id. at 634–60 (Jackson, J., concurring); id. at 660–67 (Clark, J., concurring); id. at 629–34 (Douglas, J., concurring); id. at 592–615 (Frankfurter, J., concurring).

\(^{243}\) Id.

\(^{244}\) See *Youngstown* Sheet & Tube Co. v. Sawyer, 373 U.S. 579 (1952).

result, the Orders’ requirements that its provisions will not be applied in cases where they are precluded by enabling statutes may not always be an adequate safety valve against the Orders’ transgression of statutory authority. Even where statutes do not preclude cost-benefit analysis, the equation of regulatory variables must reflect the priorities established by the statute, not those of the Administration. 246

Enactments like Executive Orders 12,291 and 12,498 lie precisely in the “zone of twilight” described in Justice Jackson’s *Youngstown* concurrence. 247 In this zone, the President possesses implied power of the type suggested in the *Myers* dicta, 248 but nevertheless is limited by congressional policies in enacting regulatory statutes. 249

B. Defining the Relationship Between Executive Orders and Statutes: The “Nexus Test”

The Supreme Court in *Chrysler Corp. v. Brown*, found that in order for a regulation, issued pursuant to a statute and upon the direction of an Executive Order, to have the force and effect of law, “it is necessary to establish a nexus between the regulations and some delegation of the requisite legislative authority by Congress.” 250 In *Chrysler*, President Jimmy Carter’s Executive Order 11,246 directed the Secretary of Labor to make certain disclosures regarding employment of women and minorities, pursuant to the Freedom of Information Act (FOIA). 251 Such disclosures, argued Chrysler, were barred by the Trade Secrets Act. That act prohibited government disclosure of secrets not “authorized by law.” 252 In seeking to determine whether such disclosure was “authorized by law,” the Court found that neither the policies in FOIA nor those in the several acts authorized such disclosure. 253 Without such authorization, no nexus could exist.

The “nexus” test was amplified in recent decisions in the Fourth Circuit and the District of Columbia Circuit, suggesting that the President is not empowered to carry out “presidential policies by

246 *Youngstown*, 373 U.S. at 579.
247 *Id.* at 637 (Jackson, J., concurring).
251 *Id.*
253 *Chrysler Corp. v. Brown*, 441 U.S. at 305.
presidential enactments. "254 Those cases have required the satisfaction of the "sufficiently close nexus" test as the condition for validity of the Executive Orders. 255 In essence, the test states that the President may not use statutory authority to achieve an objective, merely because that objective reflects an important national priority. 256

In American Federation of Labor, Inc. v. Kahn, Judge Skelly Wright applied the "sufficiently close nexus" test in deciding whether an Executive Order by President Carter exceeded statutory authority. 257 In Kahn, President Carter issued Executive Order 12,092, directing the Council on Wage and Price Stability to set voluntary wage and price standards for the nation's economy. 258 President Carter's order also directed that each executive department and agency require that all contractors certify that they are in compliance with Executive Order 12,092's wage and price guidelines. 259 The AFL-CIO challenged the Order, claiming that it exceeded the President's power. 260

The Kahn court examined the question of whether authority for such an order was located in section 205(a) of the Federal Procurement and Administrative Services Act (FPASA). 261 Section 205(a) of the Act provided that the President could "prescribe such policies and directives not inconsistent with the provisions of the Act, as he shall deem necessary to effectuate the provisions of said Act." 262 Moreover, section 201 of FPASA requires that policy and procurement be conducted in a manner "advantageous to the Government in terms of economy, efficiency and service." 263 Among other grounds, the labor unions asserted that the President's order was not consistent with the policies of FPASA, which addressed economy within the executive branch rather than in the nation as a whole. 264

In response, the government argued that the reduction of aggregate inflation would reduce the costs confronted by government sectors. 265

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255 Id.; AFL-CIO v. Kahn, 618 F.2d 784, 792 (D.C. Cir. 1979).
256 Liberty Mut. Ins. Co. v. Friedman, 639 F.2d at 164.
257 618 F.2d at 792.
258 Id. at 785–86.
259 Id. at 786.
260 Id.
261 Id. at 788.
263 Id.
264 AFL-CIO v. Kahn, 618 F.2d at 786.
265 Id. at 793.
The *Kahn* court found this rationale compelling.  

