NLWJC - Kagan

Counsel - Box 024- Folder 005

Reagan Executive Orders

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	From: Michael Fitzpatrick To: Kumiki Gibson, etal.; RE: Home fax number (partial) (1 page)	08/13/1996	P6/b(6)

COLLECTION:
Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8289

FOLDER TITLE:
Reagan Executive Orders

2009-1006-F
db1544

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Withdrawal/Redaction Marker
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[001]

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

13-Aug-1996 02:15pm

TO: (See Below)

FROM: Michael A. Fitzpatrick
Office of Mgmt and Budget, OIRA

SUBJECT: SBREFA & the E.O.s

I've already left voice mails for most of you (many seem to be on vacation, a place I will be beginning tomorrow), but I wanted to follow up with an e-mail to pass on some comments from Sally. She'd like it if folks would fax to her on the Cape their draft boilerplate language (Elena - Federalism; Jeremy - Family; Linda and Tom - Takings). She's anxious to review the drafts so we can begin the phone calls to the agencies as soon as possible. I will be back the week of the 26th and plan to pull us all together quickly to coordinate the language and the calls.

Sally's fax number is P6/(b)(6) Thanks for all your help.

Distribution:

TO: Kumiki S. Gibson
TO: Paul J. Weinstein, Jr
TO: Elena Kagan
TO: Jeremy D. Benami
TO: Thomas C. Jensen
TO: Linda L Lance

CC: Sally Katzen

Clinton Library Photocopy

Katzen EO meeting

Yes / no / not applicable — no analysis required. — form for GAO.

To be submitted to GAO

Keep stalling.

Analysis has to be reduced to writing?

cant auth
nec. for
nat reg.

2 or 3-sentence boilerplate certifications. - federalism

ECONOMICALLY SIGNIFICANT RULES EXPECTED IN 1996

DEPARTMENT OF AGRICULTURE

"Food Stamp Program: Certification Provisions of the Mickey Leland Childhood Hunger Relief Act", Final (here now)

"Dairy Tariff Rate Import Quota Licensing", Final

"CCC Export Credit Guarantee Program and CCC Intermediate Export Credit Guarantee Program", Final

"Conservation Reserve Program" (Swampbusters and Wetland Reserve Program - 1996 Farm Bill changes), Final

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

"Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents", Final

"Restaurant Labeling", NPRM

"Mad Cow Disease", NPRM

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

"HOME Investment Partnership Program", Interim Final Rule Effective

DEPARTMENT OF LABOR

Employment Standards Administration

"Procedures for Predetermination of Wage Rates and Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction" (Helpers), NPRM

"Labor Standards for Federal Service Contracts", NPRM

Office of Safety and Health Administration
"Permissible Exposure Limits for Air Contaminants", NPRM

"Occupational Exposure to Tuberculosis", NPRM

"Prevention of Work-Related Musculoskeletal Disorders", NPRM

"Steel Erection, Safety Protection for Ironworking", NPRM

DEPARTMENT OF TRANSPORTATION

U.S. Coast Guard
"Structural and Operational Measures to Reduce Oil Spills From Existing Tank Vessels Without Double Hulls" (very high visibility)

DEPARTMENT OF VETERAN AFFAIRS

"Claims Based on Tobacco Use During Active Service", NPRM

ENVIRONMENTAL PROTECTION AGENCY
*=somewhat controversial; **=very controversial

"Environmental Protection Agency Radiation Site Cleanup Regulation," NPRM**(here now)

"Compliance Assurance Monitoring Program--Credible Evidence," Final (expected between November 5 and December 31)**

"Review of the Federal Test Procedure for Emissions from Motor Vehicles and Motor Vehicle Engines," Final (half star)

"Emission Standards for Gasoline Spark-Ignition and Diesel Compression-Ignition Marine Engines," Final (half star)

"NSPS: Nitrogen Oxide Emissions from Fossil-Fuel Fired Steam Generating Units--Revision," NPRM*

"NAAQS: Ozone (Review)," NPRM**

"NAAQS: Particulate Matter (Review)," NPRM**

"National 49-State Low-Emission Vehicles Program," NPRM and Final possible before 1-97.**

"Control of Nitrogen Oxide and Particulate Emissions from Heavy-Duty Engines," NPRM and possibly Final*

"Transportation Conformity Rule Amendments: Flexibility and Streamlining," Possible Final by 1-97. (States want)*

"Pesticides and Groundwater State Management Plan Regulation," NPRM

"Lead-Based Paint Activities Rules; Training, Accreditation, and Certification Rule and Model State Plan Rule,"* Final (here now)*

"Selected Rulemakings for Abating Lead Hazards," May go Final by 11-96**

"Revision of NPDES Industrial Permit Application Requirements and Form 2C--Wastewater Discharge Information", NPRM after 11-96

"DOD Range Rule, NPRM and possibly Final by 12-96*

"Yucca Mountain", Final likely by 12-96**

"Hazardous Waste Combustion MACT, Final (12-96 deadline)**

"Financial Assurance for MSW Landfills Under Review", Final* (NPR Initiative)

"Hazardous Waste Munititions", Final*, 12-96

"Acid Rain, NOX Pahse II", Final*, 12-96

"TRI)", Final**, before 11-96 (facilities expansion)

SIGNIFICANT RULES EXPECTED IN 1996

DEPARTMENT OF AGRICULTURE

" Poultry Improvement Plan" (Zero tolerance of visible fecal mater on poulty), Final

"Import of Hass Avocados from Mexico", Final

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration
"Prescription Drug Product Labeling; Medication Guide," Final

"Protection of Human Subjects; Informed Consent," Final

Health Care Financing Administration
"Medicaid Payment for Covered Outpatient Drugs under Rebate Agreements," Final

"Revision of Medicare Hospital Conditions of Participation," NPRM and Final

"Physicians' Referrals to Health Care Entities with Which They Have Financial Relationships--Expanded to Designated Health Services," NPRM (expected between November 4 and December 31) (Possibly economically significant)

"Home Health Agency Conditions of Participation," NPRM

"End Stage Renal Disease Conditions for Coverage," NPRM

"Wage Index Used to Adjust Payment Rates for Hospice Services under the Medicare Program," NPRM and Final

"Changes to the Hospital Inpatient Prospective Payment System and Fiscal Year 1997 Rates," NPRM and Final

"Medicare Program: Revisions to Payment Policies under the Physician Fee Schedule for CalendarYear 1997," NPRM and Final

"Criteria and Procedures for Making Medical Services Coverage Decisions That Relate to Health Care Technology," Final (Possibly Economically Significant)

"CLIA Program: Categorization of Waived Tests," Final

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Housing
"RESPA Revisions," Final

DEPARTMENT OF LABOR

Occupational Safety and Health Administration
"Methylene Chloride (Preventing Occupational Illnesses: Methylene Chloride)," Final

"Recording and Reporting Occupational Injuries and Illnesses," Final

Employment and Training Administration
"Amendments to the Labor Certification Process for Temporary Agricultural Employment in the United States," NPRM

Pension and Welfare Benefits Administration
"Regulations Relating to Definition of Plan Assets: Participant Contributions," Final

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration
"Airspace Management over Grand Canyon National Park," NPRM

"Flight Crewmember Duty Limitations and Rest Requirements," Final

National Highway Traffic Safety Administration
"Undesired Side Effects of Air Bags," NPRM

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

26-Jun-1996 03:09pm

TO: Michael A. Fitzpatrick
TO: Kumiki S. Gibson

FROM: Elena Kagan
Office of the Counsel

SUBJECT: federalism eo

I've taken a look at the old Federalism EO and the new Civil Justice and Unfunded Mandates EO. There's not as much direct overlap as I had hoped. The Civil Justice EO just doesn't have much to say about federalism issues. The Unfunded Mandates EO establishes a presumption against unfunded mandates and encourages regulatory waivers. The Federalism EO establishes much more general and also stronger guidelines: asking agencies to assess the justification and constitutional authority for actions impinging on states; requiring in such cases that constitutional authority be clear (rooted in a specific provision of the Constitution) and that national action be necessary; establishing a presumption against promulgating uniform, national standards and in favor of deferring to state standards and policies; reading statutes as not preempting state law unless they expressly do so, etc. We can say truthfully that the Unfunded Mandates EO goes in the same general direction. But we can't say that it (or any other EO) effectively takes the place of the Federalism EO.

That being the case, I'm leery of repealing the Federalism EO at this point. I'd rather think about how agencies can comply with the EO in as non-burdensome way as possible. Perhaps there is no such thing as non-burdensome compliance and this approach would create a huge administrative problem. But I think the presumption should be in favor of trying to find a way to live with this EO rather than (now) to repeal it.

Civil Justice — No overlap.

Milan Smith —

Guided by principles re
imp. of federalism, limited govt
Criteria —
Assess const auth for federal action
Auth must be clr + certain; action must be necessary
distinq btw nat. probs + st probs.
grant states max admin discretion
encourage states to dev. own policies
& refrain to maxextent from estab'ing unif nat
stds. If nec - consult w/ states.
Read stats as not preempting - if poss.
Don't submit leg
- That would directly displace/neg - interfere w/ st funcs
- attach unrelated conds
- preempt st law (unless nec)

May Federalism Assessment
- Assess above
- Identify additional costs
on states
- Id effect on st function

· No reg that creates mandate
unless funds
consultation

streamline waiver applies
↑ opt for flexible policy approaches at local level

federal register

Wednesday
February 7, 1996

Part V

The President

Executive Order 12988—Civil Justice Reform

Federal Register
Vol. 61, No. 26
Wednesday, February 7, 1996

Presidential Documents

Title 3—

The President

Executive Order 12988 of February 5, 1996

Civil Justice Reform

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, and in order to improve access to justice for all persons who wish to avail themselves of court and administrative adjudicatory tribunals to resolve disputes, to facilitate the just and efficient resolution of civil claims involving the United States Government, to encourage the filing of only meritorious civil claims, to improve legislative and regulatory drafting to reduce needless litigation, to promote fair and prompt adjudication before administrative tribunals, and to provide a model for similar reforms of litigation practices in the private sector and in various states, it is hereby ordered as follows:

Section 1. *Guidelines to Promote Just and Efficient Government Civil Litigation.* To promote the just and efficient resolution of civil claims, those Federal agencies and litigation counsel that conduct or otherwise participate in civil litigation on behalf of the United States Government in Federal court shall respect and adhere to the following guidelines during the conduct of such litigation:

(a) *Pre-filing Notice of a Complaint.* No litigation counsel shall file a complaint initiating civil litigation without first making a reasonable effort to notify all disputants about the nature of the dispute and to attempt to achieve a settlement, or confirming that the referring agency that previously handled the dispute has made a reasonable effort to notify the disputants and to achieve a settlement or has used its conciliation processes.

(b) *Settlement Conferences.* As soon as practicable after ascertaining the nature of a dispute in litigation, and throughout the litigation, litigation counsel shall evaluate settlement possibilities and make reasonable efforts to settle the litigation. Such efforts shall include offering to participate in a settlement conference or moving the court for a conference pursuant to Rule 16 of the Federal Rules of Civil Procedure in an attempt to resolve the dispute without additional civil litigation.

(c) *Alternative Methods of Resolving the Dispute in Litigation.* Litigation counsel shall make reasonable attempts to resolve a dispute expeditiously and properly before proceeding to trial.

(1) Whenever feasible, claims should be resolved through informal discussions, negotiations, and settlements rather than through utilization of any formal court proceeding. Where the benefits of Alternative Dispute Resolution ("ADR") may be derived, and after consultation with the agency referring the matter, litigation counsel should suggest the use of an appropriate ADR technique to the parties.

(2) It is appropriate to use ADR techniques or processes to resolve claims of or against the United States or its agencies, after litigation counsel determines that the use of a particular technique is warranted in the context of a particular claim or claims, and that such use will materially contribute to the prompt, fair, and efficient resolution of the claims.

(3) To facilitate broader and effective use of informal and formal ADR methods, litigation counsel should be trained in ADR techniques.

(d) *Discovery.* To the extent practical, litigation counsel shall make every reasonable effort to streamline and expedite discovery in cases under counsel's supervision and control.

(1) *Review of Proposed Document Requests.* Each agency within the executive branch shall establish a coordinated procedure for the conduct and review of document discovery undertaken in litigation directly by that agency when that agency is litigation counsel. The procedure shall include, but is not necessarily limited to, review by a senior lawyer prior to service or filing of the request in litigation to determine that the request is not cumulative or duplicative, unreasonable, oppressive, unduly burdensome or expensive, taking into account the requirements of the litigation, the amount in controversy, the importance of the issues at stake in the litigation, and whether the documents can be obtained from some other source that is more convenient, less burdensome, or less expensive.

(2) *Discovery Motions.* Before petitioning a court to resolve a discovery motion or petitioning a court to impose sanctions for discovery abuses, litigation counsel shall attempt to resolve the dispute with opposing counsel. If litigation counsel makes a discovery motion concerning the dispute, he or she shall represent in that motion that any attempt at resolution was unsuccessful or impracticable under the circumstances.

(e) *Sanctions.* Litigation counsel shall take steps to seek sanctions against opposing counsel and opposing parties where appropriate.

(1) Litigation counsel shall evaluate filings made by opposing parties and, where appropriate, shall petition the court to impose sanctions against those responsible for abusive practices.

(2) Prior to filing a motion for sanctions, litigation counsel shall submit the motion for review to the sanctions officer, or his or her designee, within the litigation counsel's agency. Such officer or designee shall be a senior supervising attorney within the agency, and shall be licensed to practice law before a State court, courts of the District of Columbia, or courts of any territory or Commonwealth of the United States. The sanctions officer or designee shall also review motions for sanctions that are filed against litigation counsel, the United States, its agencies, or its officers.

(f) *Improved Use of Litigation Resources.* Litigation counsel shall employ efficient case management techniques and shall make reasonable efforts to expedite civil litigation in cases under that counsel's supervision and control. This includes but is not limited to:

(1) making reasonable efforts to negotiate with other parties about, and stipulate to, facts that are not in dispute;

(2) reviewing and revising pleadings and other filings to ensure that they are accurate and that they reflect a narrowing of issues, if any, that has resulted from discovery;

(3) requesting early trial dates where practicable;

(4) moving for summary judgment in every case where the movant would be likely to prevail, or where the motion is likely to narrow the issues to be tried; and

(5) reviewing and revising pleadings and other filings to ensure that unmeritorious threshold defenses and jurisdictional arguments, resulting in unnecessary delay, are not raised.

Sec. 2. *Government Pro Bono and Volunteer Service.* All Federal agencies should develop appropriate programs to encourage and facilitate pro bono legal and other volunteer service by government employees to be performed on their own time, including attorneys, as permitted by statute, regulation, or other rule or guideline.

Sec. 3. *Principles to Enact Legislation and Promulgate Regulations Which Do Not Unduly Burden the Federal Court System.*

(a) *General Duty to Review Legislation and Regulations.* Within current budgetary constraints and existing executive branch coordination mechanisms and procedures established in OMB Circular A-19 and Executive Order No. 12866, each agency promulgating new regulations, reviewing existing regulations, developing legislative proposals concerning regulations, and developing new legislation shall adhere to the following requirements:

(1) The agency's proposed legislation and regulations shall be reviewed by the agency to eliminate drafting errors and ambiguity;

(2) The agency's proposed legislation and regulations shall be written to minimize litigation; and

(3) The agency's proposed legislation and regulations shall provide a clear legal standard for affected conduct rather than a general standard, and shall promote simplification and burden reduction.

(b) *Specific Issues for Review.* In conducting the reviews required by subsection (a), each agency formulating proposed legislation and regulations shall make every reasonable effort to ensure:

(1) that the legislation, as appropriate—

(A) specifies whether all causes of action arising under the law are subject to statutes of limitations;

(B) specifies in clear language the preemptive effect, if any, to be given to the law;

(C) specifies in clear language the effect on existing Federal law, if any, including all provisions repealed, circumscribed, displaced, impaired, or modified;

(D) provides a clear legal standard for affected conduct;

(E) specifies whether private arbitration and other forms of private dispute resolution are appropriate under enforcement and relief provisions; subject to constitutional requirements;

(F) specifies whether the provisions of the law are severable if one or more of them is found to be unconstitutional;

(G) specifies in clear language the retroactive effect, if any, to be given to the law;

(H) specifies in clear language the applicable burdens of proof;

(I) specifies in clear language whether it grants private parties a right to sue and, if so, the relief available and the conditions and terms for authorized awards of attorney's fees, if any;

(J) specifies whether State courts have jurisdiction under the law and, if so, whether and under what conditions an action would be removable to Federal court;

(K) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(L) sets forth the standards governing the assertion of personal jurisdiction, if any;

(M) defines key statutory terms, either explicitly or by reference to other statutes that explicitly define those terms;

(N) specifies whether the legislation applies to the Federal Government or its agencies;

(O) specifies whether the legislation applies to States, territories, the District of Columbia, and the Commonwealths of Puerto Rico and of the Northern Mariana Islands;

(P) specifies what remedies are available such as money damages, civil penalties, injunctive relief, and attorney's fees; and

(Q) addresses other important issues affecting clarity and general draftsmanship of legislation set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget ("OMB") and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order.

(2) that the regulation, as appropriate—

(A) specifies in clear language the preemptive effect, if any, to be given to the regulation;

(B) specifies in clear language the effect on existing Federal law or regulation, if any, including all provisions repealed, circumscribed, displaced, impaired, or modified;

(C) provides a clear legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction;

(D) specifies in clear language the retroactive effect, if any, to be given to the regulation;

(E) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(F) defines key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items; and

(G) addresses other important issues affecting clarity and general draftsmanship of regulations set forth by the Attorney General, with the concurrence of the Director of OMB and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order.

(c) *Agency Review.* The agencies shall review such draft legislation or regulation to determine that either the draft legislation or regulation meets the applicable standards provided in subsections (a) and (b) of this section, or it is unreasonable to require the particular piece of draft legislation or regulation to meet one or more of those standards.

Sec. 4. *Principles to Promote Just and Efficient Administrative Adjudications.*

(a) *Implementation of Administrative Conference Recommendations.* In order to promote just and efficient resolution of disputes, an agency that adjudicates administrative claims shall, to the extent reasonable and practicable, and when not in conflict with other sections of this order, implement the recommendations of the Administrative Conference of the United States, entitled "Case Management as a Tool for Improving Agency Adjudication," as contained in 1 C.F.R. 305.86-7 (1991).

(b) *Improvements in Administrative Adjudication.* All Federal agencies should review their administrative adjudicatory processes and develop specific procedures to reduce delay in decision-making, to facilitate self-representation where appropriate, to expand non-lawyer counseling and representation where appropriate, and to invest maximum discretion in fact-finding officers to encourage appropriate settlement of claims as early as possible.

(c) *Bias.* All Federal agencies should review their administrative adjudicatory processes to identify any type of bias on the part of the decision-makers that results in an injustice to persons who appear before administrative adjudicatory tribunals; regularly train all fact-finders, administrative law judges, and other decision-makers to eliminate such bias; and establish appropriate mechanisms to receive and resolve complaints of such bias from persons who appear before administrative adjudicatory tribunals.

