254937

THE WHITE HOUSE
WASHINGTON
March 3, 1998

3-4-98

MR. PRESIDENT:

The attached memo seeks your guidance on a strategy for the regulatory reform bill sponsored by Sens. Thompson and Levin. The memo, which I recommend you read, is a product of a meeting convened yesterday by Erskine. He wanted you to see it today as a markup is scheduled for Thursday.

Background. The bill is better than the Dole bill we defeated in the last Congress, but it still presents significant problems. Labor, enviros and other public interest groups strongly oppose it. The business community is strongly for it. The Congressional politics are complicated with Senators on both sides of the aisle lining up in different places. The key vote here is Sen. Daschle's, who will likely support Levin even if all of Daschle's changes are not in the bill.

Options. Three are presented -- they all assume we will oppose the bill unless our concerns are met. *Option 1:* present a set of "high bar" proposals that Levin and Thompson are unlikely to accept. Satisfies labor/enviros but diminishes our negotiating posture and may result in veto-proof bill. *Option 2:* present a list of fixes to address major concerns. Would be well received by Levin/Thompson and will improve bill but may not get all we want and will be opposed by groups. *Option 3:* present expanded list of fixes that go beyond Option 2 but are below Option 1. Gives us more negotiating room to insist on Option 2 fixes as our bottom line.

Daschle prefers 2 or 3. Erskine, Larry Stein, OMB, Gene and Sally prefer 2. The VP, Podesta and Katie prefer 3.

___ Opt 1 ___ Opt 2 ___ Opt 3 ___ Discuss

Phil Caplan

254937

THE WHITE HOUSE

WASHINGTON

'98 MAR 3 AM10:57

March 2, 1998

MEMORANDUM FOR THE PRESIDENT

THROUGH: GENE SPERLING

FROM: SALLY KATZEN

SUBJECT: Regulatory Reform Legislation

This memorandum seeks your guidance on the Administration position on S. 981, the Thompson-Levin regulatory reform bill.

ACTION-FORCING EVENT: On Thursday, March 5, the Senate Governmental Affairs Committee will be holding a markup on the bill. We currently have several serious concerns with the bill. Your advisors all agree that the Administration should register our views before the markup. The number and tenor of the objections we present will depend on your preferred strategy and end game.

BACKGROUND. Senators Levin and Thompson have been working over the past 18 months on a regulatory reform bill that seeks to avoid some of the excesses in the Dole regulatory reform bill, which we defeated three times in the 104th Congress and which proved a rallying point for many of our constituencies in the 1996 election.

The most recent version of S. 981, revised after informal consultation with agencies and White House offices, responded to a number of our previous concerns. There are, however, significant problems remaining in the bill even as revised. We believe that some of these flaws could be fixed to our satisfaction; others may not. Several agencies believe that even if all of these flaws are fixed, this bill in any form will add significant administrative burdens that will interfere with their ability to issue regulations to protect health, safety, and the environment, including some of your major initiatives.

Labor unions, environmental organizations, and other public interest groups are adamantly opposed to any bill of this type -- even if moderate or benign -- and have presented this as a significant test of our credibility in protecting public health and the environment. For all of these groups, defeat of this bill is a high priority. By contrast, the business community has consistently pushed for a regulatory reform bill and is prepared to accept any version that essentially codifies your executive order governing review of regulations by OMB, although they have been disappointed by the number of concessions that Thompson has made to gain Levin's support.

The congressional politics of the issue are problematic. Levin is a moderate, is well-respected on

issues of administrative law, and is perceived as unlikely to support a bill that would adversely affect health, safety, or environmental regulations. He has attracted as co-sponsors Senators Glenn, Rockefeller and Robb. Senator Daschle feels that he has held Levin back to avoid a division in the Democratic caucus, but that he cannot do so much longer. There are at least four Democrats on the committee (led by Senators Torricelli and Durbin), and others in the Senate as a whole, who want to fight because they believe it is a good issue for Democrats and because they are under strong pressure from environmental, labor, and public interest groups. In the House, S. 981 is likely to divide Democrats along the very fault lines that emerged in the fast-track debate.

The Republican politics are also complex. The most conservative wing of the party is ideologically wedded to a far stronger version of regulatory reform legislation than Thompson has developed with Levin, and may want to preserve regulatory reform as an issue to use against Democrats. Other Republicans are willing to enact a moderate bill in order to deliver something for their constituents in this Congress.

Your advisors believe that it is likely that if the bill reaches the floor with Senator Daschle's support, it would pass the Senate with as many as 70 votes. It is generally thought the House would then send it to your desk as passed by the Senate (although House leadership will likely face pressure from the right to make the bill more extreme).

There are three options that your advisors have been discussing. They all presuppose that we will oppose the bill unless our concerns are met.

Option 1. Present a set of "high-bar" proposals that we know Levin and Thompson are unlikely to accept.

Pros: This would attempt to satisfy the expectations of labor, environmental, and public interest groups on an issue that these groups have identified as their highest priority.

Cons: This would diminish the likelihood that we can negotiate needed changes if the bill moves forward despite our strong opposition, and we could be presented with a veto-proof bill that is more burdensome than we would otherwise have been able to negotiate. Also, if the drafters fix a few of our criticisms, we run the risk of appearing to be negotiating in bad faith.

Option 2. Set forth a list of the changes to address the major concerns that the agencies and White House offices agree on.

Pros: This approach would be well received by Levin and Thompson, avoid positioning you as an opponent of any reform, and substantially improve the bill.

Cons: This will disappoint labor, environmental, and public interest groups. This approach also presents the risk that Levin and Thompson will accept only some of our changes, leaving major concerns unaddressed while depriving us of a principled ground for opposition.

Option 3. Set forth an expanded set of changes that go beyond those in Option 2. Not all of these changes would be essential to a signable bill, but the bar would not be as high as in Option 1.

Pros: This approach would give us the negotiating room to insist on the changes in Option 2 as our bottom line. This additional negotiating room will enhance our credibility with the groups in opposition, even if they would have us ask for more.

Cons: They could pick and choose among our suggestions but avoid meeting our most important concerns. This would allow them to trumpet their willingness to compromise, while casting us as unreasonable if we continue in our opposition. By raising the bar higher than Option 2, a final acceptable bill would look like more of a loss than it actually is.

We understand that Senator Daschle has given Senator Levin a number of changes which are essentially a subset of our Option 2 list. We further understand that Daschle would ask Levin to work with us to incorporate our changes in the bill. Senator Daschle will likely support Levin even if all of his own changes are not made. Senator Daschle would either favor Option 2 or 3.

DECISION

____ Option 1 **____ Option 2** **____ Option 3** **____ Let's Discuss**

Attached is a brief statement of the major concerns we would seek to address under Option 2.

S. 981 -- REGULATORY IMPROVEMENT ACT OF 1998 (Substitute)

Summary Statement of Administration Position: In S. 981, Senators Levin and Thompson have made a thoughtful, good faith effort to draft comprehensive regulatory reform legislation. The substitute bill issued earlier this month contains significant improvements over last summer's draft. We applaud this effort. While the substitute is responsive to many of our concerns, there are still serious issues remaining. One of the problems with comprehensive legislation is that so many different kinds of rulemaking are affected. We want to be sure that any new law improves the regulatory system, and does not impair -- by creating more paperwork, more red tape, and more delay- - agencies' ability to do their jobs. We are interested in working with the Congress to see if we can find the common ground.

OVERVIEW OF MAJOR AGENCY CONCERNS

Below we have distilled from agency comments the most serious and legitimate concerns. Proposed fixes follow. It bears emphasis, however, that agencies are concerned not only with the specific, major issues noted below, but with the total burden imposed by those and other provisions in the bill. Most agencies believe that this bill is unnecessary -- from their own rulemaking perspective it is certainly unwanted -- and will only add to the time, resources, and difficulties that currently attend rulemaking.

Judicial Review

- The judicial review provisions raise the prospect of tactical litigation over errors that were not material to the outcome of a particular rulemaking. This risk is compounded by the mandate that courts "shall" remand or invalidate regulations whenever an agency fails to perform the required analysis, the failure to specify that remand or invalidation is appropriate only where the agency "wholly" fails to perform the analysis, or the elimination of any judicial discretion to uphold a rule where an asserted error is not prejudicial to the outcome of the rulemaking.

Implicit Supermandate

- The bill would likely be construed to narrow the range of discretion available to agencies under their existing statutory mandates to protect human health, safety, or the environment. The purported "savings clause," providing that its terms not "be construed to supersede any requirement for rulemaking or opportunity for judicial review," exacerbates this risk. Many statutes permit agencies to promulgate more protective standards than those that would meet S. 981's analytical benchmarks (benefits justify costs, net benefits are maximized, and the rule is the most cost-effective option). But this authority often is conferred in terms that cannot be deemed a "requirement for rulemaking." Accordingly, courts may well reconcile any ambiguity in existing regulatory statutes to the policies in S. 981. This reading would compel agencies to exercise their discretion within the narrow range of options that are cost-justified and that maximize net benefits -- an implicit supermandate.

Risk Assessment

- The substitute continues an effort to codify science and analytical approach at a level of detail and in terms that are likely to prove inconsistent with the best science in this evolving field. This is especially problematic in the case of provisions tailored to analysis of cancer risks, which are ill-suited to an evaluation of risks related to environmental and natural resource protection, worker safety, or airworthiness.

- The substitute expands statutory risk assessment requirements beyond major rules to any risk assessment that OMB "determines is anticipated to have a substantial impact on a significant public policy or the economy." This could be applied to a new and unbounded category of agency actions that are not rulemakings.

- The requirement that agencies revise risk assessments whenever new and reliable information becomes available threatens an endless analytical process, reopened with each new study. Agency decisions concerning whether and how to revise a risk assessment would provide new fodder for protracted litigation.

Peer Review

- The bill would require peer review in contexts where the process would add significantly to costs and delays of the regulatory process without any foreseeable benefit. For example the requirement that cost-benefit analyses be subject to peer review would add little to the independent review OIRA already performs in our regulatory review process.

- The requirement that peer review be entirely independent of the regulating agency would render well-established and credible peer review mechanisms like EPA's Science Advisory Board unable to perform their assigned functions. This requirement also would make good peer review impossible for those agencies that have a virtual monopoly on experts in highly specialized subject areas (e.g. nuclear safety).

Other

- By codifying certain definitions, procedures, and disclosure requirements that President Clinton has imposed as a matter of discretion in Executive Order 12866, the bill would interfere with the President's prerogatives in overseeing the Executive Branch.

- The bill contains two different, uncoordinated and likely duplicative processes for the review of past regulations, imposing a major burden on agencies (sections 632 Review of rules, and 644(b) Periodic review of rules.).

- The bill imposes its analytical requirements even where the costs of compliance with the regulation have been incurred by the regulated community and no costs can be avoided by selecting a different regulatory option. This is a major burden on the agencies with no conceivable benefit to the public or regulated entities.

- The substitute requires OIRA, with help from OSTP and CEA, to conduct a series of new studies for which there is neither funding nor need.

- There definitions of "major rule" and "substitution risk" should be modified to conform to current practice.