266 *Kahn* held that the government had established a "sufficiently close nexus" between the Act's policies of "economy" and "efficiency" and the wage and price guidelines.  

267 The court supported its finding of a nexus with the finding that Congress did indeed intend to inject broad social policies into the procurement process.  

268 The court emphasized, however, that the decision did not "write a blank check for the president to fill at his will."  

269 The President has to exercise the procurement power in a manner consistent with the structure and purpose of the statute that delegated that power.  

270 The Fourth Circuit Court of Appeals in *Liberty Mutual Insurance Co. v. Friedman*  

271 amplified the "close nexus" test. The *Friedman* court applied the "close nexus" test to another Executive Order that also claimed section 205(a) of the Federal Procurement and Service Act as its authority.  

272 In *Friedman*, section 202 of Executive Order 11,246 prohibited contractors and subcontractors with the federal government from discriminating on the basis of race, color, religion, sex, or national origin and required them to take affirmative action to ensure equal employment opportunity.  

273 Liberty Mutual was the insurance underwriter for many companies with government contracts.  

274 Among the sources of authority cited for the Executive Order was the procurement power in section 205(a) of the Federal Property and Administrative Services Act, providing for an "economical and efficient system" of procurement of goods and services.  

275 While the Act authorizes Executive Orders, it does not mention employment discrimination.  

276 The Fourth Circuit Court of Appeals held that there did not exist the type of "close nexus" here that had existed in *Kahn*, because the statute had mentioned no affirmative action policy.  

277 The court refined the test stating that there had to be findings of fact demonstrating that the ills addressed by the Exec-
utive Order are those addressed by the statute whose authority is invoked. The court emphasized that the procurement power under section 205(a) did not authorize the President to read any important national policy into the statute. Where an executive order finds its authority in a statute, its terms must "lie within the contemplation of that statute." If not, the order's failure to comport with statutory intent would violate separation of powers.

The "close nexus" test suggests that executive action taken under the "take Care" clause cannot use congressionally delegated means simply to achieve presidential policy objectives. The cases applying the "nexus test" involve executive policies similar to those involved in Executive Orders 12,291 and 12,498. In both situations, the President attempted to improve the economy and efficiency of the Executive branch. It is notable that in order to achieve these goals, all the "nexus" courts required that the President's order be connected with the statute. The cases do not, in contrast, suggest that such policies were derived from the President's managerial power.

C. Judicial Validation of Congressional Restrictions on the Use of Cost-Benefit Analysis

Thus, in directing agencies to apply cost-benefit analysis, according to the methodologies suggested by the OMB and according to the Administration's regulatory principles, individual applications of the President's order may run afoul of policies underlying enabling statutes.

278 Id. at 171 ("The connection between the cost of worker's compensation policies, for which employers purchase a single policy to cover employees working on both federal and nonfederal contracts without distinction between the two, and any increase in the cost of federal contracts that could be attributed to discrimination by these insurers is simply too attenuated to allow a reviewing court to find the requisite connection between procurement costs and social objectives.").

279 Id.

280 Id.

281 Liberty Mut. Ins. Co. v. Friedman, 639 F.2d at 171.

282 See id. See also AFL-CIO v. Kahn, 618 F.2d at 792.


To the extent that the President may not use the Executive Order as a means of carrying out his own policies, application of cost-benefit analysis in accordance with OMB standards may lead to the use of cost-benefit formulas inconsistent with the policies or provisions of enabling statutes. Cost-benefit analysis is not a value-free decisionmaking tool, but rather one bound to reflect the biases of the analyst. Some variables may resist quantification, while others can only be quantified arbitrarily. Thus, application of Executive Orders 12,291 and 12,498 realistically threatens the degree to which regulations will remain consistent with congressional policies. Given the amorphous nature of cost-benefit techniques, regulatory analysis should seek foremost to follow the valuation of costs and benefits contemplated by Congress. Executive Order 12,291 is equipped to use rigid cost-benefit techniques and thus may lead to the application of analysis for which there is no “reasonably close nexus” between the application and the enabling statute.