(d) *Public Education.* All Federal agencies should develop effective and simple methods, including the use of electronic technology, to educate the public about its claims/benefits policies and procedures.

Sec. 5. *Coordination by the Department of Justice.*

(a) The Attorney General shall coordinate efforts by Federal agencies to implement sections 1, 2 and 4 of this order.

(b) To implement the principles and purposes announced by this order, the Attorney General is authorized to issue guidelines implementing sections 1 and 4 of this order for the Department of Justice. Such guidelines shall serve as models for internal guidelines that may be issued by other agencies pursuant to this order.

Sec. 6. *Definitions.* For purposes of this order:

(a) The term "agency" shall be defined as that term is defined in section 105 of title 5, United States Code.

(b) The term "litigation counsel" shall be defined as the trial counsel or the office in which such trial counsel is employed, such as the United States Attorney's Office for the district in which the litigation is pending or a litigating division of the Department of Justice. Special Assistant United States Attorneys are included within this definition. Those agencies authorized by law to represent themselves in court without assistance from the Department of Justice are also included in this definition, as are private counsel hired by any Federal agency to conduct litigation on behalf of the agency or the United States.

Sec. 7. *No Private Rights Created.* This order is intended only to improve the internal management of the executive branch in resolving disputes, conducting litigation in a reasonable and just manner, and reviewing legislation and regulations. This order shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its agencies, its officers, or any other person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order. Nothing in this order shall be construed to obligate the United States to accept a particular settlement or resolution of a dispute, to alter its standards for accepting settlements, to forego seeking a consent decree or other relief, or to alter any existing delegation of settlement or litigating authority.

Sec. 8. *Scope.*

(a) *No Applicability to Criminal Matters or Proceedings in Foreign Courts.* This order is applicable to civil matters only. It is not intended to affect criminal matters, including enforcement of criminal fines or judgments of criminal forfeiture. This order does not apply to litigation brought by or against the United States in foreign courts or tribunals.

(b) *Application of Notice Provision.* Notice pursuant to subsection (a) of section 1 is not required (1) in any action to seize or forfeit assets subject to forfeiture or in any action to seize property; (2) in any bankruptcy, insolvency, conservatorship, receivership, or liquidation proceeding; (3) when the assets that are the subject of the action or that would satisfy the judgment are subject to flight, dissipation, or destruction; (4) when the defendant is subject to flight; (5) when, as determined by litigation counsel, exigent circumstances make providing such notice impracticable or such notice would otherwise defeat the purpose of the litigation, such as in actions seeking temporary restraining orders or preliminary injunctive relief; or (6) in those limited classes of cases where the Attorney General determines that providing such notice would defeat the purpose of the litigation.

(c) *Additional Guidance as to Scope.* The Attorney General shall have the authority to issue further guidance as to the scope of this order, except section 3, consistent with the purposes of this order.

Sec. 9. *Conflicts with Other Rules.* Nothing in this order shall be construed to require litigation counsel or any agency to act in a manner contrary to the Federal Rules of Civil Procedure, Tax Court Rules of Practice and Procedure, State or Federal law, other applicable rules of practice or procedure, or court order.

Sec. 10. *Privileged Information.* Nothing in this order shall compel or authorize the disclosure of privileged information, sensitive law enforcement infor-

mation, information affecting national security, or information the disclosure of which is prohibited by law.

Sec. 11. *Effective Date.* This order shall become effective 90 days after the date of signature. This order shall not apply to litigation commenced prior to the effective date.

Sec. 12. *Revocation.* Executive Order No. 12778 is hereby revoked.

William J. Clinton

THE WHITE HOUSE,
February 5, 1996.

FR Doc. 96–2755
Filed 2–6–96; 8:45 am]
Billing code 3195–01–P

Federal Register
Vol. 58, No. 207
Thursday, October 28, 1993

Presidential Documents

Title 3—

The President

Executive Order 12875 of October 26, 1993

Enhancing the Intergovernmental Partnership

The Federal Government is charged with protecting the health and safety, as well as promoting other national interests, of the American people. However, the cumulative effect of unfunded Federal mandates has increasingly strained the budgets of State, local, and tribal governments. In addition, the cost, complexity, and delay in applying for and receiving waivers from Federal requirements in appropriate cases have hindered State, local, and tribal governments from tailoring Federal programs to meet the specific or unique needs of their communities. These governments should have more flexibility to design solutions to the problems faced by citizens in this country without excessive micromanagement and unnecessary regulation from the Federal Government.

THEREFORE, by the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to reduce the imposition of unfunded mandates upon State, local, and tribal governments; to streamline the application process for and increase the availability of waivers to State, local, and tribal governments; and to establish regular and meaningful consultation and collaboration with State, local, and tribal governments on Federal matters that significantly or uniquely affect their communities, it is hereby ordered as follows:

Section 1. *Reduction of Unfunded Mandates.* (a) To the extent feasible and permitted by law, no executive department or agency ("agency") shall promulgate any regulation that is not required by statute and that creates a mandate upon a State, local, or tribal government, unless:

(1) funds necessary to pay the direct costs incurred by the State, local, or tribal government in complying with the mandate are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of regulations containing the proposed mandate, provides to the Director of the Office of Management and Budget a description of the extent of the agency's prior consultation with representatives of affected State, local, and tribal governments, the nature of their concerns, any written communications submitted to the agency by such units of government, and the agency's position supporting the need to issue the regulation containing the mandate.

(b) Each agency shall develop an effective process to permit elected officials and other representatives of State, local, and tribal governments to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates.

Sec. 2. *Increasing Flexibility for State and Local Waivers.* (a) Each agency shall review its waiver application process and take appropriate steps to streamline that process.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by a State, local, or tribal government for a waiver of statutory or regulatory requirements in connection with any program administered by that agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the State, local, and tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

(c) Each agency shall, to the fullest extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency. If the application for a waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.

(d) This section applies only to statutory or regulatory requirements of the programs that are discretionary and subject to waiver by the agency.

Sec. 3. *Responsibility for Agency Implementation.* The Chief Operating Officer of each agency shall be responsible for ensuring the implementation of and compliance with this order.

Sec. 4. *Executive Order No. 12866.* This order shall supplement but not supersede the requirements contained in Executive Order No. 12866 ("Regulatory Planning and Review").

Sec. 5. *Scope.* (a) Executive agency means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10).

(b) Independent agencies are requested to comply with the provisions of this order.

Sec. 6. *Judicial Review.* This order is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Sec. 7. *Effective Date.* This order shall be effective 90 days after the date of this order.

William J. Clinton

THE WHITE HOUSE,
October 26, 1993.

[FR Doc. 93-26772
Filed 10-27-93; 11:36 am]
Billing code 3195-01-P

Federal Register
Vol. 52, No. 210
Friday, October 30, 1987

Presidential Documents

Title 3—

The President

Executive Order 12612 of October 26, 1987

Federalism

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to restore the division of governmental responsibilities between the national government and the States that was intended by the Framers of the Constitution and to ensure that the principles of federalism established by the Framers guide the Executive departments and agencies in the formulation and implementation of policies, it is hereby ordered as follows:

Section 1. *Definitions.* For purposes of this Order:

(a) "Policies that have federalism implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

(b) "State" or "States" refer to the States of the United States of America, individually or collectively, and, where relevant, to State governments, including units of local government and other political subdivisions established by the States.

Sec. 2. *Fundamental Federalism Principles.* In formulating and implementing policies that have federalism implications, Executive departments and agencies shall be guided by the following fundamental federalism principles:

(a) Federalism is rooted in the knowledge that our political liberties are best assured by limiting the size and scope of the national government.

(b) The people of the States created the national government when they delegated to it those enumerated governmental powers relating to matters beyond the competence of the individual States. All other sovereign powers, save those expressly prohibited the States by the Constitution, are reserved to the States or to the people.

(c) The constitutional relationship among sovereign governments, State and national, is formalized in and protected by the Tenth Amendment to the Constitution.

(d) The people of the States are free, subject only to restrictions in the Constitution itself or in constitutionally authorized Acts of Congress, to define the moral, political, and legal character of their lives.

(e) In most areas of governmental concern, the States uniquely possess the constitutional authority, the resources, and the competence to discern the sentiments of the people and to govern accordingly. In Thomas Jefferson's words, the States are "the most competent administrations for our domestic concerns and the surest bulwarks against antirepublican tendencies."

(f) The nature of our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public issues.

(g) Acts of the national government—whether legislative, executive, or judicial in nature—that exceed the enumerated powers of that government under the Constitution violate the principle of federalism established by the Framers.

(h) Policies of the national government should recognize the responsibility of—and should encourage opportunities for—individuals, families, neighborhoods, local governments, and private associations to achieve their personal, social, and economic objectives through cooperative effort.

(i) In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual States. Uncertainties regarding the legitimate authority of the national government should be resolved against regulation at the national level.

Sec. 3. *Federalism Policymaking Criteria.* In addition to the fundamental federalism principles set forth in section 2, Executive departments and agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have federalism implications:

(a) There should be strict adherence to constitutional principles. Executive departments and agencies should closely examine the constitutional and statutory authority supporting any Federal action that would limit the policymaking discretion of the States, and should carefully assess the necessity for such action. To the extent practicable, the States should be consulted before any such action is implemented. Executive Order No. 12372 ("Intergovernmental Review of Federal Programs") remains in effect for the programs and activities to which it is applicable.

(b) Federal action limiting the policymaking discretion of the States should be taken only where constitutional authority for the action is clear and certain and the national activity is necessitated by the presence of a problem of national scope. For the purposes of this Order:

(1) It is important to recognize the distinction between problems of national scope (which may justify Federal action) and problems that are merely common to the States (which will not justify Federal action because individual States, acting individually or together, can effectively deal with them).

(2) Constitutional authority for Federal action is clear and certain only when authority for the action may be found in a specific provision of the Constitution, there is no provision in the Constitution prohibiting Federal action, and the action does not encroach upon authority reserved to the States.

(c) With respect to national policies administered by the States, the national government should grant the States the maximum administrative discretion possible. Intrusive, Federal oversight of State administration is neither necessary nor desirable.

(d) When undertaking to formulate and implement policies that have federalism implications, Executive departments and agencies shall:

(1) Encourage States to develop their own policies to achieve program objectives and to work with appropriate officials in other States.

(2) Refrain, to the maximum extent possible, from establishing uniform, national standards for programs and, when possible, defer to the States to establish standards.

(3) When national standards are required, consult with appropriate officials and organizations representing the States in developing those standards.

Sec. 4. *Special Requirements for Preemption.* (a) To the extent permitted by law, Executive departments and agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute.

(b) Where a Federal statute does not preempt State law (as addressed in subsection (a) of this section), Executive departments and agencies shall construe any authorization in the statute for the issuance of regulations as authorizing preemption of State law by rule-making only when the statute expressly authorizes issuance of preemptive regulations or there is some other firm and palpable evidence compelling the conclusion that the Congress intended to delegate to the department or agency the authority to issue regulations preempting State law.

(c) Any regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated.

(d) As soon as an Executive department or agency foresees the possibility of a conflict between State law and Federally protected interests within its area of regulatory responsibility, the department or agency shall consult, to the extent practicable, with appropriate officials and organizations representing the States in an effort to avoid such a conflict.

(e) When an Executive department or agency proposes to act through adjudication or rule-making to preempt State law, the department or agency shall provide all affected States notice and an opportunity for appropriate participation in the proceedings.

Sec. 5. *Special Requirements for Legislative Proposals.* Executive departments and agencies shall not submit to the Congress legislation that would:

(a) Directly regulate the States in ways that would interfere with functions essential to the States' separate and independent existence or operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions;

(b) Attach to Federal grants conditions that are not directly related to the purpose of the grant; or

(c) Preempt State law, unless preemption is consistent with the fundamental federalism principles set forth in section 2, and unless a clearly legitimate national purpose, consistent with the federalism policymaking criteria set forth in section 3, cannot otherwise be met.

Sec. 6. *Agency Implementation.* (a) The head of each Executive department and agency shall designate an official to be responsible for ensuring the implementation of this Order.

(b) In addition to whatever other actions the designated official may take to ensure implementation of this Order, the designated official shall determine which proposed policies have sufficient federalism implications to warrant the preparation of a Federalism Assessment. With respect to each such policy for which an affirmative determination is made, a Federalism Assessment, as described in subsection (c) of this section, shall be prepared. The department or agency head shall consider any such Assessment in all decisions involved in promulgating and implementing the policy.

(c) Each Federalism Assessment shall accompany any submission concerning the policy that is made to the Office of Management and Budget pursuant to Executive Order No. 12291 or OMB Circular No. A-19, and shall:

(1) Contain the designated official's certification that the policy has been assessed in light of the principles, criteria, and requirements stated in sections 2 through 5 of this Order;

(2) Identify any provision or element of the policy that is inconsistent with the principles, criteria, and requirements stated in sections 2 through 5 of this Order;

(3) Identify the extent to which the policy imposes additional costs or burdens on the States, including the likely source of funding for the States and the ability of the States to fulfill the purposes of the policy; and

(4) Identify the extent to which the policy would affect the States' ability to discharge traditional State governmental functions, or other aspects of State sovereignty.

Sec. 7. *Government-wide Federalism Coordination and Review.* (a) In implementing Executive Order Nos. 12291 and 12498 and OMB Circular No. A-19, the Office of Management and Budget, to the extent permitted by law and consistent with the provisions of those authorities, shall take action to ensure that the policies of the Executive departments and agencies are consistent with the principles, criteria, and requirements stated in sections 2 through 5 of this Order.

(b) In submissions to the Office of Management and Budget pursuant to Executive Order No. 12291 and OMB Circular No. A-19, Executive departments and agencies shall identify proposed regulatory and statutory provisions that have significant federalism implications and shall address any substantial federalism concerns. Where the departments or agencies deem it appropriate, substantial federalism concerns should also be addressed in notices of proposed rule-making and messages transmitting legislative proposals to the Congress.

Sec. 8. *Judicial Review.* This Order is intended only to improve the internal management of the Executive branch, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

Ronald Reagan

THE WHITE HOUSE,
October 26, 1987.

[FR Doc. 87-25331
Filed 10-28-87; 4:33 pm]
Billing code 3195-01-M

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

22-Jun-1996 07:32pm

TO: (See Below)

FROM: CN=Linda L. Lance/O=OVP

SUBJECT: Re: FYI -- Congressional Review of Reagan EOs

Message Creation Date was at 22-JUN-1996 19:40:00

kg -- tom and i have discussed, and are in agreement that revising the takings EO now would be unwise. when last we discussed with the agencies, they were complying and it was not particularly burdensome, in part because of the interpretation of the EO in the AG's guidelines promulgated by Ed Meese. If we were starting from scratch we would write a different order, but to do so now we think causes more problems than it solves.

Before we write an options paper (and we're wondering if a formal options paper is really necessary or appropriate) we'd at least like to canvass relevant agencies to make sure our reading is still correct, and to get some sense of how they would respond to information-gathering under the new law and GAO activity. We plan to do that next week, but i'll be in detroit until tuesday p.m. Hope we can get back to you next week without causing problems, and go from there. At least this conveys our preliminary view. Talk to you wednesday.

Distribution:

TO: CN=Kumiki S. Gibson/O=OVP

CC: fitzpatric_m
CC: seidman_e
CC: weinstein_p
CC: kagan_e
CC: jensen_t
CC: katzen_s

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

17-Jun-1996 01:42pm

TO: (See Below)

FROM: Michael A. Fitzpatrick
Office of Mgmt and Budget, OIRA

SUBJECT: FYI -- Congressional Review of Reagan EOs

This thing's for real, and isn't likely to go away quietly anytime soon. See attached.

Distribution:

TO: Kumiki S. Gibson
TO: Ellen S. Seidman
TO: Paul J. Weinstein, Jr
TO: Elena Kagan
TO: Linda L. Lance
TO: Thomas C. Jensen

CC: Sally Katzen

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

17-Jun-1996 10:46am

TO: Michael A. Fitzpatrick

FROM: Elgie Holstein
National Economic Council

SUBJECT: JOINT COMMITTEE MAY BE FORMED TO REVIEW RULES, DO OVERSIGHT,

JOINT COMMITTEE MAY BE FORMED TO REVIEW RULES, DO OVERSIGHT, AIDE SAYS
A new House-Senate committee may be in the works for the next session of Congress to review rules emanating from federal agencies and to ensure that several executive orders pertaining to the process of issuing rules are followed, a House Republican aide told BNA June 14.
In the meantime, the House Government Reform and Oversight Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs will assume those responsibilities, the counsel to the subcommittee said.
Specifically, the subcommittee wants to ensure that federal agencies are complying with provisions in the Small Business Regulatory Enforcement Fairness Act (P.L. 104-121). The act requires, among other things, that before agencies issue a major rule, they submit a report to the Government Accounting Office and both houses of Congress containing an explanation of the rule, a ''complete cost-benefit analysis,'' actions taken relevant to the Unfunded Mandates Act of 1995, and any information relative to any other act or executive order. Congress then has 60 session days to review major rules, which could take effect after 60 calendar days.
House and Senate staff had been meeting informally to set up a bicameral task force to coordinate the review of the rules and direct them to the committees of proper jurisdiction. However, the effort to create that task force bogged down with the resignation of Senate Majority Leader Bob Dole (R-Kan) and the subsequent shift in Senate leadership to Sen. Trent Lott (R-Miss).
Rules Change Required
Setting up a new committee would require a change in rules, which the aide said the subcommittee would try to effect on the first day of the 105th Congress.
The GOP aide said the subcommittee, chaired by Rep. David McIntosh (R-Ind), especially is interested in ensuring compliance with President Clinton's Executive Order 12866 calling for cost-benefit analysis and risk assessment as well as several orders from the Reagan and Bush administrations on private property rights and takings and on civil justice reform.
''Until Clinton repeals the Reagan-Bush executive orders, they are still in effect,'' the aide said.
The executive order on private property rights requires agencies to review the effect of their rules on property rights and to assess whether a taking, as defined under the Fifth Amendment to the U.S. Constitution, has occurred.

The order directs agencies to draft rules in such a way as to avoid the taking of private property, the aide said.

''When Clinton says we don't need property rights legislation because of the executive orders, we want to see if they're being followed,'' he said. ''We don't think they are.''

The House passed a comprehensive regulatory reform bill (HR 9) in 1995 that failed to garner enough support in the Senate. Among the provisions was a section on property rights that would make landowners eligible for compensation if any portion of their property value is diminished by at least 20 percent because of regulations such as those governing wetlands protections and endangered species. The Clinton administration opposed the bill, saying it would be too costly, among other things.

The property rights requirements in the executive order are not as strong as what was contained in HR 9, the aide said. ''However, if we can show that they're not doing anything, then we have an argument for the need for legislation,'' he said.