- Exemptions needed:
  - rules to implement international trade agreements or other agreements concerning foreign affairs;
  - rules withdrawing products from market to protect human health, safety or the environment (currently, S. 981 only exempts rules authorizing product entry).

PROPOSED FIXES TO SUBSTITUTE S. 981 (Partial List)

1. Judicial Review:

    a. Change "shall" to "may," and delete reference to peer review (page 24, lines 12-13)

    b. Delete section 627(d) and substitute Glenn-Chafee review language:

    > "(d) In any proceeding involving judicial review under Section 706 or under the statute granting the rulemaking authority, the information contained in any cost-benefit analysis or risk assessment required under [sections 623,624,...] may be considered by the court as part of the administrative record as a whole solely for the purpose of determining whether the final agency action is arbitrary, capricious, or an abuse of discretion, or unsupported by substantial evidence where that standard is otherwise provided by law. The adequacy of compliance or the failure to comply with [sections 623,624,625...] shall not be grounds for remanding or invalidating a final agency action, unless the agency entirely failed to perform a required cost-benefit analysis or risk assessment.

    c. Add prejudicial error language to sec. 627(e), to ensure that only errors material to the regulatory outcome are a basis for remand.

2. Implicit Supermandate:

    a. Delete section 622(b) and replace as follows:

    > "Nothing in this subchapter shall be construed to alter or modify the substantive standards otherwise applicable to a rulemaking under other statutes, or to limit the agency's range of discretion in construing other statutes."

3. Risk Assessment

    a. Delete section 624(a)(1)(A)(ii), which broadens applicability risk assessment beyond rulemaking.

    b. Delete the requirement in section 624(d) requiring public notice of intent to perform a risk assessment

    c. Delete section 624(c)(2) to prevent unending cycle of revision, or clarify that new studies must only be considered if they are reasonably available before the agency prepares the initial risk assessment.

    d. Exclude from the coverage of section 624 those major rules that are not premised on the outcome of a risk assessment.

4. Peer Review

    a. Delete cost benefit analysis from coverage of requirement for peer review (section 625,

line 3,4)

b. Modify section 625 line 14 so that peer review participants are independent of the "program office," rather than independent of the "agency."

c. Clarify that only one round of peer review is required, and that it should be performed during the comment period on the proposal.

5. Other

a. Narrow definitions, procedures and disclosure provisions to increase Presidential discretion.

- Delete section 641 definitional constraints on what the President may review

- Modify section 643, public disclosure requirements, so that the President has maximum flexibility (concerning the scope and timing of disclosure, for example), and so that the integrity of deliberative process is maintained.

b. Regarding "look back" reviews, delete section 644(b) (duplicates review of rules section). In section 632, change cycle of review from 5 to 10 years (page 29, line 19 and page 38, line 13).

c. Modify both "lookback" and post-promulgation analysis requirements (section 623(f)(2) to exclude rules where the costs of compliance have been substantially incurred.

d. Delete section 628 guidelines, interagency coordination, and research and section 629 Risk based priorities study. Alternatively, make these requirements contingent on the availability of appropriations.

e. Definitions:

Delete "...in reasonably quantifiable costs" from page 5 lines 14,15.

- substitution risk: inset word "unavoidably" on page 8 line 19 ("...to result **unavoidably** from...")

- modify section 621(J) to exclude a rule: "that authorizes **or bars** the introduction into commerce, or recognizes **or cancels recognition of** the marketable status of, a product."

- add exemption from definition of rule for rules related to international trade.

Document No. _____

WHITE HOUSE STAFFING MEMORANDUM

DATE: 3/3 ACTION/CONCURRENCE/COMMENT DUE BY: Immediate

SUBJECT: Reg Reform Strategy

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	✓		McCURRY		✓
BOWLES	✓		McGINTY		
McLARTY			NASH		
PODESTA	✓		RADD		
MATHEWS	✓		REED		
RAINES	✓		RUFF	✓	
BLUMENTHAL			SMITH		
BERGER			SOSNIK	✓	
ECHAVESTE	✓		SPERLING		
EMANUEL	✓		STREETT		
GIBBONS			TARULLO		
STEIN	✓		VERVEER		
IBARRA			WALDMAN		
KLAIN			YELLEN		
LEWIS			BEGALA	✓	
LINDSEY					
MARSHALL					

REMARKS: Please advise

RESPONSE:

Staff Secretary
Ext. 6-2702

THE WHITE HOUSE

WASHINGTON

March 2, 1998

MEMORANDUM FOR THE PRESIDENT

THROUGH: GENE SPERLING

FROM: SALLY KATZEN

SUBJECT: Regulatory Reform Legislation

This memorandum seeks your guidance on the Administration position on S. 981, the Thompson-Levin regulatory reform bill.

ACTION-FORCING EVENT: On Thursday, March 5, the Senate Governmental Affairs Committee will be holding a markup on the bill. We currently have several serious concerns with the bill. Your advisors all agree that the Administration should register our views before the markup. The number and tenor of the objections we present will depend on your preferred strategy and end game.

BACKGROUND. Senators Levin and Thompson have been working over the past 18 months on a regulatory reform bill that seeks to avoid some of the excesses in the Dole regulatory reform bill, which we defeated three times in the 104th Congress and which proved a rallying point for many of our constituencies in the 1996 election.

The most recent version of S. 981, revised after informal consultation with agencies and White House offices, responded to a number of our previous concerns. There are, however, significant problems remaining in the bill even as revised. We believe that some of these flaws could be fixed to our satisfaction; others may not. Several agencies believe that even if all of these flaws are fixed, this bill in any form will add significant administrative burdens that will interfere with their ability to issue regulations to protect health, safety, and the environment, including some of your major initiatives.

Labor unions, environmental organizations, and other public interest groups are adamantly opposed to any bill of this type -- even if moderate or benign -- and have presented this as a significant test of our credibility in protecting public health and the environment. For all of these groups, defeat of this bill is a high priority. By contrast, the business community has consistently pushed for a regulatory reform bill and is prepared to accept any version that essentially codifies your executive order governing review of regulations by OMB, although they have been disappointed by the number of concessions that Thompson has made to gain Levin's support.

The congressional politics of the issue are problematic. Levin is a moderate, is well-respected on

issues of administrative law, and is perceived as unlikely to support a bill that would adversely affect health, safety, or environmental regulations. He has attracted as co-sponsors Senators Glenn, Rockefeller and Robb. Senator Daschle feels that he has held Levin back to avoid a division in the Democratic caucus, but that he cannot do so much longer. There are at least four Democrats on the committee (led by Senators Torricelli and Durbin), and others in the Senate as a whole, who want to fight because they believe it is a good issue for Democrats and because they are under strong pressure from environmental, labor, and public interest groups. In the House, S. 981 is likely to divide Democrats along the very fault lines that emerged in the fast-track debate.

The Republican politics are also complex. The most conservative wing of the party is ideologically wedded to a far stronger version of regulatory reform legislation than Thompson has developed with Levin, and may want to preserve regulatory reform as an issue to use against Democrats. Other Republicans are willing to enact a moderate bill in order to deliver something for their constituents in this Congress.

Your advisors believe that it is likely that if the bill reaches the floor with Senator Daschle's support, it would pass the Senate with as many as 70 votes. It is generally thought the House would then send it to your desk as passed by the Senate (although House leadership will likely face pressure from the right to make the bill more extreme).

There are three options that your advisors have been discussing. They all presuppose that we will oppose the bill unless our concerns are met.

Option 1. Present a set of "high-bar" proposals that we know Levin and Thompson are unlikely to accept.

Pros: This would attempt to satisfy the expectations of labor, environmental, and public interest groups on an issue that these groups have identified as their highest priority.

Cons: This would diminish the likelihood that we can negotiate needed changes if the bill moves forward despite our strong opposition, and we could be presented with a veto-proof bill that is more burdensome than we would otherwise have been able to negotiate. Also, if the drafters fix a few of our criticisms, we run the risk of appearing to be negotiating in bad faith.

Option 2. Set forth a list of the changes to address the major concerns that the agencies and White House offices agree on.

Pros: This approach would be well received by Levin and Thompson, avoid positioning you as an opponent of any reform, and substantially improve the bill.

Cons: This will disappoint labor, environmental, and public interest groups. This approach also presents the risk that Levin and Thompson will accept only some of our changes, leaving major concerns unaddressed while depriving us of a principled ground for opposition.

Option 3. Set forth an expanded set of changes that go beyond those in Option 2. Not all of these changes would be essential to a signable bill, but the bar would not be as high as in Option 1.

Pros: This approach would give us the negotiating room to insist on the changes in Option 2 as our bottom line. This additional negotiating room will enhance our credibility with the groups in opposition, even if they would have us ask for more.

Cons: They could pick and choose among our suggestions but avoid meeting our most important concerns. This would allow them to trumpet their willingness to compromise, while casting us as unreasonable if we continue in our opposition. By raising the bar higher than Option 2, a final acceptable bill would look like more of a loss than it actually is.

We understand that Senator Daschle has given Senator Levin a number of changes which are essentially a subset of our Option 2 list. We further understand that Daschle would ask Levin to work with us to incorporate our changes in the bill. Senator Daschle will likely support Levin even if all of his own changes are not made. Senator Daschle would either favor Option 2 or 3.

DECISION

____ Option 1 **____ Option 2** **____ Option 3** **____ Let's Discuss**

Attached is a brief statement of the major concerns we would seek to address under Option 2.

S. 981 -- REGULATORY IMPROVEMENT ACT OF 1998 (Substitute)

Summary Statement of Administration Position: In S. 981, Senators Levin and Thompson have made a thoughtful, good faith effort to draft comprehensive regulatory reform legislation. The substitute bill issued earlier this month contains significant improvements over last summer's draft. We applaud this effort. While the substitute is responsive to many of our concerns, there are still serious issues remaining. One of the problems with comprehensive legislation is that so many different kinds of rulemaking are affected. We want to be sure that any new law improves the regulatory system, and does not impair -- by creating more paperwork, more red tape, and more delay- - agencies' ability to do their jobs. We are interested in working with the Congress to see if we can find the common ground.

OVERVIEW OF MAJOR AGENCY CONCERNS

Below we have distilled from agency comments the most serious and legitimate concerns. Proposed fixes follow. It bears emphasis, however, that agencies are concerned not only with the specific, major issues noted below, but with the total burden imposed by those and other provisions in the bill. Most agencies believe that this bill is unnecessary -- from their own rulemaking perspective it is certainly unwanted -- and will only add to the time, resources, and difficulties that currently attend rulemaking.

Judicial Review

- The judicial review provisions raise the prospect of tactical litigation over errors that were not material to the outcome of a particular rulemaking. This risk is compounded by the mandate that courts "shall" remand or invalidate regulations whenever an agency fails to perform the required analysis, the failure to specify that remand or invalidation is appropriate only where the agency "wholly" fails to perform the analysis, or the elimination of any judicial discretion to uphold a rule where an asserted error is not prejudicial to the outcome of the rulemaking.