In examining cost-benefit analysis, this section limits itself to an analysis of cases concerned with environmental and public health issues. This focus reflects the “fragility” of the benefit variables that are incorporated into cost-benefit analysis, as well as the administrative orientation in the environmental field toward more “scientifically aggressive” rather than “environmentally aggressive” regulation.

Executive Orders 12,291 and 12,498 function in a manner considerably different from the executive orders in Chrysler and its progeny. In those cases, executive orders operated under the provisions of specific congressional enactments. Here, the source of authority

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287 Shane, supra note 23, at 1247 (article supporting validity of order nevertheless states: “As to individual regulations, complex issues may arise concerning the extent to which an enabling statute permits the use of cost-benefit analysis.”).
288 Rodgers, supra note 17, at 194–95.
289 Id.
290 See Exec. Order No. 12,291, supra note 4, § 6(a)(6) (empowering OMB to establish cost-benefit analysis procedures).
291 Tribe, supra note 164, at 1318.
292 See Olson, supra note 14, at 49–50 (“A more subtle and consequential internal development induced by OMB review is a ‘guessing game’, in which EPA attempts to draft rules it believes will clear OMB.”); Cf. OMB Plays Critical Role, supra note 46, at 693. (discussing EPA’s inhibition from aggressive regulation under “Quality of Life” review).
for the Orders is in the constitutionally-based managerial role. The Orders, however, do not apply in a statutory vacuum. As Justice Jackson's Youngstown discussion about the "zone of twilight" suggests, in a field where both Congress and the President are acting, congressional will must prevail.

By holding that the President cannot use congressional means for the execution of his own policies, the "close nexus" cases suggest that analysis pursuant to the Executive Orders may not incorporate variables contemplated neither in the policies of the statute nor in the provisions of the statute. These cases may further suggest that the comparative values assigned to variables used in the cost-benefit process must comport with Congress's understanding of the relationship among those variables.

Courts considering environmental agency applications of cost-benefit or similar analyses have pursued reasoning similar to that in the "close nexus" cases. They have found that agencies are not required to analyze regulations based on policies that are not found in the enabling statute. American Textile Manufacturers v. Donovan (Cotton Dust) exemplifies courts' approach to administrative cost-benefit balancing and statutory policies. In Donovan, the Occupational Safety and Health Administration had issued standards concerning the acceptable "cotton dust" concentration in textile factories. The relevant portion of OSHA's enabling act requires that:

295 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson J., concurring).
296 AFL-CIO v. Kahn, 618 F.2d at 793.
297 See id. See also Liberty Mut. Ins. Co. v. Friedman, 639 F.2d at 171.
299 One notable peculiarity of these cases is that they involve industry plaintiffs seeking to compel either EPA or OSHA to consider economic factors or technological feasibility in the regulatory process. No cases have addressed the converse situation where plaintiffs are seeking either to exclude or diminish considerations of such factors. See infra note 300.
The Secretary in promulgating standards dealing with harmful materials or harmful physical agents under this subsection shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with for the period of his working life.\textsuperscript{301}

Textile manufacturers challenged the standards issued pursuant to this Act, claiming that they did not represent an accurate balancing of costs and benefits.\textsuperscript{302} The Supreme Court rejected this contention, stating that when "Congress had determined that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute."\textsuperscript{303} Instead, the Court found that OSHA required the guarantee of health benefits to the extent feasible, rather than to the extent that was most cost-efficient.\textsuperscript{304}

The \textit{Cotton Dust} case makes clear that where legislation plainly outlines the balancing of costs and benefits, the agency can pursue no other formula.\textsuperscript{305} Indeed, it leaves in question whether the agency can undertake cost-benefit analysis where it is not clearly authorized by the statute.

Several questions remain unanswered after \textit{Cotton Dust}. The case does not state the degree to which regulatory analysis must adhere to the terms set forth in the statute.\textsuperscript{306} Nor does it state whether an agency can base its conclusions on cost-benefit analysis where the statute does not authorize it affirmatively.\textsuperscript{307} Nevertheless, under the "close nexus" test, there is considerable reason to adhere to a statute's equation of costs and benefits. Valuations of acceptable risk and of the costs necessary to prevent risks represent fundamental policies rather than value-free assessments. To the extent that the "close nexus" test prohibits application of policies other than those of the statute, the cost-benefit analysis must reflect the policies of the statute.

