BEYOND STRUCTURE AND PROCESS:
THE EARLY INSTITUTIONALIZATION OF REGULATORY REVIEW:

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Abstract:

The Office of Information and Regulatory Affairs (OIRA) these days has a bipartisan fan base, but as regulatory review was being established as a presidential power in the 1970s and early 1980s, this was not the case. This paper draws extensively on archival documents to examine the origins of regulatory review in an effort to understand how it established itself as a constant of presidential management. Successful institutionalization is not simply a matter of structure and process – that is, adding a box to an organizational flow chart – but requires resources ranging from staff, autonomy, political leverage, and expertise.

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"The single constant in the American experience with regulation has been controversy," concludes one historian of that experience (McCraw 1984, 301). And while many of the rules of political life seemed to have been suspended in 2016, this one remained evergreen.

Indeed, regulation was one of the few substantive issues to have received much airtime during the Trump-Clinton presidential campaign. The Obama administration had moved aggressively, especially after 2010, to lock in policy changes – in immigration, energy, environmental protection, labor, health care, banking, education -- by promulgating new rules rather than by passing new laws. But Obama's successor, Donald Trump, touted his long experience in the private sector to claim particular insight into the burdens of government regulation. His platform, and an early executive order, promised that he would require two regulations to be stricken from the books for every one added.[1] Other Trump orders directed departments and agencies to examine and seek to weaken high-profile rules already on the books. Trump aide Stephen Bannon claimed the president would achieve the "deconstruction of the administrative state."

Whether or not one accepted that last claim – some suggested Trump's actions were "more flash than substance" (Restuccia 2017) – all this brought a sometimes occluded presidential staff resource back into the limelight. The Office of Information and Regulatory Analysis (OIRA), a statutorily-created bureau within the Office of Management and Budget, has since 1981 been tasked by presidents with vetting the regulatory agenda and the draft rules proposed by the executive branch agencies, seeking to ensure that the benefits of regulations outweigh their costs. As regulatory issues gained salience in the early days of the Trump administration, Sen. James Lankford (R-OK) said OIRA-ians were

[1] See Executive Order 13771. How exactly the "2-for-1" swap was not entirely clear in the EO's text, nor even in the preliminary guidance issued by OMB thereafter. But that very confusion seemed likely to deter agencies from proposing new regulations.

"working in the salt mines," because "very few people see them, but they are extremely important." OIRA itself, he called "the most important agency that no one has ever heard of" (Devaney 2017).[2]

Indeed, these days OIRA is the rare example of a government agency with a bipartisan fan-base. Cass Sunstein, who headed OIRA during the first term of the Obama administration, calls it "the guardian of a well-functioning administrative process" (2014, 1841) – and most observers would agree, even where they have widely varying views on what that process should achieve, as well as on the desirable scope and scale of government regulation itself. According to longtime OIRA observer William West (2005), the agency serves as a technocratic "ideologue for efficiency." A conference marking the agency's 30th anniversary largely agreed that "the nation is well served by the existence of an institution in the White House that attempts to infuse some degree of rationality in the process of continuing changes in regulatory policy" (Pierce 2011, 4).[3] Critiques of the office offered at the conference tended to argue OIRA was too weak, not too strong (e.g., DeMuth 2011; Dudley 2011).

As a result contemporary treatments of OIRA often focus on ways it could be extended or duplicated. Some argue its purview over regulation should be extended to the output of the independent regulatory commissions, for example (see, e.g., Pierce 2011, speaking for many). Or that Congress should create a legislative regulation office to emulate it (Wallach and Kosar 2016). Or, indeed, that every state should create its own OIRA -- enhancing the analytic power of regulatory review to tamp down local rentseeking (Glaeser and Sunstein 2014).

An interesting commonality of these recommendations is that they are largely structural and process-driven. That is, they start on the basis that transplanting federal regulatory review into another venue –a state capitol, say – will have the same effect that OIRA has now. If we create a new box on the

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[2] It's worth noting that OIRA plays a far more salient role in legal scholarship – see the exhaustive references in Pasachoff (2016), who rightly points out that other parts of OMB matter too.

[3] See the special issue of *Administrative Law Review*, volume 63, compiling the contributions to this conference, as well as Arbuckle (2011); DeMuth and Ginsburg (1986); Dudley and Warren (2015); Kagan (2001); Pasachoff (2016); Sunstein (2014). Wiseman (2009) argues that even Congress should like OIRA.

organization chart, create a review process that flows through it, rational cost-benefit analysis – "good government" – will result.

Structure and process surely matter to outcomes (Moe 1989). But they are likely not the whole answer to the key question, "Why does OIRA work?" Scholars of public administration and of the regulatory process suggest that other things matter too. John Graham and Paul Noe (2017), for instance, note the need to move "beyond process excellence." Stuart Shapiro and Debra Borie-Holtz (2013, 20) note the "indeterminate effect" of procedural controls.

In short, resources of various kinds must supplement structure and process. Those might include money, personnel, expertise, culture, leverage in bureaucratic politics, even the weight of history (OMB dates to the 1920s). Dan Carpenter (e.g., 2001, 2010) has tracked generally how bureaucratic agencies build their reputation, protect their autonomy, and thus enhance their power; more specific to OIRA and regulatory review, Bolton et al (2016) track how organizational capacity molds effectiveness, and William West (2009) urges scholars to look "inside the black box" (see too Shapiro 2011).

The present project takes that mandate seriously, examining the origins of regulatory review to understand how it established itself as a constant of presidential management. How did OIRA succeed as a going – seemingly permanent – concern? After all, most early scholarly – and, it should be said, pro-regulatory -- takes on the agency were not positive (O'Reilly and Brown 1987, 422).

With a tip of the hat to West's (2005) take on "the institutionalization of regulatory review," this paper takes the story backward, to its "early institutionalization." It excavates the genesis of regulatory review efforts dating to Lyndon Johnson through Nixon's Quality of Life Review to the early days of OIRA under Ronald Reagan. The narrative is grounded in extensive archival research that traces the choices that led to OIRA's organizational development and its place in the presidential branch. Structure is shown to be necessary -- but not sufficient -- for presidential management of the regulatory state.

I. Thinking about Institutionalization

A week after the 1984 election OMB deputy director Joseph Wright was thinking about President Reagan's second term, and beyond: "Get it institutionalized or it will not survive in Washington, D.C."[4]

What does "getting it institutionalized" mean? Broader research along these lines focuses on the formal (often, Constitutional) rules constraining and empowering presidents, as well as the duties and rights of the office as shaped by historical precedents of law, prerogative, and circumstance (Corwin 1957; Pious 1979). These pattern presidential behavior by channeling the formal and informal "recurring interactions in organizations" that serve as another commonly-used definition of "institution" (Hult and Walcott 1990, 34), echoing Huntington (1968, 12): "Institutions are stable, valued, recurring patterns of behavior." Wright himself meant creating organizations whose job it would be to perform the managerial tasks he wanted to prioritize, and would be expected by others to do so, such that they would outlast the Reagan presidency and become 'normal' for future administrations.

Institutionalization, then, "is the process by which organizations and procedures acquire value and stability" (Huntington 1968, 12, 15), specifically by gaining "adaptability, complexity, autonomy and coherence." This is similar to Nelson Polsby's (1968, 145) well-known definition of the phenomenon as applied to the U.S. Congress: an organization that is institutionalized is well bounded (again, has autonomy), internally complex, and universalistic (i.e., following impersonal rules rather than favoritism or nepotism). Carpenter's work on the Food and Drug Administration, in discussing "reputation and power institutionalized," notes that reputation arises from beliefs about the "capacities, roles, and obligations of an organization" among that organizations' "audience networks" (2010, 298, 45; and see Carpenter 2001 for additional discussion of organizational autonomy.)

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[4] Joe Wright, "Status of Management Reviews - FY 86 budget," November 12, 1984. National Archives [NARA], Record Group [RG] 51, Entry UD-UP 200, OMB Director's Office Files, Box 3, [Management/Budget Presentations - March - December 1984].

These characteristics do not all apply perfectly to regulatory review – a process embodied in various organizational forms and legal authorizations from the 1970s to the present -- but they help us think about what resources are necessary for a process to obtain "value and stability." The narrative below draws out a number of these:

- Organizational capacity, in terms of funding, staffers, and expertise or competence;
- Organizational leverage, in terms of legal or *de facto* ability to set the terms of action (or to prevent action from occurring),[5] and to prevent others from seeking to perform the same functions – this could come from various sources, including congruence with presidential preferences;
- Organizational complexity, such that proprietary internal processes are established in a way that would make it difficult to shift functions to another actor; and
- Organizational reputation, flowing from "skill and will" (as Neustadt put it with regards to presidential behavior [1990, 50]) for using these resources well – which becomes a resource in its own right.

How do these play out in the extended history of presidents' efforts to build their capacity for regulatory review? It is to that history we now turn.