Implicit Supermandate

- The bill would likely be construed to narrow the range of discretion available to agencies under their existing statutory mandates to protect human health, safety, or the environment. The purported "savings clause," providing that its terms not "be construed to supersede any requirement for rulemaking or opportunity for judicial review," exacerbates this risk. Many statutes permit agencies to promulgate more protective standards than those that would meet S. 981's analytical benchmarks (benefits justify costs, net benefits are maximized, and the rule is the most cost-effective option). But this authority often is conferred in terms that cannot be deemed a "requirement for rulemaking." Accordingly, courts may well reconcile any ambiguity in existing regulatory statutes to the policies in S. 981. This reading would compel agencies to exercise their discretion within the narrow range of options that are cost-justified and that maximize net benefits -- an implicit supermandate.

Risk Assessment

- The substitute continues an effort to codify science and analytical approach at a level of detail and in terms that are likely to prove inconsistent with the best science in this evolving field. This is especially problematic in the case of provisions tailored to analysis of cancer risks, which are ill-suited to an evaluation of risks related to environmental and natural resource protection, worker safety, or airworthiness.

- The substitute expands statutory risk assessment requirements beyond major rules to any risk assessment that OMB "determines is anticipated to have a substantial impact on a significant public policy or the economy." This could be applied to a new and unbounded category of agency actions that are not rulemakings.

- The requirement that agencies revise risk assessments whenever new and reliable information becomes available threatens an endless analytical process, reopened with each new study. Agency decisions concerning whether and how to revise a risk assessment would provide new fodder for protracted litigation.

Peer Review

- The bill would require peer review in contexts where the process would add significantly to costs and delays of the regulatory process without any foreseeable benefit. For example the requirement that cost-benefit analyses be subject to peer review would add little to the independent review OIRA already performs in our regulatory review process.

- The requirement that peer review be entirely independent of the regulating agency would render well-established and credible peer review mechanisms like EPA's Science Advisory Board unable to perform their assigned functions. This requirement also would make good peer review impossible for those agencies that have a virtual monopoly on experts in highly specialized subject areas (e.g. nuclear safety).

Other

- By codifying certain definitions, procedures, and disclosure requirements that President Clinton has imposed as a matter of discretion in Executive Order 12866, the bill would interfere with the President's prerogatives in overseeing the Executive Branch.

- The bill contains two different, uncoordinated and likely duplicative processes for the review of past regulations, imposing a major burden on agencies (sections 632 Review of rules, and 644(b) Periodic review of rules.).

- The bill imposes its analytical requirements even where the costs of compliance with the regulation have been incurred by the regulated community and no costs can be avoided by selecting a different regulatory option. This is a major burden on the agencies with no conceivable benefit to the public or regulated entities.

- The substitute requires OIRA, with help from OSTP and CEA, to conduct a series of new studies for which there is neither funding nor need.

- There definitions of "major rule" and "substitution risk" should be modified to conform to current practice.

- Exemptions needed:
  - rules to implement international trade agreements or other agreements concerning foreign affairs;
  - rules withdrawing products from market to protect human health, safety or the environment (currently, S. 981 only exempts rules authorizing product entry).

PROPOSED FIXES TO SUBSTITUTE S. 981 (Partial List)

1. Judicial Review:

    a. Change "shall" to "may," and delete reference to peer review (page 24, lines 12-13)

    b. Delete section 627(d) and substitute Glenn-Chafee review language:

> "(d) In any proceeding involving judicial review under Section 706 or under the statute granting the rulemaking authority, the information contained in any cost-benefit analysis or risk assessment required under [sections 623,624,...] may be considered by the court as part of the administrative record as a whole solely for the purpose of determining whether the final agency action is arbitrary, capricious, or an abuse of discretion, or unsupported by substantial evidence where that standard is otherwise provided by law. The adequacy of compliance or the failure to comply with [sections 623,624,625...] shall not be grounds for remanding or invalidating a final agency action, unless the agency entirely failed to perform a required cost-benefit analysis or risk assessment.

    c. Add prejudicial error language to sec. 627(e), to ensure that only errors material to the regulatory outcome are a basis for remand.

2. Implicit Supermandate:

    a. Delete section 622(b) and replace as follows:

> "Nothing in this subchapter shall be construed to alter or modify the substantive standards otherwise applicable to a rulemaking under other statutes, or to limit the agency's range of discretion in construing other statutes."

3. Risk Assessment

    a. Delete section 624(a)(1)(A)(ii), which broadens applicability risk assessment beyond rulemaking.

    b. Delete the requirement in section 624(d) requiring public notice of intent to perform a risk assessment

    c. Delete section 624(c)(2) to prevent unending cycle of revision, or clarify that new studies must only be considered if they are reasonably available before the agency prepares the initial risk assessment.

    d. Exclude from the coverage of section 624 those major rules that are not premised on the outcome of a risk assessment.

4. Peer Review

    a. Delete cost benefit analysis from coverage of requirement for peer review (section 625,

line 3,4)

b. Modify section 625 line 14 so that peer review participants are independent of the "program office," rather than independent of the "agency."

c. Clarify that only one round of peer review is required, and that it should be performed during the comment period on the proposal.

5. Other

a. Narrow definitions, procedures and disclosure provisions to increase Presidential discretion.

- Delete section 641 definitional constraints on what the President may review

- Modify section 643, public disclosure requirements, so that the President has maximum flexibility (concerning the scope and timing of disclosure, for example), and so that the integrity of deliberative process is maintained.

b. Regarding "look back" reviews, delete section 644(b) (duplicates review of rules section). In section 632, change cycle of review from 5 to 10 years (page 29, line 19 and page 38, line 13).

c. Modify both "lookback" and post-promulgation analysis requirements (section 623(f)(2) to exclude rules where the costs of compliance have been substantially incurred.

d. Delete section 628 guidelines, interagency coordination, and research and section 629 Risk based priorities study. Alternatively, make these requirements contingent on the availability of appropriations.

e. Definitions:

Delete "...in reasonably quantifiable costs" from page 5 lines 14,15.

- substitution risk: inset word "unavoidably" on page 8 line 19 ("...to result **unavoidably** from...")

- modify section 621(J) to exclude a rule: "that authorizes **or bars** the introduction into commerce, or recognizes **or cancels recognition of** the marketable status of, a product."

- add exemption from definition of rule for rules related to international trade.

Document No. _____

WHITE HOUSE STAFFING MEMORANDUM

DATE: 3/3 ACTION/CONCURRENCE/COMMENT DUE BY: Immediate

SUBJECT: Reg Reform Strategy

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☑	☐	McCURRY	☐	☑
BOWLES	☑	☐	McGINTY	☐	☐
McLARTY	☐	☐	NASH	☐	☐
PODESTA	☑	☐	RADD	☐	☐
MATHEWS	☑	☐	REED	☐	☐
RAINES	☑	☐	RUFF	☑	☐
BLUMENTHAL	☐	☐	SMITH	☐	☐
BERGER	☐	☐	SOSNIK	☑	☐
ECHAVESTE	☑	☐	SPERLING	☐	☐
EMANUEL	☑	☐	STREETT	☐	☐
GIBBONS	☐	☐	TARULLO	☐	☐
STEIN	☑	☐	VERVEER	☐	☐
IBARRA	☐	☐	WALDMAN	☐	☐
KLAIN	☐	☐	YELLEN	☐	☐
LEWIS	☐	☐	BEGALA	☑	☐
LINDSEY	☐	☐	_____	☐	☐
MARSHALL	☐	☐	_____	☐	☐
			_____	☐	☐

REMARKS: Please advise

RESPONSE:

Staff Secretary
Ext. 6-2702

THE WHITE HOUSE

WASHINGTON

March 2, 1998

MEMORANDUM FOR THE PRESIDENT

THROUGH: GENE SPERLING

FROM: SALLY KATZEN

SUBJECT: Regulatory Reform Legislation

This memorandum seeks your guidance on the Administration position on S. 981, the Thompson-Levin regulatory reform bill.

ACTION-FORCING EVENT: On Thursday, March 5, the Senate Governmental Affairs Committee will be holding a markup on the bill. We currently have several serious concerns with the bill. Your advisors all agree that the Administration should register our views before the markup. The number and tenor of the objections we present will depend on your preferred strategy and end game.

BACKGROUND. Senators Levin and Thompson have been working over the past 18 months on a regulatory reform bill that seeks to avoid some of the excesses in the Dole regulatory reform bill, which we defeated three times in the 104th Congress and which proved a rallying point for many of our constituencies in the 1996 election.

The most recent version of S. 981, revised after informal consultation with agencies and White House offices, responded to a number of our previous concerns. There are, however, significant problems remaining in the bill even as revised. We believe that some of these flaws could be fixed to our satisfaction; others may not. Several agencies believe that even if all of these flaws are fixed, this bill in any form will add significant administrative burdens that will interfere with their ability to issue regulations to protect health, safety, and the environment, including some of your major initiatives.

Labor unions, environmental organizations, and other public interest groups are adamantly opposed to any bill of this type -- even if moderate or benign -- and have presented this as a significant test of our credibility in protecting public health and the environment. For all of these groups, defeat of this bill is a high priority. By contrast, the business community has consistently pushed for a regulatory reform bill and is prepared to accept any version that essentially codifies your executive order governing review of regulations by OMB, although they have been disappointed by the number of concessions that Thompson has made to gain Levin's support.

The congressional politics of the issue are problematic. Levin is a moderate, is well-respected on

issues of administrative law, and is perceived as unlikely to support a bill that would adversely affect health, safety, or environmental regulations. He has attracted as co-sponsors Senators Glenn, Rockefeller and Robb. Senator Daschle feels that he has held Levin back to avoid a division in the Democratic caucus, but that he cannot do so much longer. There are at least four Democrats on the committee (led by Senators Torricelli and Durbin), and others in the Senate as a whole, who want to fight because they believe it is a good issue for Democrats and because they are under strong pressure from environmental, labor, and public interest groups. In the House, S. 981 is likely to divide Democrats along the very fault lines that emerged in the fast-track debate.

The Republican politics are also complex. The most conservative wing of the party is ideologically wedded to a far stronger version of regulatory reform legislation than Thompson has developed with Levin, and may want to preserve regulatory reform as an issue to use against Democrats. Other Republicans are willing to enact a moderate bill in order to deliver something for their constituents in this Congress.

Your advisors believe that it is likely that if the bill reaches the floor with Senator Daschle's support, it would pass the Senate with as many as 70 votes. It is generally thought the House would then send it to your desk as passed by the Senate (although House leadership will likely face pressure from the right to make the bill more extreme).

There are three options that your advisors have been discussing. They all presuppose that we will oppose the bill unless our concerns are met.

Option 1. Present a set of "high-bar" proposals that we know Levin and Thompson are unlikely to accept.

Pros: This would attempt to satisfy the expectations of labor, environmental, and public interest groups on an issue that these groups have identified as their highest priority.

Cons: This would diminish the likelihood that we can negotiate needed changes if the bill moves forward despite our strong opposition, and we could be presented with a veto-proof bill that is more burdensome than we would otherwise have been able to negotiate. Also, if the drafters fix a few of our criticisms, we run the risk of appearing to be negotiating in bad faith.

Option 2. Set forth a list of the changes to address the major concerns that the agencies and White House offices agree on.