The aide predicted that no more legislation aimed at reforming regulations would move during this session. However, he said, House Republicans will try to push through a bill next session calling for agency review of regulations that would be tougher than one (HR 994) that was abruptly pulled from the House floor in early March.

-- By Susan Bruninga

Government Operations

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

17-Jun-1996 03:38pm

TO: (See Below)

FROM: CN=Kumiki S. Gibson/O=OVP

SUBJECT: Re: FYI -- Congressional Review of Reagan EOs

Message Creation Date was at 17-JUN-1996 15:47:00

In order for us to stay ahead of this, Mike & I should get an options memo out as soon as Sally returns -- which could be as early as Monday, June 24. In order for us to prepare the options memo, we will need from each of you your "assignment" from last week's meeting. Please provide your assignment to mike (oeob #350) BY COB ON FRIDAY, JUNE 21, VIA E-MAIL OR DISK. Please let one of us know if this deadline is a problem; Mike & I are planning to write this weekend. Thanks. ksg

FITZPATRIC_M @ A1
06/17/96 01:38 PM
To: Kumiki S. Gibson/OVP, Linda L. Lance/OVP, SEIDMAN_E @ A1@CD@LNGATE@LNGAT WEINSTEIN_P @ A1@CD@LNGATE@LNGATE, KAGAN_E @ A1@CD@LNGATE@LNGATE, JENSEN_T @ A1@CD@LNGATE@LNGATE
cc: KATZEN_S @ A1@CD@LNGATE@LNGATE
Subject: FYI -- Congressional Review of Reagan EOs

This thing's for real, and isn't likely to go away quietly anytime soon.

See attached.

Distribution:

TO: FITZPATRIC_M

CC: seidman_e
CC: weinstein_p
CC: kagan_e
CC: jensen_t
CC: katzen_s
CC: CN=Linda L.. Lance/O=OVP

6-10-96 EOs.

pieces of EO 12875 - unf. mandates
fed EO / EO civil justice

Any time you file a rule - send a copy to H., S, GAO
↳ major rules passed on to Cong w/ full reports

GAO came up w/ form -
asks: did you do anal under EOs?
discs w/ GAO re modifying form.

MacIntosh wants stats - 0 out of 200 rules - done this analysis.

No one-size fits all on this EO
Several task forces - on each
1. can we on federalism just revoke?
2. Thgs - what do we do w/ thg analysis?
[I said: JQ very concerned - have to claim exec privilege]
3. Family.

survey agy compliance w/

general policy - Mike/Kamiki -
w/ recommendation

1. agency compliance - tell them to do X, Y... instruct/encourage
2. GAO piece - SK w/c w/ Them?
agy - fill out forms??
delay forms - take responsibs.

MF - gen'l / coordinator

24183

Federal Register
Vol. 52, No. 174
Wednesday, September 9, 1987

Presidential Documents

Title 3—

The President

Executive Order 12606 of September 2, 1987

The Family

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to ensure that the autonomy and rights of the family are considered in the formulation and implementation of policies by Executive departments and agencies, it is hereby ordered as follows:

Section 1. *Family Policymaking Criteria.* In formulating and implementing policies and regulations that may have significant impact on family formation, maintenance, and general well-being, Executive departments and agencies shall, to the extent permitted by law, assess such measures in light of the following questions:

(a) Does this action by government strengthen or erode the stability of the family and, particularly, the marital commitment?

(b) Does this action strengthen or erode the authority and rights of parents in the education, nurture, and supervision of their children?

(c) Does this action help the family perform its functions, or does it substitute governmental activity for the function?

(d) Does this action by government increase or decrease family earnings? Do the proposed benefits of this action justify the impact on the family budget?

(e) Can this activity be carried out by a lower level of government or by the family itself?

(f) What message, intended or otherwise, does this program send to the public concerning the status of the family?

(g) What message does it send to young people concerning the relationship between their behavior, their personal responsibility, and the norms of our society?

Sec. 2. *Governmentwide Family Policy Coordination and Review.*

(a) Executive departments and agencies shall identify proposed regulatory and statutory provisions that may have significant potential negative impact on the family well-being and provide adequate rationale on why such proposal should be submitted. The head of the department or agency, shall certify in writing that, to the extent permitted by law, such measure has been assessed in light of the criteria in Section 1 of this Order and how such measures will enhance family well-being. Such certification shall be transmitted to the Office of Management and Budget. Departments and agencies shall give careful consideration to family-related concerns and their impact in notices of proposed rulemaking and messages transmitting legislative proposals to the Congress.

(b) The Office of Management and Budget shall, to the extent permitted by law, take action to ensure that the policies of the Executive departments and agencies are applied in light of the criteria set forth in Section 1 of this Order.

(c) The Office of Policy Development shall assess existing and proposed policies and regulations that impact family well-being in light of the criteria established by Section 1 of this Order, provide evaluations on those measures that have significant potential impact on the family to the Office of Management and Budget, and advise the President on policy and regulatory actions that may be taken to strengthen the institutions of marriage and family in America.

Sec. 3. *Report.* The Office of Policy Development shall submit preliminary reports including specific recommendations to the Domestic Policy Council and shall submit a final report to the President no later than 180 days from the date of this Order. Each year thereafter, a report, including recommendations shall be submitted, through the Domestic Policy Council to the President.

Sec. 4. *Judicial Review.* This Order is intended to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

Ronald Reagan

THE WHITE HOUSE,
September 2, 1987.

[FR Doc. 87-20895
Filed 9-8-87; 11:56 am]
Billing code 3195-01-M

Federal Register
Vol. 53, No. 53
Friday, March 18, 1988

Presidential Documents

Title 3—

The President

Executive Order 12630 of March 15, 1988

Governmental Actions and Interference With Constitutionally Protected Property Rights

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to ensure that government actions are undertaken on a well-reasoned basis with due regard for fiscal accountability, for the financial impact of the obligations imposed on the Federal government by the Just Compensation Clause of the Fifth Amendment, and for the Constitution, it is hereby ordered as follows:

Section 1. *Purpose.* (a) The Fifth Amendment of the United States Constitution provides that private property shall not be taken for public use without just compensation. Government historically has used the formal exercise of the power of eminent domain, which provides orderly processes for paying just compensation, to acquire private property for public use. Recent Supreme Court decisions, however, in reaffirming the fundamental protection of private property rights provided by the Fifth Amendment and in assessing the nature of governmental actions that have an impact on constitutionally protected property rights, have also reaffirmed that governmental actions that do not formally invoke the condemnation power, including regulations, may result in a taking for which just compensation is required.

(b) Responsible fiscal management and fundamental principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights. Executive departments and agencies should review their actions carefully to prevent unnecessary takings and should account in decision-making for those takings that are necessitated by statutory mandate.

(c) The purpose of this Order is to assist Federal departments and agencies in undertaking such reviews and in proposing, planning, and implementing actions with due regard for the constitutional protections provided by the Fifth Amendment and to reduce the risk of undue or inadvertent burdens on the public fisc resulting from lawful governmental action. In furtherance of the purpose of this Order, the Attorney General shall, consistent with the principles stated herein and in consultation with the Executive departments and agencies, promulgate Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings to which each Executive department or agency shall refer in making the evaluations required by this Order or in otherwise taking any action that is the subject of this Order. The Guidelines shall be promulgated no later than May 1, 1988, and shall be disseminated to all units of each Executive department and agency no later than July 1, 1988. The Attorney General shall, as necessary, update these guidelines to reflect fundamental changes in takings law occurring as a result of Supreme Court decisions.

Sec. 2. *Definitions.* For the purpose of this Order: (a) "Policies that have takings implications" refers to Federal regulations, proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, or other Federal policy statements that, if implemented or enacted, could effect a taking, such as rules and regulations that propose or implement licensing, permitting, or other condition requirements or limitations on private property use, or that require dedications or exactions from owners of private property. "Policies that have takings implications" does not include:

(1) Actions abolishing regulations, discontinuing governmental programs, or modifying regulations in a manner that lessens interference with the use of private property;

(2) Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations;

(3) Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings;

(4) Studies or similar efforts or planning activities;

(5) Communications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such communications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority;

(6) The placement of military facilities or military activities involving the use of Federal property alone; or

(7) Any military or foreign affairs functions (including procurement functions thereunder) but not including the U.S. Army Corps of Engineers civil works program.

(b) Private property refers to all property protected by the Just Compensation Clause of the Fifth Amendment.

(c) "Actions" refers to proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, applications of Federal regulations to specific property, or Federal governmental actions physically invading or occupying private property, or other policy statements or actions related to Federal regulation or direct physical invasion or occupancy, but does not include:

(1) Actions in which the power of eminent domain is formally exercised;

(2) Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations;

(3) Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings;

(4) Studies or similar efforts or planning activities;

(5) Communications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such communications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority;

(6) The placement of military facilities or military activities involving the use of Federal property alone; or

(7) Any military or foreign affairs functions (including procurement functions thereunder), but not including the U.S. Army Corps of Engineers civil works program.

Sec. 3. *General Principles.* In formulating or implementing policies that have takings implications, each Executive department and agency shall be guided by the following general principles:

(a) Governmental officials should be sensitive to, anticipate, and account for, the obligations imposed by the Just Compensation Clause of the Fifth Amendment in planning and carrying out governmental actions so that they do not result in the imposition of unanticipated or undue additional burdens on the public fisc.

(b) Actions undertaken by governmental officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use, may constitute a taking of

property. Further, governmental action may amount to a taking even though the action results in less than a complete deprivation of all use or value, or of all separate and distinct interests in the same private property and even if the action constituting a taking is temporary in nature.

(c) Government officials whose actions are taken specifically for purposes of protecting public health and safety are ordinarily given broader latitude by courts before their actions are considered to be takings. However, the mere assertion of a public health and safety purpose is insufficient to avoid a taking. Actions to which this Order applies asserted to be for the protection of public health and safety, therefore, should be undertaken only in response to real and substantial threats to public health and safety, be designed to advance significantly the health and safety purpose, and be no greater than is necessary to achieve the health and safety purpose.

(d) While normal governmental processes do not ordinarily effect takings, undue delays in decision-making during which private property use if interfered with carry a risk of being held to be takings. Additionally, a delay in processing may increase significantly the size of compensation due if a taking is later found to have occurred.

(e) The Just Compensation Clause is self-actuating, requiring that compensation be paid whenever governmental action results in a taking of private property regardless of whether the underlying authority for the action contemplated a taking or authorized the payment of compensation. Accordingly, governmental actions that may have a significant impact on the use or value of private property should be scrutinized to avoid undue or unplanned burdens on the public fisc.

Sec. 4. *Department and Agency Action.* In addition to the fundamental principles set forth in Section 3, Executive departments and agencies shall adhere, to the extent permitted by law, to the following criteria when implementing policies that have takings implications:

(a) When an Executive department or agency requires a private party to obtain a permit in order to undertake a specific use of, or action with respect to, private property, any conditions imposed on the granting of a permit shall:

(1) Serve the same purpose that would have been served by a prohibition of the use or action; and

(2) Substantially advance that purpose.

(b) When a proposed action would place a restriction on a use of private property, the restriction imposed on the use shall not be disproportionate to the extent to which the use contributes to the overall problem that the restriction is imposed to redress.

(c) When a proposed action involves a permitting process or any other decision-making process that will interfere with, or otherwise prohibit, the use of private property pending the completion of the process, the duration of the process shall be kept to the minimum necessary.

(d) Before undertaking any proposed action regulating private property use for the protection of public health or safety, the Executive department or agency involved shall, in internal deliberative documents and any submissions to the Director of the Office of Management and Budget that are required:

(1) Identify clearly, with as much specificity as possible, the public health or safety risk created by the private property use that is the subject of the proposed action;

(2) Establish that such proposed action substantially advances the purpose of protecting public health and safety against the specifically identified risk;

(3) Establish to the extent possible that the restrictions imposed on the private property are not disproportionate to the extent to which the use contributes to the overall risk; and

(4) Estimate, to the extent possible, the potential cost to the government in the event that a court later determines that the action constituted a taking.

In instances in which there is an immediate threat to health and safety that constitutes an emergency requiring immediate response, this analysis may be done upon completion of the emergency action.

Sec. 5. *Executive Department and Agency Implementation.* (a) The head of each Executive department and agency shall designate an official to be responsible for ensuring compliance with this Order with respect to the actions of that department or agency.

(b) Executive departments and agencies shall, to the extent permitted by law, identify the takings implications of proposed regulatory actions and address the merits of those actions in light of the identified takings implications, if any, in all required submissions made to the Office of Management and Budget. Significant takings implications should also be identified and discussed in notices of proposed rule-making and messages transmitting legislative proposals to the Congress, stating the departments' and agencies' conclusions on the takings issues.

(c) Executive departments and agencies shall identify each existing Federal rule and regulation against which a takings award has been made or against which a takings claim is pending including the amount of each claim or award. A "takings" award has been made or a "takings" claim pending if the award was made, or the pending claim brought, pursuant to the Just Compensation Clause of the Fifth Amendment. An itemized compilation of all such awards made in Fiscal Years 1985, 1986, and 1987 and all such pending claims shall be submitted to the Director, Office of Management and Budget, on or before May 16, 1988.

(d) Each Executive department and agency shall submit annually to the Director, Office of Management and Budget, and to the Attorney General an itemized compilation of all awards of just compensation entered against the United States for takings, including awards of interest as well as monies paid pursuant to the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601.

(e)(1) The Director, Office of Management and Budget, and the Attorney General shall each, to the extent permitted by law, take action to ensure that the policies of the Executive departments and agencies are consistent with the principles, criteria, and requirements stated in Sections 1 through 5 of this Order, and the Office of Management and Budget shall take action to ensure that all takings awards levied against agencies are properly accounted for in agency budget submissions.

(2) In addition to the guidelines required by Section 1 of this Order, the Attorney General shall, in consultation with each Executive department and agency to which this Order applies, promulgate such supplemental guidelines as may be appropriate to the specific obligations of that department or agency.

Sec. 6. *Judicial Review.* This Order is intended only to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

Ronald Reagan

THE WHITE HOUSE,
March 15, 1988.

[FR Doc. 88-6145
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Billing code 3195-01-M

P.L. 104-121
Signed, March 29, 1996

Subtitle E—Congressional Review

SEC. 251. CONGRESSIONAL REVIEW OF AGENCY RULEMAKING.

Title 5, United States Code, is amended by inserting immediately after chapter 7 the following new chapter:

"CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

"Sec.
"801. Congressional review.
"802. Congressional disapproval procedure.
"803. Special rule on statutory, regulatory, and judicial deadlines.
"804. Definitions.
"805. Judicial review.
"806. Applicability; severability.
"807. Exemption for monetary policy.
"808. Effective date of certain rules.

"§ 801. Congressional review

"(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

"(i) a copy of the rule;

"(ii) a concise general statement relating to the rule, including whether it is a major rule; and

"(iii) the proposed effective date of the rule.

"(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

"(i) a complete copy of the cost-benefit analysis of the rule, if any;

"(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

"(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

"(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

"(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

"(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

"(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

"(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

"(A) the later of the date occurring 60 days after the date on which—

"(i) the Congress receives the report submitted under paragraph (1); or

"(ii) the rule is published in the Federal Register, if so published;

"(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

"(i) on which either House of Congress votes and fails to override the veto of the President; or

"(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

"(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

"(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

"(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

"(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

"(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a

rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

"(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

"(2) Paragraph (1) applies to a determination made by the President by Executive order that the rule should take effect because such rule is—

"(A) necessary because of an imminent threat to health or safety or other emergency;

"(B) necessary for the enforcement of criminal laws;

"(C) necessary for national security; or

"(D) issued pursuant to any statute implementing an international trade agreement.

"(3) An exercise by the President of the authority under this subsection shall have no effect on the procedures under section 802 or the effect of a joint resolution of disapproval under this section.

"(d)(1) In addition to the opportunity for review otherwise provided under this chapter, in the case of any rule for which a report was submitted in accordance with subsection (a)(1)(A) during the period beginning on the date occurring—

"(A) in the case of the Senate, 60 session days, or

"(B) in the case of the House of Representatives, 60 legislative days,

before the date the Congress adjourns a session of Congress through the date on which the same or succeeding Congress first convenes its next session, section 802 shall apply to such rule in the succeeding session of Congress.

"(2)(A) In applying section 802 for purposes of such additional review, a rule described under paragraph (1) shall be treated as though—

"(i) such rule were published in the Federal Register (as a rule that shall take effect) on—

"(I) in the case of the Senate, the 15th session day, or

"(II) in the case of the House of Representatives, the 15th legislative day,

after the succeeding session of Congress first convenes; and

"(ii) a report on such rule were submitted to Congress under subsection (a)(1) on such date.

"(B) Nothing in this paragraph shall be construed to affect the requirement under subsection (a)(1) that a report shall be submitted to Congress before a rule can take effect.

"(3) A rule described under paragraph (1) shall take effect as otherwise provided by law (including other subsections of this section).

"(e)(1) For purposes of this subsection, section 802 shall also apply to any major rule promulgated between March 1, 1996, and the date of the enactment of this chapter.

"(2) In applying section 802 for purposes of Congressional review, a rule described under paragraph (1) shall be treated as though—

"(A) such rule were published in the Federal Register on the date of enactment of this chapter; and

"(B) a report on such rule were submitted to Congress under subsection (a)(1) on such date.

"(3) The effectiveness of a rule described under paragraph (1) shall be as otherwise provided by law, unless the rule is made of no force or effect under section 802.

"(f) Any rule that takes effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect.

"(g) If the Congress does not enact a joint resolution of disapproval under section 802 respecting a rule, no court or agency may infer any intent of the Congress from any action or inaction of the Congress with regard to such rule, related statute, or joint resolution of disapproval.

"§ 802. Congressional disapproval procedure

"(a) For purposes of this section, the term 'joint resolution' means only a joint resolution introduced in the period beginning on the date on which the report referred to in section 801(a)(1)(A) is received by Congress and ending 60 days thereafter (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress), the matter after the resolving clause of which is as follows: 'That Congress disapproves the rule submitted by the ____ relating to ____, and such rule shall have no force or effect.' (The blank spaces being appropriately filled in).

"(b)(1) A joint resolution described in subsection (a) shall be referred to the committees in each House of Congress with jurisdiction.

"(2) For purposes of this section, the term 'submission or publication date' means the later of the date on which—

"(A) the Congress receives the report submitted under section 801(a)(1); or

"(B) the rule is published in the Federal Register, if so published.

"(c) In the Senate, if the committee to which is referred a joint resolution described in subsection (a) has not reported such joint resolution (or an identical joint resolution) at the end of 20 calendar days after the submission or publication date defined under subsection (b)(2), such committee may be discharged from further consideration of such joint resolution upon a petition supported in writing by 30 Members of the Senate, and such joint resolution shall be placed on the calendar.

"(d)(1) In the Senate, when the committee to which a joint resolution is referred has reported, or when a committee is discharged (under subsection (c)) from further consideration of a joint resolution described in subsection (a), it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) for a motion to proceed to the consideration of the joint resolution, and all points of order against the joint resolution (and against consideration of the joint resolution) are waived. The motion is not subject to amendment, or to a motion to postpone, or to a motion to proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the joint resolution is agreed

to, the joint resolution shall remain the unfinished business of the Senate until disposed of.