\textsuperscript{301} \textit{American Textile}, 452 U.S. at 508 (quoting Occupational Health and Safety Act, 29 U.S.C. § 655(b)(3) (1982)).

\textsuperscript{302} \textit{American Textile}, 452 U.S. at 506.

\textsuperscript{303} \textit{Id.} at 510.

\textsuperscript{304} \textit{Id.} at 519–20.

\textsuperscript{305} \textit{Id.}

\textsuperscript{306} The case does for example state that "substantive revision of regulatory policy" may be a function lying in Executive oversight. \textit{American Textile}, 452 U.S. at 540 (citing Industrial Union Dept. v. American Petroleum Institute, 448 U.S. 607, 649 (1980)).

\textsuperscript{307} See \textit{American Textile}, 452 U.S. at 490.
VI. LIMITING APPLICATION OF COST-BENEFIT ANALYSIS PURSUANT TO EXECUTIVE ORDERS 12,291 AND 12,498

A. The Administration's Regulatory Agenda in Issuing the Executive Orders

Both Executive Orders grant the Office of Management and Budget considerable power to determine the extent and nature of application of cost-benefit analysis. Executive Order 12,291 begins by stating that no regulation shall be promulgated “where costs to society exceed benefits.” The effect of this provision is to create the presumption that the OMB will use the cost-benefit approach to rulemaking to the exclusion of other less scientifically precise approaches.

The Orders thus place considerable authority in the Director of the Office of Management and Budget, to determine how and when Executive Order 12,291 will apply. The Director is entitled to develop criteria for the designation of rules, or simply to declare that a given rule is a major rule. Similarly, the Director has the power to waive the requirements of the order. By authorizing the OMB to choose which regulations will be subject to 12,291 scrutiny

308 See Exec. Order No. 12,291, supra note 4, § 6 (outlining OMB powers); Exec. Order No. 12,498, supra note 8, § 3 (outlining OMB's power under 12,498).
309 Exec. Order No. 12,291, supra note 4, § 2.
Cost/benefit analysis may ordinarily be applied by an agency to a regulatory action, except when Congress has forbidden its use or has specified in the authorizing legislation, the precise regulatory outcome Congress desired. Any legislative directive short of complete specificity, however, can lead to disputes as to whether Congress intended--or even contemplated--the application of cost-benefit analysis by the agency in the agency's adoption of legislative rules to carry out the program. Disputes about the agency's authority can undermine the regulatory program, and may at last be resolved, and then only temporarily, in a judicial rather than a legislative, forum. Protracted disputes over an agency's authority to apply cost-benefit analysis can be largely avoided by direct Congressional attention to the matter.

Id. See also HOUSE REPORT, supra note 22, at 81 (“This is not to say that Congress never intends in a specific case to restrict presidential supervision of an Executive agency, but it should not be presumed to do so whenever it delegates rulemaking power directly to a subordinate Executive official rather than the President.”).
312 Exec. Order No. 12,291, supra note 4, § 3(a).
313 Id. § 6(d).
and which will not, the Order makes it possible to target regulations that are contrary to the Administration’s policies.

The Order gives the Office of Management and Budget the authority to promulgate procedures for the drafting of RIAs and standards for assessing the social costs and benefits of regulation. Thus, the OMB possesses the power not only to determine when RIAs will be used, but also to dictate the methodology by which they will be used.

Both in mandate and in everyday practice, the Orders endow the Office of Management and Budget with formidable powers of review over individual administrative agencies. The Orders require that RIAs be submitted to an OMB review group. Thus, the Orders permit OMB comment at points where public comment is unavailable. Often OMB, upon submission of RIAs will lobby aggressively against regulations that are inconsistent with Reagan Administration policies. The effect, as in Nixon’s “Quality of Life” review is for agencies to voluntarily diminish the effectiveness of regulations.

The Orders and the Administration’s comments on them reflect the specific motives that the Administration wishes to introduce into rulemaking. The Orders specifically state that one of their goals is to reduce regulatory burdens.