II. Regulation and Regulatory Review

Presidential interest in influencing regulation goes back to the genesis of regulatory agencies. In the pre-New Deal period, most regulation was conducted by independent regulatory commissions (IRCs) such as the Interstate Commerce Commission (created in 1887) and the Federal Trade Commission (1914). Congressional delegation of regulatory authority grew dramatically in the 1930s, as the

[5] This is consistent with Robert Dahl's notion of power, where A has power over B if A can get B to do something she would not otherwise do (though also, here, to stop B from doing something she otherwise would do.)

government took more responsibility for various aspects of the economy, including food and drug safety, energy, communications, shipping, and air travel. But the regulatory power of the line agencies rose dramatically with the size and reach of the federal government, expanding the scope of social, as opposed to economic, regulation (Goodman and Wrightson 1987). The Great Society of the 1960s was succeeded by a notable wave of additional rulemaking in the 1970s, extending protections to workers, consumers, and to the environment. But concerns about the effects of regulation – the costs it imposed on business and on the macroeconomy in an era of high inflation – set in nearly as quickly.

The Quality of Life, for Nixon and Ford

Hoping to steal a march on Democrats in advance of the 1972 presidential campaign, Richard Nixon had created the Environmental Protection Agency through a reorganization plan effective in December 1970. At the same time, he was conflicted about what the EPA actually wanted to do. After all, while EPA's budget in fiscal year 1973 was $2.4 billion, OMB estimated that its regulatory actions to that point under the Clean Air Act would result in $65 billion in non-federal spending.[6] The administration set up a series of advisory groups to solicit industry concerns, including a "Quality of Life Committee" in the White House under John Ehrlichman to ensure that "suitable analyses of benefits and costs" were conducted and that regulators consulted with other federal agencies (especially Commerce) concerned with EPA's aggressive rulemaking efforts (Tozzi 2011, 44; Conley 2006, 161-63; Percival 2011).[7]

Cost-benefit analysis of regulation had begun to gain traction in the federal government in the mid-1960s, in conjunction with the Johnson Administration's attempts to ensure cost-effective budget decisions through the Planning, Programming, and Budgeting System (PPBS). The impetus came from

[6] See Office of Management and Budget, Issue Paper: Environmental Protection Agency, 1974 Budget, "Issue #1: Quality of Life Review," n.d., available at http://thecre.com/ombpapers/QualityofLife2.htm

[7] Nixon also created a National Industrial Pollution Control Council via Executive Order 11523.

the Pentagon (Fuchs and Anderson 1987). The Flood Control Act of 1936 had authorized Army Corps of Engineers projects on navigable waters only when the projects' benefits exceeded their costs. An Army analyst (and economics PhD) named Jim Tozzi, who would become a critical bureaucratic entrepreneur in the service of regulatory review (very much in the spirit of Skowronek and Glassman 2007), picked up on a policy paper urging extension of cost-benefit analysis not just to those capital projects but to regulations too.[8] Tozzi, director of the Systems Analysis Group (SAG) working for the Secretary of the Army, pushed his group to do just that, on regulations dealing with such topics as flood plains and reservoir controls.

The Corps was not best pleased with this – and managed to get its allies in Congress to abolish the SAG. But the work done in developing the methods and processes of regulatory cost-benefit analysis would have important spillover effects. Tozzi and his colleagues ultimately moved from the Pentagon to OMB, where Tozzi became chief of the Environment branch in 1972.

This shift intersected with the work of the Ehrlichman committee, which soon tasked OMB with the "Quality of Life" task. This avoided setting up a new organization, which might attract press or congressional attention; and besides, OMB was already concerned with the impact of EPA's regulatory agenda on the presidential program, and on other agencies' budgets.[9] In May 1971, director George Shultz had written to EPA claiming the authority to review – and clear – its regulations (Eads and Fix 1984, 47-48), building on OMB's longstanding authority for coordinating interagency review of budget requests, draft legislation, testimony to Congress, and executive orders.

In October 1971, a brief memorandum from Shultz to department heads across government sought to extend such central clearance to "proposed agency regulations, standards, guidelines and

[8] The paper was written by A. Allan Schmid, a visiting professor from Michigan State University working in the Office of the Secretary of the Army. Author iterview with Jim Tozzi, March 22, 2017. See also Conley (2006, 164) and, for a link to the original paper, Tozzi (2011, 41).

[9] However, according to Tozzi, most of his supervision in this area came from the White House, not OMB; he recalled reporting directly to Domestic Council aides John Whitaker and Richard Fairbanks. Author interview with Jim Tozzi.

similar materials" where those had "a significant impact on the policies, programs, and procedures of other agencies" or "impose significant costs on, or negative benefits to, non-Federal sectors." Analysis had to be accompanied by a "comparison of the expected benefits or accomplishments and the costs (Federal and non-Federal) associated with the alternatives considered."[10]

The memo backed away from giving OMB (or the White House more generally) decision-making power to approve or veto proposed rules. "It was well understood," law professor Robert Percival notes (2011, 2498), "that the President lacked directive authority over agency regulatory decisions." This is because of two important legal facts that have constrained the way presidents have been able to act in this area: the power to promulgate regulations under a given statute is normally delegated to a specific department head, not to the president; and the Administrative Procedure Act dictates a specific process by which regulations are drafted, published, and made effective (for a useful overview see Kerwin 2003).

Even so the Quality of Life Review (QLR), as it became known, was a potentially powerful tool that set the groundwork for future attempts at regulatory review. First, it was conducted by the same personnel who oversaw the budget process, giving OMB sometimes tacit but very real leverage over agency behavior. As Tozzi recalls, linking budget and regulatory outputs "accentuated" the "force of the OMB review": "we made a lot of changes. When a regulation went out of OMB, it was lean and mean" (Tozzi 2011, 48; and as quoted in Twohey 2002, 12).

Second, it included not just formal draft regulations but any document ("standards, guidelines and similar materials") that was part of the regulatory process as well, limiting agencies' ability to do an end-run around the process.

As a result, the "force and depth" of the QLR template was arguably unique (Tozzi 2011, 48).

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[10] Shultz to Heads of Departments and Agencies, "Agency Regulations, Standards, and Guidelines Pertaining to Environmental Quality, Consumer Protection, and Occupational and Public Health and Safety," memo of October 5, 1971, available at http://thecre.com/ombpapers/QualityofLife1.htm

However, its *breadth* was quite constrained. While Shultz's memorandum applied to any regulatory programs pertaining to "environmental quality, consumer protection, and occupational and public health and safety," the EPA was clearly its main target. That agency's assistant administrator later complained that "in practice this requirement has been routinely imposed only on" EPA.[11] The budget examiner for the Food and Drug Administration – in sharp contrast to Tozzi and his colleagues in the Natural Resources Division of OMB – reported that he "simply ignored" the QLR memo (quoted in Eads and Fix 1984, 49). And as the OMB itself later recalled, "The first major institutional involvement of OMB in regulatory matters arose in response to White House concern over the rules jurisdiction granted the then-new EPA… Under OMB direction, EPA was required to give other affected agencies an opportunity to comment on its proposed rules, to review and respond to those comments, and then to submit the entire record of the exchange to OMB for review."[12]

The process pushed EPA towards more analytic rulemaking: to create an internal Office of Planning and Evaluation, and to begin both internal coordination and external consultation far earlier in the regulatory formulation process than had previously been the case (Eads and Fix 1984, 50). Not surprisingly, though, QLR was often contentious. "The reviews themselves reportedly consisted of heated arguments between EPA and the Department of Commerce,… with OMB at times playing a mediating role and at times pressing its own institutional interests" (Eads and Fix 1984, 49). According to EPA the "differential treatment… caused substantial public and Congressional concern and… created some employee morale problems."[13]

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[11] Alvin L. Alm to Jim J. Tozzi, "Interagency Review of EPA Regulations," memo of November 1, 1976, available at http://thecre.com/pdf/QualLifeReview7.PDF. See too Conley (2006, 165); Percival (1991; 2011). Tozzi, in a 2017 interview with the author, agreed that "EPA was right" that it received by far the most attention. "That's a fair criticism." He notes, though, that OMB only had five staff people working on QLR and thus expanding the review was not feasible. See also Tozzi's 2009 interview with the National Archives as part of the Nixon Presidential Materials Project, available at http://thecre.com/video/National_Archive.html .

[12] D. Mathiasen, "Organization and Personnel of the Budget Office," draft report, October 25, 1983, NARA, RG 51, Entry UD-WW 281, Records of Information and Regulatory Affairs, Information Policy Branch, Box 1, [1.01.02 OMB Functions and Organization Statements].

[13] Alm to Tozzi, "Interagency Review of EPA Regulations."