"(2) In the Senate, debate on the joint resolution, and on all debatable motions and appeals in connection therewith, shall be limited to not more than 10 hours, which shall be divided equally between those favoring and those opposing the joint resolution. A motion further to limit debate is in order and not debatable. An amendment to, or a motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the joint resolution is not in order.

"(3) In the Senate, immediately following the conclusion of the debate on a joint resolution described in subsection (a), and a single quorum call at the conclusion of the debate if requested in accordance with the rules of the Senate, the vote on final passage of the joint resolution shall occur.

"(4) Appeals from the decisions of the Chair relating to the application of the rules of the Senate to the procedure relating to a joint resolution described in subsection (a) shall be decided without debate.

"(e) In the Senate the procedure specified in subsection (c) or (d) shall not apply to the consideration of a joint resolution respecting a rule—

"(1) after the expiration of the 60 session days beginning with the applicable submission or publication date, or

"(2) if the report under section 801(a)(1)(A) was submitted during the period referred to in section 801(d)(1), after the expiration of the 60 session days beginning on the 15th session day after the succeeding session of Congress first convenes.

"(f) If, before the passage by one House of a joint resolution of that House described in subsection (a), that House receives from the other House a joint resolution described in subsection (a), then the following procedures shall apply:

"(1) The joint resolution of the other House shall not be referred to a committee.

"(2) With respect to a joint resolution described in subsection (a) of the House receiving the joint resolution—

"(A) the procedure in that House shall be the same as if no joint resolution had been received from the other House; but

"(B) the vote on final passage shall be on the joint resolution of the other House.

"(g) This section is enacted by Congress—

"(1) as an exercise of the rulemaking power of the Senate and House of Representatives, respectively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of a joint resolution described in subsection (a), and it supersedes other rules only to the extent that it is inconsistent with such rules; and

"(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

"§ 803. Special rule on statutory, regulatory, and judicial deadlines

"(a) In the case of any deadline for, relating to, or involving any rule which does not take effect (or the effectiveness of which is terminated) because of enactment of a joint resolution under section 802, that deadline is extended until the date 1 year after the date of enactment of the joint resolution. Nothing in this subsection shall be construed to affect a deadline merely by reason of the postponement of a rule's effective date under section 801(a).

"(b) The term 'deadline' means any date certain for fulfilling any obligation or exercising any authority established by or under any Federal statute or regulation, or by or under any court order implementing any Federal statute or regulation.

"§ 804. Definitions

"For purposes of this chapter—

"(1) The term 'Federal agency' means any agency as that term is defined in section 551(1).

"(2) The term 'major rule' means any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—

"(A) an annual effect on the economy of $100,000,000 or more;

"(B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

"(C) 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.

The term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act.

"(3) The term 'rule' has the meaning given such term in section 551, except that such term does not include—

"(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing;

"(B) any rule relating to agency management or personnel; or

"(C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.

"§ 805. Judicial review

"No determination, finding, action, or omission under this chapter shall be subject to judicial review.

"§ 806. Applicability; severability

"(a) This chapter shall apply notwithstanding any other provision of law.

"(b) If any provision of this chapter or the application of any provision of this chapter to any person or circumstance, is held

invalid, the application of such provision to other persons or circumstances, and the remainder of this chapter, shall not be affected thereby.

"§ 807. Exemption for monetary policy

"Nothing in this chapter shall apply to rules that concern monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee.

"§ 808. Effective date of certain rules

"Notwithstanding section 801—

"(1) any rule that establishes, modifies, opens, closes, or conducts a regulatory program for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping, or

"(2) any rule which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest,

shall take effect at such time as the Federal agency promulgating the rule determines.".

SEC. 252. EFFECTIVE DATE.

The amendment made by section 351 shall take effect on the date of enactment of this Act.

SEC. 253. TECHNICAL AMENDMENT.

The table of chapters for part I of title 5, United States Code, is amended by inserting immediately after the item relating to chapter 7 the following:

"8. Congressional Review of Agency Rulemaking ..... 801".

THE WHITE HOUSE

WASHINGTON

June 6, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN EK

SUBJECT: REAGAN EXECUTIVE ORDERS

After our phone conversation today, Sally decided to hold a meeting early next week; she invited (aside from me) Kumiki, Tom Jensen, Linda Lance, Ellen Seidman, and Paul Weinstein. I believe she wants me to decide what to do about the federalism EO; she wants to assign some of these other people to the Family and Takings Orders. I'll keep you informed, as to both my own part of this project and the others.

My initial view is that (1) the federalism order is the only one we should even think about repealing at this juncture (and maybe we shouldn't even do that); (2) we should develop a set of non-onerous procedures that will allow agencies to claim formal compliance with the orders; and (3) we should think long and hard before trying to withhold the agencies' takings analyses. Let me know what you think -- either generally or as to the above points.

DAVID M. McINTOSH
2D DISTRICT, INDIANA

GOVERNMENT REFORM AND OVERSIGHT COMMITTEE

SUBCOMMITTEE CHAIRMAN
NATIONAL ECONOMIC GROWTH, NATURAL RESOURCES AND REGULATORY AFFAIRS

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RICHMOND

POLICY ADDRESS BEFORE THE U.S. CHAMBER OF COMMERCE "THE LANDMARK CONGRESSIONAL REVIEW ACT"

May 21, 1996

Too often Washington forgets that federal regulations have real consequences for real Americans. Take, for example, the moving testimony of Harvey Johnson from Forest City, Iowa. Harvey's family owns 82 acres of dry, prime Iowa farm land. Harvey came before my Subcommittee and tearfully told us his story -- how government bureaucrats have taken away his family farm, saying it is an endangered wetland. Government officials threatened his son and daughter with astronomical fines, and cut off their government farm programs. And just when they thought everything was settling down, the USDA subpoenaed their local bank records and other business records. Mr. Johnson broke down in tears when he told how the government treated the Johnson family more like criminals than productive members of society. Mr. Johnson said that the stress of the ordeal has exacerbated his bout with liver cancer. His wife and son have ulcers and his daughter has suffered under the psychological strain.

The really tragic part of the story is that the government officials are tormenting the Johnson family based on a wetlands policy manual that isn't even a regulation submitted for public comment. It was never approved by Congress. And it was never tested to see if it made good sense, if the benefits outweigh the costs, or if it amounted to a taking of private property. Our forefathers fought against the King of Britain to put an end to this type of tyranny. Well, I'm here to say that such high-handed regulatory practices are about to stop.

It is going to stop because of the new Congressional Review Act. The Act is the most significant change in regulatory law in 50 years [since 1946,] when Congress enacted the Administrative Procedure Act. Yet, when President Clinton signed the Congressional Review Act into law, no one noticed. Most observers failed to read it carefully.

Today I would like to tell you about this revolutionary change in our regulatory system. First, I want to walk though some of its most important provisions. Second, I want to enlist you, as leaders in the business community, to help find examples of regulations that can be improved using this process. Third, I will suggest a few "next steps" to ensure that this new process better serves the needs of the American public.

PRINTED ON RECYCLED PAPER

As to what we accomplished, let me begin by quoting from the April 24, 1996 *Wall Street Journal* editorial praising the bill:

> President Clinton on March 29 signed into law important provisions reining in bureaucrats who impose a heavy tax on American productivity with rules and regulations. * * *
>
> [Nevertheless,] some Democratic insiders are calling President Clinton's signing of this law "a big mistake." ... One agency official said that the [congressional] review provisions may have a similar impact as the White House Council of Competitiveness in the Bush Administration. * * * This unnamed official laments that ... "it will give special interests the opportunity to lobby Congress on rules they find troublesome."

I found the comments from the "unnamed" Clinton Administration source very revealing. First of all, it shows how arrogant officials in Washington can be. This "unnamed official" clearly has great disdain for democracy and public accountability. These bureaucrats don't want elected officials who might pay attention to private citizens, farmers, small business owners, or families to interfere with the bureaucrats regulations. [By the way, I've often thought that the fastest way to become famous in Washington is to change your name to "Unnamed Source."] My second comment is to confirm the agency official's worst fear and my sincere hope. I worked at the President's Council on Competitiveness. Let me tell you, it is precisely our goal to recreate that public accountability that we used in the Council on Competitiveness.

The three most significant features of the Congressional Review Act I will address are as follows: First, all agency statements that affect the public are now subject to the same scrutiny as other rules. No longer will "policy statements," "guidelines," or "manuals" be used in a court of law against an American citizen if they do not follow all of the requirements of this Act. Second, agencies will either have to conduct a real cost-benefit analysis, takings analysis, and federalism assessment as set forth in the Reagan, Bush, and Clinton executive orders or they will have to submit reports to Congress explaining why they are violating these executive orders. Agencies that fail to comply with some of these procedural steps also may be subject to suit under the new Regulatory Flexibility provisions of the law. Third, Congress will now have a chance to reject those rules that are seriously flawed.

Defining the Scope of the Problem: Regulations Strangle American Ingenuity

Before I discuss the details of the Congressional Review Act, however, I want to remind everyone of the scope of the problem we face with inefficient, ineffective, and overly burdensome regulation.

Americans want a regulatory system that gives us a cleaner environment, a safer workplace, and healthier lives. But our system fails to live up to these goals.

- When 60% of the money spent on Superfund goes to lawyers and consultants -- that's not cleaner.

- When the overwhelming number of OSHA fines are for paperwork violations -- **that's not safer.**

- When FDA takes twice as long as Great Britain and other industrialized countries to approve new drugs and tens of thousands of Americans die -- **that's not healthier.**

Instead of a cleaner, safer, healthier America, we have red tape that strangles innovations, costs jobs, and hurts our competitiveness.

According to the General Accounting Office, the federal government requires the public to spend approximately 647 billion dollars each year on non-tax regulations.[1] Other estimates place the annual cost of regulations at near 900 billion dollars. Now, 647 billion dollars is more than the total amount of federal discretionary spending (which is $ 546 billion) and almost two and one-half times more than we spend on national defense ($ 274 billion).[2]

There is little dispute that the sheer cost of regulations has been rising at a geometric rate. Economists also agree that the loss of productivity due to increasing government regulations is in part to blame for the sluggish growth in the United States economy. This productivity loss is felt by all consumers, pensioners, investors, borrowers, and managers -- but it is felt most immediately, and borne most directly, by American workers. Two experts who appeared last Thursday before our Subcommittee testified that 85-88% of any increase in government payroll taxes, mandated benefits, and regulations is passed on to workers in the form of reduced wages. One expert testified that the wage stagnation of the last decade exists in large part because of the cost of government, particularly the increasing level of payroll taxes, mandates, and government regulations.

Inefficient, ineffective, and overly-burdensome regulation presents moral, political, and philosophical problems in addition to harm that is economically quantifiable. Defenders of the status quo are fond of saying that many of the benefits of regulation cannot be quantified in dollar terms, and that regulations are justified (to them anyway) even if they flunk a cost-benefit test. Well, the true cost of our regulatory state is not measured in dollars alone either. Alexis de Tocqueville warned us more than 150 years ago about the dangers of over-regulation in America and how it destroys the initiative of a nation as surly as any tyrannical dictator. This is what he had to say:

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[1] "Regulatory Reform: Information and Costs, Cost Effectiveness, and Mandated Deadlines for Regulations," United States General Accounting Office, Briefing Report to the Ranking Minority Member, Committee on Government Affairs, U.S. Senate, p. 15 (March 1995).

[2] Budget of the United States Government, Fiscal Year 1997, Historical Tables, p. 109 (The President's Budget for FY 1997).

> [Despotic power] covers the surface of society with a network of small complicated rules, minute and uniform, through which the most original minds and the most energetic characters cannot penetrate. . . . Such a power does not destroy, but it prevents existence; it does not tyrannize, but it compresses, enervates, extinguishes, and stupefies a people, till each nation is reduced to be nothing better than a flock of timid and industrious animals, of which the government is the shepherd.[3]

The new Congressional Review Act is part of the solution, and it may be as important as the original Administrative Procedure Act in changing regulatory behavior. This is how it works:

First, the Act requires federal agencies to submit every new rule to the House, the Senate, and to the Comptroller General of GAO. If the agencies do not do so, (with very few exceptions), the rule cannot go into effect. When an agency has not submitted a particular rule to Congress or to GAO, the law operates by its own force to render that rule ineffective.

The Act defines a "rule" extremely broadly, much more broadly than most people commonly understand that term to mean. With a few exceptions, such as agency personnel rules and rules of particular applicability, a "rule" in the Congressional Review Act includes any agency statement of general applicability and future effect. This is important: any agency statement of general applicability and future effect. What are agency statements of general applicability and future effect? There are four broad categories of regulatory activities covered:

First, formal or adjudicatory rulemaking, which include rulings issued pursuant to agency adjudicatory proceedings. OSHA used to issue some of its worker protection standards pursuant to such procedures, and until 1990, the FDA issued some of its food safety standards in this manner.

Second, "informal rulemaking," which include all final rules published in the Federal Register pursuant to notice-and-comment procedures. This is most of what is commonly thought to be a regulation in the hundreds of volumes of the Code of Federal Regulations.

Third, interpretative rules that are not subject to notice-and-comment requirements but normally must be published in the Federal Register before they can adversely affect a person. This third category includes general statements of agency policy, interpretative rules, and staff enforcement manuals and other instructions to agency staff. Examples of interpretive rules of general applicability include IRS tax notices and IRS revenue rulings, EPA and EEOC guidelines on how to proceed in enforcement matters, and the wetlands manual that is reeking such havoc on the Johnsons' lives.

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[3] Alexis de Tocqueville, Democracy in America (1840), edited by Phillips Bradly, vol. 2 at 319 (Alfred A. Knopf, New York 1976).

The fourth and last category is a body of materials that are produced and used by the agencies but that were never published or subject to notice and comment. These include guidance documents such as the Superfund risk assessment guidance and broad policy statements such as those on waste minimization.

The other sponsors of the legislation and I were concerned that some agencies have tried to circumvent normal rulemaking requirements by giving legal effect to general statements of policy, "guidelines," and agency policy and procedure manuals. The wetlands manual is the most infamous example of agency rulemaking by guidance document. The Army Corps of Engineers, together with EPA and the Fish and Wildlife Service, issued the wetlands manual without public notice or opportunity for public comment. The manual purported to provide agency officials mere "guidance" on the meaning of a few words in section 404 of the Clean Water Act that prohibit discharges in the navigable waterways of the United States. But this manual had the effect of categorizing millions of acres of new lands as wetlands. In the 1989 manual that Congress eventually overruled by law, a wetland was defined to include dry land in which there was some water 18 inches below the surface for 7 days between the spring and fall. No one ever looked at this manual to see if it made sense. Yet, dozens of Americans were criminally prosecuted for alleged violations based on its proscriptions. How can anyone claim that these types of documents do not have the effect of rules? Harvey Johnson and his family certainly know better. Well, now I finally have an answer for Mr. Johnson. The wetlands manual is a rule, and if it is reissued without substantial change, I will do my best to kill it.

The second important feature of the Act is that agencies must also submit to GAO copies of the cost-benefit analysis for each rule, and information regarding the agency's compliance with various laws, including the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and "**any other Act and any relevant Executive Orders.**" In the joint House/Senate legislative history, we listed the other Acts and executive orders that we wanted information on. Let me briefly describe some of them.

First, is cost-benefit analysis. Independent studies have confirmed that the Clinton OMB is not requiring cost-benefit analysis for many covered rules. Even OMB admitted in October of 1994 that "there is much to be done to obtain the benefits" of the executive order. DOT's "Light Truck Average Fuel Economy Standard" is the most recent example of a rule in which the agency admits that the impact of the rule is economically significant but that no Final Regulatory Impact Analysis was conducted. Now the agency will have to do a real cost-benefit analysis. ??

Second, agencies will have to perform a Federalism assessment for each proposed rule under President Reagan's Executive Order 12612. From now on, every federal welfare and Medicaid rule that micro-manages the way States implement these programs will have to show it does not interfere with the State's ability to provide services to those who really need it.

Third, private property rights will be protected under President Reagan's Executive Order 12630, which requires agencies to avoid interfering with private property rights and requires takings assessments to be conducted on proposed rules.

Fourth, President Bush's Executive Order 12778 requires them to consider the impact the rule has on litigation. Regulations are supposed to provide guidance on how to comply with a statute and prevent needless litigation. The Superfund regulations and guidelines are a prime example of complex rules that cause more litigation than they prevent.

The current Administration ignores most of these Reagan/Bush executive orders. Now, the President will either have to comply with these executive orders, repeal them, or admit that he is doing neither.

Already, the GAO review is having a beneficial effect. For each major rule, GAO is mandated to issue its own report to the Congress on whether the agencies have conducted a cost-benefit analysis on the rule, and whether they have complied with the listed laws and executive orders we have identified. Already, GAO has found that the Department of Transportation violated the procedural requirements of the Congressional Review Act by not conducting the required analyses of its "Light Truck Average Fuel Economy Standard."

how did this violate proc. reqs.??

Another important feature of the Act is the time delay we built in so that new major rules cannot go into effect until 60 days after they are submitted to Congress and published in the Federal Register. Because major rules are now subject to congressional review, this means several things: First, they do not become effective until Congress has had an opportunity to look at them. Second, if a small number of Congressmen and Senators object to the rule, they can force a vote in each body on whether the rule should be rejected. Third, there will not be "midnight regulations" like the ones we saw at the end of the Carter Administration, because of the 60 day waiting period. This gives the Senate and House time to review the rule and pass a resolution of disapproval.

overstated

At the end of the 60 calender day period, a major rule may go into effect if the agency wants it to. However, it will often take Congress much longer to pass resolutions of disapproval so we decided that Congress would be given an adequate opportunity to deliberate and act on joint resolutions of disapproval under expedited procedures. Thus, we can reject a rule even if the rule has gone into effect before Congress completes legislative action. Those expedited procedures eliminate the Senate filibuster and limit the time for debate.

Depending on when a rule is issued and when it is delivered to Congress, these special congressional procedures are available for at least four months, but could last up to a year after the rule is issued. This is because the Act provides that the House and Senate have 60 session days to use the expedited procedures to pass a resolution of disapproval after the rule is submitted to Congress. It also allows a new Congress an additional 60 session days to review rules that are issued between sessions or shortly before a previous session ended. My best guess at this time is that any rule issued after about May 1 of this year will be subject to review under the expedited procedures until about June 15 of 1997.

For those of us who believe that Congress has greatly exceeded its constitutional power to delegate the scope and content of many federal programs, this is a first principled step in

accepting responsibility for the lawmaking power that Article I of the Constitution vested exclusively in Congress. The time period for congressional review of agency rules was appropriately extended and should be extended indefinitely in any future legislative revision. In sum, these special congressional procedures should apply anytime we want to overrule a particular rule.