Pros: This approach would be well received by Levin and Thompson, avoid positioning you as an opponent of any reform, and substantially improve the bill.

Cons: This will disappoint labor, environmental, and public interest groups. This approach also presents the risk that Levin and Thompson will accept only some of our changes, leaving major concerns unaddressed while depriving us of a principled ground for opposition.

Option 3. Set forth an expanded set of changes that go beyond those in Option 2. Not all of these changes would be essential to a signable bill, but the bar would not be as high as in Option 1.

Pros: This approach would give us the negotiating room to insist on the changes in Option 2 as our bottom line. This additional negotiating room will enhance our credibility with the groups in opposition, even if they would have us ask for more.

Cons: They could pick and choose among our suggestions but avoid meeting our most important concerns. This would allow them to trumpet their willingness to compromise, while casting us as unreasonable if we continue in our opposition. By raising the bar higher than Option 2, a final acceptable bill would look like more of a loss than it actually is.

We understand that Senator Daschle has given Senator Levin a number of changes which are essentially a subset of our Option 2 list. We further understand that Daschle would ask Levin to work with us to incorporate our changes in the bill. Senator Daschle will likely support Levin even if all of his own changes are not made. Senator Daschle would either favor Option 2 or 3.

DECISION

____ Option 1 **____ Option 2** **____ Option 3** **____ Let's Discuss**

Attached is a brief statement of the major concerns we would seek to address under Option 2.

S. 981 -- REGULATORY IMPROVEMENT ACT OF 1998 (Substitute)

Summary Statement of Administration Position: In S. 981, Senators Levin and Thompson have made a thoughtful, good faith effort to draft comprehensive regulatory reform legislation. The substitute bill issued earlier this month contains significant improvements over last summer's draft. We applaud this effort. While the substitute is responsive to many of our concerns, there are still serious issues remaining. One of the problems with comprehensive legislation is that so many different kinds of rulemaking are affected. We want to be sure that any new law improves the regulatory system, and does not impair -- by creating more paperwork, more red tape, and more delay- - agencies' ability to do their jobs. We are interested in working with the Congress to see if we can find the common ground.

OVERVIEW OF MAJOR AGENCY CONCERNS

Below we have distilled from agency comments the most serious and legitimate concerns. Proposed fixes follow. It bears emphasis, however, that agencies are concerned not only with the specific, major issues noted below, but with the total burden imposed by those and other provisions in the bill. Most agencies believe that this bill is unnecessary -- from their own rulemaking perspective it is certainly unwanted -- and will only add to the time, resources, and difficulties that currently attend rulemaking.

Judicial Review

- The judicial review provisions raise the prospect of tactical litigation over errors that were not material to the outcome of a particular rulemaking. This risk is compounded by the mandate that courts "shall" remand or invalidate regulations whenever an agency fails to perform the required analysis, the failure to specify that remand or invalidation is appropriate only where the agency "wholly" fails to perform the analysis, or the elimination of any judicial discretion to uphold a rule where an asserted error is not prejudicial to the outcome of the rulemaking.

Implicit Supermandate

- The bill would likely be construed to narrow the range of discretion available to agencies under their existing statutory mandates to protect human health, safety, or the environment. The purported "savings clause," providing that its terms not "be construed to supersede any requirement for rulemaking or opportunity for judicial review," exacerbates this risk. Many statutes permit agencies to promulgate more protective standards than those that would meet S. 981's analytical benchmarks (benefits justify costs, net benefits are maximized, and the rule is the most cost-effective option). But this authority often is conferred in terms that cannot be deemed a "requirement for rulemaking." Accordingly, courts may well reconcile any ambiguity in existing regulatory statutes to the policies in S. 981. This reading would compel agencies to exercise their discretion within the narrow range of options that are cost-justified and that maximize net benefits -- an implicit supermandate.

Risk Assessment

- The substitute continues an effort to codify science and analytical approach at a level of detail and in terms that are likely to prove inconsistent with the best science in this evolving field. This is especially problematic in the case of provisions tailored to analysis of cancer risks, which are ill-suited to an evaluation of risks related to environmental and natural resource protection, worker safety, or airworthiness.

- The substitute expands statutory risk assessment requirements beyond major rules to any risk assessment that OMB "determines is anticipated to have a substantial impact on a significant public policy or the economy." This could be applied to a new and unbounded category of agency actions that are not rulemakings.

- The requirement that agencies revise risk assessments whenever new and reliable information becomes available threatens an endless analytical process, reopened with each new study. Agency decisions concerning whether and how to revise a risk assessment would provide new fodder for protracted litigation.

Peer Review

- The bill would require peer review in contexts where the process would add significantly to costs and delays of the regulatory process without any foreseeable benefit. For example the requirement that cost-benefit analyses be subject to peer review would add little to the independent review OIRA already performs in our regulatory review process.

- The requirement that peer review be entirely independent of the regulating agency would render well-established and credible peer review mechanisms like EPA's Science Advisory Board unable to perform their assigned functions. This requirement also would make good peer review impossible for those agencies that have a virtual monopoly on experts in highly specialized subject areas (e.g. nuclear safety).

Other

- By codifying certain definitions, procedures, and disclosure requirements that President Clinton has imposed as a matter of discretion in Executive Order 12866, the bill would interfere with the President's prerogatives in overseeing the Executive Branch.

- The bill contains two different, uncoordinated and likely duplicative processes for the review of past regulations, imposing a major burden on agencies (sections 632 Review of rules, and 644(b) Periodic review of rules.).

- The bill imposes its analytical requirements even where the costs of compliance with the regulation have been incurred by the regulated community and no costs can be avoided by selecting a different regulatory option. This is a major burden on the agencies with no conceivable benefit to the public or regulated entities.

- The substitute requires OIRA, with help from OSTP and CEA, to conduct a series of new studies for which there is neither funding nor need.

- There definitions of "major rule" and "substitution risk" should be modified to conform to current practice.

- Exemptions needed:
  - rules to implement international trade agreements or other agreements concerning foreign affairs;
  - rules withdrawing products from market to protect human health, safety or the environment (currently, S. 981 only exempts rules authorizing product entry).

PROPOSED FIXES TO SUBSTITUTE S. 981 (Partial List)

1. Judicial Review:

    a. Change "shall" to "may," and delete reference to peer review (page 24, lines 12-13)

    b. Delete section 627(d) and substitute Glenn-Chafee review language:

> "(d) In any proceeding involving judicial review under Section 706 or under the statute granting the rulemaking authority, the information contained in any cost-benefit analysis or risk assessment required under [sections 623,624,...] may be considered by the court as part of the administrative record as a whole solely for the purpose of determining whether the final agency action is arbitrary, capricious, or an abuse of discretion, or unsupported by substantial evidence where that standard is otherwise provided by law. The adequacy of compliance or the failure to comply with [sections 623,624,625...] shall not be grounds for remanding or invalidating a final agency action, unless the agency entirely failed to perform a required cost-benefit analysis or risk assessment.

    c. Add prejudicial error language to sec. 627(e), to ensure that only errors material to the regulatory outcome are a basis for remand.

2. Implicit Supermandate:

    a. Delete section 622(b) and replace as follows:

> "Nothing in this subchapter shall be construed to alter or modify the substantive standards otherwise applicable to a rulemaking under other statutes, or to limit the agency's range of discretion in construing other statutes."

3. Risk Assessment

    a. Delete section 624(a)(1)(A)(ii), which broadens applicability risk assessment beyond rulemaking.

    b. Delete the requirement in section 624(d) requiring public notice of intent to perform a risk assessment

    c. Delete section 624(c)(2) to prevent unending cycle of revision, or clarify that new studies must only be considered if they are reasonably available before the agency prepares the initial risk assessment.

    d. Exclude from the coverage of section 624 those major rules that are not premised on the outcome of a risk assessment.

4. Peer Review

    a. Delete cost benefit analysis from coverage of requirement for peer review (section 625,

line 3,4)

b. Modify section 625 line 14 so that peer review participants are independent of the "program office," rather than independent of the "agency."

c. Clarify that only one round of peer review is required, and that it should be performed during the comment period on the proposal.

5. Other

a. Narrow definitions, procedures and disclosure provisions to increase Presidential discretion.

- Delete section 641 definitional constraints on what the President may review

- Modify section 643, public disclosure requirements, so that the President has maximum flexibility (concerning the scope and timing of disclosure, for example), and so that the integrity of deliberative process is maintained.

b. Regarding "look back" reviews, delete section 644(b) (duplicates review of rules section). In section 632, change cycle of review from 5 to 10 years (page 29, line 19 and page 38, line 13).

c. Modify both "lookback" and post-promulgation analysis requirements (section 623(f)(2) to exclude rules where the costs of compliance have been substantially incurred.

d. Delete section 628 guidelines, interagency coordination, and research and section 629 Risk based priorities study. Alternatively, make these requirements contingent on the availability of appropriations.

e. Definitions:

Delete "...in reasonably quantifiable costs" from page 5 lines 14,15.

- substitution risk: inset word "unavoidably" on page 8 line 19 ("...to result **unavoidably** from...")

- modify section 621(J) to exclude a rule: "that authorizes **or bars** the introduction into commerce, or recognizes **or cancels recognition of** the marketable status of, a product."

- add exemption from definition of rule for rules related to international trade.

Document No. _____

WHITE HOUSE STAFFING MEMORANDUM

DATE: 3/3 ACTION/CONCURRENCE/COMMENT DUE BY: Immediate

SUBJECT: Reg Reform Strategy

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☑	☐	McCURRY	☐	☑
BOWLES	☑	☐	McGINTY	☐	☐
McLARTY	☐	☐	NASH	☐	☐
PODESTA	☑	☐	RADD	☐	☐
MATHEWS	☑	☐	REED	☐	☐
RAINES	☑	☐	RUFF	☑	☐
BLUMENTHAL	☐	☐	SMITH	☐	☐
BERGER	☐	☐	SOSNIK	☑	☐
ECHAVESTE	☑	☐	SPERLING	☐	☐
EMANUEL	☑	☐	STREETT	☐	☐
GIBBONS	☐	☐	TARULLO	☐	☐
STEIN	☑	☐	VERVEER	☐	☐
IBARRA	☐	☐	WALDMAN	☐	☐
KLAIN	☐	☐	YELLEN	☐	☐
LEWIS	☐	☐	BEGALA	☑	☐
LINDSEY	☐	☐	_____	☐	☐
MARSHALL	☐	☐	_____	☐	☐
			_____	☐	☐

REMARKS: Please advise

RESPONSE:

Katie = Opt 3

Staff Secretary
Ext. 6-2702

THE WHITE HOUSE

WASHINGTON

March 2, 1998

MEMORANDUM FOR THE PRESIDENT

THROUGH: GENE SPERLING

FROM: SALLY KATZEN

SUBJECT: Regulatory Reform Legislation

This memorandum seeks your guidance on the Administration position on S. 981, the Thompson-Levin regulatory reform bill.

ACTION-FORCING EVENT: On Thursday, March 5, the Senate Governmental Affairs Committee will be holding a markup on the bill. We currently have several serious concerns with the bill. Your advisors all agree that the Administration should register our views before the markup. The number and tenor of the objections we present will depend on your preferred strategy and end game.