EPA did push back: EPA administrator William Ruckelshaus testified before Congress in 1972 that EOP officials were not imposing decisions upon the agency – "if they were, I would be breaking the law, and I would not function as administrator… if I let them do so." He had told Nixon he would resign if political considerations overruled environmental science (Percival 2011, 2498). Even so Carter EPA administrator Douglas Costle would later tell the president that QLR was used "to control/muzzle the Agency. The issue was politicized, and many environmentalists and our bureaucracy remain highly sensitive."[14] EPA charged that the reviews caused delays that pushed regulations past statutory deadlines; that staff resources wound up "divert[ed]" to the interagency process and away from "direct contact with persons actually affected by the regulations"; and that OMB's "coordinating role… has caused a diffusion of responsibility, transferring a significant degree of control over the regulations from EPA to OMB and subordinate officials in other agencies."[15]

Nixon's early departure from office in August 1974 did not greatly affect QLR, which stayed in place until early 1977. But new President Gerald Ford added another track of regulatory review as well. With inflation still rampant (over 11% in 1974), Congress created the Council on Wage and Price Stability (CWPS) soon after Nixon's resignation.[16] The Council's job was to diagnose and analyze causes of inflation in the economy, and to weigh in on agency behaviors that might have an inflationary impact. In October 1974 Ford announced his "Whip Inflation Now" program, which included a pledge to make CWPS the "watchdog over inflationary costs of all governmental actions" and to require that executive branch policy proposals be subject to "inflation impact statements" that "weighed [their] effect on the Nation."[17] The latter was made effective in November through Executive Order 11821, which required

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[14] Douglas Costle to the President, "Ensuring Sensible Regulation," memo of October 6, 1977. Jimmy Carter Library, Office of the Staff Secretary, Presidential Files, Container 46, [10/11/77 [2]].
[15] John R. Quarles, Jr., acting administrator, to EPA assistant administrators et al., "Termination of the Quality of Life Review," memo of January 25, 1977, available at http://thecre.com/pdf/QualLifeReview8.PDF.
[16] P.L. 93-387. CWPS replaced the Cost of Living Council.
[17] Gerald R. Ford, "Address to a Joint Session of Congress on the Economy," October 8, 1974.

that "major" legislative and regulatory proposals "must be accompanied by a statement which certifies that the inflationary impact of the proposal has been evaluated."

Monitoring these Inflation Impact Statements – which were renamed Economic Impact Statements in late 1976[18] -- was OMB's responsibility. But CWPS, seeing an opportunity to enhance its remit, jumped in as well. Pointing to its statutory responsibility to "review and appraise the various programs, policies, and agencies," CWPS began to prepare analyses of regulatory programs too. CWPS officials also testified at agency hearings as rules were being considered.

All this became part of the public record during the rulemaking process mandated by the Administrative Procedure Act. As such the CWPS side of things did not conflict with QLR, since that interagency process took place *before* proposed rules were published in the first place. There was overlap to the extent that EPA regulations were among those subject to CWPS comment – EPA was still the QLR's main target, though by the end of the Ford administration OMB had, EPA conceded, "recently made efforts to apply the same ground rules to other agencies."[19] And CWPS worked with OMB's Economics and Government Management Division on the impact statements (Percival 2011, 2500).

But CWPS staff did not take part in QLR, which continued to be administered by the budget side of OMB (Eads and Fix 1984, 52; Tozzi 2011, 51). Nor did CWPS have the ability to determine what regulations were "major." James C. Miller III, then a CWPS economist – and later director of OMB – recalled that "I'd call up an agency and say 'we just saw this morning in the Federal Register a regulation you published. We think it is a major rule which requires an IIS. They'd say no. And that was the end of the conversation" (quoted in Fuchs and Anderson 1987, 28).

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[18] EO 11949, issued December 31, 1976.

[19] John Quarles, Jr. (acting administrator, EPA) to Don Crabill (OMB), letter and attached memo of January 25, 1977, available at http://thecre.com/pdf/QualLifeReview8.PDF. For much of the administration, though, EPA still felt "singled out" for QLR attention (Percival 2011, 2500).

Thus by the end of the Ford administration only several dozen rules had received an impact statement. A late 1976 report from CWPS to Ford's Economic Policy Board noted the lack of enthusiasm for the program among regulatory agency decision-makers and the need for "formal directives that require agency compliance" to make the program to work more effectively (Hopkins 2011, 73).

Mr Carter Goes to Washington

"I came to Washington to reorganize a Federal Government which had grown more preoccupied with its own bureaucratic needs than with those of the people," Jimmy Carter recalled in March 1978. "I have often said that the American people are sick and tired of excessive Federal regulation…. As a farmer and small businessman, and later as a governor, I shared this resentment and frustration."[20]

Carter, then, entered office fully on board with what was now a bipartisan effort to review the economic impact of proposed regulations; indeed, six weeks into his presidency he stated bluntly that "one of my Administration's major goals is to free the American people from the burden of over-regulation." Where rules did not "protec[t] the public interest" but instead harmed competition, raised prices, or discouraged private sector innovation, "we will eliminate government regulation."[21]
QLR itself – a low-level but persistent issue for environmentalists during the 1976 campaign – was phased out in early 1977 when EPA decided it should not "be assumed to continue automatically from the previous Administration… Certainly it is unimaginable," the acting EPA director told his subordinates, "that the new Administration will continue the arrangement of having one review system for EPA and different systems for other agencies."[22]

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[20] Jimmy Carter, "Statement on Executive Order 12044," March 23, 1978.
[21] Jimmy Carter, "Airline Industry Regulation Message to the Congress," March 4, 1977.
[22] John R. Quarles, Jr., acting administrator, to EPA assistant administrators et al., "Termination of the Quality of Life Review," memo of January 25, 1977, available at http://thecre.com/pdf/QualLifeReview8.PDF

He was right about that: Carter wanted a bigger system altogether. OMB created a Regulatory Policy and Reports Management Division in October 1977. In August, his OMB director, Bert Lance, had proposed a range of regulatory process reforms, including mandating an agency review of existing regulations with an eye towards sunsetting those that were outmoded; emphasizing "adequate consideration of the consequences of new regulations"; and enhancing public participation in regulatory development.[23]

The administration, led by Charles Schultze, then chair of the Council of Economic Advisers, worked with OMB (notably Stan Morris, on the management side) and CWPS to come up with an executive order implementing "regulatory analysis," with a focus on process rather than on the substance of most regulations. As Schultze briefed the president in October, that phrase was designed "to sever any connections with the much-criticized Economic Impact Statement Program of the Ford Administration."[24]

The new idea – or new version of the old idea -- was to require agencies to prepare a 20-40 page regulatory analysis for all major proposed regulations, to be issued when the rule went out for public comment. (Further, "major" rules would now have to include any regulation that would have an annual effect on the economy of $100 million or more, or cause a major increase in costs or prices for a specific industry or region.)

The Regulatory Analysis (RA) would include the economic impact of the proposed regulation as well as of alternative approaches the agency had considered; those alternatives would also be put out for public comment. An interagency group – which became the Regulatory Analysis Review Group (RARG) – would oversee a supplemental process, for 10-20 selected rules each year,[25] to review the

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[23] Bert Lance to the President, "Improving the Federal Regulatory Process," memo and attached material of August 23, 1977, NARA, RG 51, OMB Office of General Counsel, Executive Order and Proclamation Files 1977-79, Box 4, [EO 12044 (T1-9/78.1)].
[24] Charlie Schultze to the President, "Economic Impact Analysis," memo of October 7, 1977. Jimmy Carter Library [JCL], Office of the Staff Secretary, Presidential Files, Container 46, [10/11/77 [2]].
[25] Rules for review would be chosen by a steering committee made up of CEA, OMB, Treasury, Labor, Commerce, and one member, rotating quarterly, from the regulatory agencies.

adequacy of the agency's analysis. RARG would be chaired by CEA and include OMB as well as Treasury, Commerce, Labor, and key regulatory agencies.[26] CWPS would provide staff support. The group would not be able to delay or order changes in the regulation, but its review would be part of the open record. This would provide some public pressure, while meeting the strictures of the Administrative Procedure Act. And without some formal check, Schultze warned that agencies would simply conduct "pro-forma" analysis, "generating paperwork but having no impact on the quality of regulations."