As the *Wall Street Journal* editorial noted, however, the Administration is schizophrenic, particularly about this feature of the Act. President Clinton said that he was for the Act but the editorial noted that some agency officials are experiencing "buyers regret."

One of the most important reasons for the time delay is so that citizen groups can have time to engage in the process. We will need to rely upon you to educate your members and the American people about the costs and harm caused by bad regulations. Citizen groups will play a key role in fighting these regulations as we take them up in Congress.

For all of these reasons, I grow increasingly suspicious of the Administration's protestation that the next Congress may pass judgment on rules issued after an election defeat. Does the Administration have a hidden regulatory agenda that it believes would be soundly rejected in the next Congress? Does the public support every "midnight rule" that may be issued in December pursuant to such a hidden regulatory agenda? My question for the President is this: what are you trying to hide?

The next point I wish to address is what happens when Congress passes a law disapproving of a regulation. The immediate effect is that the disapproved rule shall be treated as if it were never issued. This is true even if the rule previously went into effect. Thus, all enforcement proceedings based on the disapproved rule would have to be dismissed and all agency or court orders based on the disapproved rule would have to be vacated. If the rule is bad enough to get overruled, it deserves to be treated as if it never existed.

Another effect of a resolution of disapproval is that an agency may not issue or reissue any rule substantially similar to the one that was rejected until and unless Congress passes a new law that specifically authorizes it. This provision is necessary to prevent the agencies from circumventing a resolution of disapproval. However, the limitation is far reaching if an agency claims it has no discretion in what kind of rule to issue. If Congress enacts a resolution disapproving of such a rule, then Congress's disapproval could effectively overrule the underlying statutory mandate. In such cases, no new rule may be issued without specific authorization of Congress.

For example, the Clean Air Act amendments of 1990 contained a provision that required certain cities, like Los Angeles, to institute draconian steps to reduce the number of private automobile trips people took to and from work. EPA claimed that the provision left it with no discretion in the type of trip reduction rules it could issue. It was about to require forced car-pooling in these cities. Luckily, Congress amended this provision of law to make it more flexible. But let us assume that the provision still existed in its original form and EPA continued to

maintain that it had no discretion in what type of rule it could issue. If EPA had issued the forced car pooling rule and Congress killed the rule, its intent to override the underlying statute would be pretty clear. This is because Congress would know that the EPA could not reissue a rule substantially similar to the one that was disapproved.

If the agency is issuing a rule pursuant to a general legislative directive, then it has more flexibility when Congress rejects one of its stupid regulations. Some time ago, OSHA circulated an approximate 800 page advanced notice of proposed rulemaking on a draft ergonomics rule. The draft rule was a complete blunder, particularly since OSHA had no scientific evidence showing that its multi-billion dollar draft rule would have done anything about the ergonomic disorders it supposedly addressed. Last year, Congress nearly cut off all funds for the ergonomics rulemaking and cautioned OSHA that its rules should be based on sound science. What is most interesting about the ergonomics rule, however, is that Congress has never instructed or even specifically authorized OSHA to issue an ergonomics rule. OSHA claimed that its authority to issue an ergonomics rule is derived from the general duty clause of its enabling statute -- which relates generically to protecting worker safety. If OSHA issued an ergonomics rule similar to one that was circulated and Congress disapproved it, OSHA would have two options. OSHA could exercise its discretion to issue a substantially different rule or it could exercise its discretion not to issue any new rule.

It will be the agency's responsibility in the first instance when promulgating the rule to determine the range of discretion afforded under the original law and to let Congress know whether that law authorizes the agency to issue a substantially different rule. During debate, Congress will make its intent clear regarding the agency's options of lack thereof after enactment of a joint resolution. Then, if a resolution of disapproval is enacted, the agency and the courts must give effect to what Congress intended.

Let me explain how this will significantly alter agency behavior. Wendy Gramm, who headed up OMB's Office of Information and Regulatory Affairs in the Reagan Administration, believes that one of the biggest problems we face with the agency bureaucrats is that they are risk averse. She thinks that it is easier for regulators to err on the side of over-regulation, and hide behind the "statute-made-me-do-it" defense. Well, that defense is a risky one now. If the agency claims that it has no discretion and Congress rejects the rule that is issued, the courts might hold that the agency does not have any options under the new law. I believe this fact will make the agencies think long and hard about claiming that its hands are tied. That in turn, will require the agencies to seriously consider alternatives that achieve the same or superior level of protection or effectiveness at reduced cost.

Let me summarize by suggesting just some of the ways in which this new law will fundamentally change the way Washington regulates.

It is almost certain that agencies will be more responsive and open to suggestions and comments from regulated entities during the rulemaking process. This will foster a more cooperative, less threatening, regulatory environment among agencies, small businesses, and other

regulated entities. As a result, agencies will issue more flexible and less burdensome rules that achieve the same or superior level of protection of health, safety, and the environment.

I want to conclude with a brief thought on where we go from here. I have already shared a plan with the Speaker that would make the Congressional Review Act even more powerful. Based on a successful model in several states, including Ohio and Michigan, we should establish a Joint House/Senate Committee on Agency Rulemaking Review. This Joint House/Senate Committee will be the focal point for reviewing pending rules and acting on those that are made final. The Joint Committee would have the time and resources to study the rules carefully, to work with the agencies on revising proposed rules, and to introduce resolutions of disapproval in each House for those that should be rejected. The Joint Committee could also work with the committees of jurisdiction in each House as they consider each joint resolution. Speaker Gingrich was very interested in setting up such a Joint Committee. In the next few weeks, I will develop the proposal further in writing and send it with a letter to the Speaker and the Senate Majority Leader for action at that beginning of the next Congress.

We also need to move swiftly and thoughtfully to use the Congressional Review Act this year to get rid of stupid regulations so that the Harvey Johnsons of the world can rest easier at night, without fear that in the wee hours of the morning they will hear a knock on their door and a government agent will appear and say "I'm from the government and I'm here to help you."

I am confident that working together with you we can make this new law effective and finally get the government back on the side of the American people.

record a written finding, with reasons therefor, that those requirements would not advance the effective participation of small entities in the rulemaking process. For purposes of this subsection, the factors to be considered in making such a finding are as follows:

"(1) In developing a proposed rule, the extent to which the covered agency consulted with individuals representative of affected small entities with respect to the potential impacts of the rule and took such concerns into consideration.

"(2) Special circumstances requiring prompt issuance of the rule.

"(3) Whether the requirements of subsection (b) would provide the individuals identified in subsection (b)(2) with a competitive advantage relative to other small entities.".

(b) SMALL BUSINESS ADVOCACY CHAIRPERSONS.—Not later than 30 days after the date of enactment of this Act, the head of each covered agency that has conducted a final regulatory flexibility analysis shall designate a small business advocacy chairperson using existing personnel to the extent possible, to be responsible for implementing this section and to act as permanent chair of the agency's review panels established pursuant to this section.

SEC. 245. EFFECTIVE DATE.

This subtitle shall become effective on the expiration of 90 days after the date of enactment of this subtitle, except that such amendments shall not apply to interpretative rules for which a notice of proposed rulemaking was published prior to the date of enactment.

Subtitle E—Congressional Review

SEC. 251. CONGRESSIONAL REVIEW OF AGENCY RULEMAKING.

Title 5, United States Code, is amended by inserting immediately after chapter 7 the following new chapter:

"CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

"Sec.
"801. Congressional review.
"802. Congressional disapproval procedure.
"803. Special rule on statutory, regulatory, and judicial deadlines.
"804. Definitions.
"805. Judicial review.
"806. Applicability; severability.
"807. Exemption for monetary policy.
"808. Effective date of certain rules.

"§ 801. Congressional review

"(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

"(i) a copy of the rule;

"(ii) a concise general statement relating to the rule, including whether it is a major rule; and

"(iii) the proposed effective date of the rule.

"(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

"(i) a complete copy of the cost-benefit analysis of the rule, if any;

"(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

"(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

"(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

"(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

"(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

"(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

"(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

"(A) the later of the date occurring 60 days after the date on which—

"(i) the Congress receives the report submitted under paragraph (1); or

"(ii) the rule is published in the Federal Register, if so published;

"(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

"(i) on which either House of Congress votes and fails to override the veto of the President; or

"(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

"(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

"(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

"(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

"(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

"(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a

rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

"(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

"(2) Paragraph (1) applies to a determination made by the President by Executive order that the rule should take effect because such rule is—

"(A) necessary because of an imminent threat to health or safety or other emergency;

"(B) necessary for the enforcement of criminal laws;

"(C) necessary for national security; or

"(D) issued pursuant to any statute implementing an international trade agreement.

"(3) An exercise by the President of the authority under this subsection shall have no effect on the procedures under section 802 or the effect of a joint resolution of disapproval under this section.

"(d)(1) In addition to the opportunity for review otherwise provided under this chapter, in the case of any rule for which a report was submitted in accordance with subsection (a)(1)(A) during the period beginning on the date occurring—

"(A) in the case of the Senate, 60 session days, or

"(B) in the case of the House of Representatives, 60 legislative days,

before the date the Congress adjourns a session of Congress through the date on which the same or succeeding Congress first convenes its next session, section 802 shall apply to such rule in the succeeding session of Congress.

"(2)(A) In applying section 802 for purposes of such additional review, a rule described under paragraph (1) shall be treated as though—

"(i) such rule were published in the Federal Register (as a rule that shall take effect) on—

"(I) in the case of the Senate, the 15th session day, or

"(II) in the case of the House of Representatives, the 15th legislative day,

after the succeeding session of Congress first convenes; and

"(ii) a report on such rule were submitted to Congress under subsection (a)(1) on such date.

"(B) Nothing in this paragraph shall be construed to affect the requirement under subsection (a)(1) that a report shall be submitted to Congress before a rule can take effect.

"(3) A rule described under paragraph (1) shall take effect as otherwise provided by law (including other subsections of this section).

"(e)(1) For purposes of this subsection, section 802 shall also apply to any major rule promulgated between March 1, 1996, and the date of the enactment of this chapter.

"(2) In applying section 802 for purposes of Congressional review, a rule described under paragraph (1) shall be treated as though—

"(A) such rule were published in the Federal Register on the date of enactment of this chapter; and

"(B) a report on such rule were submitted to Congress under subsection (a)(1) on such date.

"(3) The effectiveness of a rule described under paragraph (1) shall be as otherwise provided by law, unless the rule is made of no force or effect under section 802.

"(f) Any rule that takes effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect.

"(g) If the Congress does not enact a joint resolution of disapproval under section 802 respecting a rule, no court or agency may infer any intent of the Congress from any action or inaction of the Congress with regard to such rule, related statute, or joint resolution of disapproval.

"§ 802. Congressional disapproval procedure

"(a) For purposes of this section, the term 'joint resolution' means only a joint resolution introduced in the period beginning on the date on which the report referred to in section 801(a)(1)(A) is received by Congress and ending 60 days thereafter (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress), the matter after the resolving clause of which is as follows: 'That Congress disapproves the rule submitted by the ____ relating to ____, and such rule shall have no force or effect.' (The blank spaces being appropriately filled in).

"(b)(1) A joint resolution described in subsection (a) shall be referred to the committees in each House of Congress with jurisdiction.

"(2) For purposes of this section, the term 'submission or publication date' means the later of the date on which—

"(A) the Congress receives the report submitted under section 801(a)(1); or

"(B) the rule is published in the Federal Register, if so published.

"(c) In the Senate, if the committee to which is referred a joint resolution described in subsection (a) has not reported such joint resolution (or an identical joint resolution) at the end of 20 calendar days after the submission or publication date defined under subsection (b)(2), such committee may be discharged from further consideration of such joint resolution upon a petition supported in writing by 30 Members of the Senate, and such joint resolution shall be placed on the calendar.

"(d)(1) In the Senate, when the committee to which a joint resolution is referred has reported, or when a committee is discharged (under subsection (c)) from further consideration of a joint resolution described in subsection (a), it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) for a motion to proceed to the consideration of the joint resolution, and all points of order against the joint resolution (and against consideration of the joint resolution) are waived. The motion is not subject to amendment, or to a motion to postpone, or to a motion to proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the joint resolution is agreed

to, the joint resolution shall remain the unfinished business of the Senate until disposed of.

"(2) In the Senate, debate on the joint resolution, and on all debatable motions and appeals in connection therewith, shall be limited to not more than 10 hours, which shall be divided equally between those favoring and those opposing the joint resolution. A motion further to limit debate is in order and not debatable. An amendment to, or a motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the joint resolution is not in order.

"(3) In the Senate, immediately following the conclusion of the debate on a joint resolution described in subsection (a), and a single quorum call at the conclusion of the debate if requested in accordance with the rules of the Senate, the vote on final passage of the joint resolution shall occur.

"(4) Appeals from the decisions of the Chair relating to the application of the rules of the Senate to the procedure relating to a joint resolution described in subsection (a) shall be decided without debate.

"(e) In the Senate the procedure specified in subsection (c) or (d) shall not apply to the consideration of a joint resolution respecting a rule—

"(1) after the expiration of the 60 session days beginning with the applicable submission or publication date, or

"(2) if the report under section 801(a)(1)(A) was submitted during the period referred to in section 801(d)(1), after the expiration of the 60 session days beginning on the 15th session day after the succeeding session of Congress first convenes.

"(f) If, before the passage by one House of a joint resolution of that House described in subsection (a), that House receives from the other House a joint resolution described in subsection (a), then the following procedures shall apply:

"(1) The joint resolution of the other House shall not be referred to a committee.

"(2) With respect to a joint resolution described in subsection (a) of the House receiving the joint resolution—

"(A) the procedure in that House shall be the same as if no joint resolution had been received from the other House; but

"(B) the vote on final passage shall be on the joint resolution of the other House.

"(g) This section is enacted by Congress—

"(1) as an exercise of the rulemaking power of the Senate and House of Representatives, respectively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of a joint resolution described in subsection (a), and it supersedes other rules only to the extent that it is inconsistent with such rules; and

"(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

"§ 803. Special rule on statutory, regulatory, and judicial deadlines

"(a) In the case of any deadline for, relating to, or involving any rule which does not take effect (or the effectiveness of which is terminated) because of enactment of a joint resolution under section 802, that deadline is extended until the date 1 year after the date of enactment of the joint resolution. Nothing in this subsection shall be construed to affect a deadline merely by reason of the postponement of a rule's effective date under section 801(a).

"(b) The term 'deadline' means any date certain for fulfilling any obligation or exercising any authority established by or under any Federal statute or regulation, or by or under any court order implementing any Federal statute or regulation.

"§ 804. Definitions

"For purposes of this chapter—

"(1) The term 'Federal agency' means any agency as that term is defined in section 551(1).

"(2) The term 'major rule' means any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—

"(A) an annual effect on the economy of $100,000,000 or more;

"(B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

"(C) 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.

The term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act.

"(3) The term 'rule' has the meaning given such term in section 551, except that such term does not include—

"(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing;

"(B) any rule relating to agency management or personnel; or

"(C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.

"§ 805. Judicial review

"No determination, finding, action, or omission under this chapter shall be subject to judicial review.

"§ 806. Applicability; severability

"(a) This chapter shall apply notwithstanding any other provision of law.

"(b) If any provision of this chapter or the application of any provision of this chapter to any person or circumstance, is held

invalid, the application of such provision to other persons or circumstances, and the remainder of this chapter, shall not be affected thereby.

"§ 807. Exemption for monetary policy

"Nothing in this chapter shall apply to rules that concern monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee.

"§ 808. Effective date of certain rules

"Notwithstanding section 801—

"(1) any rule that establishes, modifies, opens, closes, or conducts a regulatory program for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping, or

"(2) any rule which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest,

shall take effect at such time as the Federal agency promulgating the rule determines.".

SEC. 252. EFFECTIVE DATE.

The amendment made by section 351 shall take effect on the date of enactment of this Act.

SEC. 253. TECHNICAL AMENDMENT.

The table of chapters for part I of title 5, United States Code, is amended by inserting immediately after the item relating to chapter 7 the following:

"8. Congressional Review of Agency Rulemaking ..... 801".

TITLE III—PUBLIC DEBT LIMIT

SEC. 301. INCREASE IN PUBLIC DEBT LIMIT.

Subsection (b) of section 3101 of title 31, United States Code, is amended by striking the dollar limitation contained in such subsection and inserting "$5,500,000,000,000".

Newt Gingrich

Speaker of the House of Representatives.

Strom Thurmond

~~*Vice President of the*~~ *United States and President of the Senate,* pro Tempore

Federal Register
Vol. 52, No. 210
Friday, October 30, 1987

Presidential Documents

Title 3—

The President

Executive Order 12612 of October 26, 1987

Federalism

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to restore the division of governmental responsibilities between the national government and the States that was intended by the Framers of the Constitution and to ensure that the principles of federalism established by the Framers guide the Executive departments and agencies in the formulation and implementation of policies, it is hereby ordered as follows:

Section 1. *Definitions.* For purposes of this Order:

(a) "Policies that have federalism implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

(b) "State" or "States" refer to the States of the United States of America, individually or collectively, and, where relevant, to State governments, including units of local government and other political subdivisions established by the States.

Sec. 2. *Fundamental Federalism Principles.* In formulating and implementing policies that have federalism implications, Executive departments and agencies shall be guided by the following fundamental federalism principles:

(a) Federalism is rooted in the knowledge that our political liberties are best assured by limiting the size and scope of the national government.

(b) The people of the States created the national government when they delegated to it those enumerated governmental powers relating to matters beyond the competence of the individual States. All other sovereign powers, save those expressly prohibited the States by the Constitution, are reserved to the States or to the people.

(c) The constitutional relationship among sovereign governments, State and national, is formalized in and protected by the Tenth Amendment to the Constitution.

(d) The people of the States are free, subject only to restrictions in the Constitution itself or in constitutionally authorized Acts of Congress, to define the moral, political, and legal character of their lives.

(e) In most areas of governmental concern, the States uniquely possess the constitutional authority, the resources, and the competence to discern the sentiments of the people and to govern accordingly. In Thomas Jefferson's words, the States are "the most competent administrations for our domestic concerns and the surest bulwarks against antirepublican tendencies."

(f) The nature of our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public issues.

(g) Acts of the national government—whether legislative, executive, or judicial in nature—that exceed the enumerated powers of that government under the Constitution violate the principle of federalism established by the Framers.

(h) Policies of the national government should recognize the responsibility of—and should encourage opportunities for—individuals, families, neighborhoods, local governments, and private associations to achieve their personal, social, and economic objectives through cooperative effort.

(i) In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual States. Uncertainties regarding the legitimate authority of the national government should be resolved against regulation at the national level.

Sec. 3. *Federalism Policymaking Criteria.* In addition to the fundamental federalism principles set forth in section 2, Executive departments and agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have federalism implications:

(a) There should be strict adherence to constitutional principles. Executive departments and agencies should closely examine the constitutional and statutory authority supporting any Federal action that would limit the policymaking discretion of the States, and should carefully assess the necessity for such action. To the extent practicable, the States should be consulted before any such action is implemented. Executive Order No. 12372 ("Intergovernmental Review of Federal Programs") remains in effect for the programs and activities to which it is applicable.

