

Again, I simply return to the proposition which the court has accepted in other cases that the pharmaceutical company has a legitimate entitlement. The company performed a very lawful, purposeful activity in doing the research and developing the patents of the drugs.

I do not see where a nuisance exception has any relevance in this scenario. It is not a nuisance to create this drug, and it is not a nuisance to operate a drug production plant.

I do not want to be trivial about this at all, but it is very easy to give away what you do not own. In my view, this is what happens in a lot of these cases. Some great lofty public good is determined by a state, county, or Federal Government, and any activity that impedes it is automatically declared a nuisance. So I would say that the Fifth Amendment is not restricted to land uses. It's a property clause.

Ms. Jones: I would like to thank both of our panelists.

THE COUNCIL ON COMPETITIVENESS AND REGULATORY REVIEW: A
"KINDER, GENTLER" APPROACH TO REGULATION?

Delissa Ridgway*

Jim Tozzi**

Michael Waldman***

Ms. Ridgway: I am Delissa Ridgway. I am delighted to be able to present the last panel this morning. We have two distinguished commentators to address one of the hottest topics in administrative law today, the President's Council on Competitiveness.¹⁷⁴ The fundamental

* Ms. Ridgway is counsel to the Washington, D.C., law firm of Shaw, Pittman, Potts & Trowbridge, where she has specialized in the area of nuclear energy law since 1979. She received her undergraduate and Masters degrees from the University of Missouri, Columbia. She earned her law degree from Northeastern University School of Law in Boston. She has been an officer of the Federal Bar Association's Administrative Law Section since 1984.

** Dr. Tozzi has a Bachelor of Science degree from the Carnegie Institute of Technology, a Masters from the University of Pittsburgh, and a Ph.D. in economics and business administration from the University of Florida.

*** Mr. Waldman is an attorney. He is a graduate of Columbia College and the New York University School of Law, where he was a member of the Law Review.

174. The President's Council on Competitiveness:

[r]eviews government regulations to ensure that they are cost effective and minimize burdens on the economy [and] [w]orks to identify opportunities for industry deregulation; ensures that the workforce is knowledgeable, skilled and flexible; reduces regulatory barriers to scientific and technological progress; and increases the availability of investment capital. Interests include education, quality, and productivity.

CONGRESSIONAL QUARTERLY, WASHINGTON INFORMATION DIRECTORY 45 (1992-93). Critics contend that the Council does not have regulatory policy goals in mind, but that

question is this: what is the proper role of regulation, and just how much is enough?

Now, there are a number of us in the room who have enough gray hair to know that this debate has been going on since long before OMB started reviewing regulations. Indeed, there are a lot of us who think that humorist Will Rogers was correct when he said that government is too damned expensive and thank God we don't get all we pay for.¹⁷⁵

Our panelists today are going to update Will Rogers' observation by focusing on provocative issues including the following: whether federal regulation is actually a barrier to U.S. competitiveness in the international marketplace; whether White House activism in the regulatory process is a legitimate exercise of Executive oversight as the Competitiveness Council maintains; whether, instead, the Competitiveness Council is an unconstitutional breach of the separation of powers and a secret court of last resort for politically well-connected businesses unhappy about regulatory enforcement; and finally, whether the President's regulatory moratorium and other recent deregulatory initiatives have had a definable impact either through increased competitiveness, reductions in public health and safety, or possibly both.

I will briefly introduce our two panelists. Dr. Jim Tozzi is currently the President of his own group, the Multinational Companies. Among other things, his group sells products and services in overseas markets, conducts mergers and acquisitions for multinational companies, and represents clients before federal agencies on domestic and international regulatory issues.

In his prior life, Dr. Tozzi spent eleven years, from 1972 to 1983, in the Executive Office of the President. Most recently, he served as Deputy Administrator of the Office of Management and Budget (OMB) in charge of the Office of Information and Regulatory Affairs (OIRA).¹⁷⁶ In that capacity, he was responsible for implementing the Administration's program for overseeing, coordinating and approving all federal regulations. It goes without saying that he is a big fan of the Competitiveness Council.

Dr. Tozzi is also a veteran of radio and TV public affairs shows. He

it functions as a back-door for political contributors to get political favors.

175. PAULA M. LOVE, *THE WILL ROGERS BOOK 20* (1972) (quoting Will Rogers as saying, "Lord, the money we do spend on government and it's not one bit better than the government we got for one-third the money twenty years ago").

176. The OIRA, under OMB, "[o]versees development of federal regulatory programs . . . [s]upervises agency information management activities in accordance with the Paperwork Reduction Act of 1980, as amended, [and] reviews agency analysis of the effect of government regulatory activities on the United States economy." CONGRESSIONAL QUARTERLY, INC., *WASHINGTON INFORMATION DIRECTORY* 55 (1992-93).

has had his editorials on regulatory reform topics published in the leading newspapers and journals across the country.

And in this corner, we have Michael Waldman. Mr. Waldman is the Director of Public Citizens' Congress Watch, the lobbying arm of the national consumer and environmental advocacy organization that Ralph Nader founded back in 1971. Congress Watch monitors legislation and lobbies for consumer and environmental protection, as well as government and corporate accountability.

Congress Watch has recently published two articles on the Council on Competitiveness, cleverly titled "All the Vice President's Men" and "The Hidden Story: What Bush and Quayle Don't Say About the Regulatory Moratorium."