Schultze defended the process as one that was consistent with Carter's desire to insure a cost-effective approach to regulation, but also one that could bring the regulatory agencies themselves on board as "part of the process." He hoped they would, over time, "improve their own economic analysis"; if "they see this review solely as a device for Treasury, CEA, OMB, Labor and Commerce to strong-arm them on particular regulations, the system won't work." The process was meant to be "peer review" rather than "the antagonistic and generally unproductive public filings" by CWPS under the Ford program. For those who might criticize it as an attack on environmental quality, or labor standards, Schultze reassured the president that making the review part of the public comment process should not delay the issuance of needed regulations. And again, he stressed, "this group has *no authority* to order changes in regulations."[27]

That didn't mean the agencies were happy about the plan. Carter had asked Lance to survey the departments, and most of them followed the classic bureaucratic tactic of seeking to kill the proposal with kindness. They "agreed with the *intent* of the guidelines" (DOD) and thought "*on balance*, … guidelines are useful tools" (DOT), but despite their "general agreement" (Treasury) and "support" (Commerce) noted "this is major effort, not one to be dealt with quickly or cursorily: the draft guidelines are inadequate" (Commerce) and "additional burdens might be placed on an already burdensome

[26] Agriculture, Defense, Energy, HEW, Interior, Justice, Transportation, EPA.
[27] Schultze to the President, "Economic Impact Analysis," October 7, 1977. Emphasis in original.

system" (Labor), indeed, "the workload generated [should]… be minimized so as not to outweigh the intended benefits" (Treasury).[28] In general disagreements continued to be raised, and issues re-opened, long past the projected October 1977 issuance date (Eads and Fix 1984, 56-57). EPA in particular kept up the fight, urging that there be limits on how many of its rules could be reviewed and that it get more representation in choosing the rules chosen for the RARG. EPA administrator Douglas Costle argued too that the "complex process" would in fact delay rules "much longer" than the time allowed for public comment. And he played the Nixon card: "reintroducing too close an analogy [to QLR] only nine months after the old system ended will probably be misinterpreted and actually hinder reform": "the suspicion, based on actual past experience, will be that EPA's true intent has been thwarted before being allowed to see the light of day."[29]

By the time the executive order was ready in March 1978, many of the agencies' comments (though not EPA's main complaints) had been incorporated. Schultze noted that while many of the agencies would prefer no process, "almost all agree that if such a process is to exist, this approach is acceptable." Intriguingly, the administration had also sent the order out for public comment via the *Federal Register* as if it were itself a regulation – the first time (and the last?) a draft executive order had ever been handled in this manner. More than three hundred and fifty letters responded, including one from the chairs and ranking members of six Senate committees and subcommittees. They urged that the independent regulatory commissions (IRCs) be excluded from the scope of the order. Otherwise it "would violate the intent of Congress that the Executive Branch not control the rules these agencies issue."[30] OMB director Jim McIntyre (who had succeeded Lance in autumn 1977) didn't agree with that legal interpretation, but did argue for political prudence: including the IRCs in the order, he argued,

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[28] Ibid., "Summary of Agency Comments." Emphasis added.
[29] Douglas Costle to the President, "Ensuring Sensible Regulation," memo of October 6, 1977. JCL, Office of the Staff Secretary, Presidential Files, Container 46, [10/11/77 [2]].
[30] Senator Abraham Ribicoff et al., letter to the President, December 16, 1977.

"would provoke a confrontation with the Congress and attract attention away from the substantial improvements the Order can make in the management of regulation in the executive branch."[31]

Executive Order 12044 in Practice

On the eve of the order's issuance, Carter handwrote a note to McIntyre: "Jim: Devote top effort to enforcement. I will help you personally."[32] Enforcement of EO 12044 would prove to be inconsistent – but the Carter process did put in place much of the expertise and infrastructure for regulatory review that Reagan would build on.

OMB's guidance to department heads laid out five standards for evaluating how well they were complying with the order. A McIntyre memo demanded more public participation; clearer regulatory language (in "plain English"); and also effective senior-level policy oversight, so that the presidents' political appointees were not simply signing off on (or being rolled by) the regulatory proposals generated lower in the civil service. "Agencies should… tell us, using examples, the effects of this provision of the Order: what major recommendations were disapproved at the policy level? What improvements, if any, were made as a result of better policy oversight? If delay was a problem, agencies should describe those cases in detail…" For regulatory analysis itself: was it completed early in the process? "Was the least burdensome of the acceptable alternatives chosen? If not, were the reasons provided to the public?" Had reviews of extant regulations occurred, "to help weed out unnecessary regulations and to improve essential ones"?[33]

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[31] James T. McIntyre to the President, "Executive Order on Improving Government Regulations," memo, attached material, and handwritten comments of March 20, 1978. NARA, RG 51, OMB Office of General Counsel, Executive Order and Proclamation Files 1977-79, Box 4, [EO 12044].

[32] Ibid.

[33] James McIntryre to Heads of Executive Departments and Agencies, "Evaluation of EO 12044, Improving Government Regulations," memo of April 10, 1979. NARA, RG 51, Entry UD-WW 281, Records of Information and Regulatory Affairs, Information Policy Branch, Box 4, [1.50.10 DO/MIS Executive Orders].

The 'grades' given to the Department of Health, Education, and Welfare in 1979 are instructive in this regard. In February, OMB's deputy associate director for regulatory policy wrote to HEW reviewing the department's semi-annual agenda of regulations, just published in the *Federal Register*. OMB tried to be gentle – "since this was HEW's first attempt at producing a complete agenda… some problems were to be expected" – but sent along a lengthy document enumerating "many deficiencies" even so. These started with the fact that HEW's agenda was published six weeks late; it also included in its list of "proposed" rules some that had already been published months ago, and "significant differences in the quality of its separate components." What was the statutory rationale for various new rules? Why were so few rules undergoing regulatory analysis? What was the rationale for choosing particular existing regulations for review and not others?[34]

In June HEW submitted a new report, again more than a month late: an "analysis of our first year implementation of" EO 12044. OMB was, if anything, even less impressed. Its readers marked up HEW's effort with comments such as "not true" (sometimes underlined twice) and "not certain" -- the department's list of analyzed rules prompted another "not true," a question mark, and an "only at OMB request." More global comments argued that HEW needed "improved responsiveness to OMB," starting with meeting deadlines; OMB also disagreed with how the department was calculating the costs of regulations. HEW's "greatest weaknesses of [its] 12044 practices" were pretty fundamental: "avoidance of regulatory analysis." (Someone else added, "poor general attitude.") Another note in the file recounted that HEW's best evidence of progress was the "absence of public complaints" but went on to say "there is little other evidence of significant progress…"[35]

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[34] Stanley Morris to Richard Cotton, letter of February 12, 1979, and attached materials. NARA, RG 51, Entry UD-WW 368, OIRA 1981-84 Division Office, Box 2, [EO 12044 – Department of Health, Education and Welfare].

[35] Richard Cotton to Wayne Granquist, letter of June 14, 1979, and attached materials. NARA, RG 51, Entry UD-WW 368, OIRA 1981-84 Division Office, Box 2, [EO 12044 – Department of Health, Education and Welfare].

OMB urged "corrective action," starting with the "imposition of [a] regulatory analysis procedure," the creation of an "intra-departmental regulatory policy coordinating committee," and the assignment of personnel "full time on regulation."[36] A meeting followed with HEW Secretary Joseph Califano. Talking points for the encounter stressed how important the order was to President Carter. Many of the criticisms of the report card were repeated: "Regulatory analysis is HEW's weakest area. The Department has conducted only a handful… since promulgation" of the order, "(one at OMB/RARG request) and has, in OMB's view, avoided undertaking several analyses when they should have been developed." To be sure, praise was sprinkled in as well: "HEW has a good effort underway in complying with the Order. It is in the top third of all Departments." But this was apparently a low bar, and the praise was faint. The OMB interlocutors were to tell the Secretary that "the president must be able to point to specific results" and to hope they could "candidly discuss performance to date and to agree on specific future reform targets."[37]

The results of this meeting are, alas, not included in the file. Given Califano's rocky relationship with the White House generally, it was likely contentious. Still, more generally OMB did feel it was making some progress on accounting for the costs of regulations. One analyst reported that after a meeting with EPA and Labor on the subject, the Labor representative said "he felt that the Department's response… could not simply be to 'stonewall' as he had planned. After the meeting he realized that we were reasonable people trying to do an important job." She noted in reply OMB understood they were not far along in "analytic methods and capability" but if Labor could "just pick one or two areas and try to do a serious job of estimating the resources needed to do cost accounting" OMB would help.[38]

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[36] Ibid.

[37] Stanley Morris to John White and Wayne Granquist, "Briefing Materials for E.O. 12044 Meeting with the Department of HEW," memo, n.d. [summer 1979] and attached materials. NARA, RG 51, Entry UD-WW 368, OIRA 1981-84 Division Office, Box 2, [EO 12044 – Department of Health, Education and Welfare].

[38] Diane Steed to Harrison Wellford, "Meeting with Agencies on Regulatory Cost Accounting," memo of July 2, 1980. Entry UD-WW 257, OMB Program Records: Records of Regulatory Policy (OIRA), Box 1, [OIRA-RP-EPA-1980-4, General].

As that suggests, the Carter efforts did not get off to a rapid start. In September 1978 Eizenstat complained to Carter that OMB was not doing enough to "demonstrate fulfillment of your commitment to discipline the bureaucracy," prompting a handwritten note from Carter to McIntyre: "I want the executive order re regulatory review carried out…. I need a series of substantive sunset announcements." This didn't really happen; in May 1979 McIntyre conceded that "collectively we have not done enough to show major progress."[39] Continued griping by the White House about OMB aggressiveness did have an effect in an early 1980 OMB reorganization that created an office for Regulatory and Information Policy (see the next section for more detail.)