BACKGROUND. Senators Levin and Thompson have been working over the past 18 months on a regulatory reform bill that seeks to avoid some of the excesses in the Dole regulatory reform bill, which we defeated three times in the 104th Congress and which proved a rallying point for many of our constituencies in the 1996 election.

The most recent version of S. 981, revised after informal consultation with agencies and White House offices, responded to a number of our previous concerns. There are, however, significant problems remaining in the bill even as revised. We believe that some of these flaws could be fixed to our satisfaction; others may not. Several agencies believe that even if all of these flaws are fixed, this bill in any form will add significant administrative burdens that will interfere with their ability to issue regulations to protect health, safety, and the environment, including some of your major initiatives.

Labor unions, environmental organizations, and other public interest groups are adamantly opposed to any bill of this type -- even if moderate or benign -- and have presented this as a significant test of our credibility in protecting public health and the environment. For all of these groups, defeat of this bill is a high priority. By contrast, the business community has consistently pushed for a regulatory reform bill and is prepared to accept any version that essentially codifies your executive order governing review of regulations by OMB, although they have been disappointed by the number of concessions that Thompson has made to gain Levin's support.

The congressional politics of the issue are problematic. Levin is a moderate, is well-respected on

issues of administrative law, and is perceived as unlikely to support a bill that would adversely affect health, safety, or environmental regulations. He has attracted as co-sponsors Senators Glenn, Rockefeller and Robb. Senator Daschle feels that he has held Levin back to avoid a division in the Democratic caucus, but that he cannot do so much longer. There are at least four Democrats on the committee (led by Senators Torricelli and Durbin), and others in the Senate as a whole, who want to fight because they believe it is a good issue for Democrats and because they are under strong pressure from environmental, labor, and public interest groups. In the House, S. 981 is likely to divide Democrats along the very fault lines that emerged in the fast-track debate.

The Republican politics are also complex. The most conservative wing of the party is ideologically wedded to a far stronger version of regulatory reform legislation than Thompson has developed with Levin, and may want to preserve regulatory reform as an issue to use against Democrats. Other Republicans are willing to enact a moderate bill in order to deliver something for their constituents in this Congress.

Your advisors believe that it is likely that if the bill reaches the floor with Senator Daschle's support, it would pass the Senate with as many as 70 votes. It is generally thought the House would then send it to your desk as passed by the Senate (although House leadership will likely face pressure from the right to make the bill more extreme).

There are three options that your advisors have been discussing. They all presuppose that we will oppose the bill unless our concerns are met.

Option 1. Present a set of "high-bar" proposals that we know Levin and Thompson are unlikely to accept.

Pros: This would attempt to satisfy the expectations of labor, environmental, and public interest groups on an issue that these groups have identified as their highest priority.

Cons: This would diminish the likelihood that we can negotiate needed changes if the bill moves forward despite our strong opposition, and we could be presented with a veto-proof bill that is more burdensome than we would otherwise have been able to negotiate. Also, if the drafters fix a few of our criticisms, we run the risk of appearing to be negotiating in bad faith.

Option 2. Set forth a list of the changes to address the major concerns that the agencies and White House offices agree on.

Pros: This approach would be well received by Levin and Thompson, avoid positioning you as an opponent of any reform, and substantially improve the bill.

Cons: This will disappoint labor, environmental, and public interest groups. This approach also presents the risk that Levin and Thompson will accept only some of our changes, leaving major concerns unaddressed while depriving us of a principled ground for opposition.

Option 3. Set forth an expanded set of changes that go beyond those in Option 2. Not all of these changes would be essential to a signable bill, but the bar would not be as high as in Option 1.

Pros: This approach would give us the negotiating room to insist on the changes in Option 2 as our bottom line. This additional negotiating room will enhance our credibility with the groups in opposition, even if they would have us ask for more.

Cons: They could pick and choose among our suggestions but avoid meeting our most important concerns. This would allow them to trumpet their willingness to compromise, while casting us as unreasonable if we continue in our opposition. By raising the bar higher than Option 2, a final acceptable bill would look like more of a loss than it actually is.

We understand that Senator Daschle has given Senator Levin a number of changes which are essentially a subset of our Option 2 list. We further understand that Daschle would ask Levin to work with us to incorporate our changes in the bill. Senator Daschle will likely support Levin even if all of his own changes are not made. Senator Daschle would either favor Option 2 or 3.

DECISION

____ Option 1 ____ Option 2 ____ Option 3 ____ Let's Discuss

Attached is a brief statement of the major concerns we would seek to address under Option 2.

S. 981 -- REGULATORY IMPROVEMENT ACT OF 1998 (Substitute)

Summary Statement of Administration Position: In S. 981, Senators Levin and Thompson have made a thoughtful, good faith effort to draft comprehensive regulatory reform legislation. The substitute bill issued earlier this month contains significant improvements over last summer's draft. We applaud this effort. While the substitute is responsive to many of our concerns, there are still serious issues remaining. One of the problems with comprehensive legislation is that so many different kinds of rulemaking are affected. We want to be sure that any new law improves the regulatory system, and does not impair -- by creating more paperwork, more red tape, and more delay- - agencies' ability to do their jobs. We are interested in working with the Congress to see if we can find the common ground.

OVERVIEW OF MAJOR AGENCY CONCERNS

Below we have distilled from agency comments the most serious and legitimate concerns. Proposed fixes follow. It bears emphasis, however, that agencies are concerned not only with the specific, major issues noted below, but with the total burden imposed by those and other provisions in the bill. Most agencies believe that this bill is unnecessary -- from their own rulemaking perspective it is certainly unwanted -- and will only add to the time, resources, and difficulties that currently attend rulemaking.

Judicial Review

- The judicial review provisions raise the prospect of tactical litigation over errors that were not material to the outcome of a particular rulemaking. This risk is compounded by the mandate that courts "shall" remand or invalidate regulations whenever an agency fails to perform the required analysis, the failure to specify that remand or invalidation is appropriate only where the agency "wholly" fails to perform the analysis, or the elimination of any judicial discretion to uphold a rule where an asserted error is not prejudicial to the outcome of the rulemaking.

Implicit Supermandate

- The bill would likely be construed to narrow the range of discretion available to agencies under their existing statutory mandates to protect human health, safety, or the environment. The purported "savings clause," providing that its terms not "be construed to supersede any requirement for rulemaking or opportunity for judicial review," exacerbates this risk. Many statutes permit agencies to promulgate more protective standards than those that would meet S. 981's analytical benchmarks (benefits justify costs, net benefits are maximized, and the rule is the most cost-effective option). But this authority often is conferred in terms that cannot be deemed a "requirement for rulemaking." Accordingly, courts may well reconcile any ambiguity in existing regulatory statutes to the policies in S. 981. This reading would compel agencies to exercise their discretion within the narrow range of options that are cost-justified and that maximize net benefits -- an implicit supermandate.

Risk Assessment

- The substitute continues an effort to codify science and analytical approach at a level of detail and in terms that are likely to prove inconsistent with the best science in this evolving field. This is especially problematic in the case of provisions tailored to analysis of cancer risks, which are ill-suited to an evaluation of risks related to environmental and natural resource protection, worker safety, or airworthiness.

- The substitute expands statutory risk assessment requirements beyond major rules to any risk assessment that OMB "determines is anticipated to have a substantial impact on a significant public policy or the economy." This could be applied to a new and unbounded category of agency actions that are not rulemakings.

- The requirement that agencies revise risk assessments whenever new and reliable information becomes available threatens an endless analytical process, reopened with each new study. Agency decisions concerning whether and how to revise a risk assessment would provide new fodder for protracted litigation.

Peer Review

- The bill would require peer review in contexts where the process would add significantly to costs and delays of the regulatory process without any foreseeable benefit. For example the requirement that cost-benefit analyses be subject to peer review would add little to the independent review OIRA already performs in our regulatory review process.

- The requirement that peer review be entirely independent of the regulating agency would render well-established and credible peer review mechanisms like EPA's Science Advisory Board unable to perform their assigned functions. This requirement also would make good peer review impossible for those agencies that have a virtual monopoly on experts in highly specialized subject areas (e.g. nuclear safety).

Other

- By codifying certain definitions, procedures, and disclosure requirements that President Clinton has imposed as a matter of discretion in Executive Order 12866, the bill would interfere with the President's prerogatives in overseeing the Executive Branch.

- The bill contains two different, uncoordinated and likely duplicative processes for the review of past regulations, imposing a major burden on agencies (sections 632 Review of rules, and 644(b) Periodic review of rules.).

- The bill imposes its analytical requirements even where the costs of compliance with the regulation have been incurred by the regulated community and no costs can be avoided by selecting a different regulatory option. This is a major burden on the agencies with no conceivable benefit to the public or regulated entities.

- The substitute requires OIRA, with help from OSTP and CEA, to conduct a series of new studies for which there is neither funding nor need.

- There definitions of "major rule" and "substitution risk" should be modified to conform to current practice.

- Exemptions needed:
  - rules to implement international trade agreements or other agreements concerning foreign affairs;
  - rules withdrawing products from market to protect human health, safety or the environment (currently, S. 981 only exempts rules authorizing product entry).

PROPOSED FIXES TO SUBSTITUTE S. 981 (Partial List)

1. Judicial Review:

    a. Change "shall" to "may," and delete reference to peer review (page 24, lines 12-13)

    b. Delete section 627(d) and substitute Glenn-Chafee review language:

> "(d) In any proceeding involving judicial review under Section 706 or under the statute granting the rulemaking authority, the information contained in any cost-benefit analysis or risk assessment required under [sections 623,624,...] may be considered by the court as part of the administrative record as a whole solely for the purpose of determining whether the final agency action is arbitrary, capricious, or an abuse of discretion, or unsupported by substantial evidence where that standard is otherwise provided by law. The adequacy of compliance or the failure to comply with [sections 623,624,625...] shall not be grounds for remanding or invalidating a final agency action, unless the agency entirely failed to perform a required cost-benefit analysis or risk assessment.

    c. Add prejudicial error language to sec. 627(e), to ensure that only errors material to the regulatory outcome are a basis for remand.

2. Implicit Supermandate:

    a. Delete section 622(b) and replace as follows:

> "Nothing in this subchapter shall be construed to alter or modify the substantive standards otherwise applicable to a rulemaking under other statutes, or to limit the agency's range of discretion in construing other statutes."

3. Risk Assessment

    a. Delete section 624(a)(1)(A)(ii), which broadens applicability risk assessment beyond rulemaking.

    b. Delete the requirement in section 624(d) requiring public notice of intent to perform a risk assessment

    c. Delete section 624(c)(2) to prevent unending cycle of revision, or clarify that new studies must only be considered if they are reasonably available before the agency prepares the initial risk assessment.

    d. Exclude from the coverage of section 624 those major rules that are not premised on the outcome of a risk assessment.

4. Peer Review

    a. Delete cost benefit analysis from coverage of requirement for peer review (section 625,

line 3,4)

b. Modify section 625 line 14 so that peer review participants are independent of the "program office," rather than independent of the "agency."

c. Clarify that only one round of peer review is required, and that it should be performed during the comment period on the proposal.