Mr. Waldman has written widely on business, government, and the law. He is the author of *Who Robbed America?: A Citizen's Guide to the S&L Scandal*,¹⁷⁷ which the L.A. Times described "as among the best post-mortems on the 1980s."¹⁷⁸ His articles have appeared in the New York Times, the New Republic, USA Today, the Boston Globe, Newsday, the Nation, and the Washington Monthly.¹⁷⁹ He appears frequently on TV and radio programs as well, including 60 Minutes, Crossfire, The McNeil-Lehrer Newshour, The Today Show, Good Morning America, CBS Nightwatch, Nightline, The Larry King Show, Talk of America, and others.

Now a quick word on format before we get started. We are going to pretend that we are the McLaughlin Group, although I have to be candid and say that, with me in charge, it is more likely to resemble Oprah or Geraldo.

I am going to start by posing a few questions and then letting these gentlemen argue. I will interject as necessary to focus the debate and to prevent bloodshed. Towards the end of our allotted time, we will take some questions from the audience.

Now, on to what I'm sure is going to be an informative and highly spirited debate. We will start with you, Mr. Waldman.

177. MICHAEL WALDMAN, WHO ROBBED AMERICA: A CITIZEN'S GUIDE TO THE S&L SCANDAL (1990).

178. Robert Kuttner, *The Loan Rangers*, L.A. TIMES, Dec. 30, 1990 (Book Review), at 2.

179. Waldman's writings include the following: *Deep Freeze the Regulatory Freeze*, N.Y. TIMES, Feb. 2, 1992, § 3, at 13; *The Politics of the Rich and the Poor: Wealth and the American Electorate in the Reagan Aftermath: Book Reviews*, NATION, Aug. 13, 1990, at 175; *December Surprise: Bush's Deferred Banking Crises: Commercial Banking*, NEW REPUBLIC, June 29, 1992, at 26; *Face-Off: Tax Breaks for Birthday Bashes; Forbes Shouldn't Take a Write-off*, USA TODAY, Aug. 25, 1989, at 8A; and *Fluctuating Fortunes: The Political Power of Business in America: Book Reviews*, 21 WASH. MONTHLY 56 (1989).

The fact sheet that the Council on Competitiveness has issued states that America's ability to compete depends on reducing regulatory burdens on the free enterprise system.¹⁸⁰ What about that premise? Do you agree that deregulation leads to economic growth?

Mr. Waldman: To be sure, regulation or deregulation can have an impact on competitiveness. I do not think it is necessarily accurate to say that deregulation helps competitiveness, nor is it necessarily correct to say that regulation helps competitiveness. Certain types of deregulation can be devastating to competitiveness. Of course, the savings and loan scandal is the most vivid example of this.

There are types of regulation that can help competitiveness. For the Competitiveness Council to work more effectively, there are many problems that it should address. Among these are the education system, the tax code, skills training, and other areas that actually affect the competitiveness of this country more than the specific regulations that the Council on Competitiveness has targeted.

Looking at the Quayle Council's activities, it has not put forward broad deregulatory initiatives as much as it has served as a back door for individual businesses that are unhappy with the way they are regulated by specific agencies. These businesses approach the Quayle Council in secrecy and the Council delivers.¹⁸¹ This process undercuts the structure of the regulatory system in the country and is a great threat to the entire edifice of regulatory agencies.

Ms. Ridgway: Mr. Tozzi, is it really true that regulation is the root of all evil today and that federal regulation is a barrier to U.S. competitiveness?

Mr. Tozzi: Mr. Waldman's statement that there is much that the Council could work on to contribute to competitiveness is correct.

We have a few problems in this country that need to be addressed which are hurting us in the international markets. One of these problems is the federal deficit, which no one in Washington really seems to give a damn about.

I have worked for five Presidents. My parents told me they were glad I left the government because in the twenty or so years I worked there,

180. President's Council on Competitiveness Fact Sheet, 27 WEEKLY COMP. PRES. DOC. 538 (May 7, 1991).

181. See CHRISTINE TRIANO & NANCY WATZMAN, ALL THE VICE PRESIDENT'S MEN: HOW THE QUAYLE COUNCIL ON COMPETITIVENESS SECRETLY UNDERMINES HEALTH, SAFETY AND ENVIRONMENTAL PROGRAMS 9-19 (OMB Watch/Public Citizen) (1991) [hereinafter Triano & Watzman, ALL THE VICE PRESIDENT'S MEN] (providing examples of Council's targeting of health, safety and environmental regulations at the behest of regulated industries).

the deficit went up.¹⁸²

We do have ways to attack the deficit problem. For example, there are fundamental problems in our labor management scheme. I agree that there are numerous substantial problems that are more pressing than the regulatory process. Notwithstanding that, we all know how Washington works, tackling only what can be handled. And one thing that might be manageable is the federal regulatory structure.

There are instances when regulations hurt our competitiveness by placing significant costs on private industry.¹⁸³ I do not think that all regulations necessarily have this impact. But given the fact that no other solutions seem feasible, we can try to eliminate regulations which have negative impacts on competitiveness.

A capitalistic economy such as ours is based upon an engine which runs over both the good and the bad if it is not somewhat controlled. The role of government is to harness it. But you must harness it in a direction that serves a number of objectives. What we are debating today is the nature of that harness and how it operates. Certainly, I do think that it is within the acceptable role of the White House to oversee what agencies do in this area.