But in general, it wasn't just OMB that picked and chose its interventions – the RARG/CWPS team filed just 5 sets of comments in 1978, 5 in 1979, and 8 in 1980.[40] Nor were rentseeking politics set aside: when EPA was looking to regulate coal-fueled electric power plants, for instance, Carter's need for West Virginia senator Robert Byrd's support on the SALT II treaty (Anderson 1991). Interestingly, in the fall of 1978, McIntrye, Eizenstat and Schultze drafted enhancements to presidential control, including the assertion that the president had the authority to make final determinations on the issuance of regulations – this "caused consternation in the regulatory community." But it never went past draft form (Anderson 1991). In the end, the White House backed away; the same memo's proposals for an enforceable regulatory calendar morphed into regular reports from a very inclusive Regulatory Council, which was announced in an October 1978 speech.

[39] Stu Eizenstat to the President, memo and attached materials of September 2, 1978. JCL, Neustadt Papers, Box 70. This was supported by an interview I conducted with CWPS attorney Sally Katzen, March 11, 2017.
[40] The increase over time was partly due to the arrival of Alfred Kahn as the dual-hatted chair of CWPS and special adviser to the president on inflation. See Eads and Fix (1984, 60); Katzen interview.

Another Weapon in the Binder: Paperwork Control

The 1942 Federal Reports Act (FRA) emerged from the explosion in the government's information collection efforts in the late 1930s. It required that agencies collect only essential information, and that OMB approve forms, surveys or questionnaires those agencies sought to issue, coordinating matters so that multiple agencies were not asking the same people the same questions (Stringham 1943).[41]

FRA could be used as useful leverage for other management purposes. In the wake of complaints from manufacturers, OMB agreed in late 1980 that EPA was in "blatant violation of the Act." OMB director McIntrye wrote to the agency posing a Hobson's choice: would EPA prefer to have its information-gathering efforts stopped? Or… to submit its regulations for OMB analysis? "I would appreciate your views with respect to which of the aforementioned alternatives you prefer we pursue," McIntyre wrote.[42]

That incident illuminates the broader development of information collection as a parallel mechanism for enhancing presidential leverage over agency regulations. In parallel with the hundreds of recommendations made by the longstanding Commission on Federal Paperwork, in November 1979 Carter issued EO 12174, simply entitled "Paperwork." The new EO both repeated elements of the FRA ("agencies shall minimize the paperwork burden – i.e., the time and costs entailed in complying with requests for information and record-keeping requirements" and such requests made "only to the extent necessary to gather the basic information required to fulfill an agency's mission") and relied on its authority to impose several additional procedural demands. Most notably, each agency was to prepare an annual "paperwork budget" detailing the number of hours required to comply with its requests; OMB

[41] However, some 80% of the federal paperwork burden wound up exempted from the law – notably because the Internal Revenue Service was not included.

[42] James T. McIntyre, Jr., to Douglas Costle, letter of November 25, 1980, and supporting material. NARA, RG 51, Entry UD-WW 257, OMB Program Records: Records of Regulatory Policy (OIRA), Box 1, [OIRA-RP-EPA-1980-4, General].

was given the power to review and modify those budgets, and to publish an annual calendar with significant requests for information. This, one OMB staffer boasted, was "the most far-reaching reform of paperwork control since enactment of the Federal Reports Act" itself.[43]

Carter had been seeking statutory authority for EOP regulatory analysis since 1979 in order to codify his executive order; as Jim Tozzi later put it, he "didn't want the fluke of an election to overturn centralized review."[44] That did not get far, but the law that became the Paperwork Reduction Act (PRA) of 1980 (P.L. 96-511) provided a new vehicle that proved very maneuverable indeed.

The PRA started by simply amplifying the FRA, eliminating many of its exemptions (notably for the IRS) and enhancing OMB authority by allowing it disqualify agency information collection (questionnaires, record-keeping requirements, reporting requirements, interviews, or regulations that themselves later required the collection of information) for any reason. Further, no one could be penalized for not filling out a form that had not received OMB approval. The law also expanded OMB's oversight role over federal information policy, statistics (angering the Commerce Department), and the nascent field of data processing (angering the Pentagon).

Not surprisingly, OMB was on board. The agency's associate director for management and regulatory policy, Wayne Granquist, told Congress that "we have become much more cognizant of the relationship between Federal regulations and the reporting burden imposed on the public. Furthermore, improving the management of Federal information is not a controversial issue…. As career staff to the President, OMB can provide the objective analysis and policy oversight needed to improve the processes by which we collect and manage information."[45] The agency wound up taking what Jim Tozzi called "extraordinary steps" to lobby directly on Capitol Hill in favor of the bill. Tozzi himself was nicknamed

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[43] Granted, this was a low bar. See Stan Morris, "Note to the Regulatory Policy and Reports Management Staff," memo of January 25, 1980, NARA, RG 51, Entry UD-WW 368, OIRA 1981-84 Division Office, Box 2, [C.6.1 OIRA/HR Creation of RIP].
[44] Tozzi interview with author; see, e.g., the proposed Regulation Reform Act of 1979 (S. 755, H.R. 3263).
[45] Wayne Granquist before House Government Operations Committee, February 21, 1980. NARA, RG 51, Entry UD-WW 281, Records of Information and Regulatory Affairs, Information Policy Branch, Box 5, [1.60.20.02 Paperwork Bill, 1/26/80 #4].

"Stealth," since (as a *Washington Post* profile put it in 1981) "like a Stealth bomber, Tozzi reached his target while shielding his whereabouts from adversaries," notably the Defense Department and National Security Council and their efforts to maintain autonomy over their computer systems (Behr 1981b).

Most of the other executive departments were also less than enthusiastic. Treasury did not like losing its monopoly over tax forms; Labor argued "the regulatory process will be unduly slowed by the imposition of the paperwork requirements"; Defense complained generally that "the Bill creates a more powerful bureaucracy in OMB." A memo assessing the bill's pros and cons reminded Carter that Labor had made the same argument with regards to the paperwork executive order, and that Treasury's demands would effectively gut the bill (restoring the status quo ante), since "more than half of all paperwork imposed by the Federal government is imposed by the IRS." It noted that the president, if he wished, could grant exemptions to the defense community regarding data processing.[46]

OMB did have one objection to the PRA: its creation of a separate statutory office to handle paperwork management tasks. It preferred keeping such tasks under the charge of an assistant director, to provide a single point of contact within OMB. A new, independent office "would isolate these functions from other OMB responsibilities [and] prevent the balancing of competing interests."[47]

Along these lines, in October 1977, OMB had created a division of Regulatory Policy and Reports Management (RPRM), which had helped with the drafting of EOs 12044 and 12174 as well as on their implementation. RPRM was centered around "desk officers" who handled agency-specific regulatory and reporting requirements. This would become "the fundamental building block in the new

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[46] Carter, however, wrote on the memo that "exemptions… should not be too broad." See Stu Eizenstat and Si Lazarus to the President, "Enrolled Bill HR6410, Paperwork Reduction Act of 1980," memo and supporting material of December 10, 1980. NARA, RG 51, Entry UD-WW 281, Records of Information and Regulatory Affairs, Information Policy Branch, Box 5, [1.60.20.02 Paperwork Bill, 1/26/80 #4].

[47] Wayne Granquist before House Government Operations Committee, February 21, 1980. NARA, RG 51, Entry UD-WW 281, Records of Information and Regulatory Affairs, Information Policy Branch, Box 5, [1.60.20.02 Paperwork Bill, 1/26/80 #4].

organization" that replaced RPRM in early 1980, partly as a way to respond to White House complaints (noted earlier) that OMB was dragging its feet on regulatory review.[48]

The new 45-person Office of Regulatory and Information Policy added the Information Systems Policy staff to the mix. RIP, as it inevitably became known, would combine the EO 12044 process activities on the management side of OMB with the regulation-by-regulation review still within the purview of the budget side (Tozzi 2011, 52).[49] And it would, of course, be the precursor to the new Office of Information and Regulatory Analysis (OIRA) ultimately created in the PRA. In December 1980, despite having lost his reelection bid and despite the strong objections of much of his Cabinet, Carter signed that bill into law.

A Firm Foundation

Carter planned to build on these initiatives and expand regulatory review. OMB's division heads were told in February 1980 that "the Director would like to use the 1981 Spring Planning Review to develop broad policy choices that would form the basis for the President's second term." Questions included: "between now and 1985, can we develop the tools for annual preparation of a regulatory budget? Could we credibly estimate (1) benefits, (2) immediate costs, or (3) later costs if nothing is done? Could it be used to terminate regulations that are no longer needed?"[50]

The Carter presidency ended more abruptly than it had planned, of course. The PRA (and OIRA with it) did not become effective until early 1981, after Ronald Reagan had taken office. Nonetheless a good deal of the apparatus that would become abruptly more salient in a few months was already built.