5. Other

a. Narrow definitions, procedures and disclosure provisions to increase Presidential discretion.

- Delete section 641 definitional constraints on what the President may review

- Modify section 643, public disclosure requirements, so that the President has maximum flexibility (concerning the scope and timing of disclosure, for example), and so that the integrity of deliberative process is maintained.

b. Regarding "look back" reviews, delete section 644(b) (duplicates review of rules section). In section 632, change cycle of review from 5 to 10 years (page 29, line 19 and page 38, line 13).

c. Modify both "lookback" and post-promulgation analysis requirements (section 623(f)(2) to exclude rules where the costs of compliance have been substantially incurred.

d. Delete section 628 guidelines, interagency coordination, and research and section 629 Risk based priorities study. Alternatively, make these requirements contingent on the availability of appropriations.

e. Definitions:

Delete "...in reasonably quantifiable costs" from page 5 lines 14,15.

- substitution risk: inset word "unavoidably" on page 8 line 19 ("...to result **unavoidably** from...")

- modify section 621(J) to exclude a rule: "that authorizes **or bars** the introduction into commerce, or recognizes **or cancels recognition of** the marketable status of, a product."

- add exemption from definition of rule for rules related to international trade.

Bristine - Option 2

Polestra - 3, if it makes it a real decision

Stein - Option 2

Entre - 3

OMB - 2

JD - Prefers 3

Document No. _____

WHITE HOUSE STAFFING MEMORANDUM

DATE: 3/3 ACTION/CONCURRENCE/COMMENT DUE BY: Immediate

SUBJECT: Reg Reform Strategy

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☑	☐	McCURRY	☐	☑
BOWLES	☑	☐	McGINTY	☑	☐
McLARTY	☐	☐	NASH	☐	☐
PODESTA	☑	☐	RADD	☐	☐
MATHEWS	☑	☐	REED	☐	☐
RAINES	☑	☐	RUFF	☑	☐
BLUMENTHAL	☐	☐	SMITH	☐	☐
BERGER	☐	☐	SOSNIK	☑	☐
ECHAVESTE	☑	☐	SPERLING	☐	☐
EMANUEL	☑	☐	STREETT	☐	☐
GIBBONS	☐	☐	TARULLO	☐	☐
STEIN	☑	☐	VERVEER	☐	☐
IBARRA	☐	☐	WALDMAN	☐	☐
KLAIN	☐	☐	YELLEN	☐	☐
LEWIS	☐	☐	BEGALA	☑	☐
LINDSEY	☐	☐	_____	☐	☐
MARSHALL	☐	☐	_____	☐	☐
			_____	☐	☐

REMARKS: Please advise

RESPONSE:

Staff Secretary
Ext. 6-2702

254660
'98 FEB 27 PM3:

THE WHITE HOUSE

WASHINGTON

February 27, 1998

RECOMMENDED TELEPHONE CALL

TO:	Loreen Gephardt, Mother of Minority Leader Richard Gephardt, D-MO
DATE:	February 28, 1998
RECOMMENDED BY:	Larry Stein LS
PURPOSE:	To wish Mrs. Gephardt a happy 90th birthday.
BACKGROUND:	Loreen Gephardt, mother of Minority Leader Richard Gephardt, turned ninety years old Saturday, February 21. Congressman Gephardt and his family will gather Saturday, February 28 in St. Louis to celebrate the occasion. The Congressman would appreciate a call from the President to his mother to wish her a happy birthday.
CONTACT PERSON AND PHONE NUMBER(S):	Loreen Gephardt (314) 849-8131
DATE OF SUBMISSION:	February 27, 1998

To: Phil

Fr: Rahm

"I am fine with option 2"

rec'd 3/4/98
1:20 pm

Document No. _____

WHITE HOUSE STAFFING MEMORANDUM

DATE: 3/3 ACTION/CONCURRENCE/COMMENT DUE BY: Immediate

SUBJECT: Reg Reform Strategy

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☑	☐	McCURRY	☐	☑
BOWLES	☑	☐	McGINTY	☐	☐
McLARTY	☐	☐	NASH	☐	☐
PODESTA	☑	☐	RADD	☐	☐
MATHEWS	☑	☐	REED	☐	☐
RAINES	☑	☐	RUFF	☑	☐
BLUMENTHAL	☐	☐	SMITH	☐	☐
BERGER	☐	☐	SOSNIK	☑	☐
ECHAVESTE	☑	☐	SPERLING	☐	☐
EMANUEL	☑	☐	STREETT	☐	☐
GIBBONS	☐	☐	TARULLO	☐	☐
STEIN	☑	☐	VERVEER	☐	☐
IBARRA	☐	☐	WALDMAN	☐	☐
KLAIN	☐	☐	YELLEN	☐	☐
LEWIS	☐	☐	BEGALA	☑	☐
LINDSEY	☐	☐	_____	☐	☐
MARSHALL	☐	☐	_____	☐	☐
			_____	☐	☐

REMARKS: Please advise

RESPONSE: I am fine w- option 2

Staff Secretary
Ext. 6-2702

THE WHITE HOUSE

WASHINGTON

March 2, 1998

MEMORANDUM FOR THE PRESIDENT

THROUGH: GENE SPERLING

FROM: SALLY KATZEN

SUBJECT: Regulatory Reform Legislation

This memorandum seeks your guidance on the Administration position on S. 981, the Thompson-Levin regulatory reform bill.

ACTION-FORCING EVENT: On Thursday, March 5, the Senate Governmental Affairs Committee will be holding a markup on the bill. We currently have several serious concerns with the bill. Your advisors all agree that the Administration should register our views before the markup. The number and tenor of the objections we present will depend on your preferred strategy and end game.

BACKGROUND. Senators Levin and Thompson have been working over the past 18 months on a regulatory reform bill that seeks to avoid some of the excesses in the Dole regulatory reform bill, which we defeated three times in the 104th Congress and which proved a rallying point for many of our constituencies in the 1996 election.

The most recent version of S. 981, revised after informal consultation with agencies and White House offices, responded to a number of our previous concerns. There are, however, significant problems remaining in the bill even as revised. We believe that some of these flaws could be fixed to our satisfaction; others may not. Several agencies believe that even if all of these flaws are fixed, this bill in any form will add significant administrative burdens that will interfere with their ability to issue regulations to protect health, safety, and the environment, including some of your major initiatives.

Labor unions, environmental organizations, and other public interest groups are adamantly opposed to any bill of this type -- even if moderate or benign -- and have presented this as a significant test of our credibility in protecting public health and the environment. For all of these groups, defeat of this bill is a high priority. By contrast, the business community has consistently pushed for a regulatory reform bill and is prepared to accept any version that essentially codifies your executive order governing review of regulations by OMB, although they have been disappointed by the number of concessions that Thompson has made to gain Levin's support.

The congressional politics of the issue are problematic. Levin is a moderate, is well-respected on

issues of administrative law, and is perceived as unlikely to support a bill that would adversely affect health, safety, or environmental regulations. He has attracted as co-sponsors Senators Glenn, Rockefeller and Robb. Senator Daschle feels that he has held Levin back to avoid a division in the Democratic caucus, but that he cannot do so much longer. There are at least four Democrats on the committee (led by Senators Torricelli and Durbin), and others in the Senate as a whole, who want to fight because they believe it is a good issue for Democrats and because they are under strong pressure from environmental, labor, and public interest groups. In the House, S. 981 is likely to divide Democrats along the very fault lines that emerged in the fast-track debate.

The Republican politics are also complex. The most conservative wing of the party is ideologically wedded to a far stronger version of regulatory reform legislation than Thompson has developed with Levin, and may want to preserve regulatory reform as an issue to use against Democrats. Other Republicans are willing to enact a moderate bill in order to deliver something for their constituents in this Congress.

Your advisors believe that it is likely that if the bill reaches the floor with Senator Daschle's support, it would pass the Senate with as many as 70 votes. It is generally thought the House would then send it to your desk as passed by the Senate (although House leadership will likely face pressure from the right to make the bill more extreme).

There are three options that your advisors have been discussing. They all presuppose that we will oppose the bill unless our concerns are met.

Option 1. Present a set of "high-bar" proposals that we know Levin and Thompson are unlikely to accept.

Pros: This would attempt to satisfy the expectations of labor, environmental, and public interest groups on an issue that these groups have identified as their highest priority.

Cons: This would diminish the likelihood that we can negotiate needed changes if the bill moves forward despite our strong opposition, and we could be presented with a veto-proof bill that is more burdensome than we would otherwise have been able to negotiate. Also, if the drafters fix a few of our criticisms, we run the risk of appearing to be negotiating in bad faith.

Option 2. Set forth a list of the changes to address the major concerns that the agencies and White House offices agree on.

Pros: This approach would be well received by Levin and Thompson, avoid positioning you as an opponent of any reform, and substantially improve the bill.

Cons: This will disappoint labor, environmental, and public interest groups. This approach also presents the risk that Levin and Thompson will accept only some of our changes, leaving major concerns unaddressed while depriving us of a principled ground for opposition.

Option 3. Set forth an expanded set of changes that go beyond those in Option 2. Not all of these changes would be essential to a signable bill, but the bar would not be as high as in Option 1.

Pros: This approach would give us the negotiating room to insist on the changes in Option 2 as our bottom line. This additional negotiating room will enhance our credibility with the groups in opposition, even if they would have us ask for more.

Cons: They could pick and choose among our suggestions but avoid meeting our most important concerns. This would allow them to trumpet their willingness to compromise, while casting us as unreasonable if we continue in our opposition. By raising the bar higher than Option 2, a final acceptable bill would look like more of a loss than it actually is.

We understand that Senator Daschle has given Senator Levin a number of changes which are essentially a subset of our Option 2 list. We further understand that Daschle would ask Levin to work with us to incorporate our changes in the bill. Senator Daschle will likely support Levin even if all of his own changes are not made. Senator Daschle would either favor Option 2 or 3.

DECISION

____ Option 1 ____ Option 2 ____ Option 3 ____ Let's Discuss

Attached is a brief statement of the major concerns we would seek to address under Option 2.

S. 981 -- REGULATORY IMPROVEMENT ACT OF 1998 (Substitute)

Summary Statement of Administration Position: In S. 981, Senators Levin and Thompson have made a thoughtful, good faith effort to draft comprehensive regulatory reform legislation. The substitute bill issued earlier this month contains significant improvements over last summer's draft. We applaud this effort. While the substitute is responsive to many of our concerns, there are still serious issues remaining. One of the problems with comprehensive legislation is that so many different kinds of rulemaking are affected. We want to be sure that any new law improves the regulatory system, and does not impair -- by creating more paperwork, more red tape, and more delay- - agencies' ability to do their jobs. We are interested in working with the Congress to see if we can find the common ground.

OVERVIEW OF MAJOR AGENCY CONCERNS

Below we have distilled from agency comments the most serious and legitimate concerns. Proposed fixes follow. It bears emphasis, however, that agencies are concerned not only with the specific, major issues noted below, but with the total burden imposed by those and other provisions in the bill. Most agencies believe that this bill is unnecessary -- from their own rulemaking perspective it is certainly unwanted -- and will only add to the time, resources, and difficulties that currently attend rulemaking.