Ms. Ridgway: Mr. Tozzi, critics of the Council are concerned that the only costs that the Administration considers are the *regulatory costs to business*. Don't you think we also need to consider *societal costs* associated with deregulation? In other words, is it not true that society pays lower costs when there is less cancer, fewer injuries, and a more honest marketplace? Mr. Waldman would say that these societal goals are fostered by strong regulation.

Mr. Tozzi: Yes, I believe that is true. I do think we have a system that relies heavily upon estimating costs. There is a tendency for everyone to believe that the benefits side is ignored because of problems with quantification. Uncertainty regarding quantification might, in some instances, reduce the impact of societal benefits on the ultimate determination. I cannot defend this, but it is a fact. Though, I certainly do not think that all regulatory reviews automatically dismiss the impacts of environmental or health regulations.

Mr. Waldman: If you look at cost-benefit analysis as a concept, it

182. From 1970 to 1990, the federal deficit rose from \$370.1 billion to \$3,233.3 billion. Interest paid on the debt rose from 9.9% of the federal budget to 21.1% of the budget. *The World Almanac & Book of Facts* 139-40 (1992).

183. See Robert W. Hahn & John A. Hird, *The Costs and Benefits of Regulation: Review and Synthesis*, 8 YALE J. ON REG. 233 (1990) (discussing how to measure relative merits of different kinds of regulations, and how various regulations affect economy differently).

certainly makes sense. Certainly, we do not want a regulation that has more costs to society than benefits.

However, the simple fact is that the regulatory review process tilts very heavily towards overestimation of costs and underestimation of benefits.¹⁸⁴ The best example I can think of is to look at the alleged cost savings from the regulatory moratorium provided by the Bush Administration.¹⁸⁵ These numbers appear to be cooked beyond recognition. The Bush Administration claimed, for example, in the "official" statistics, a fifteen to twenty billion dollar savings from the moratorium.¹⁸⁶ We asked the Vice President's office to provide the basis for that claim of savings. The office did not respond. We then tried to get the information from the agencies. About half of the agencies did not respond. The agencies that did respond include the Federal Maritime Commission and the Federal Energy Management Agency. The agencies that have not yet responded include the Department of Health and Human Services, the Department of the Interior, the Department of Labor, and the Environmental Protection Agency.

The EPA claimed that there was a regulatory change, as part of this regulatory freeze, dealing with a pesticide called EBDC that they were going to pull off the market. The Quayle Council intervened, as part of the regulatory review process, and now the pesticide is not going to be pulled.¹⁸⁷ From this change, the Quayle Council claimed a significant savings. When we called the people at the EPA who actually wrote the new rule to inquire about the savings, they told us we had to be mistaken; they had never heard of it.

Other alleged savings we received from some of these agencies were handwritten scraps of paper that looked as if they were created in the cafeteria during a coffee break. When you rely on these kinds of numbers for what are often life and death decisions, you inevitably walk on

184. *See id.* (noting that estimates of costs of economic regulation often overstate true costs).

185. On January 28, 1992, President Bush announced a 90-day moratorium on all new regulations that could hinder economic growth. 28 WEEKLY COMP. PRES. DOC. 170, 172. Two months later, President Bush estimated savings from the moratorium to be "about \$15 billion to \$20 billion per year." 28 WEEKLY COMP. PRES. DOC. 726, 727 (Apr. 29, 1992).

186. *Id.*

187. EBDCs are a class of fungicides. As a result of Council interference, the EPA reversed an earlier position which called for banning this "probable human carcinogen" from use on 45 food crops, and instead called for a halt on only 11 crops. CHRISTINE TRIANO & NANCY WATZMAN, THE HIDDEN STORY: WHAT BUSH AND QUAYLE DON'T SAY ABOUT THE REGULATORY MORATORIUM 5 (1992) [hereinafter THE HIDDEN STORY]. When criticized for this decision, the EPA explained that it was based on a down-graded cancer risk and a faulty market study. *Id.*

shaky ground, because the numbers often come from industry and are thus tilted towards estimating costs.

Right now, we do not have an adequate ability to analyze regulatory benefits.¹⁸⁸ Since this is the case, we should really not be doing cost-benefit analysis, or at least not relying on it so much. We should recognize that these are political choices being made by a political office.

Ms. Ridgway: There's relatively little that's been made public about exactly how the Council operates. I invite each of you to address that topic briefly. Please discuss your understanding of how the Council operates and how it should operate.

Mr. Waldman: To understand the way the Council operates, we must first think about how regulatory agencies operate. Under the APA, Congress delegates law-writing authority to regulatory agencies under strict conditions.¹⁸⁹ Agencies must docket their contacts with the public. They cannot base their decisions on ex parte communications. And they have to hear from all sides.¹⁹⁰ The agencies must further rely on scientific or technical criteria, and perhaps most importantly, they must make documentation of their decisions available to the public, the press, and Congress through the Freedom of Information Act.¹⁹¹

The Vice President's Council, on the other hand, acts in secret.¹⁹² It will not say which regulations it is examining. It will not disclose to the public, the press, or Congress the agency personnel with whom it has met or communicated. It will not say what evidence, if any, it is using to reach its decisions. And it claims exemption from the Freedom of Information Act.