(b) Federal action limiting the policymaking discretion of the States should be taken only where constitutional authority for the action is clear and certain and the national activity is necessitated by the presence of a problem of national scope. For the purposes of this Order:

(1) It is important to recognize the distinction between problems of national scope (which may justify Federal action) and problems that are merely common to the States (which will not justify Federal action because individual States, acting individually or together, can effectively deal with them).

(2) Constitutional authority for Federal action is clear and certain only when authority for the action may be found in a specific provision of the Constitution, there is no provision in the Constitution prohibiting Federal action, and the action does not encroach upon authority reserved to the States.

(c) With respect to national policies administered by the States, the national government should grant the States the maximum administrative discretion possible. Intrusive, Federal oversight of State administration is neither necessary nor desirable.

(d) When undertaking to formulate and implement policies that have federalism implications, Executive departments and agencies shall:

(1) Encourage States to develop their own policies to achieve program objectives and to work with appropriate officials in other States.

(2) Refrain, to the maximum extent possible, from establishing uniform, national standards for programs and, when possible, defer to the States to establish standards.

(3) When national standards are required, consult with appropriate officials and organizations representing the States in developing those standards.

Sec. 4. *Special Requirements for Preemption.* (a) To the extent permitted by law, Executive departments and agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute.

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(b) Where a Federal statute does not preempt State law (as addressed in subsection (a) of this section), Executive departments and agencies shall construe any authorization in the statute for the issuance of regulations as authorizing preemption of State law by rule-making only when the statute expressly authorizes issuance of preemptive regulations or there is some other firm and palpable evidence compelling the conclusion that the Congress intended to delegate to the department or agency the authority to issue regulations preempting State law.

(c) Any regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated.

(d) As soon as an Executive department or agency foresees the possibility of a conflict between State law and Federally protected interests within its area of regulatory responsibility, the department or agency shall consult, to the extent practicable, with appropriate officials and organizations representing the States in an effort to avoid such a conflict.

(e) When an Executive department or agency proposes to act through adjudication or rule-making to preempt State law, the department or agency shall provide all affected States notice and an opportunity for appropriate participation in the proceedings.

Sec. 5. *Special Requirements for Legislative Proposals.* Executive departments and agencies shall not submit to the Congress legislation that would:

(a) Directly regulate the States in ways that would interfere with functions essential to the States' separate and independent existence or operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions;

(b) Attach to Federal grants conditions that are not directly related to the purpose of the grant; or

(c) Preempt State law, unless preemption is consistent with the fundamental federalism principles set forth in section 2, and unless a clearly legitimate national purpose, consistent with the federalism policymaking criteria set forth in section 3, cannot otherwise be met.

Sec. 6. *Agency Implementation.* (a) The head of each Executive department and agency shall designate an official to be responsible for ensuring the implementation of this Order.

(b) In addition to whatever other actions the designated official may take to ensure implementation of this Order, the designated official shall determine which proposed policies have sufficient federalism implications to warrant the preparation of a Federalism Assessment. With respect to each such policy for which an affirmative determination is made, a Federalism Assessment, as described in subsection (c) of this section, shall be prepared. The department or agency head shall consider any such Assessment in all decisions involved in promulgating and implementing the policy.

(c) Each Federalism Assessment shall accompany any submission concerning the policy that is made to the Office of Management and Budget pursuant to Executive Order No. 12291 or OMB Circular No. A-19, and shall:

(1) Contain the designated official's certification that the policy has been assessed in light of the principles, criteria, and requirements stated in sections 2 through 5 of this Order;

(2) Identify any provision or element of the policy that is inconsistent with the principles, criteria, and requirements stated in sections 2 through 5 of this Order;

(3) Identify the extent to which the policy imposes additional costs or burdens on the States, including the likely source of funding for the States and the ability of the States to fulfill the purposes of the policy; and

(4) Identify the extent to which the policy would affect the States' ability to discharge traditional State governmental functions, or other aspects of State sovereignty.

Sec. 7. *Government-wide Federalism Coordination and Review.* (a) In implementing Executive Order Nos. 12291 and 12498 and OMB Circular No. A-19, the Office of Management and Budget, to the extent permitted by law and consistent with the provisions of those authorities, shall take action to ensure that the policies of the Executive departments and agencies are consistent with the principles, criteria, and requirements stated in sections 2 through 5 of this Order.

(b) In submissions to the Office of Management and Budget pursuant to Executive Order No. 12291 and OMB Circular No. A-19, Executive departments and agencies shall identify proposed regulatory and statutory provisions that have significant federalism implications and shall address any substantial federalism concerns. Where the departments or agencies deem it appropriate, substantial federalism concerns should also be addressed in notices of proposed rule-making and messages transmitting legislative proposals to the Congress.

Sec. 8. *Judicial Review.* This Order is intended only to improve the internal management of the Executive branch, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

Ronald Reagan

THE WHITE HOUSE,
October 26, 1987.

[FR Doc. 87-25331
Filed 10-28-87; 4:33 pm]
Billing code 3195-01-M

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Presidential Documents

Title 3—

The President

Executive Order 12875 of October 26, 1993

Enhancing the Intergovernmental Partnership

The Federal Government is charged with protecting the health and safety, as well as promoting other national interests, of the American people. However, the cumulative effect of unfunded Federal mandates has increasingly strained the budgets of State, local, and tribal governments. In addition, the cost, complexity, and delay in applying for and receiving waivers from Federal requirements in appropriate cases have hindered State, local, and tribal governments from tailoring Federal programs to meet the specific or unique needs of their communities. These governments should have more flexibility to design solutions to the problems faced by citizens in this country without excessive micromanagement and unnecessary regulation from the Federal Government.

THEREFORE, by the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to reduce the imposition of unfunded mandates upon State, local, and tribal governments; to streamline the application process for and increase the availability of waivers to State, local, and tribal governments; and to establish regular and meaningful consultation and collaboration with State, local, and tribal governments on Federal matters that significantly or uniquely affect their communities, it is hereby ordered as follows:

Section 1. *Reduction of Unfunded Mandates.* (a) To the extent feasible and permitted by law, no executive department or agency ("agency") shall promulgate any regulation that is not required by statute and that creates a mandate upon a State, local, or tribal government, unless:

(1) funds necessary to pay the direct costs incurred by the State, local, or tribal government in complying with the mandate are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of regulations containing the proposed mandate, provides to the Director of the Office of Management and Budget a description of the extent of the agency's prior consultation with representatives of affected State, local, and tribal governments, the nature of their concerns, any written communications submitted to the agency by such units of government, and the agency's position supporting the need to issue the regulation containing the mandate.

(b) Each agency shall develop an effective process to permit elected officials and other representatives of State, local, and tribal governments to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates.

Sec. 2. *Increasing Flexibility for State and Local Waivers.* (a) Each agency shall review its waiver application process and take appropriate steps to streamline that process.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by a State, local, or tribal government for a waiver of statutory or regulatory requirements in connection with any program administered by that agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the State, local, and tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

(c) Each agency shall, to the fullest extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency. If the application for a waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.

(d) This section applies only to statutory or regulatory requirements of the programs that are discretionary and subject to waiver by the agency.

Sec. 3. *Responsibility for Agency Implementation.* The Chief Operating Officer of each agency shall be responsible for ensuring the implementation of and compliance with this order.

Sec. 4. *Executive Order No. 12866.* This order shall supplement but not supersede the requirements contained in Executive Order No. 12866 ("Regulatory Planning and Review").

Sec. 5. *Scope.* (a) Executive agency means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10).

(b) Independent agencies are requested to comply with the provisions of this order.

Sec. 6. *Judicial Review.* This order is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Sec. 7. *Effective Date.* This order shall be effective 90 days after the date of this order.

William J. Clinton

THE WHITE HOUSE,
October 26, 1993.

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Filed 10-27-93; 11:36 am]
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federal register

Wednesday
February 7, 1996

Part V

The President

Executive Order 12988—Civil Justice Reform

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Presidential Documents

Title 3—

The President

Executive Order 12988 of February 5, 1996

Civil Justice Reform

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, and in order to improve access to justice for all persons who wish to avail themselves of court and administrative adjudicatory tribunals to resolve disputes, to facilitate the just and efficient resolution of civil claims involving the United States Government, to encourage the filing of only meritorious civil claims, to improve legislative and regulatory drafting to reduce needless litigation, to promote fair and prompt adjudication before administrative tribunals, and to provide a model for similar reforms of litigation practices in the private sector and in various states, it is hereby ordered as follows:

Section 1. *Guidelines to Promote Just and Efficient Government Civil Litigation.* To promote the just and efficient resolution of civil claims, those Federal agencies and litigation counsel that conduct or otherwise participate in civil litigation on behalf of the United States Government in Federal court shall respect and adhere to the following guidelines during the conduct of such litigation:

(a) *Pre-filing Notice of a Complaint.* No litigation counsel shall file a complaint initiating civil litigation without first making a reasonable effort to notify all disputants about the nature of the dispute and to attempt to achieve a settlement, or confirming that the referring agency that previously handled the dispute has made a reasonable effort to notify the disputants and to achieve a settlement or has used its conciliation processes.

(b) *Settlement Conferences.* As soon as practicable after ascertaining the nature of a dispute in litigation, and throughout the litigation, litigation counsel shall evaluate settlement possibilities and make reasonable efforts to settle the litigation. Such efforts shall include offering to participate in a settlement conference or moving the court for a conference pursuant to Rule 16 of the Federal Rules of Civil Procedure in an attempt to resolve the dispute without additional civil litigation.

(c) *Alternative Methods of Resolving the Dispute in Litigation.* Litigation counsel shall make reasonable attempts to resolve a dispute expeditiously and properly before proceeding to trial.

(1) Whenever feasible, claims should be resolved through informal discussions, negotiations, and settlements rather than through utilization of any formal court proceeding. Where the benefits of Alternative Dispute Resolution ("ADR") may be derived, and after consultation with the agency referring the matter, litigation counsel should suggest the use of an appropriate ADR technique to the parties.

(2) It is appropriate to use ADR techniques or processes to resolve claims of or against the United States or its agencies, after litigation counsel determines that the use of a particular technique is warranted in the context of a particular claim or claims, and that such use will materially contribute to the prompt, fair, and efficient resolution of the claims.

(3) To facilitate broader and effective use of informal and formal ADR methods, litigation counsel should be trained in ADR techniques.

(d) *Discovery.* To the extent practical, litigation counsel shall make every reasonable effort to streamline and expedite discovery in cases under counsel's supervision and control.

(1) *Review of Proposed Document Requests.* Each agency within the executive branch shall establish a coordinated procedure for the conduct and review of document discovery undertaken in litigation directly by that agency when that agency is litigation counsel. The procedure shall include, but is not necessarily limited to, review by a senior lawyer prior to service or filing of the request in litigation to determine that the request is not cumulative or duplicative, unreasonable, oppressive, unduly burdensome or expensive, taking into account the requirements of the litigation, the amount in controversy, the importance of the issues at stake in the litigation, and whether the documents can be obtained from some other source that is more convenient, less burdensome, or less expensive.

(2) *Discovery Motions.* Before petitioning a court to resolve a discovery motion or petitioning a court to impose sanctions for discovery abuses, litigation counsel shall attempt to resolve the dispute with opposing counsel. If litigation counsel makes a discovery motion concerning the dispute, he or she shall represent in that motion that any attempt at resolution was unsuccessful or impracticable under the circumstances.

(e) *Sanctions.* Litigation counsel shall take steps to seek sanctions against opposing counsel and opposing parties where appropriate.

(1) Litigation counsel shall evaluate filings made by opposing parties and, where appropriate, shall petition the court to impose sanctions against those responsible for abusive practices.

(2) Prior to filing a motion for sanctions, litigation counsel shall submit the motion for review to the sanctions officer, or his or her designee, within the litigation counsel's agency. Such officer or designee shall be a senior supervising attorney within the agency, and shall be licensed to practice law before a State court, courts of the District of Columbia, or courts of any territory or Commonwealth of the United States. The sanctions officer or designee shall also review motions for sanctions that are filed against litigation counsel, the United States, its agencies, or its officers.

(f) *Improved Use of Litigation Resources.* Litigation counsel shall employ efficient case management techniques and shall make reasonable efforts to expedite civil litigation in cases under that counsel's supervision and control. This includes but is not limited to:

(1) making reasonable efforts to negotiate with other parties about, and stipulate to, facts that are not in dispute;

(2) reviewing and revising pleadings and other filings to ensure that they are accurate and that they reflect a narrowing of issues, if any, that has resulted from discovery;

(3) requesting early trial dates where practicable;

(4) moving for summary judgment in every case where the movant would be likely to prevail, or where the motion is likely to narrow the issues to be tried; and

(5) reviewing and revising pleadings and other filings to ensure that unmeritorious threshold defenses and jurisdictional arguments, resulting in unnecessary delay, are not raised.

Sec. 2. *Government Pro Bono and Volunteer Service.* All Federal agencies should develop appropriate programs to encourage and facilitate pro bono legal and other volunteer service by government employees to be performed on their own time, including attorneys, as permitted by statute, regulation, or other rule or guideline.

Sec. 3. *Principles to Enact Legislation and Promulgate Regulations Which Do Not Unduly Burden the Federal Court System.*

(a) *General Duty to Review Legislation and Regulations.* Within current budgetary constraints and existing executive branch coordination mechanisms and procedures established in OMB Circular A-19 and Executive Order No. 12866, each agency promulgating new regulations, reviewing existing regulations, developing legislative proposals concerning regulations, and developing new legislation shall adhere to the following requirements:

(1) The agency's proposed legislation and regulations shall be reviewed by the agency to eliminate drafting errors and ambiguity;

(2) The agency's proposed legislation and regulations shall be written to minimize litigation; and

(3) The agency's proposed legislation and regulations shall provide a clear legal standard for affected conduct rather than a general standard, and shall promote simplification and burden reduction.

(b) *Specific Issues for Review.* In conducting the reviews required by subsection (a), each agency formulating proposed legislation and regulations shall make every reasonable effort to ensure:

(1) that the legislation, as appropriate—

(A) specifies whether all causes of action arising under the law are subject to statutes of limitations;

(B) specifies in clear language the preemptive effect, if any, to be given to the law;

(C) specifies in clear language the effect on existing Federal law, if any, including all provisions repealed, circumscribed, displaced, impaired, or modified;

(D) provides a clear legal standard for affected conduct;

(E) specifies whether private arbitration and other forms of private dispute resolution are appropriate under enforcement and relief provisions; subject to constitutional requirements;

(F) specifies whether the provisions of the law are severable if one or more of them is found to be unconstitutional;

(G) specifies in clear language the retroactive effect, if any, to be given to the law;

(H) specifies in clear language the applicable burdens of proof;

(I) specifies in clear language whether it grants private parties a right to sue and, if so, the relief available and the conditions and terms for authorized awards of attorney's fees, if any;

(J) specifies whether State courts have jurisdiction under the law and, if so, whether and under what conditions an action would be removable to Federal court;

(K) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(L) sets forth the standards governing the assertion of personal jurisdiction, if any;

(M) defines key statutory terms, either explicitly or by reference to other statutes that explicitly define those terms;

(N) specifies whether the legislation applies to the Federal Government or its agencies;

(O) specifies whether the legislation applies to States, territories, the District of Columbia, and the Commonwealths of Puerto Rico and of the Northern Mariana Islands;

(P) specifies what remedies are available such as money damages, civil penalties, injunctive relief, and attorney's fees; and

(Q) addresses other important issues affecting clarity and general draftsmanship of legislation set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget ("OMB") and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order.

(2) that the regulation, as appropriate—

(A) specifies in clear language the preemptive effect, if any, to be given to the regulation;

(B) specifies in clear language the effect on existing Federal law or regulation, if any, including all provisions repealed, circumscribed, displaced, impaired, or modified;

(C) provides a clear legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction;

(D) specifies in clear language the retroactive effect, if any, to be given to the regulation;

(E) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(F) defines key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items; and

(G) addresses other important issues affecting clarity and general draftsmanship of regulations set forth by the Attorney General, with the concurrence of the Director of OMB and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order.

(c) *Agency Review.* The agencies shall review such draft legislation or regulation to determine that either the draft legislation or regulation meets the applicable standards provided in subsections (a) and (b) of this section, or it is unreasonable to require the particular piece of draft legislation or regulation to meet one or more of those standards.

Sec. 4. *Principles to Promote Just and Efficient Administrative Adjudications.*

(a) *Implementation of Administrative Conference Recommendations.* In order to promote just and efficient resolution of disputes, an agency that adjudicates administrative claims shall, to the extent reasonable and practicable, and when not in conflict with other sections of this order, implement the recommendations of the Administrative Conference of the United States, entitled "Case Management as a Tool for Improving Agency Adjudication," as contained in 1 C.F.R. 305.86-7 (1991).

(b) *Improvements in Administrative Adjudication.* All Federal agencies should review their administrative adjudicatory processes and develop specific procedures to reduce delay in decision-making, to facilitate self-representation where appropriate, to expand non-lawyer counseling and representation where appropriate, and to invest maximum discretion in fact-finding officers to encourage appropriate settlement of claims as early as possible.

(c) *Bias.* All Federal agencies should review their administrative adjudicatory processes to identify any type of bias on the part of the decision-makers that results in an injustice to persons who appear before administrative adjudicatory tribunals; regularly train all fact-finders, administrative law judges, and other decision-makers to eliminate such bias; and establish appropriate mechanisms to receive and resolve complaints of such bias from persons who appear before administrative adjudicatory tribunals.

(d) *Public Education.* All Federal agencies should develop effective and simple methods, including the use of electronic technology, to educate the public about its claims/benefits policies and procedures.

Sec. 5. *Coordination by the Department of Justice.*

(a) The Attorney General shall coordinate efforts by Federal agencies to implement sections 1, 2 and 4 of this order.

(b) To implement the principles and purposes announced by this order, the Attorney General is authorized to issue guidelines implementing sections 1 and 4 of this order for the Department of Justice. Such guidelines shall serve as models for internal guidelines that may be issued by other agencies pursuant to this order.

Sec. 6. *Definitions.* For purposes of this order:

(a) The term "agency" shall be defined as that term is defined in section 105 of title 5, United States Code.

(b) The term "litigation counsel" shall be defined as the trial counsel or the office in which such trial counsel is employed, such as the United States Attorney's Office for the district in which the litigation is pending or a litigating division of the Department of Justice. Special Assistant United States Attorneys are included within this definition. Those agencies authorized by law to represent themselves in court without assistance from the Department of Justice are also included in this definition, as are private counsel hired by any Federal agency to conduct litigation on behalf of the agency or the United States.

Sec. 7. *No Private Rights Created.* This order is intended only to improve the internal management of the executive branch in resolving disputes, conducting litigation in a reasonable and just manner, and reviewing legislation and regulations. This order shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its agencies, its officers, or any other person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order. Nothing in this order shall be construed to obligate the United States to accept a particular settlement or resolution of a dispute, to alter its standards for accepting settlements, to forego seeking a consent decree or other relief, or to alter any existing delegation of settlement or litigating authority.