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[48] Stan Morris, "Note to the Regulatory Policy and Reports Management Staff," memo of January 25, 1980, NARA, RG 51, Entry UD-WW 368, OIRA 1981-84 Division Office, Box 2, [C.6.1 OIRA/HR Creation of RIP]; more generally, see Anderson 1991.

[49] Special assistant to the director Alice Rogoff apparently was the driving force behind this reorganization (Tozzi 2011, 52); in my interview he stressed "I was *not* behind" it.

[50] Dave Mathiasen to Distribution [Jim Tozzi], "New Focus for Spring Planning Review," memo of February 21, 1980. NARA, RG 51, Entry UD-WW 281, Records of Information and Regulatory Affairs, Information Policy Branch, Box 4, [1.31.15 Spring Review Planning and Policy Guidance 1981].

Critics argued that the Carter contribution was mostly process, not substance, and that regulation was being tamed by adding another layer of regulators (Clark 1981; DeMuth 1980). But James Anderson (1991, 144) concluded that "the Carter administration's efforts and experiences collectively constituted a substantial legacy for the Reagan administration in devising its regulatory management program." Regulatory review advocate Tozzi puts it similarly: "When Reagan issued the executive order, we had an infrastructure, which is very important…. We had a system in place" (quoted in Dieterle 2017).

A late 1980 document prepared to justify the fiscal 1982 budget for the Office of Regulatory and Information Policy gives a good sense of that. RIP was, it argued, "improving and simplifying the regulatory process" and "implementing major reform initiatives in the Administration's regulatory reform program," notably "agency compliance with Executive Order 12044."[51] Along those lines RIP was already requesting regulatory analyses and sunset reviews; it was part of the RARG reviews and provided staff support for RARG membership; it made "formal, public assessments of agency performance and accomplishments under EO 12044" and was working to develop analytic methods for more accurate cost-benefit analysis. The first information collection budget completed under EO 12174 – a much larger endeavor than review under the FRA -- calculated that executive branch agencies imposed 1.276 billion hours of work on the public. OMB's target for FY1981 was 4 percent less than that (a mere 1.228 billion hours!)[52]

At this point RIP had about forty full-time employees plus another ten temporary and part-time staff. The office's budget justification noted that with 84 agencies under the Paperwork mandate, 28 submitting information collection budgets, and 40 or so subject to regulatory monitoring, this was far from sufficient. More money was needed "to overcome the cumulative effects of several years of low

[51] EO 12044 was extended by EO 12221 to March 1981, or until the PRA came into effect.
[52] "Decision Unit Overview: Regulatory and Information Policy," fiscal 1982, NARA, RG 51, Entry UD-WW 368, OIRA 1981-84 Division Office, Box 1, [A.2 OIRA/HR 1981-82 Administrative Matters].

resource application that are now resulting in Congressional, agency, public and reorganization team criticisms of OMB efforts."[53]

The Reagan Renovation

It was left to President Reagan to put the finishing touches on the scaffolding his predecessors had bequeathed him. He did so with gusto.

On January 22, 1981, Reagan announced the formation of a Presidential Task Force on Regulatory Relief, to be chaired by Vice President George H.W. Bush. (The shift from regulatory *reform*, to *relief*, would also be reflected in July 1981 revisions to the OMB Budget Examiner's Handbook.[54]) Other members included the secretaries of Treasury, Commerce, and Labor; the Attorney General; the director of OMB and chair of CEA; White House staffers Martin Anderson and Rich Williamson; and White House counsel Boyden Gray. The executive director was James C. Miller, III, a former CWPS analyst who would soon move to OMB to head OIRA. A week later, on January 29, Reagan sent a memo to his cabinet announcing a freeze on pending regulations, postponing for sixty days both the effective date of final regulations already completed and the promulgation of proposed regulations in final form. That same day he issued Executive Order 12288, terminating CWPS. However, the twenty or so staffers responsible for regulatory analysis at CWPS were kept on, and would soon be merged into OMB.

In early February, a memo to Reagan informed him that "the staff of the Task Force and OMB have been developing an executive order" to replace EO 12044, "which has proven totally ineffective."[55] An internal OMB memo was less dramatic. Jim Miller, who would soon take over OIRA, wrote to OMB deputy director Ed Harper that "the Carter program made some advances, primarily in terms of cost

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[53] Ibid.

[54] B. James, "OMB Examiner's Handbook: Budget Policies," draft of July 8, 1981. NARA, RG 51, Entry UD-WW 281, Records of Information and Regulatory Affairs, Information Policy Branch, Box 1, [1.02.05 1981-82 OMB Examiner's Handbook].

[55] Richard Darman to the Cabinet, "Cabinet Matter: Executive Order on Regulatory Management," draft memo for the President of February 2, 1981. Ronald Reagan Library (RRL), White House Office of Records Management [WHORM] Subject Files: FG – Federal Government Organizations, Box 1, [FG (000068-000088)]. See also Miller (2011, 96-97).

accounting and paperwork reduction (primarily, I gather, because of Jim Tozzi's work). It did *not* make much of an inroad into the substance of regulations (it was 'business as usual.')" By contrast, he promised, "Our program will build on the successes of the accounting and paperwork reduction programs and, for the first time, make real changes in the substance" of regulations.[56]

Despite the shout-out, Tozzi himself – quickly reappointed at OMB by incoming director David Stockman -- would likely have argued that the "first time" such changes had been made occurred in the Nixon administration. Further, as we have seen, Carter's program – while indeed focused on process – did result in substantive adjustments to select regulations.

To do so more systematically meant walking a tightrope. As Peter Shane, then in the OMB general counsel's office, wrote to Miller: "our policy aim is to give the Director some measure of leverage over the regulatory process without purporting to authorize OMB to disapprove regulatory officials' exercise of their statutory discretion."[57] There was discussion of giving OMB power to reject the regulatory impact statements required to accompany "major" rules (see below); this, the White House counsel's office thought, would "give the OMB a great deal of practical control over the content of rules themselves."[58]

In distinct contrast to the Carter administration's very inclusive formulation process – in 1977, an OMB official reassured that "nothing in [EO 12044] will be new to the agencies, since much of it has

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[56] Jim Miller to Ed Harper, memo of January 29, 1981. NARA, RG 51, Office of the Director: Deputy Director's Subject Files: Ed Harper, 1981-82, FRC 51-82-50, Box 3, [Regulatory Relief].

[57] Peter M. Shane to James C. Miller III, "Draft Executive Order on Federal Regulation," memo of January 29, 1981. NARA, RG 51, Office of the Director: Deputy Director's Subject Files: Ed Harper, 1981-82, FRC 51-82-50, Box 3, [Regulatory Relief]; see also Richard Willard to Fred Fielding, "Executive Order on Regulatory Reform," memo of February 6, 1981, which notes that "a recurring question in regulatory review programs is the power of the President to control the actual content of rulemaking entrusted by statute to particular agencies." This memo reflects a meeting that day, for which Willard's handwritten notes suggest that Jim Tozzi was not yet a known force to the White House – he is identified as "Jim Cozey." Notes and memo in RRL, WHORM Subject Files: FG – Federal Government Organizations, Box 1, [FG 000089 (2)].

[58] Richard Willard to Fred Fielding, "Proposed Executive Order Entitled 'Federal Regulation,'" memo of February 13, 1981; see also Alex Kozinski to Fred Fielding, "Executive Order on Federal Regulation," memo of February 12, 1981. Both in RRL, WHORM Subject Files: FG – Federal Government Organizations, Box 1, [FG 000089].

already been carefully negotiated with different agency people"[59] – drafting the new order was closely-held. Tozzi, CWPS acting director Thomas Hopkins, Miller, Gray, the White House counsel's office, and OMB and OLC lawyers were involved; the agencies got far less say. Early drafts of the order were held within the EOP;[60] a later draft ten days later was distributed for departmental review around 8 pm on February 13 – the Friday before a three-day weekend – with a demand for comment by 11 am on Monday, Presidents' Day.

More than one Cabinet secretary complained about the consequent inability to gather staff attorneys to review and give input on the text -- many comments came in on Tuesday, February 17.[61] But the order was issued that same day. Indeed, when departments' general counsels were summoned to the White House to review the text, they assumed it was a draft still ripe for revision, and began to mark up their copies with proposed amendments. Only when they turned to the last page did they see President Reagan's signature: the order was already in effect (Behr 1981a).