As a result, the Council, from what we can tell from news leaks and congressional investigations, has been a magnet for business lobbyists who do not like what is happening with regard to the Clean Air Act or agencies like the EPA and OSHA. Also, there is some highly dis-

188. See Hahn & Hird, *supra* note 183, at 254 (noting that variation in estimates of costs and benefits of economic regulations indicate that "estimates may be merely 'guesstimates'").

189. The head of an executive department may prescribe regulations for the government of his department. 5 U.S.C. § 301 (1988).

190. After notice of a proposed rule, the agency must give interested parties an opportunity to participate and must consider the relevant material presented in making its decision. 5 U.S.C. § 553 (1988).

191. Each agency must make available for public inspection and copying all final opinions, statements of policy and interpretation which have been adopted by the agency, and administrative staff manuals and instructions to staff that affect the public. 5 U.S.C. § 552(a)(2) (1988).

192. See Dana Priest, *Competitiveness Council Suspected of Unduly Influencing Regulators, Secrecy Foils Senate Panel's Attempt to Probe Vice President's Group*, WASH. POST, Nov. 18, 1991, at A19 (discussing secrecy surrounding Council on Competitiveness).

turbing evidence that it is not just any business that contacts the Council, but campaign contributors.

Buried in the middle of a *Washington Post* series on Quayle, by David Broder and Bob Woodward, was the revelation that the Council got its first list of regulations to examine through closed door meetings between Quayle, Alan Hubbard, who was then the Executive Director of the Council, and GOP campaign contributors.¹⁹³ The contributors were asked what regulations they would like the Council to examine. And, according to the same article, Quayle bragged that the Council leaves no fingerprints. He claimed that was the best way to operate.¹⁹⁴

We have done some studies that show a high correlation between big soft money contributions to the Republican Party and the industries that benefitted from Council interventions. We get outraged at Congress about the Keating Five and similar scandals, but it is entirely possible, and in this case likely, that the same sort of thing is happening in the White House.

Mr. Tozzi: First of all, I think we have to look at the merits of having some type of regulatory review process in the White House. But let us assume, just for the basis of this discussion, that White House regulatory review will exist and the only issue to be discussed is the process by which that review takes place.

I worked under then-Vice President Bush on his Task Force on Regulatory Relief,¹⁹⁵ whose role was similar to that of the Council now. Of course, the Council is more active than the task force was when I was there. Why is this? The extra activity by Quayle's Council can be attributed to Congress. When we had the Task Force on Regulatory Relief under Vice President Bush, the staff of the task force consisted of workers from OIRA at OMB. And, then, we had a political head. Over the last several years, Congress has failed to confirm a new head for OIRA.¹⁹⁶ And since OIRA was the main manager of the regulatory

193. Bob Woodward & David S. Broder, *Quayle's Quest: Curb Rules, Leave No Fingerprints*, WASH. POST, Jan. 9, 1992, at A1 [hereinafter *Quayle's Quest*].

194. *Id.*

195. President Reagan created the Task Force on Regulatory Relief with Exec. Order No. 12,291, 3 C.F.R. § 127 (1981), reprinted in 5 U.S.C. § 601 app. at 473 (1988), to "reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide presidential oversight of the regulatory process, minimize duplication and conflict of regulations and insure well reasoned regulations." *Id.* Executive Order No. 12,498 placed the OMB in charge of this process and required the head of each agency to annually submit to OMB an overview of the agency's policies, goals and objectives. Exec. Order No. 12,498, 3 C.F.R. 323 (1985), reprinted in 5 U.S.C. § 601 app. at 476 (1988).

196. Congress and the White House have quarreled over the reauthorization of OIRA and the confirmation of a head for the office. The Senate Committee on Govern-

review process, having no confirmed head has left a power vacuum. The Council moved to fill this vacuum. I think this is appropriate under the circumstances. The President needs some oversight of these programs, and the Council fills this important role.

Now we turn to the problem of "secrecy." There are two types of communications which should be differentiated. There are communications between the Council and the agencies or their staffs, which I call internal to the government. Then there are the external communications, such as phone calls or correspondence between outside parties or their agents and members of the Council.

In terms of internal deliberations, I never supported making public any deliberative discussions among agencies. I take this position because there is a lot of grandstanding, not only to appease public interest groups, but to appease industrial groups, as well. When these types of analyses are presented, they tend to be weak, but you do not want to denigrate the presenter on the record. Those kinds of deliberative processes should be held privately within the government.

The same secrecy occurs within regulatory agencies, such as OSHA and EPA. They have meetings and they record for the public certain things, but there are also long, serious discussions of how regulations are written and what their processes are, which are not made public.

Nonetheless, OMB, over my objections obviously, releases to the public any internal correspondence after a rule is proposed or final.¹⁹⁷ Political reasons force OMB to follow a whole set of procedures, which I certainly do not support, that makes public *all* communications after action is finalized.¹⁹⁸

Now the question that I guess Mr. Waldman is raising is why do these procedures not apply to the Council. Maybe they do. I do not know of any Council prohibitions that prevent agencies from keeping records of their contacts with the Council.

In any event, part of the problem is the perceived lack of political oversight at OMB. Whereas with the Council, we have moved right into the offices of the two highest elected officials in the country.

ment Affairs, the committee with jurisdiction over the nomination, has refused to process a nomination for a head of OIRA unless the President agrees to certain restrictions on OIRA's actions. 137 CONG. REC. S15103-01 (daily ed. Oct. 24, 1991) (statement of Sen. Kasten); 138 CONG. REC. S796-03 (daily ed. Jan. 31, 1992) (statement of Sen. Roth).