Judicial Review

- The judicial review provisions raise the prospect of tactical litigation over errors that were not material to the outcome of a particular rulemaking. This risk is compounded by the mandate that courts "shall" remand or invalidate regulations whenever an agency fails to perform the required analysis, the failure to specify that remand or invalidation is appropriate only where the agency "wholly" fails to perform the analysis, or the elimination of any judicial discretion to uphold a rule where an asserted error is not prejudicial to the outcome of the rulemaking.

Implicit Supermandate

- The bill would likely be construed to narrow the range of discretion available to agencies under their existing statutory mandates to protect human health, safety, or the environment. The purported "savings clause," providing that its terms not "be construed to supersede any requirement for rulemaking or opportunity for judicial review," exacerbates this risk. Many statutes permit agencies to promulgate more protective standards than those that would meet S. 981's analytical benchmarks (benefits justify costs, net benefits are maximized, and the rule is the most cost-effective option). But this authority often is conferred in terms that cannot be deemed a "requirement for rulemaking." Accordingly, courts may well reconcile any ambiguity in existing regulatory statutes to the policies in S. 981. This reading would compel agencies to exercise their discretion within the narrow range of options that are cost-justified and that maximize net benefits -- an implicit supermandate.

Risk Assessment

- The substitute continues an effort to codify science and analytical approach at a level of detail and in terms that are likely to prove inconsistent with the best science in this evolving field. This is especially problematic in the case of provisions tailored to analysis of cancer risks, which are ill-suited to an evaluation of risks related to environmental and natural resource protection, worker safety, or airworthiness.

- The substitute expands statutory risk assessment requirements beyond major rules to any risk assessment that OMB "determines is anticipated to have a substantial impact on a significant public policy or the economy." This could be applied to a new and unbounded category of agency actions that are not rulemakings.

- The requirement that agencies revise risk assessments whenever new and reliable information becomes available threatens an endless analytical process, reopened with each new study. Agency decisions concerning whether and how to revise a risk assessment would provide new fodder for protracted litigation.

Peer Review

- The bill would require peer review in contexts where the process would add significantly to costs and delays of the regulatory process without any foreseeable benefit. For example the requirement that cost-benefit analyses be subject to peer review would add little to the independent review OIRA already performs in our regulatory review process.

- The requirement that peer review be entirely independent of the regulating agency would render well-established and credible peer review mechanisms like EPA's Science Advisory Board unable to perform their assigned functions. This requirement also would make good peer review impossible for those agencies that have a virtual monopoly on experts in highly specialized subject areas (e.g. nuclear safety).

Other

- By codifying certain definitions, procedures, and disclosure requirements that President Clinton has imposed as a matter of discretion in Executive Order 12866, the bill would interfere with the President's prerogatives in overseeing the Executive Branch.

- The bill contains two different, uncoordinated and likely duplicative processes for the review of past regulations, imposing a major burden on agencies (sections 632 Review of rules, and 644(b) Periodic review of rules.).

- The bill imposes its analytical requirements even where the costs of compliance with the regulation have been incurred by the regulated community and no costs can be avoided by selecting a different regulatory option. This is a major burden on the agencies with no conceivable benefit to the public or regulated entities.

- The substitute requires OIRA, with help from OSTP and CEA, to conduct a series of new studies for which there is neither funding nor need.

- There definitions of "major rule" and "substitution risk" should be modified to conform to current practice.

- Exemptions needed:
  - rules to implement international trade agreements or other agreements concerning foreign affairs;
  - rules withdrawing products from market to protect human health, safety or the environment (currently, S. 981 only exempts rules authorizing product entry).

PROPOSED FIXES TO SUBSTITUTE S. 981 (Partial List)

1. Judicial Review:

    a. Change "shall" to "may," and delete reference to peer review (page 24, lines 12-13)

    b. Delete section 627(d) and substitute Glenn-Chafee review language:

> "(d) In any proceeding involving judicial review under Section 706 or under the statute granting the rulemaking authority, the information contained in any cost-benefit analysis or risk assessment required under [sections 623,624,...] may be considered by the court as part of the administrative record as a whole solely for the purpose of determining whether the final agency action is arbitrary, capricious, or an abuse of discretion, or unsupported by substantial evidence where that standard is otherwise provided by law. The adequacy of compliance or the failure to comply with [sections 623,624,625...] shall not be grounds for remanding or invalidating a final agency action, unless the agency entirely failed to perform a required cost-benefit analysis or risk assessment.

    c. Add prejudicial error language to sec. 627(e), to ensure that only errors material to the regulatory outcome are a basis for remand.

2. Implicit Supermandate:

    a. Delete section 622(b) and replace as follows:

> "Nothing in this subchapter shall be construed to alter or modify the substantive standards otherwise applicable to a rulemaking under other statutes, or to limit the agency's range of discretion in construing other statutes."

3. Risk Assessment

    a. Delete section 624(a)(1)(A)(ii), which broadens applicability risk assessment beyond rulemaking.

    b. Delete the requirement in section 624(d) requiring public notice of intent to perform a risk assessment

    c. Delete section 624(c)(2) to prevent unending cycle of revision, or clarify that new studies must only be considered if they are reasonably available before the agency prepares the initial risk assessment.

    d. Exclude from the coverage of section 624 those major rules that are not premised on the outcome of a risk assessment.

4. Peer Review

    a. Delete cost benefit analysis from coverage of requirement for peer review (section 625,

line 3,4)

b. Modify section 625 line 14 so that peer review participants are independent of the "program office," rather than independent of the "agency."

c. Clarify that only one round of peer review is required, and that it should be performed during the comment period on the proposal.

5. Other

a. Narrow definitions, procedures and disclosure provisions to increase Presidential discretion.

- Delete section 641 definitional constraints on what the President may review

- Modify section 643, public disclosure requirements, so that the President has maximum flexibility (concerning the scope and timing of disclosure, for example), and so that the integrity of deliberative process is maintained.

b. Regarding "look back" reviews, delete section 644(b) (duplicates review of rules section). In section 632, change cycle of review from 5 to 10 years (page 29, line 19 and page 38, line 13).

c. Modify both "lookback" and post-promulgation analysis requirements (section 623(f)(2) to exclude rules where the costs of compliance have been substantially incurred.

d. Delete section 628 guidelines, interagency coordination, and research and section 629 Risk based priorities study. Alternatively, make these requirements contingent on the availability of appropriations.

e. Definitions:

Delete "...in reasonably quantifiable costs" from page 5 lines 14,15.

- substitution risk: inset word "unavoidably" on page 8 line 19 ("...to result **unavoidably** from...")

- modify section 621(J) to exclude a rule: "that authorizes **or bars** the introduction into commerce, or recognizes **or cancels recognition of** the marketable status of, a product."

- add exemption from definition of rule for rules related to international trade.

257766
2014

THE WHITE HOUSE

WASHINGTON

'98 MAR 25 PM1:23

March 25, 1998

3-31-98 OK as per Paul Caplan DBV

ACTION

MEMORANDUM FOR THE PRESIDENT

FROM: SAMUEL BERGER

SUBJECT: Revised Response to PM Prodi on Prisoner Transfer

3-31-98

Purpose

To provide a revised response to PM Prodi on a prisoner transfer request.

Background

In early March you signed a letter to Prime Minister Prodi regarding Italy's request to the Attorney General for the transfer of Silvia Baraldini, convicted in 1982 of criminal conspiracy involving a robbery resulting in fatalities. You indicated in the letter that Janet would be in touch with appropriate Italian authorities to explore whether mutually agreeable conditions could be reached for a prisoner transfer.

Prior to the delivery of your letter, Justice determined that Italy was not in a position to provide the necessary assurances that Baraldini would serve more than 1-3 additional years in prison if transferred. Janet's staff has recommended against a transfer. On balance, I agree given the nature of the crime in question. As a result, delivery of the letter you signed on March 9 would create false optimism as to the outcome of the AG review.

I recommend you still respond directly to Prime Minister Prodi on the Baraldini case. The revised response notes your personal attention to the case and indicates that Janet will respond directly in a number of weeks. This will occur after your letter is received, but prior to your May 6 meeting with Prodi.

RECOMMENDATION

That you sign the letter to PM Prodi at Tab A.

cc: Vice President
Chief of Staff

Attachment
Tab A Letter to Prime Minister Prodi

THE WHITE HOUSE

WASHINGTON

Dear Romano:

Thank you for your letter concerning Silvia Baraldini. I understand your government has delivered a letter to Attorney General Reno concerning possible conditions for a prisoner transfer and that there have been discussions between appropriate officials of our two governments.

I also understand the sensitivity of this case in Italy. At the same time, given that the crime with which Ms. Baraldini was involved resulted in loss of life, there are also serious concerns in this country about the case. I have asked Attorney General Reno to respond directly to your government's request in the next few weeks.

In the meantime, I look forward to your upcoming visit to Washington.

Sincerely,

His Excellency Dr. Romano Prodi
President of the Council of Ministers
of the Republic of Italy
Rome

THE WHITE HOUSE

WASHINGTON

March 9, 1998

Dear Romano:

Thank you for your letter concerning Silvia Baraldini. I understand your government has delivered a letter to Attorney General Reno concerning possible conditions for a prisoner transfer under the applicable international agreements. Given the nature of the issues involved, we will respond to the request through that channel.

I understand the sensitivity of this case in Italy. At the same time, given that the crime for which Ms. Baraldini was convicted involved the loss of life, there are serious concerns in this country also. My Attorney General will be in touch with the appropriate authorities in Italy to explore whether mutually agreeable conditions can be worked out for a prisoner transfer.

In the meantime, I look forward to your upcoming visit to Washington.

Sincerely,

Bill Clinton

His Excellency Dr. Romano Prodi
President of the Council of Ministers
of the Italian Republic
Rome

NATIONAL SECURITY COUNCIL
DISTRIBUTION RECEIPT

LOG 9800297
DATE 09 MAR 98

SUBJECT: RESPONSE TO ITALIAN PM PRODI RE PRISONER TRANSFER
DOCUMENT CLASSIFICATION: CONFIDENTIAL

EXTERNAL DISTRIBUTION:	DATE	TIME	SIGNATURE
EXECUTIVE SECRETARIAT FOR THE EXECUTIVE SECRETARY ROOM 7224 2201 C STREET, NW DEPARTMENT OF STATE	_____	_____	_____

PRINT LAST NAME: _____

COPY: 1

DECLASSIFIED
E.O. 13526
White House Guidelines, May 16, 2017
By M NARA, Date 1/9/21
2019-0990-S

DATE, TIME, SIGN THE RECEIPT AND RETURN TO: NSC RECORDS MGNT, ROOM 379 OEOB

255492

0297

THE WHITE HOUSE

WASHINGTON

March 7, 1998

3-9-98

ACTION

MEMORANDUM FOR THE PRESIDENT

FROM: SAMUEL BERGER

SUBJECT: Response to Italian Prime Minister Prodi

Purpose

To respond to a letter from Prime Minister Prodi regarding a prisoner transfer.