Sec. 8. *Scope.*

(a) *No Applicability to Criminal Matters or Proceedings in Foreign Courts.* This order is applicable to civil matters only. It is not intended to affect criminal matters, including enforcement of criminal fines or judgments of criminal forfeiture. This order does not apply to litigation brought by or against the United States in foreign courts or tribunals.

(b) *Application of Notice Provision.* Notice pursuant to subsection (a) of section 1 is not required (1) in any action to seize or forfeit assets subject to forfeiture or in any action to seize property; (2) in any bankruptcy, insolvency, conservatorship, receivership, or liquidation proceeding; (3) when the assets that are the subject of the action or that would satisfy the judgment are subject to flight, dissipation, or destruction; (4) when the defendant is subject to flight; (5) when, as determined by litigation counsel, exigent circumstances make providing such notice impracticable or such notice would otherwise defeat the purpose of the litigation, such as in actions seeking temporary restraining orders or preliminary injunctive relief; or (6) in those limited classes of cases where the Attorney General determines that providing such notice would defeat the purpose of the litigation.

(c) *Additional Guidance as to Scope.* The Attorney General shall have the authority to issue further guidance as to the scope of this order, except section 3, consistent with the purposes of this order.

Sec. 9. *Conflicts with Other Rules.* Nothing in this order shall be construed to require litigation counsel or any agency to act in a manner contrary to the Federal Rules of Civil Procedure, Tax Court Rules of Practice and Procedure, State or Federal law, other applicable rules of practice or procedure, or court order.

Sec. 10. *Privileged Information.* Nothing in this order shall compel or authorize the disclosure of privileged information, sensitive law enforcement infor-

mation, information affecting national security, or information the disclosure of which is prohibited by law.

Sec. 11. *Effective Date.* This order shall become effective 90 days after the date of signature. This order shall not apply to litigation commenced prior to the effective date.

Sec. 12. *Revocation.* Executive Order No. 12778 is hereby revoked.

William J. Clinton

THE WHITE HOUSE,
February 5, 1996.

[FR Doc. 96–2755
Filed 2–6–96; 8:45 am]
Billing code 3195–01–P

Federal Register
Vol. 52, No. 174
Wednesday, September 9, 1987

Presidential Documents

Title 3—

The President

Executive Order 12606 of September 2, 1987

The Family

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to ensure that the autonomy and rights of the family are considered in the formulation and implementation of policies by Executive departments and agencies, it is hereby ordered as follows:

Section 1. *Family Policymaking Criteria.* In formulating and implementing policies and regulations that may have significant impact on family formation, maintenance, and general well-being, Executive departments and agencies shall, to the extent permitted by law, assess such measures in light of the following questions:

(a) Does this action by government strengthen or erode the stability of the family and, particularly, the marital commitment?

(b) Does this action strengthen or erode the authority and rights of parents in the education, nurture, and supervision of their children?

(c) Does this action help the family perform its functions, or does it substitute governmental activity for the function?

(d) Does this action by government increase or decrease family earnings? Do the proposed benefits of this action justify the impact on the family budget?

(e) Can this activity be carried out by a lower level of government or by the family itself?

(f) What message, intended or otherwise, does this program send to the public concerning the status of the family?

(g) What message does it send to young people concerning the relationship between their behavior, their personal responsibility, and the norms of our society?

Sec. 2. *Governmentwide Family Policy Coordination and Review.*

(a) Executive departments and agencies shall identify proposed regulatory and statutory provisions that may have significant potential negative impact on the family well-being and provide adequate rationale on why such proposal should be submitted. The head of the department or agency, shall certify in writing that, to the extent permitted by law, such measure has been assessed in light of the criteria in Section 1 of this Order and how such measures will enhance family well-being. Such certification shall be transmitted to the Office of Management and Budget. Departments and agencies shall give careful consideration to family-related concerns and their impact in notices of proposed rulemaking and messages transmitting legislative proposals to the Congress.

(b) The Office of Management and Budget shall, to the extent permitted by law, take action to ensure that the policies of the Executive departments and agencies are applied in light of the criteria set forth in Section 1 of this Order.

(c) The Office of Policy Development shall assess existing and proposed policies and regulations that impact family well-being in light of the criteria established by Section 1 of this Order, provide evaluations on those measures that have significant potential impact on the family to the Office of Management and Budget, and advise the President on policy and regulatory actions that may be taken to strengthen the institutions of marriage and family in America.

Sec. 3. *Report.* The Office of Policy Development shall submit preliminary reports including specific recommendations to the Domestic Policy Council and shall submit a final report to the President no later than 180 days from the date of this Order. Each year thereafter, a report, including recommendations shall be submitted, through the Domestic Policy Council to the President.

Sec. 4. *Judicial Review.* This Order is intended to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

Ronald Reagan

THE WHITE HOUSE,
September 2, 1987.

[FR Doc. 87-20895
Filed 9-8-87; 11:56 am]
Billing code 3195-01-M

Federal Register
Vol. 53, No. 53
Friday, March 18, 1988

Presidential Documents

Title 3—

The President

Executive Order 12630 of March 15, 1988

Takings

Governmental Actions and Interference With Constitutionally Protected Property Rights

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to ensure that government actions are undertaken on a well-reasoned basis with due regard for fiscal accountability, for the financial impact of the obligations imposed on the Federal government by the Just Compensation Clause of the Fifth Amendment, and for the Constitution, it is hereby ordered as follows:

Section 1. *Purpose.* (a) The Fifth Amendment of the United States Constitution provides that private property shall not be taken for public use without just compensation. Government historically has used the formal exercise of the power of eminent domain, which provides orderly processes for paying just compensation, to acquire private property for public use. Recent Supreme Court decisions, however, in reaffirming the fundamental protection of private property rights provided by the Fifth Amendment and in assessing the nature of governmental actions that have an impact on constitutionally protected property rights, have also reaffirmed that governmental actions that do not formally invoke the condemnation power, including regulations, may result in a taking for which just compensation is required.

(b) Responsible fiscal management and fundamental principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights. Executive departments and agencies should review their actions carefully to prevent unnecessary takings and should account in decision-making for those takings that are necessitated by statutory mandate.

(c) The purpose of this Order is to assist Federal departments and agencies in undertaking such reviews and in proposing, planning, and implementing actions with due regard for the constitutional protections provided by the Fifth Amendment and to reduce the risk of undue or inadvertent burdens on the public fisc resulting from lawful governmental action. In furtherance of the purpose of this Order, the Attorney General shall, consistent with the principles stated herein and in consultation with the Executive departments and agencies, promulgate Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings to which each Executive department or agency shall refer in making the evaluations required by this Order or in otherwise taking any action that is the subject of this Order. The Guidelines shall be promulgated no later than May 1, 1988, and shall be disseminated to all units of each Executive department and agency no later than July 1, 1988. The Attorney General shall, as necessary, update these guidelines to reflect fundamental changes in takings law occurring as a result of Supreme Court decisions.

Sec. 2. *Definitions.* For the purpose of this Order: (a) "Policies that have takings implications" refers to Federal regulations, proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, or other Federal policy statements that, if implemented or enacted, could effect a taking, such as rules and regulations that propose or implement licensing, permitting, or other condition requirements or limitations on private property use, or that require dedications or exactions from owners of private property. "Policies that have takings implications" does not include:

(1) Actions abolishing regulations, discontinuing governmental programs, or modifying regulations in a manner that lessens interference with the use of private property;

(2) Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations;

(3) Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings;

(4) Studies or similar efforts or planning activities;

(5) Communications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such communications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority;

(6) The placement of military facilities or military activities involving the use of Federal property alone; or

(7) Any military or foreign affairs functions (including procurement functions thereunder) but not including the U.S. Army Corps of Engineers civil works program.

(b) Private property refers to all property protected by the Just Compensation Clause of the Fifth Amendment.

(c) "Actions" refers to proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, applications of Federal regulations to specific property, or Federal governmental actions physically invading or occupying private property, or other policy statements or actions related to Federal regulation or direct physical invasion or occupancy, but does not include:

(1) Actions in which the power of eminent domain is formally exercised;

(2) Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations;

(3) Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings;

(4) Studies or similar efforts or planning activities;

(5) Communications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such communications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority;

(6) The placement of military facilities or military activities involving the use of Federal property alone; or

(7) Any military or foreign affairs functions (including procurement functions thereunder), but not including the U.S. Army Corps of Engineers civil works program.

Sec. 3. *General Principles.* In formulating or implementing policies that have takings implications, each Executive department and agency shall be guided by the following general principles:

(a) Governmental officials should be sensitive to, anticipate, and account for, the obligations imposed by the Just Compensation Clause of the Fifth Amendment in planning and carrying out governmental actions so that they do not result in the imposition of unanticipated or undue additional burdens on the public fisc.

(b) Actions undertaken by governmental officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use, may constitute a taking of

property. Further, governmental action may amount to a taking even though the action results in less than a complete deprivation of all use or value, or of all separate and distinct interests in the same private property and even if the action constituting a taking is temporary in nature.

(c) Government officials whose actions are taken specifically for purposes of protecting public health and safety are ordinarily given broader latitude by courts before their actions are considered to be takings. However, the mere assertion of a public health and safety purpose is insufficient to avoid a taking. Actions to which this Order applies asserted to be for the protection of public health and safety, therefore, should be undertaken only in response to real and substantial threats to public health and safety, be designed to advance significantly the health and safety purpose, and be no greater than is necessary to achieve the health and safety purpose.

(d) While normal governmental processes do not ordinarily effect takings, undue delays in decision-making during which private property use if interfered with carry a risk of being held to be takings. Additionally, a delay in processing may increase significantly the size of compensation due if a taking is later found to have occurred.

(e) The Just Compensation Clause is self-actuating, requiring that compensation be paid whenever governmental action results in a taking of private property regardless of whether the underlying authority for the action contemplated a taking or authorized the payment of compensation. Accordingly, governmental actions that may have a significant impact on the use or value of private property should be scrutinized to avoid undue or unplanned burdens on the public fisc.

Sec. 4. *Department and Agency Action.* In addition to the fundamental principles set forth in Section 3, Executive departments and agencies shall adhere, to the extent permitted by law, to the following criteria when implementing policies that have takings implications:

(a) When an Executive department or agency requires a private party to obtain a permit in order to undertake a specific use of, or action with respect to, private property, any conditions imposed on the granting of a permit shall:

(1) Serve the same purpose that would have been served by a prohibition of the use or action; and

(2) Substantially advance that purpose.

(b) When a proposed action would place a restriction on a use of private property, the restriction imposed on the use shall not be disproportionate to the extent to which the use contributes to the overall problem that the restriction is imposed to redress.

(c) When a proposed action involves a permitting process or any other decision-making process that will interfere with, or otherwise prohibit, the use of private property pending the completion of the process, the duration of the process shall be kept to the minimum necessary.

(d) Before undertaking any proposed action regulating private property use for the protection of public health or safety, the Executive department or agency involved shall, in internal deliberative documents and any submissions to the Director of the Office of Management and Budget that are required:

(1) Identify clearly, with as much specificity as possible, the public health or safety risk created by the private property use that is the subject of the proposed action;

(2) Establish that such proposed action substantially advances the purpose of protecting public health and safety against the specifically identified risk;

(3) Establish to the extent possible that the restrictions imposed on the private property are not disproportionate to the extent to which the use contributes to the overall risk; and

(4) Estimate, to the extent possible, the potential cost to the government in the event that a court later determines that the action constituted a taking.

In instances in which there is an immediate threat to health and safety that constitutes an emergency requiring immediate response, this analysis may be done upon completion of the emergency action.

Sec. 5. *Executive Department and Agency Implementation.* (a) The head of each Executive department and agency shall designate an official to be responsible for ensuring compliance with this Order with respect to the actions of that department or agency.

(b) Executive departments and agencies shall, to the extent permitted by law, identify the takings implications of proposed regulatory actions and address the merits of those actions in light of the identified takings implications, if any, in all required submissions made to the Office of Management and Budget. Significant takings implications should also be identified and discussed in notices of proposed rule-making and messages transmitting legislative proposals to the Congress, stating the departments' and agencies' conclusions on the takings issues.

(c) Executive departments and agencies shall identify each existing Federal rule and regulation against which a takings award has been made or against which a takings claim is pending including the amount of each claim or award. A "takings" award has been made or a "takings" claim pending if the award was made, or the pending claim brought, pursuant to the Just Compensation Clause of the Fifth Amendment. An itemized compilation of all such awards made in Fiscal Years 1985, 1986, and 1987 and all such pending claims shall be submitted to the Director, Office of Management and Budget, on or before May 16, 1988.

(d) Each Executive department and agency shall submit annually to the Director, Office of Management and Budget, and to the Attorney General an itemized compilation of all awards of just compensation entered against the United States for takings, including awards of interest as well as monies paid pursuant to the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601.

(e)(1) The Director, Office of Management and Budget, and the Attorney General shall each, to the extent permitted by law, take action to ensure that the policies of the Executive departments and agencies are consistent with the principles, criteria, and requirements stated in Sections 1 through 5 of this Order, and the Office of Management and Budget shall take action to ensure that all takings awards levied against agencies are properly accounted for in agency budget submissions.

(2) In addition to the guidelines required by Section 1 of this Order, the Attorney General shall, in consultation with each Executive department and agency to which this Order applies, promulgate such supplemental guidelines as may be appropriate to the specific obligations of that department or agency.

Sec. 6. *Judicial Review.* This Order is intended only to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

Ronald Reagan

THE WHITE HOUSE,
March 15, 1988.

[FR Doc. 88-6145
Filed 3-16-88; 4:53 pm]
Billing code 3195-01-M

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

06-Jun-1996 05:49pm

TO: (See Below)

FROM: Sally Katzen
Office of Mgmt and Budget, OIRA

SUBJECT: meeting

Please attend a brain storming/strategy session on possible Administration responses to the new Congressional Review Act requirements to comply with Reagan era executive orders on topics such as takings, families and federalism. This is a followup to a meeting I had with Jack Quinn in which he asked that we pull together representatives from various WH offices to coordinate our strategy.

The meeting is scheduled for Tuesday, June 11 at 1:00pm in room 350. Please call my assistant Phyllis Kaiser-Dark (x54852) to let her know if you plan to attend.

Distribution:

TO: Elena Kagan
TO: Ellen S. Seidman
TO: Kumiki S. Gibson
TO: Paul J. Weinstein, Jr
TO: Thomas C. Jensen
TO: Linda L. Lance
TO: Michael A. Fitzpatrick
TO: Jefferson B. Hill

CC: Wendy J. Einhellig
CC: Angelina Walker

Reagan EOs

Tom Temin / Linda Lance

Takings - leave EO alone
but analysis: Not covered by A-Cpiv /
have to be Exec Priv

Copy of EOs.

Family - ① must get certification
or ② find coverage in existing docs -
+ repeal w incorp by ref.

Federalism - ① Repeal - coverage in 2 EOs
or
② Certify by reference to
others.

Sometime next week -
mtg to get all people together -
points in process.

Suzanne Sinden / Wagner / Fur

Telecon w/ S. Katzen

3 EOs.

1. Takings – we rewrote it. Dems hated. We shelved.
No reason to do anything until now (e.g.
?? Hays assessment being done
→ A/C privilege (DOJ)

2. Family.
Can't just repeal. Keep it in force but minimize impact.

3. Federalism.
Amend – to repeal. → and → 12875 – harcum
→ put into civil justice order, if anything there
signed unfunded mandates

Elena
2 no. Agree
JQ

THE WHITE HOUSE

WASHINGTON

May 14, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN EK

SUBJECT: KATZEN MEMO ON REAGAN EO'S

In the attached memo, which you sent to me for review, Sally Katzen recommends that we review three executive orders issued by President Reagan -- on Family, Federalism, and Takings -- with an eye toward revising them to fit this Administration's priorities. I agree that we should undertake this review. But I also think that we should consider certain issues relating to compliance with these executive orders prior to completing a general review. In order to resolve these issues promptly, I recommend we convene a meeting with Sally and other interested parties.

Katzen makes her recommendation in light of the passage of the Small Business Regulatory Fairness Act, which provides for Congressional review of regulations. Under this provision, each agency promulgating a rule must submit to the GAO, among other things, "relevant information or requirements under any relevant Executive Orders." The GAO then reports to Congress on the agency's compliance with applicable legal standards.

The GAO has indicated that, pursuant to these provisions, it will require an agency promulgating a rule to disclose (among other things) whether the agency has complied with the Reagan orders. The GAO also will require an agency to provide any analyses undertaken under these orders -- such as an agency's takings analysis.

One problem stemming from these requirements is that agency compliance with the Reagan orders has been spotty. (OIRA does not currently monitor compliance with these executive orders.) If agencies continue to do what they've been doing, they will have to admit a failure to comply with applicable directives.

A second problem is that some agencies have concerns about disclosing the analyses undertaken pursuant to these executive orders, even to Congress. DOJ, for example, believes that its takings analyses, if made public, could harm the government in litigation. It is trying to come up with a proposal involving some alternative kind of disclosure.

It makes sense, as Sally says, to review the Reagan EO's given the new disclosure requirements. We should get this process under way as soon as possible. It also makes sense to consider what agencies should do in the meantime. Should

agencies immediately change their rulemaking processes to comply with the Reagan EO's? (Likewise, should OIRA change its monitoring practices?) Should agencies disclose all analyses that the GAO asks for, or are some sorts of disclosure arguably not required by the new statute? We should consider whether to adopt administration-wide positions on these matters and, if so, what these positions should be. I therefore recommend that you check "let's discuss" on Sally's memo.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

MAY - 7 1996

TO SALLY
cc: KW / EK

MEMORANDUM FOR JACK QUINN

FROM: Sally Katzen

SUBJECT: Congressional Review: Agency Non-Compliance with Three Reagan Executive Orders

Problem: As part of the Congressional review of agency regulations, some Republican Members are asking GAO to evaluate agency compliance with, among other things, the Family, Federalism, and Takings Executive Orders issued by President Reagan. You will recall that when E.O. 12866 was issued, we deferred revising or rescinding these three Orders. Since then, we have been focusing on the implementation of 12866, and have not carefully scrutinized the agencies' submissions for their responsiveness to the three Reagan Orders. I would expect that agency compliance has been spotty at best, a view likely to be echoed by GAO.

Background: On March 29, The President signed the Debt Limit Extension bill, which included the Small Business Regulatory Fairness Act containing Congressional review provisions for regulations. Pursuant to these procedures, each agency is to submit to Congress and GAO a copy of each final rule, and submit to GAO (and make available to Congress) various analyses, including those for cost-benefit, the Regulatory Flexibility Act, and the Unfunded Mandates Act, as well as "any other relevant information or requirements under any other Act and any relevant Executive orders."[1] For final "major" rules (but not for final "non-major" rules), GAO then has 15 days to report to Congress on "agenc[ies'] compliance with [these] procedural steps."[2]

Since there was no Conference Report, the law's Congressional sponsors have inserted their own legislative history into the Congressional Record.[3] In largely similar statements (see attached), they describe what analyses and other information on the agencies' compliance with

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[1] 5 U.S.C. 801(a)(1)(B)(iv).