197. OMB maintains current indices which identify information pertaining to matters issued, adopted or promulgated after July 4, 1987. These indices are available to the public and can be inspected or copied without charge. 5 C.F.R. §§ 1303.10, 1303.20 (1992).

198. 5 C.F.R. § 1303.10 (1992).

I do not think, as precedent, they are going to open to the public deliberative discussions at that level, whether for regulatory review or domestic policy review. This would go way beyond the precedents set in regulatory issues. So I agree, I would not open those up.

Mr. Waldman: If I could just briefly say, I think there are a few flaws in that analysis.

First of all, you are correct that OMB has, in theory, safeguards, and that the Council on Competitiveness does not. However, I do not think this is only because there is no head of OIRA. I think it is sort of a shell game.

Also, OMB only places communications in the record after the whole process is over. I do not think you can go look at an agency's communications with OMB, while the regulatory dispute is happening.¹⁹⁹

Mr. Tozzi: That is right.

Mr. Waldman: So, at the end of the process, some historian can check it out. But it is not something that is available to the press, the public or Congress while the Council's review is taking place.

Also, the reason there is no head of OIRA is that nobody has been proposed. Now, the White House might not want to subject its activities in this area to congressional scrutiny and the controversy that would come from a nominations fight. But that is no reason to completely avoid the process. So if the real problem is the absence of OIRA leadership, then there is a simple solution, which is for the White House to appoint a head.

The final point is the issue of whether or not the Council's communications constitute internal deliberative proceedings, and whether it is appropriate for the President or the White House to withhold documents recording any of them. Is the Council on Competitiveness acting as an assistant to the President, or is it in fact acting as a super-regulatory agency?²⁰⁰

It is our contention, and in fact it has been upheld by at least one

199. The OMB provides indices and access to documents "pertaining to matters issued, adopted, or promulgated after July 4, 1987." *Id.* (emphasis added). Thus, under this standard, documents that pertain to an ongoing dispute would not be provided.

200. Agencies are subject to the public disclosure requirements in the APA and FOIA, while entities which act merely to advise and assist the President are not; they are protected by executive privilege. The Council has claimed, like the Task Force on Regulatory Relief before it, that it is not subject to the disclosure requirements in the APA or FOIA because it is not an "agency" within the meaning of these statutes, and because its sole purpose is to advise and assist the President. For a discussion of these issues, see Caroline DeWitt, Comment, *The President's Council on Competitiveness: Secretly Undermining the Administrative Procedure Act with Regulatory Review*, 6 ADMIN. L.J. OF AM. U. 759, 759 (1993).

Federal District Court here in D.C., that if it walks like a duck and quacks like a duck, it is a duck.²⁰¹ And if the Council on Competitiveness is involving itself in the minutiae of writing regulations, such as toxicity standards and definitions of wetlands, with no expertise in these areas, then the Council is regulating and must be considered a regulatory agency.²⁰²

In the case of *Meyer v. Bush*,²⁰³ the Public Citizen Litigation Group filed a lawsuit under FOIA seeking records from the Task Force on Regulatory Relief, which was the Council's predecessor. Judge Joyce Green ruled that, in this context, the Task Force was an agency.²⁰⁴ This is being appealed, as you can imagine, by the Administration. Regardless, *Meyer v. Bush* represents a fairly clear judicial statement that, when you act as an agency, you must follow the rules of an agency.

Imagine what would happen to all the governmental structures and all the open government laws if the White House could just take under its wing any function of government that it wanted to shield from public view. The White House could eliminate OSHA in favor of a White House Committee on worker safety rules, and then exempt itself from the public disclosure laws of the APA based on Executive privilege, and so on. This threatens to undercut the entire structure of administrative law. Obviously, that is one of the main reasons we are so concerned about it.

Ms. Ridgway: Mr. Tozzi, Dan Quayle's press secretary, David Beckwith, has chastised the critics of the Council for presuming that government bureaucrats should make regulatory decisions, rather than elected officials.²⁰⁵ Beckwith has been quoted as saying that it is better that the Vice President and the representatives of the President are the ones who resolve administration policy on sensitive matters, rather than some green eyeshade type in the bowels of the bureaucracy.²⁰⁶

Now, without adopting his rather colorful, if insensitive, characterization of dedicated public servants, could you tell us a little bit about why you think that it's better for regulatory decisions at that level to be

201. *Meyer v. Bush*, No. 88-3112, (D.D.C. Sept. 30, 1991) (mem. op.), *appeal docketed*, No. 92-5029 (D.C. Cir. Sept. 18, 1992) (holding that Council's direct predecessor, Task Force on Regulatory Relief, was agency subject to APA and FOIA).

202. *Id.* at 12.

203. *Meyer v. Bush*, No. 88-3112, (D.D.C. Sept. 30, 1991) (mem. op.), *appeal docketed*, No. 92-5029 (D.C. Cir. Sept. 18, 1992).

204. *Id.* at 12.

205. *Quayle Competitiveness Council Called Secretive, Meddlesome by OMB Watch Report*, 174 Daily Executive Report (BNA) A-11 (Sept. 9, 1991).

206. *Id.*

made at the White House?

Mr. Tozzi: Well, having been one of those green eyeshade types, I can appreciate the question.