Background

PM Prodi wrote calling to your attention the fact that Italy has submitted its fifth request to the Attorney General for the transfer under the Strasbourg Convention of Italian citizen Silvia Baraldini, jailed since 1982 for criminal conspiracy.

The case is complicated because Baraldini's crime involved loss of life, she has not shown remorse, and Italy has indicated she will be released within one or two years of her transfer. Justice is prepared to consider seriously a possible compromise. In light of Prodi's visit in May and the delicate state of our relations, I have asked Janet to keep me informed of her considerations.

The response advises the Prime Minister that the matter remains under review and that a response will be forthcoming from the Attorney General to the Italian Minister of Justice.

RECOMMENDATION

That you sign the letter to PM Prodi at Tab A.

Attachments
Tab A Letter to PM Prodi
Tab b Incoming correspondence

cc: Vice President
Chief of Staff

AMBASCIATA D'ITALIA
WASHINGTON, D. C.

C0C021

January 13, 1998

Dear Ms. Sapiro,

To complete your files, I am pleased to transmit the original of the letter to President Clinton from the President of the Council of Ministers regarding the case of Ms. Silvia Baraldini.

You will recall that the text of the message and unofficial translation were transmitted on December 22 last.

Sincerely yours,

Luca Ferrari
Counselor

Ms. Miriam Sapiro
National Security Council
Old Executive Office Building
Washington, DC 20560

N26 11:4

Ambasciata d' Italia
Il Ministro

011877

December 22, 1997

Dear Mr. President,

I have the honor to convey the text of a letter from the President of the Council of Ministers of Italy, the Hon. Romano Prodi, regarding the case of Silvia Baraldini and the possibility of her transfer to Italy under the terms of the Strasbourg Convention.

In so doing, please allow me to take this occasion also to extend my personal best wishes for the approaching holiday season.

With the sentiments of my highest esteem and consideration, I remain,

Sincerely yours,

Antonio Puri Purini

Antonio Puri Purini
Chargé d'Affaires, a.i.

The Honorable
William J. Clinton
President of the United States of America

Il Presidente
del Consiglio dei Ministri

UCD/ 4315

Roma, 19 December 1997

Dear Bill,

It is with a heavy heart that I submit again to your attention (after our conversation at the White House with your former Ambassador to Rome Bartholomew) the troublesome case of Silvia Baraldini, the Italian citizen sentenced 16 years ago in the United States to 43 years for terrorist activities.

The Italian Government's fifth recourse, under the terms of the Strasbourg Convention, to obtain her transfer to a jail in our country, is presently being considered by the US Attorney General's office, after the rejection last July of the appeal by a Parole Board in Danbury, Connecticut.

Far from me, or anybody else in my government, to question the judicial system of your country or pass judgement on the severity of the sentence (Silvia Baraldini's crimes were serious even though she has no blood on her hands). I feel bound to stress once again, however, the humanitarian aspects of her case: a serious bout with cancer during her detention; the loss of her sister killed by terrorists in Africa; an ailing mother in her eighties in Rome.

H. E. William J. CLINTON
President of the United States
of America
WASHINGTON

JAN 6 11:41

Il Presidente
del Consiglio dei Ministri

I feel moreover that the Baraldini's case has assumed disproportionate dimensions. Due also to the unusual attention paid by our mass media and by the Italian and European Parliaments, public opinion in my country is following this affair with an ever increasing emotional partecipation. What I used to consider, beyond its merits, a typical "leftist" cause, in the last two years has been embraced by political leaders of the Center and of the Right, such as the chairman of the Republican Party Giorgio La Malfa and the retired NATO General Luigi Calligaris, now a M.E.P. with the Forza Italia Party.

Is a Christmas miracle to be expected?

Yours sincerely

Happy Christmas

Romano Prodi

AMBASCIATA D'ITALIA
WASHINGTON, D. C.

C00321

January 13, 1998

Dear Ms. Sapiro,

To complete your files, I am pleased to transmit the original of the letter to President Clinton from the President of the Council of Ministers regarding the case of Ms. Silvia Baraldini.

You will recall that the text of the message and unofficial translation were transmitted on December 22 last.

Sincerely yours,

Luca Ferrari
Counselor

Ms. Miriam Sapiro
National Security Council
Old Executive Office Building
Washington, DC 20560

(2611)

Ambasciata d' Italia
Il Ministro

011877

December 22, 1997

Dear Mr. President,

I have the honor to convey the text of a letter from the President of the Council of Ministers of Italy, the Hon. Romano Prodi, regarding the case of Silvia Baraldini and the possibility of her transfer to Italy under the terms of the Strasbourg Convention.

In so doing, please allow me to take this occasion also to extend my personal best wishes for the approaching holiday season.

With the sentiments of my highest esteem and consideration, I remain,

Sincerely yours,

Antonio Puri Purini

Antonio Puri Purini
Chargé d'Affaires, a.i.

The Honorable
William J. Clinton
President of the United States of America

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20504

0297 Red

March 4, 1998

ACTION

MEMORANDUM FOR SAMUEL R. BERGER

THROUGH: DONALD K. BANDLER

FROM: K. C. BROWN

SUBJECT: Presidential Response to Italian PM on a Prisoner Transfer

Italian Prime Minister Prodi wrote the President calling attention to the fact that Italy is submitting its fifth request for transfer under the terms of the Strasbourg Convention on Prisoner Exchanges for Silvia Baraldini, an Italian citizen currently in the 16th year of a forty-year sentence for criminal conspiracy.

Italy formally presented this request to AG Reno on January 30th. Justice has serious concerns about transferring her because she was involved in a violent crime involving loss of life for which she has not demonstrated remorse. Italy, however, has indicated that she would serve only another year or two after the transfer. Nonetheless, Justice is prepared to discuss possible conditions for a transfer with Italian authorities. We are not obligated to grant release under the Strasbourg Convention. State advises that a refusal would be an irritant, but not a setback to the bilateral relationship. You discussed the matter with the Attorney General on February 26, without reference to a particular outcome.

The response advises the Prime Minister that the matter remains under review, and that a response will be forthcoming from the Attorney General to the Italian Minister of Justice.

Concurrence by: Newell Highsmith per NH

RECOMMENDATION

That you sign the memo to the President at Tab I

Attachments
Tab I Memo to the President
Tab A Letter to PM Prodi
Tab B Incoming correspondence

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20504

February 11, 1998

ACTION

MEMORANDUM FOR SAMUEL R. BERGER

THROUGH: DONALD K. BANDLER

FROM: K. C. BROWN KCB

SUBJECT: Presidential Response to Italian PM on a Prisoner Transfer

Italian Prime Minister Prodi wrote the President calling attention to the fact that Italy is submitting its fifth request for transfer under the terms of the Strasbourg Convention on Prisoner Exchanges for Silvia Baraldini, an Italian citizen currently in the 16th year of a forty-year sentence for criminal conspiracy.

Italy formally presented this request to AG Reno on January 30th. Justice has serious concerns about transferring her because she was involved in a violent crime involving loss of life for which she has not demonstrated remorse. Italy, however, has indicated that she would serve only another year or two after the transfer. Nonetheless, Justice is prepared to discuss possible conditions for a transfer with Italian authorities. We are not obligated to grant release under the Strasbourg Convention. State advises that a refusal would be an irritant, but not a setback to the bilateral relationship.

Not a judicial matter

~~Given the longstanding practice not to comment on judicial matters,~~ the response advises the Prime Minister that the matter remains under review, and that a response will be forthcoming from the Attorney General to the Italian Minister of Justice.

Concurrence by: Newell Highsmith NH

RECOMMENDATION

That you sign the memo to the President at Tab I

In light of SRB's recent discussion with AF on this topic, recommend we modify package as noted. SRB raised without reference to a particular outcome.

Attachments
Tab I Memo to the President
Tab A Letter to PM Prodi
Tab B Incoming correspondence

THE WHITE HOUSE

WASHINGTON

ACTION

MEMORANDUM FOR THE PRESIDENT

FROM: SAMUEL BERGER

SUBJECT: Letter from Italian Prime Minister Prodi

Purpose

Respond to Prime Minister Prodi regarding a prisoner transfer.

Background

PM Prodi calls your attention to Italy's fifth request to the Attorney General for the transfer under the Strasbourg Convention of Italian citizen Silvia Baraldini, jailed since 1982 for criminal conspiracy.

~~Given the longstanding practice not to comment on judicial matters,~~ The response advises the Prime Minister that the matter remains under review and that a response will be forthcoming from the Attorney General to the Italian Minister of Justice.

RECOMMENDATION

That you sign the letter to PM Prodi at Tab A.

Attachments
Tab A Response to PM Prodi
Tab B Original correspondence

(3) In light of Prodi's visit in May and the delicate state of our relations, I have ~~raised this directly with Janet with a view~~ asked Janet to keep me informed on her considerations. ~~Janet indicates some willingness~~

(1) ~~to~~ The case is complicated because ~~of the~~ Baraldini's crime involved ~~fatalities~~ loss of life, she has not shown remorse, and

cc: Vice President
Chief of Staff

Italy has indicated she will be released within 16 years after transfer.

(2) Janet is prepared to ... possible

THE WHITE HOUSE

WASHINGTON

ACTION

MEMORANDUM FOR THE PRESIDENT

FROM: SAMUEL BERGER

SUBJECT: ~~Response to~~ Letter from Italian Prime Minister Prodi

Purpose

~~To~~ Respond to ~~a letter from~~ Prime Minister Prodi regarding a prisoner transfer.

Background

PM Prodi ~~wrote~~ calling to your attention ~~the fact that~~ to Italy's ~~has submitted its~~ fifth request to the Attorney General for the transfer under the Strasbourg Convention of Italian citizen Silvia Baraldini, jailed since 1982 for criminal conspiracy.

Given the longstanding practice not to comment on judicial matters, the response advises the Prime Minister that the matter remains under review and that a response will be forthcoming from the Attorney General to the Italian Minister of Justice.

RECOMMENDATION

That you sign the letter to PM Prodi at Tab A

Attachments
Tab A Response to PM Prodi
Tab B Original correspondence

cc: Vice President
Chief of Staff

THE WHITE HOUSE

WASHINGTON

Dear Romano:

Thank you for your letter concerning ~~the prisoner transfer for~~ Silvia Baraldini. I understand your government has delivered a letter to Attorney General Reno concerning possible conditions for a prisoner transfer under the applicable international agreements. Given the nature of the issues involved, we ~~shall~~ will ~~be~~ respond~~ing~~ to the request through that channel.

I ~~can~~ understand also the sensitivity of this case in Italy. At the same time, given that the crime for which Ms. Baraldini was convicted involved the loss of life, there are serious concerns in this country ~~about the prospect of her early release from prison~~. My Attorney General will be in touch with the appropriate authorities in Italy to explore whether mutually agreeable conditions can be worked out for a prisoner transfer.

In the meantime, I look forward to your upcoming visit to Washington.

Sincerely,

His Excellency Dr. Romano Prodi
President of the Council of Ministers
of the Italian Republic
Rome