There was a reason for the evasion – as agencies got word of the new order, their hackles were quickly raised. A late January 1981 memo to the new Secretary of Agriculture warned that the draft was duplicative of EO 12044 but also placed "considerably more of the management function at OMB" and that it should be opposed. With a marked lack of bureaucratic solidarity, the Secretary was informed that "the target of this executive order appears to be those agencies that are out of control with respect to unnecessary regulation. This criticism is justified when referring to certain independent agencies such as EPA, FTC, etc. However, it is not the case with the Department of Agriculture."[62] Notes on a phone

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[59] Stan Morris to Ron Kienlen, "Clearance of Draft Executive Order on Improving Regulatory Practices," memo of September 26, 1977. NARA, RG 51, OMB Office of General Counsel, Executive Order and Proclamation Files 1977-79, Box 4, [EO 12044].
[60] See Richard Darman, White House Staffing Memorandum, Document 000089S, February 3, 1981. RRL, WHORM Subject Files: FG – Federal Government Organizations, Box 1, [FG 000089 (2)].
[61] See the correspondence in RRL, WHORM Subject Files: FG – Federal Government Organizations, Box 1, FG (000067 (1)], e.g., Samuel Pierce to Craig Fuller, "Proposed Executive Order/Federal Regulation," memo of February 17, 1981. See too Miller (1994, 3).
[62] Richard Lyng to the Secretary, "Proposed Executive Order on Regulatory Management," memo of January 27, 1981. RRL, WHORM Subject Files: FG – Federal Government, Organizations, Box 1, [FG (Begin-000066)].

call to the White House from a departmental general counsel were blunt: "the Secretary of Transportation is strongly opposed to the proposal as written," arguing that the new process would lead to lengthy delays (even for the rescission of extant rules), that OMB was not competent to conduct such reviews anyway, and that it represented "over-centralization" (contrary to the "Cabinet government" the president claimed to want.) Jeanne Kirkpatrick, as ambassador to the UN, presumably did not have many regulations to issue, but weighed in anyway: "is the OMB best capable, or capable at all, of determining for all departments of this complex government… No attribute of OMB's composition fits it to make the technical and political determinations involved here."[63]

But the president disagreed, seeing OMB's centralized role as the only way to encourage policy coordination, "greater political accountability, and more balanced regulatory decisions" (DeMuth and Ginsburg 1986, 1081). As issued, Executive Order 12291 required all executive branch agencies (again exempting the independent regulatory commissions, for political rather than legal reasons) to submit both proposed and final draft regulations to OMB. "Regulatory action shall not be undertaken unless the potential benefits to society from the regulation outweigh the potential costs to society" and the choice of regulation maximized the "net benefits to society." Major regulations, those with annual economic effects of at least $100 million,[64] required formal "Regulatory Impact Analyses" to be completed. Existing rules were also subject to review, if the director designated them as "major."[65]

As Harper summed up to Ed Meese some months later, "The purpose of the regulatory relief program is not to usurp agency discretion or to override the authority of regulatory officials to apply their statutes as Congress intended. Rather, it is to ensure that policy decisions are made according to a

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[63] Craig Fuller notes of telephone call from John Fowler, February 16, 1981, 10:45 a.m.; Jeane J. Kirkpatrick to Members of the Cabinet, "Executive Order on Federal Regulation," memo of February 16, 1981. Both in RRL, WHORM Subject Files: FG – Federal Government Organizations, Box 1, FG (000067 (1)].

[64] The OMB director could also define other regulations as "major."

[65] "Attachment B: Talking Points for Ed Meese's Meeting with Regulatory Officials," n.d., attached to Ed Harper to Ed Meese, "Proposed Actions in Regulatory Reform Area," memo of November 20, 1981.

clear set of guidelines, based upon economic efficiency, in an area where statutes are often vague or contradictory," and to center decision-making on "the strengths of the free market."[66]

Rhetorically this was not so different from Carter's program (or Nixon's, or Ford's). What would make it more effective?

III. Institutionalizing EO 12291

One answer was that new ability to enforce. The PRA had given OIRA new authority to reject agency information-gathering efforts. Very few regulations do not generate paperwork, and by law that paperwork needed to receive approval. And the general notion of presidential oversight of regulation was buttressed by a D.C. Circuit Court decision handed down in April 1981, arising from a case brought against a regulation issued by President Carter's EPA. "The authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking," wrote the court (albeit in dicta.) "Single mission agencies do not always have the answers to complex regulatory problems. An overworked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policymakers in other agencies as well as in the White House."[67]

Still, knowing those arguments and ideas is not equal to following them. And much of the reaction to OIRA's actions was hostile (O'Reilly and Brown 1987; Eads and Fix 1984; Friedman 1995). Legal leverage needed to be given additional resources: money, expertise, presidential support and, eventually, reputation.

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[66] Ed Harper to Ed Meese, "Proposed Actions in Regulatory Reform Area," memo of November 20, 1981.
[67] *Sierra Club v Costle*, 657 F.2d 298 (D.C. Circuit, 1981) at 406.

1. OIRA Infrastructure: People, Money, Expertise

The new Office of Information and Regulatory Affairs was built as the sum of three extant staffs: OMB's Office of Regulatory Information and Policy; the twenty or so regulatory analysis staff from CWPS; and the 25-strong Office of Statistical Policy and Standards from the Commerce Department, which was moved to OMB by the Paperwork Reduction Act.[68] Tozzi and Hopkins became deputy administrators under Miller. The RIP staff (under Tozzi) became three management branches devoted to regulatory policy, information policy, and reports management; the others (under Hopkins) became two "analysis" branches covering regulatory and statistical analysis.

The division between regulatory "policy" and "analysis" was somewhat artificial but reflected several dynamics. First was the simple, separate history of CWPS and the need to accommodate both Tozzi and Hopkins (who were allies rather than rivals). Second was Miller's belief in what Tozzi later called the "sanctity of the economics profession" in regulatory analysis; most of the RIP group was not comprised of academic economists. Third was a loose functional divide: the idea was for Hopkins' division to organize not by agency (as did the RIP "desk officers") but by regulatory problem areas that cut across agency lines, and to focus most heavily on highly controversial and costly regulations. They would however work closely behind the scenes with the desk officers, buffered from direct agency contact while providing detailed analysis of select rules. The analysis branch also served as wider staff support for the Vice President's Task Force.

The structure evolved frequently, usually as "analysts" moved over to the "policy" side. Most notably, in May 1983, when Hopkins and Tozzi left government, the two divisions merged under a single

[68] An aide to Tozzi noted in December 1980 that Congress expected OMB to absorb the Commerce staff rather than create its own capacity for statistical analysis -- otherwise "we will have a fight on our hands." In any case, "with the probable Reagan [hiring] freeze it makes sense to increase the base [the number of staff 'lines' in OIRA] as much as possible." At least in the near term, Tozzi was advised to keep the Commerce cadre as a separate office within OIRA: to do otherwise "would probably also result in a serious outcry from the professional statistical community. You don't need that fight." John P. McNicholas to Jim Tozzi, "Views on Statistical Policy Function under S. 1411," memo of December 1, 1980. NARA, RG 51, Entry UD-WW 281, Records of Information and Regulatory Affairs, Information Policy Branch, Box 5, [1.60.20.02 Paperwork Bill, 1/26/80 #4].

deputy administrator, Robert Bedell. Bedell had been at OMB since 1973 and had served as its deputy general counsel since 1978; in that capacity he had helped to draft EO 12291.

Nearly from its inception OIRA sought more staff and more space. As soon as OIRA was created, Tozzi wrote to the White House's Office of Administration asking to expand across the entirety of the third floor of the New Executive Office Building.[69] Just six days after EO 12291 was issued, Tozzi wrote to the White House's Office of Administration asking to "expedite the hiring of personnel for OIRA," including both management analysts at the GS-13 to GS-15 level and record-keeping and data entry help. The requests kept coming. "We are in desperate need of good clerical help," OIRA staff importuned. "Our needs are immediate."[70] At a February 1982 meeting Miller said that "the nature of our responsibility is increasing to the extent we need as much staff help as we can possibly get."[71] After all, internal estimates suggested that in fiscal 1983 OIRA would have to review 4200 regulations under EO 12291, calculate and dictate information collection budgets, review some 7800 requests to issue forms, and assist the Task Force: "the Vice President expects us to reform the regulatory process, stop burdensome new regulations, and ferret out existing regulations with unwarranted cost and complexity."[72] In the month of February 1981 alone, the desk officers dealing with education, housing, and labor met with departmental staff, congressional aides, other parts of OMB, and even with school principals; went to agency public hearings and working sessions, and provided guidance in return;

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[69] Jim Tozzi to Linda Smith, "Need for More Office Space for RIP," memo of January 29, 1981. NARA, RG 51, Entry UD-WW 368, OIRA 1981-84 Division Office, Box 1, [A.2 OIRA/HR 1981-82 Administrative Matters].

[70] See, e.g., Jim Tozzi to Linda Smith, "Request to Post 'Vacancy Announcements' Against OIRA Vacancies," memo of February 23, 1981; Louis Kincannon to Linda Smith, "Hiring a Temporary Secretary," memo of February 11, 1981; Chris DeMuth to Linda Smith, "Request to Hire," memo of October 29, 1981. All in NARA, RG 51, Entry UD-WW 368, OIRA 1981-84 Division Office, Box 6, [P.3. Personnel Matters 1981-82].