The idea that these decisions are strictly technical is incorrect. Take, for example, the environmental area. Before I went into the regulatory business, I headed the environmental branch of OMB for years. The big thing in the environmental area now is risk assessment. A chemical is examined, and doses of it are given to rats, and studies are made of any exposures of people to the chemical, and data is collected. This data measures the toxicity of the chemical. If the chemical is seen as a carcinogen, estimations are made as to the risk that a person may get cancer.

I would say that this technical assessment of risk should be done by technical people. But it should be subject to policy oversight, because many assumptions are made during technical reviews.

More importantly, since there is no monopoly of knowledge or insight in deciding what risks the American public should bear (whether you are going to protect against a cancer, one in a million, one in ten million, or one in twenty million), this decision is not a technical one. It is a public policy decision. And no one head of any particular agency should be empowered to make such a decision, independent of his colleagues.

In terms of minutiae, there is a substantial constraint on the Council, in that they can only block something. The Council cannot place anything in the *Federal Register*. Only the agency heads have the ticket to the *Federal Register*.²⁰⁷ This is something that should not be changed. This is something that operates as a check and balance. So the Council can argue with agency personnel, but in the end, if the agency head does not agree, nothing will go into the *Federal Register*.

The other big check on the Council's power is its size. The Council only has six people, whereas the green eyeshade types number in the hundreds of thousands. The numbers themselves are a huge check on the Council's power.

So when the Council examines the minutiae of a rule, it is because there are tremendous public policy implications. And the actual number that they review at the policy level is only a handful.

Ms. Ridgway: Mr. Waldman, I assume you want to respond to that?

Mr. Waldman: The Council on Competitiveness and the Vice Presi-

207. The Director of the *Federal Register* is not authorized to accept any document for publication unless it is an official action of the agency concerned. 1 C.F.R. § 5.4(c) (1992).

dent are trying to exert market power. It is not realistic to think that when the Vice President's office suggests revisions to an agency head, that the "suggestions" will be ignored. With the even more active role of Vice President Quayle today than with Vice President Bush in the early 1980's, these "suggestions" are occurring more and more.

Also, it may be that there are only a few staff on the Council on Competitiveness, but there are a hundred thousand or so people who work directly or indirectly for business lobbies in Washington. These people, in a sense, are the extended staff of the Council. There are plenty of cases where the "suggestions" go from lobbyists to the Executive Branch to the Council on Competitiveness, and then to an agency.²⁰⁸

The fact of the matter is, I agree that these many regulatory decisions are policy decisions and should be made by elected officials. This is where Congress comes in, and the President, too, when he signs a law passed by Congress.

I did not vote for David McIntosh, who is the Assistant to the Vice President for Domestic Policy, and the Director of the Council on Competitiveness. The heads of agencies, at the very least, are confirmed by Congress, whereas the green eyeshade types in the White House are not.

So to the extent that the issue is one of democratic accountability in rulemaking, the proper place to look for that is in compliance with a law passed by both branches of government. It is not just Congress; anything that is a law is signed by the President. We sometimes have a tendency to see this as a conflict between the Executive Branch and Congress, but nothing becomes law unless the President signs it.

Ms. Ridgway: The regulatory moratorium, one of the Council's or at least the President's major initiatives, was initially called a freeze but now has turned out to be more like a slush. Of course, the Administration identified sufficient benefits from the moratorium success, to justify extending it for 120 days.²⁰⁹

Mr. Tozzi, please tell us a little bit about the success stories of the regulatory moratorium. Has it in fact bolstered a lagging economy?

Mr. Tozzi: Remember, my undergraduate degree was in engineering,

208. For example, despite the fact that electric utilities cause 70% of the nation's sulfur dioxide emissions, and 30% of the nitrogen oxide emissions, the White House has pressured EPA to relax regulation of electric power plants under the Clean Air Act, and allow them to refurbish old plants instead of build new ones. TRIANO & WATZMAN, *supra* note 187, at 14.

209. President Bush extended the moratorium for 120 days on April 29, 1992. 28 WEEKLY COMP. PRES. DOC. 728, 729 (Apr. 29, 1992).

so I am not an expert on bolstering sagging economies. However, I will draw analogies between the moratorium enacted under President Reagan²¹⁰ and the moratorium under President Bush.

As for the moratorium that was imposed by President Reagan, you will recall that in the last years of the Carter Administration, Congress and the Executive Branch went berserk, as is usually the case in the final days of an administration; and not only in Democratic administrations, but Republican ones as well. Things just tend to go into the *Register*. So in December after the election, the *Federal Register* was going up in reams. Everything that was hanging around the Executive Branch since the Roosevelt Administration got into the *Federal Register*.

So President Reagan comes in, and he is forced to confront this mess. I suggested a freeze of the regulations. The attorneys responded that there is no such thing as a legal freeze. I suggested that they create such a thing.

I told them that I wanted the agencies to put something in the *Federal Register* to change the effective date of the regulations, in order to have time to review them. Everyone, including the Justice Department, was skeptical. But we did it. And the moratorium made a lot of sense. With the Reagan Administration, facing such voluminous regulations, the moratorium made some sense.

Moving to the recent Bush moratorium, this also was in response to a flurry of regulations in the last couple of years that in my opinion should have been looked at again. So I think the recent moratorium was intended as a signal to the bureaucracy that the Executive Branch will take a closer look at regulatory activities than in the past. That signal was clear.

Of course, the moratorium will expire, and everything will come out. So the question becomes what did the moratorium accomplish?