[2] 5 U.S.C. 801(a)(2)(A).

[3] Statement by Senator Nickles -- for himself, and Senators Reid and Stevens -- April 18, at S3683. Statement by Representative Hyde, April 19, at E571.

rulemaking procedures should be sent to GAO. Included in their list of "any relevant Executive orders" are the three Reagan Orders that remain in effect, but that are essentially moribund: E.O. 12606 (the Family); E.O. 12612 (Federalism); and E.O. 12630 (Takings).

Congressional staff have also asked GAO to be prepared to provide "periodic statistical reports on all rules submitted" to Congress and GAO. To assist in fulfilling this requirement, GAO recently discussed with us a draft form they have designed which agencies would have to submit with each final rule indicating whether, among other things, they had complied with the three Reagan Orders.[4]

We took the position that GAO was going beyond the scope of the legislation in requiring agencies to submit such a form. If, however, GAO disagrees with us and decides to require a form like the one we were shown, the agencies' answers will likely be "no" in most instances. During OIRA review of proposed agency rules under E.O. 12866, we have not been monitoring agency adherence to those Orders. And if agencies have performed analyses under those Orders, they have not been included in the materials we have received for review.

Recommendation: I recommend that we begin a review of these three Orders to determine whether, and if so how, they should be redrafted to reaffirm the Administration's commitments in these areas.

A few years ago, we had prepared a draft Takings Order that was put aside because of legislative proposals then under consideration. Some of what is in the Federalism Order has been incorporated in the recently issued E.O. 12988 (Civil Justice Reform) which directs agencies to ensure that draft legislation and regulations specify "in clear language the preemptive effect, if any, to be given to the law/regulation"; other aspects may have been subsumed in the Unfunded Mandates Act. The Family Order, as well, needs to be reviewed on its merits for appropriate revision (either as an Executive Order or other policy statement). Accordingly, we may reach very different conclusions regarding the next steps to take for each of the Orders.

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This process may well take several months, but I believe we should at least assign initial leads for each of the studies and begin assessments of these Orders on the merits.

Decision:

___ Agree

___ Disagree

___ Let's Discuss → Sally: I think you and I and the relevant folks from our offices should meet ASAP. I agree with you that this is important and urgent; there are, obviously, important implications in all of this —

Thanks

Jack

cc: Alice M. Rivlin
Jack Lew
Bob Damus

THE WHITE HOUSE

WASHINGTON

May 14, 1996

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KATHY WALLMAN

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MAY - 7 1996

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Decision:

____ Agree

____ Disagree

____ Let's Discuss

cc: Alice M. Rivlin
Jack Lew
Bob Damus

normal rules of either House—with one exception. Subsection 802(f) sets forth one unique provision that does not expire in either House. Subsection 802(f) provides procedures for passage of a joint resolution of disapproval when one House passes a joint resolution and transmits it to the other House that has not yet completed action. In both Houses, the joint resolution of the first House to act shall not be referred to a committee but shall be held at the desk. In the Senate, a House-passed resolution may be considered directly only under normal Senate procedures, regardless of when it is received by the Senate. A resolution of disapproval that originated in the Senate may be considered under the expedited procedures only during the period specified in subsection 802(e). Regardless of the procedures used to consider a joint resolution in either House, the final vote of the second House shall be on the joint resolution of the first House (no matter when that vote takes place). If the second House passes the resolution, no conference is necessary and the joint resolution will be presented to the President for his signature. Subsection 802(f) is justified because subsection 802(a) sets forth the required language of a joint resolution in each House, and thus, permits little variance in the joint resolutions that could be introduced in each House.

Effect of enactment of a joint resolution of disapproval

Subsection 801(b)(1) provides that: "A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule." Subsection 801(b)(2) provides that such a disapproved rule "may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule." Subsection 801(b)(2) is necessary to prevent circumvention of a resolution disapproval. Nevertheless, it may have a different impact on the issuing agencies depending on the nature of the underlying law that authorized the rule.

If the law that authorized the disapproved rule provides broad discretion to the issuing agency regarding the substance of such rule, the agency may exercise its broad discretion to issue a substantially different rule. If the law that authorized the disapproved rule did not mandate the promulgation of any rule, the issuing agency may exercise its discretion not to issue any new rule. Depending on the law that authorized the rule, an issuing agency may have both options. But if an agency is mandated to promulgate a particular rule and its discretion in issuing the rule is narrowly circumscribed, the enactment of a resolution of disapproval for that rule may work to prohibit the reissuance of any rule. The authors intend the debate on any resolution of disapproval to focus on the law that authorized the rule and make the congressional intent clear regarding the agency's options or lack thereof after enactment of a joint resolution of disapproval. It will be the agency's responsibility in the first instance when promulgating the rule to determine the range of discretion afforded under the original law and whether the law authorizes the agency to issue a substantially different rule. Then, the agency must give effect to the resolution of disapproval.

Limitation on judicial review of congressional or administrative actions

Section 805 provides that a court may not review any congressional or administrative "determination, finding, action, or omission under this chapter." Thus, the major rule determinations made by the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget are not subject to judicial review. Nor may a court review whether Congress complied with the congressional review procedures in this chapter. This latter limitation on the scope of judicial review was drafted in recognition of the constitutional right of each House of Congress to "determine the Rules of its Proceedings," U.S. Const., art. I, §5, cl. 2, which includes being the final arbiter of compliance with such Rules.

The limitation on a court's review of subsidiary determination or compliance with congressional procedures, however, does not bar a court from giving effect to a resolution of disapproval that was enacted into law. A court with proper jurisdiction may treat the congressional enactment of a joint resolution of disapproval as it would treat the enactment of any other federal law. Thus, a court with proper jurisdiction may review the resolution of disapproval and the law that authorized the disapproved rule to determine whether the issuing agency has the legal authority to issue a substantially different rule. The language of subsection 801(g) is also instructive. Subsection 801(g) prohibits a court or agency from inferring any intent of the Congress only when "Congress does not enact a joint resolution of disapproval," or by implication, when it has not yet done so. In deciding cases or controversies properly before it, a court or agency must give effect to the intent of the Congress when such a resolution is enacted and becomes the law of the land. The limitation on judicial review in no way prohibits a court from determining whether a rule is in effect. For example, the authors expect that a court might recognize that a rule has no legal effect due to the operation of subsections 801(a)(1)(A) or 801(a)(3).

Enactment of a joint resolution of disapproval for a rule that was already in effect

Subsection 801(f) provides that: "Any rule that takes effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect." Application of this subsection should be consistent with existing judicial precedents on rules that are deemed never to have taken effect.

Agency information required to be submitted to GAO

Pursuant to subsection 801(a)(1)(B), the federal agency promulgating the rule shall submit to the Comptroller General (and make available to each House) (i) a complete copy of the cost-benefit analysis of the rule, if any, (ii) the agency's actions related to the Regulatory Flexibility Act, (iii) the agency's actions related to the Unfunded Mandates Reform Act, and (iv) "any other relevant information or requirements under any other Act and any relevant Executive Orders." Pursuant to subsection 801(a)(1)(B), this information must be submitted to the Comptroller General on the day the agency submits the rule to Congress and to GAO.

The authors intend information supplied in conformity with subsection 801(a)(1)(B)(iv) to encompass both agency-specific statutes and government-wide statutes and executive orders that impose requirements relevant to each rule. Examples of agency-specific statutes include information regarding compliance with the law that authorized the rule and any agency-specific procedural requirements, such as section 9 of the Consumer Product Safety Act, as amended, 15 U.S.C. §2054 (procedures for consumer product safety rules); section 6 of the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. §655 (promulgation of standards); section 307(d) of the Clean Air Act, as amended, 42 U.S.C. §7607(d) (promulgation of rules); and section 501 of the Department of Energy Organization Act, 42 U.S.C. §7191 (procedure for issuance of rules, regulations, and orders). Examples of government-wide statutes include other chapters of the Administrative Procedure Act, 5 U.S.C. §§551–559 and 701–706; and the Paperwork Reduction Act, as amended, 44 U.S.C. §§3501–3520.

Examples of relevant executive orders include E.O. No. 12866 (Sept. 30, 1993) (Regulatory Planning and Review); E.O. No. 12606 (Sept. 2, 1987) (Family Considerations in Policy Formulation and Implementation); E.O. No. 12612 (Oct. 26, 1987) (Federalism Considerations in Policy Formulation and Implementation); E.O. No. 12630 (Mar. 15, 1988) (Government Actions and Interference with Constitutionally Protected Property Rights); E.O. No. 23875 (Oct. 26, 1993) (Enhancing the Intergovernmental Partnership); E.O. No. 12778 (Oct. 23, 1991) (Civil Justice Reform); E.O. No. 12988 (Feb. 5, 1996) (Civil Justice Reform) (effective May 5, 1996).

GAO reports on major rules

Fifteen days after the federal agency submits a copy of a major rule and report to each House of Congress and the Comptroller General, the Comptroller General shall prepare and provide a report on the major rule to the committee of jurisdiction in each House. Subsection 801(a)(2)(B) requires agencies to cooperate with the Comptroller General in providing information relevant to the Comptroller General's reports on major rules. Given the 15-day deadline for these reports, it is essential that the agencies' initial submission to the General Accounting Office (GAO) contain all of the information necessary for GAO to conduct its analysis. At a minimum, the agency's submission must include the information required of all rules pursuant to 801(a)(1)(B). Whenever possible, OMB should work with GAO to alert GAO when a major rule is likely to be issued and to provide as much advance information to GAO as possible on such proposed major rule. In particular, OMB should attempt to provide the complete cost-benefit analysis on a major rule, if any, well in advance of the final rule's promulgation.

It also is essential for the agencies to present this information in a format that will facilitate the GAO's analysis. The authors expect that GAO and OMB will work together to develop, to the greatest extent practicable, standard formats for agency submissions. OMB also should ensure that agencies follow such formats. The authors also expect that agencies will provide expeditiously any additional information that GAO may require for a thorough report. The authors do not intend the Comptroller General's reports to be delayed beyond the 15-day deadline due to lack of information or resources unless the committees of jurisdiction indicate a different preference. Of course, the Comptroller General may supplement his initial report at any time with any additional information, on its own, or at the request of the relevant committees or jurisdiction.

Covered agencies and entities in the executive branch

The authors intend this chapter to be comprehensive in the agencies and entities that are subject to it. The term "Federal agency" in subsection 804(1) was taken from 5 U.S.C. §551(1). That definition includes "each authority of the Government" that is not expressly excluded by subsection 551(1)(A)–(H). With those few exceptions, the objective was to cover each and every government entity, whether it is a department, independent agency, independent establishment, or government corporation. This is because Congress is enacting the congressional review

joint resolution of disapproval in the Senate. Subsection 802(c) allows 30 Senators to petition for the discharge of resolution from a Senate committee after a specified period of time (the later of 20 calendar days after the rule is submitted to Congress or published in the Federal Register, if it is so published). Subsection 802(d) specifies procedures for the consideration of a resolution on the Senate floor. Such a resolution is highly privileged, points of order are waived, a motion to postpone consideration is not in order, the resolution is unamendable, and debate on the joint resolution and "on all debatable motions and appeals in connection therewith" (including a motion to proceed) is limited to no more than 10 hours.

Subsection 802(e) provides that the special Senate procedures specified in subsections 802(c)–(d) shall not apply to the consideration of any joint resolution of disapproval of a rule after 60 session days of the Senate beginning with the later date that rule is submitted to Congress or published, if it is so published. However, if a rule and accompanying report are submitted to Congress shortly before the end of a session or during an intersession recess as described in subsection 801(d)(1), the special Senate procedures specified in subsections 802(c)–(d) shall expire 60 session days after the 15th session day of the succeeding session of Congress—or on the 75th session day after the succeeding session of Congress first convenes. For purposes of subsection 802(e), the term "session day" refers only to a day the Senate is in session, rather than a day both Houses are in session. However, in computing the time specified in subsection 801(d)(1), that subsection specifies that there shall be an additional period of review in the next session if either House did not have an adequate opportunity to complete action on a joint resolution. Thus, if either House of Congress did not have adequate time to consider a joint resolution in a given session (60 session days in the Senate and 60 legislative days in the House), resolutions of disapproval may be introduced or reintroduced in both Houses in the next session, and the special Senate procedures specified in subsection 802(c)–(d) shall apply in the next session of the Senate.

If a joint resolution of disapproval is pending when the expedited Senate procedures specified in subsections 802(c)–(d) expire, the resolution shall not die in either House but shall simply be considered pursuant to the normal rules of either House—with one exception. Subsection 802(f) sets forth one unique provision that does not expire in either House. Subsection 802(f) provides procedures for passage of a joint resolution of disapproval when one House passes a joint resolution and transmits it to the other House that has not yet completed action. In both Houses, the joint resolution of the first House to act shall not be referred to a committee but shall be held at the desk. In the Senate, a House-passed resolution may be considered directly only under normal Senate procedures, regardless of when it is received by the Senate. A resolution of disapproval that originated in the Senate may be considered under the expedited procedures only during the period specified in subsection 802(e). Regardless of the procedures used to consider a joint resolution in either House, the final vote of the second House shall be on the joint resolution of the first House (no matter when that vote takes place). If the second House passes the resolution, no conference is necessary and the joint resolution will be presented to the President for his signature. Subsection 802(f) is justified because subsection 802(a) sets forth the required language of a joint resolution in each House, and thus, permits little variance in the joint resolutions that could be introduced in each House.

Effect of enactment of a joint resolution of disapproval

Subsection 801(b)(1) provides that: "A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule." Subsection 801(b)(2) provides that such a disapproved rule "may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule." Subsection 801(b)(2) is necessary to prevent circumvention of a resolution of disapproval. Nevertheless, it may have a different impact on the issuing agencies depending on the nature of the underlying law that authorized the rule.

If the law that authorized the disapproved rule provides broad discretion to the issuing agency regarding the substance of such rule, the agency may exercise its broad discretion to issue a substantially different rule. If the law that authorized the disapproved rule did not mandate the promulgation of any rule, the issuing agency may exercise its discretion not to issue any new rule. Depending on the law that authorized the rule, an issuing agency may have both options. But if an agency is mandated to promulgate a particular rule and its discretion in issuing the rule is narrowly circumscribed, the enactment of a resolution of disapproval for that rule may work to prohibit the reissuance of any rule. The committees intend the debate on any resolution of disapproval to focus on the law that authorized the rule and make the congressional intent clear regarding the agency's options or lack thereof after enactment of a joint resolution of disapproval. It will be the agency's responsibility in the first instance when promulgating the rule to determine the range of discretion afforded under the original law and whether the law authorizes the agency to issue a substantially different rule. Then, the agency must give effect to the resolution of disapproval.

Limitation on judicial review of congressional or administrative actions

Section 805 provides that a court may not review any congressional or administrative "determination, finding, action, or omission under this chapter." Thus, the major rule determinations made by the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget are not subject to judicial review. Nor may a court review whether Congress complied with the congressional review procedures in this chapter. This latter limitation on the scope of judicial review was drafted in recognition of the constitutional right of each House of Congress to "determine the Rules of its Proceedings." U.S. Const., art. I, §5, cl. 2, which includes being the final arbiter of compliance with such Rules.

The limitation on a court's review of subsidiary determination or compliance with congressional procedures, however, does not bar a court from giving effect to a resolution of disapproval that was enacted into law. A court with proper jurisdiction may treat the congressional enactment of a joint resolution of disapproval as it would treat the enactment of any other federal law. Thus, a court with proper jurisdiction may review the resolution of disapproval and the law that authorized the disapproved rule to determine whether the issuing agency has the legal authority to issue a substantially different rule. The language of subsection 801(g) is also instructive. Subsection 801(g) prohibits a court or agency from inferring any intent of the Congress only when "Congress does not enact a joint resolution of disapproval," or by implication, when it has not yet done so. In deciding cases or controversies properly before it, a court or agency must give effect to the intent of the Congress when such a resolution is enacted and becomes the law of the land. The limitation on judicial review in no way prohibits a court from determining whether a rule is in effect. For example, the committees expect that a court might recognize that a rule has no legal effect due to the operation of subsections 801(a)(1)(A) or 801(a)(3).

Enactment of a joint resolution of disapproval for a rule that was already in effect

Subsection 801(f) provides that: "Any rule that takes effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect." Application of this subsection should be consistent with existing judicial precedents on rules that are deemed never to have taken effect.

Agency information required to be submitted to GAO

Pursuant to subsection 801(a)(1)(B), the federal agency promulgating the rule shall submit to the Comptroller General (and make available to each House) (i) a complete copy of the cost-benefit analysis of the rule, if any, (ii) the agency's actions related to the Regulatory Flexibility Act, (iii) the agency's actions related to the Unfunded Mandates Reform Act, and (iv) "any other relevant information or requirements under any other Act and any relevant Executive Orders." Pursuant to subsection 801(a)(1)(B), this information must be submitted to the Comptroller General on the day the agency submits the rule to Congress and to GAO.

The committees intend information supplied in conformity with subsection 801(a)(1)(B)(iv) to encompass both agency-specific statutes and government-wide statutes and executive orders that impose requirements relevant to each rule. Examples of agency-specific statutes include information regarding compliance with the law that authorized the rule and any agency-specific procedural requirements, such as section 9 of the Consumer Product Safety Act, as amended, 15 U.S.C. §2054 (procedures for consumer product safety rules); section 6 of the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. §655 (promulgation of standards); section 307(d) of the Clean Air Act, as amended, 42 U.S.C. §7607(d) (promulgation of rules); and section 501 of the Department of Energy Organization Act, 42 U.S.C. §7191 (procedure for issuance of rules, regulations, and orders). Examples of government-wide statutes include other chapters of the Administrative Procedure Act, 5 U.S.C. §§551–559 and 701–706; and the Paperwork Reduction Act, as amended, 44 U.S.C. §§3501–3520.

Examples of relevant executive orders include E.O. No. 12866 (Sept. 30, 1993) (Regulatory Planning and Review); E.O. No. 12606 (Sept. 2, 1987) (Family Considerations in Policy Formulation and Implementation); E.O. No. 12612 (Oct. 26, 1987) (Federalism Considerations in Policy Formulation and Implementation); E.O. No. 12630 (Mar. 15, 1988) (Government Actions and Interference with Constitutionally Protected Property Rights); E.O. No. 12875 (Oct. 26, 1993) (Enhancing the Intergovernmental Partnership); E.O. No. 12778 (Oct. 23, 1991) (Civil Justice Reform); E.O. No. 12988 (Feb. 5, 1996) (Civil Justice Reform) (effective May 5, 1996).

GAO reports on major rules

Fifteen days after the federal agency submits a copy of a major rule and report to each House of Congress and the Comptroller General, the Comptroller General shall prepare and provide a report on the major rule