The Reagan Orders reflect an agenda of reducing the amount of regulation, particularly to the extent that it burdens business and industry. Executive Order 12,291 itself contains some of these biases. For example, section 2(e) of the Order requires that agencies “shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by regulation, the condition of the national economy, and other regulatory actions contemplated for the future.” This subsection thus suggests that agencies should place a particular regulatory focus on the affected industries.

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314 Id. § 6(a)(2), 6(a)(6).
315 HOUSE REPORT, supra note 22, at 82.
316 Exec. Order No. 12,291, supra note 4, § 3(a)(2).
318 Olson, supra note 14, at 43–46.
319 Exec. Order No. 12,291, supra note 4, Preamble, § 2; REGULATORY PROGRAM, supra note 15, at xi–xxxi.
320 Exec. Order No. 12,291, supra note 4, Preamble.
322 Exec. Order No. 12,291, supra note 4, § 2(e).
Administration statements emphasize the Orders' deregulatory agenda.\textsuperscript{323} For example, the current Administration is committed in its regulatory philosophy toward insuring that regulations are "consistent with the constitutional principle of federalism."\textsuperscript{324} One reason for this focus is that the states can save between six and eight billion dollars through this approach.\textsuperscript{325} Another reason is the conviction that states are more competent to decide what is best for the people.\textsuperscript{326}

The Regulatory Program's approach to risk-assessment reveals yet other biases. The drafters of the program argue that many assessments of risk focus only on upper-bound estimates of potential risk.\textsuperscript{327} The Program argues, for example, that cancer risk estimates have been too conservative and that they presume lifetime exposure.\textsuperscript{328} According to the program, conservative assumptions of this sort will compound and have an extremely high likelihood of over-stating actual risk.\textsuperscript{329} Implicit in this argument are certain convictions about what are acceptable risks. This may come undoubtedly to inform the way in which individual agencies make regulatory decisions.

\textbf{B. The Substantive Nature of Cost-Benefit Analysis}

In general, cost-benefit analysis is a very mutable tool involving numerous problems in valuation, and is therefore more suited to a public forum than to agency weighing. For example, those undertaking to balance cost-benefit variables may not be able to quantify certain variables for purposes of compiling a regulatory record.\textsuperscript{330} One significant reason for this is that not all regulatory variables are amenable to quantification.\textsuperscript{331} While some variables, such as lost

\textsuperscript{323} REGULATORY PROGRAM, supra note 15, at xi-xxxi.
\textsuperscript{324} Id. at xiv.
\textsuperscript{325} Id.
\textsuperscript{326} Id.
\textsuperscript{327} Id. at xxiii.
\textsuperscript{328} Id. at xxiii, xv.
\textsuperscript{329} Id. at xxv.
\textsuperscript{330} The Order does, however, require that non-quantifiable variables be explained in the RIAs. Exec. Order No. 12,291, supra note 4, § 3(a)(1)-(3).
\textsuperscript{331}Rodgers, supra note 17, at 196 ("For many goods, market prices are simply unavailable and speculation soon takes over."). \textit{But see} POSNER, ECONOMIC ANALYSIS OF LAW 357 (1986) ("In areas involving safety and health, either cost-benefit analysis or benefit analyses requires monetizing risks to life and limb. But, as should by now be clear, this does not require putting a price tag on lives and limbs. All it requires is knowledge of the amounts of money that
industry profits are fit easily into a regulatory analysis, certain aesthetic and moral values are less easily quantified. Even where agencies can quantify values, it is difficult to identify the common denominator among the choices. One writer suggests that the only denominator would be a monetary one. Even in the unlikely case that regulators could find a common denominator, the designation of numerical values would be highly arbitrary.

Often benefits are not concrete, but rather reflective of legislative caution toward certain potentially harmful substances. Courts have relaxed standards of review in cases where the measurement of harm was on the “frontiers of scientific knowledge.” Where Congress has chosen to protect against such unforeseen harm, assessment of benefit (reduced risk) cannot satisfactorily be measured against other variables.