Well, there are some structural changes being made in certain agencies, which will have some long term impact. But I think that it was primarily a strong signal that the Bush Administration is going to try to harness the regulatory structure. So the moratorium under President Bush is different than the one under President Reagan, and different results will be achieved.

Ms. Ridgway: Mr. Waldman, would you conclude by giving us a few examples of the casualties of the moratorium that Public Citizen has identified?

210. Exec. Order No. 12,291, 3 C.F.R. § 127 (1981), *reprinted in* 5 U.S.C. § 601 app. at 473 (1988).

Mr. Waldman: Like Pogo, we have met the enemy, and he is us. I mean, it was the wild-eyed redtape regulators appointed by Ronald Reagan and George Bush who put forward these regulations. If you look at the increase in regulation in the last year or two, the reasons for the increase were not actions by the regulators themselves, but laws passed by Congress and signed by the President. Examples range from FIRREA,²¹¹ the Americans with Disabilities Act,²¹² the Clean Air Act,²¹³ and the Nutritional Labeling Act.²¹⁴

President Bush is bragging about these laws in the re-election campaign, while quietly worrying about their impact and trying to undercut them. So you must be careful when assessing the current regulatory increase. It has not been as significant as some would have you believe.

The moratorium, of course, has not had a dramatic impact on the economy in the short time that it has been around. It probably would not have a dramatic impact on the economy even if it were around for another year or two.

I agree that the moratorium is a signal to the agencies that a chill has taken place. A signal emerging from a time of regulatory schizophrenia, where the Administration appoints people like Reilly²¹⁵ and Kessler²¹⁶ at the agencies, and was talking about its environmental record, and then they were quietly doing these things with the Quayle Council.

It brought together the policies of the Administration and signaled a real ascendancy for the deregulatory forces. The moratorium has had no real positive impact on the economy, but it has had a negative impact on some specific rules that we have examined. At the beginning of the moratorium, we did an analysis of health and safety, environmental, and consumer protection regulations that we thought would be affected.²¹⁷ After the first ninety days, we went back and looked at them, and found that out of fifty or so regulations, forty-three had been delayed, three had been issued, but in a significantly weakened form, and three had been killed outright.²¹⁸

211. Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183.

212. Americans With Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990).

213. The Air Pollution Prevention and Control Act, 42 U.S.C. §§ 7401-7642 (1988).

214. Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (1990).

215. William K. Reilly, Administrator of the Environmental Protection Agency.

216. David Kessler, Administrator of the Food and Drug Administration.

217. See TRIANO & WATZMAN, *supra* note 187 (examining impact of Bush Administration's moratorium).

218. *Id.* at 2.

I mentioned the pesticide regulation earlier. Yet another particularly indefensible casualty of the moratorium comes from the Consumer Product Safety Commission (CPSC). The CPSC worked for years and years on a regulation which would require labeling on small toy parts that could choke young children.²¹⁹ In the middle of the moratorium, the CPSC reversed its position and decided not to issue the rule,²²⁰ despite the fact that many children die every year from these types of chokings.

Another particularly egregious example of the effects of the moratorium is seen in the OMB's attempts to do risk analysis of occupational safety and health regulations. As you know, cost-benefit analysis is not a legal basis for review of these types of rules.²²¹ Another case concerns a rule issued three years ago, called the Permissible Exposure Limitations (PEL) rule.²²² The rule was quite comprehensive and technically complex. Yet, after going through the whole process of developing it, OSHA received a short letter from OMB stating that the regulation

219. On June 7, 1988, an advance notice of proposed rulemaking (ANPR) was published which began the proceedings of the Consumer Product Safety Commission (CPSC) towards promulgating regulations banning certain toys and articles intended for use by children younger than three years which present a risk of choking, aspiration, or ingestion because of small parts. 52 Fed. Reg. 20,865 (1988).

220. On June 26, 1990, the CPSC announced that it was terminating the proceedings discussed above. The Commission concluded that the existing small parts regulations had been effective, and that the proposed changes would require modifications to a significant percentage of toys and other articles and would increase the costs of production and sale of these products. 55 Fed. Reg. 26,076 (1990).

221. In *American Textile Mfr. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981), the Supreme Court held that Congress did not direct OSHA to use cost-benefit analysis in promulgating health and safety rules. The Court noted that language indicating such analysis should be performed was absent from the agency's enabling act, and that when Congress wants an agency to use cost-benefit analysis, it knows how to indicate this desire. *Id.* The Court cited two examples of Congress using clear language to require agencies to perform cost-benefit analyses. First, the Court quoted from the Flood Control Act of 1936, in which Congress stated: "[T]he Federal Government should improve or participate in the improvement of navigable waters or their tributaries, including watersheds thereof, for flood-control purposes *if the benefits to whomsoever they may accrue are in excess of the estimated costs.*"

Id. (emphasis added by Supreme Court).

Another example cited by the Court is the Outer Continental Shelf Lands Act Amendments of 1978, which provided that offshore drilling operations shall use:

[T]he best available and safest technologies which the Secretary determines to be economically *feasible*, wherever failure of equipment would have a significant effect on safety, health, or the environment, *except where the Secretary determines that the incremental benefits are clearly insufficient to justify the incremental costs of using such technologies.*

Id. (emphasis added by Supreme Court).