Assessment of benefits and costs based on market values—i.e. dollars—ignores the notion that people often make public decisions based upon entirely different considerations than they use for private decisions. It would thus be ineffective to correlate public welfare values with market values.

C. Factors in the Judicial Limitation of Executive Orders 12,291 and 12,498

Because cost-benefit analysis is a potent and possibly skewed technique, and because the Reagan Administration brings a very specific agenda to the application of cost-benefit analysis under Executive Orders 12,291 and 12,498, make necessary judicial scrutiny of the type suggested in the “close nexus” cases and in the cases where people demand to run small risks—risks of the same general level that pollution or other regulated hazards create. The amount of money demanded for assuming the risks is the benefit of eliminating the risk.”.

332 See Kelman, supra note 18, at 31-36.
333 Id.
334 Rodgers, supra note 17, at 193-94.
336 Barnard, The Emerging Regulatory Dilemma in Management of Assessed Risk for Carcinogens, 363 ANN. N.Y. ACAD. SCI. 89, 90 (1981) (Stating that while government’s general perception that there are a small number of carcinogens is based on dated information, there is growing evidence that there are a large number of chemicals that will “give a carcinogenic signal in some test system.”).
337 See Kelman, supra note 18, at 35.
the courts have considered the application of cost-benefit analysis by regulatory agencies.339

These cases yield two important principles. First, an executive order cannot use congressional means for the realization of presidential policies.340 Second, cost-benefit weighing must be consistent with the equation of costs and benefits contemplated by Congress.341

By definition, cost-benefit analysis is the quantification of policy objectives.342 Statutes typically have policy sections, which dictate the essential factors that must be considered in the regulatory process. Individual provisions, such as that in Cotton Dust, also instruct agencies on how they are to assess the costs of regulations.343

Given that these policies are in fact stated, then cost-benefit analysis should not inject policies not contemplated by Congress. As the Myers managerial role suggests, one exception to this “nexus” requirement might be the case where cost-benefit analysis incorporates variables that relate to the internal management of the executive branch.344 Such a variable might, for example, be the cost of enforcing a particular regulatory initiative. Alternatively, the executive branch may consider additional cost-benefit factors, where Congress has failed to set complete criteria for cost-benefit analysis.345

VII. CONCLUSION

Executive Orders 12,291 and 12,498 are potent enactments with considerable authority to alter regulations substantively. The Orders permit the OMB to decide which regulations will undergo regulatory analysis and to develop uniform methodologies for that analysis. Comment under the Executive Order 12,291 takes place at junctures in the rulemaking process where there is no opportunity for public comment. Moreover, as “Quality of Life” review demonstrated, agencies are often inhibited by regulatory review schemes from issuing aggressive regulations, fearful of delays in promulgation.

341 See id.
343 American Textile, 452 U.S. at 490.
344 See Myers v. United States, 272 U.S. 52 (1926).
345 See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 539, 635–38 (1952) (Jackson, J., concurring) (recognizing that the President may act where Congress has chosen not to act). See also American Fed’n of Gov’t Employees, AFL-CIO v. Carmen, 669 F.2d 815, 821 (D.C. Cir. 1981).
The Reagan Administration's deregulatory agenda combined with the mutability of cost-benefit analysis compounds the power of Executive Orders 12,291 and 12,498. The Administration's statements make clear its objective to reduce the costs to the private sector and to state and local governments that overregulation has created. Similarly, the statements make clear that the Administration is committed not to maximum protection against environmental and public health harms, but rather to risk-assessment based on typical exposure. To the extent that the cost-benefit method is optimally effective only when involving variables that are both quantifiable and mathematically comparable, cost-benefit analysis in cases of health, moral and aesthetic benefit must necessarily be arbitrary.

Of course, at some point the choice of acceptable risk must be made. Preferences expressed through the legislative process, however, are more likely to reflect public wishes than an arbitrary cost-benefit formula. In other words, it is the legislature, not the President, who is empowered to design the cost-benefit equation.

Accordingly, applying the "close nexus" test, cost-benefit analysis under Executive Orders 12,291 and 12,498 must embody not the policies of the Administration, but rather those of the statute. Indeed, statutes often suggest the criteria for such balancing. It is the Administration's responsibility to adhere to those criteria.