222. The OSHA Permissible Exposure Limitations Rule set the permissible exposure limits for over 1000 hazardous substances used in the construction, maritime, and agriculture industries. TRIANO & WATZMAN, *supra* note 187, at 6.

cost jobs.²²³

OMB's reasoning was that workers losing their jobs, because of the unbearable cost of the regulation to their employer, would also lose their health, and ultimately cost the government more money. Consequently, the rule should not be issued.²²⁴ For those of you who read Jonathan Swift's *A Modest Proposal*,²²⁵ it includes similar reasoning.

There are a host of examples like this, where deregulatory activity has been greatly stepped up under the guise of efficiency, and I think there are real costs, in human lives lost, due to initiatives like the regulatory moratorium, if only from delay.

Ms. Ridgway: And I want to thank both of our panelists, and close with a quote from the *Legal Times*, focusing on the point that administrative law specialists on both sides of the issue have questioned. Namely, whether the relatively short period of time that the regulatory moratorium will be in place provides a realistic opportunity to get anything done, especially given the glacial pace with which administrative processes operate.

The *Legal Times* said that: "[E]ven if the moratorium ends up making more of a dent than many expect, its impact may still be short-lived . . . [t]he day after the moratorium [ends], you may have the world's fattest *Federal Register*, and Bush is going to look awfully silly."²²⁶

Again, I would like to thank both of our panelists for being here.

223. Based on a theory that OSHA's rule would lead to a cut in wages, and actually hurt instead of protect workers, the White House pressured OSHA into soliciting further comments on the rule. *Id.* OMB's theory is presented in a March 10, 1992, letter from James B. MacRae, Jr., Acting Administrator of OIRA, to Nancy Risque-Rohrbach, Assistant Secretary for Policy, the Department of Labor. *Id.*

224. OMB's position was based on a well-known theory that being poor heightens health risks, and illness compounds poverty. See Don Colburn, *A Vicious Cycle of Risk*, WASH. POST, July 28, 1992 (Health), at 10 (quoting H. Jack Geiger, Chairman of the Department of Community Health and Social Medicine at City University of New York Medical School).

225. See Jonathan Swift, *A Modest Proposal for Preventing the Children of Poor People from Being a Burden to Their Parents or the Country, and Making Them Beneficial to the Public*, in JONATHAN SWIFT 492 (A. Ross & D. Woolley eds. 1984) (suggesting satirically that killing and eating babies of poor families would solve food shortage and lead to happier and healthier society).

226. *Rule 'Freeze' Is Slushy*, LEGAL TIMES OF WASH., Feb. 3, 1992, at 15.

AFTERNOON SESSION

Introduction

Elliott Milstein, Esq.*

Mr. Milstein: Good afternoon. My name is Elliott Milstein. I am the Dean of the Washington College of Law of The American University. It is my pleasure to welcome you to the law school. My job here is to introduce my colleague, Professor Thomas Sargentich.

I am sure that all of you are familiar with Tom's work. Tom has earned national, even international, recognition for his outstanding scholarship in the fields of constitutional and administrative law.

Tom, having graduated from Harvard University in 1972, earned his Master's of Philosophy at Oxford University in 1974 and his J.D. from Harvard Law School in 1977. While in law school, he was editor of the Harvard Civil Rights-Civil Liberties Law Review.

Upon his graduation from law school, he served as a law clerk to the Honorable Arlin M. Adams of the United States Court of Appeals for the Third Circuit. Between 1978 and 1982, Tom served as the Attorney-Advisor for the Office of Legal Counsel (OLC) at the Department of Justice. Between 1982 and 1983, Tom served as a Senior Attorney-Advisor in OLC.

This is what law school deans call an absolutely perfect resume and absolutely perfect background for being a law professor. We were the school fortunate enough to recruit him, and it has been a romance ever since.

In his ten years at the Washington College of Law, he has distinguished himself both as a teacher and a scholar. Tom's recent scholarship is focused on the administrative process and the separation of powers.²²⁷ At last check, he was working on an article called, *The Limits of*

* Elliott Milstein is the Dean of the Washington College of Law of The American University.

227. See Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430 (1987) [hereinafter Sargentich, *Separation of Powers*]; Thomas O. Sargentich, *The Delegation Debate and Competing Ideals of the Administrative Process*, 36 AM. U. L. REV. 419 (1987) [hereinafter Sargentich, *Delegation Debate*]; Thomas O. Sargentich, *The Future of Administrative Law*, 104 HARV. L. REV. 769 (1991) (reviewing CHRISTOPHER EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY (1990)); Thomas O. Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 WIS. L. REV. 385 [hereinafter Sargentich, *Contemporary Debate*]; Thomas O. Sargentich, *The Scope of Judicial Review of Issues of Law: Chevron Revisited*, 6 ADMIN. L.J. OF AM. U. 277 (1992); Thomas O. Sargentich, *Teaching Administrative Law in the Twenty-First Century*, 1 WIDENER J. PUB. L. 1

*the Parliamentary Critique of the Separation of Powers.*²²⁸

Tom is Vice-Chair of the Committee on Government Organization and Separation of Powers of the American Bar Association's Section on Administrative Law and Regulatory Policy. He also has served as a consultant to the Administrative Conference of the United States on a study of the appropriate judicial forum for review of agency action.

Ladies and gentlemen, Tom Sargentich.

(1992).

228. Thomas O. Sargentich, *The Limits of the Parliamentary Critique of the Separation of Powers*, 34 WM & MARY L. REV. 679 (1993).