[71] Granted, the gravity of these responsibilities varied. Another action item from the meeting reads: "Gail -- would you have someone call Mr Barnes in Agriculture to tell him … he should call Mr Miller … [about] his request for an exemption for navel oranges." Jim Tozzi, "Action items resulting from 8:30 meeting with Miller," notes of February 23, 1981. NARA, RG 51, Entry UD-WW 411, OIRA Information Policy Branch FY1981-82, Box 1, [2.20.15 IP Operating Procedures].

[72] No author, "Budget Justification for the Office of Information and Regulatory Affairs," report of February 27, 1981. NARA, RG 51, Entry UD-WW 411, OIRA Information Policy Branch FY1981-82, Box 1, [2.20.15 IP Operating Procedures].

reviewed options papers; screened resumes; and even joined a pilot program on whether to adopt OMB-wide word processing.[73]

Though the Reagan administration was trying to pare domestic spending, OIRA argued that the cuts under discussion would mean its ability to "probe into the most important regulations on the review list would be so restricted as to affect materially the comprehensiveness and thoroughness of information for the President." OIRA had about 75 staff, but said it needed 93 just to keep up with "current services" -- given the "new legislative and administrative mandates [that] have increased our oversight responsibilities," 114 would be ideal.[74] (This was already a compromise from an earlier request for 142 staff, which even its author realized was impossible, even as she sketched out scenarios cannibalizing OMB's current vacancies in other divisions and hiring a slew of detailees from other agencies.)[75] By October 1981, 77 staff were on board, with at least another ten analysts needed.[76] The office peaked later that year with just under 90 full-time staff, plus 9-10 part-time and temporary reinforcements.[77] These numbers would decrease somewhat over time, with 84 authorized staff in early 1982 and about 75 by 1986.[78]

The number of people was important, but so was their expertise. This is a particularly important point given Polsby's point that rules, to be institutionalized, must be universalistic rather than subjective. The creation of a discipline of cost-benefit analysis, that can be applied impartially across

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[73] OIRA Reports Management: Human Resources, "Highlights for week ending" February 6, 13, 20, 27, 1981." NARA, RG 51, Entry UD-WW 368, OIRA 1981-84 Division Office, Box 9, [W.1 Weekly Activities Report, 1981].

[74] "Decision Unit 0336: Office of Regulatory and Information Policy," n.d. (late 1981). NARA, RG 51, Entry UD-WW 368, OIRA 1981-84 Division Office, Box 1, [A.2 OIRA/HR 1981-82 Administrative Matters].

[75] No author, "Budget Justification for the Office of Information and Regulatory Affairs," report of February 27, 1981. NARA, RG 51, Entry UD-WW 411, OIRA Information Policy Branch FY1981-82, Box 1, [2.20.15 IP Operating Procedures].

[76] "Update on Personnel: OIRA," revised October 2, 1981. NARA, RG 51, Entry UD-WW 368, OIRA 1981-84 Division Office, Box 6, [P.3. Personnel Matters 1981-82]

[77] "Decision Unit 0336: Office of Regulatory and Information Policy," fiscal 1983. NARA, RG 51, Entry UD-WW 368, OIRA 1981-84 Division Office, Box 1, [A.2 OIRA/HR 1981-82 Administrative Matters].

[78] "Personnel Summary" and attached material, July 26, 1982. NARA, RG 51, Entry UD-WW 411, OIRA Information Policy Branch FY1981-82, Box 1, [2.20.15 IP Operating Procedures]; Entry UD-UP 276, Records of the Office of the Director, 10/15/85-1/10/89, Box 28, [Staffing Analysis 1986].

policy areas, goes exactly to that point. (This of course remains a contested arena, as President Trump's revocation of an Obama-era procedure estimating the "social cost of carbon" recently made clear.)[79] The agencies (and some in Congress) complained that OIRA did not have the technical expertise to evaluate highly complex regulatory proposals. This was not lost on OIRA itself. Early on, for example, an analyst warned Tozzi that four large radiation rules about to emerge from EPA were very complicated: "the staff knows relatively little about them." He noted that if OIRA wanted to weigh in substantively it would need to "devote a large block of CWPS staff time to studying the rules and developing recommendations. This would be a sizeable effort" that would force decisions on how to use finite resources.[80]

But vacancy announcements posted by OMB as early as 1979 – seeking "leadership in the agency implementation of Executive Order 12044" – prioritized skills in both research design and substance ranging from "economics, statistics, mathematics, law, or administrative law" -- not to mention "the ability to maintain judgment and perspective under pressure."[81] The need for quantitative skills, not surprisingly, ramped up after the more formal imposition of cost-benefit analysis: a 1981 announcement stressed "demonstrated analytical ability… background in economics, statistics, mathematics, financial analysis, or other quantitative analytical training."[82] A summary of OIRA staff qualifications from around the time the agency was created tallied 17 Ph.D.'s, 2 J.D.'s, 16 M.A.'s, and 10 B.A.'s. Seventeen of these highest degrees were in economics, eight in math or statistics, four in physical

[79] EO 13783, issued on March 28, 2017.
[80] Geoffrey White to Jim Tozzi, "EPA Radiation Protection Guidance," memo of March 30, 1981. NARA, RG 51, Entry UD-WW 257, OMB Program Records: Records of Regulatory Policy (OIRA), Box 1, [OIRA-RP-EPA-1980-4, General].
[81] "Merit Promotion Program Vacancy Announcement" dated October 12, 1979, as well as other similar material and personnel memoranda in NARA, RG 51, Entry UD-WW 368, OIRA 1981-84 Division Office, Box 6, [P.3. Personnel Matters 1981-82].
[82] Draft "Vacancy Announcement," n.d., included with letter of February 23, 1981. NARA, RG 51, Entry UD-WW 368, OIRA 1981-84 Division Office, Box 6, [P.3. Personnel Matters 1981-82].

sciences, and two in law. The other 14 were in political science, public administration, or another social science.[83]

OIRA analysts certainly did get into the fine print. One 1982 OMB-Task Force review of proposed special education regulations generated ten pages of single spaced questions honing in on everything from how specific learning disabilities would be defined (which seemed to vary across different sections of the draft regulations) to whether language matched up with statute ("although this change appears to be a good one, is it legal?"; "why is subsection (e) of this section necessary? there is no such provision in the statute"; "this subsection is significantly more prescriptive than the statute. Why?"). Politics were not absent from the equation—one section dealing with disciplinary actions against disabled students was highlighted as "extremely important and politically sensitive" – but with an eye towards clarity, at least within OIRA. Other actors in the EOP could of course weigh in, as discussed below.

2. Rules, Precedents, and Standard Operating Procedures

With people in place, OIRA needed to establish process. By this I do not mean the simple flow-chart, executive order-mandated, process of rule submission – though by mid-March 1981, 144 rules and reports had been submitted, 79 in one week alone.[84] By the end of 1982, a total of 5,436 regulations had been reviewed since the issuance of EO 12291, 54 of them "major."[85]

Instead, I mean the development of complex internal rules that brought that top-line process to meaningful life and gave OIRA actual rather than nominal authority. In drafting a memo for the director to send to agencies regarding implementation of EO 12291, OMB staff noted both the "mounds of paper" the PRA was already generating and that "agencies continue to be concerned about the extent of

[83] "Summary of OIRA Professional Staff and Experience," n.d. NARA, RG 51, Entry UD-WW 281, Records of Information and Regulatory Affairs, Box 5, [1.60.20.02 Paperwork Bill, 1/26/80 #4].
[84] "General Notes: Regulations Received for Review under EO 12291," status as of March 18, 1981. NARA, RG 51, Entry UD-WW 368, OIRA 1981-84 Division Office, Box 7, [R.4.3 Regulatory Tracking System – Weekly Report to J. Miller 1981-82].
[85] OMB Release 83-15, OMB Office of Public Affairs (April 27, 1983).

the OMB role – which should lead us *not* to flaunt the new power available to us." (An additional note observed that Secretary of Transportation "Lewis is already complaining about this procedure!!")[86] Even so, Tozzi soon warned Jim Miller that he needed to be on the lookout for agencies looking to do "informal guidance via administrative notes."[87]

More broadly, complying with the new executive order meant amending internal OMB rules and revising the bulletins that governed agency behavior. Tozzi told Miller that he needed to "rewrite… specific procedures applicable to proposed regulatory directives, including" the definition of a "major rule," how the Director will do "pre-clearance" to decide if something is major, and how both draft and final directives would be routed and analyzed.[88] Getting this started, Miller issued more than a dozen "Standard Operating Procedure Memoranda" that were compiled in May 1981. Number 5, for instance, decreed that "whenever meetings are held to which staff from executive agencies are invited, the relevant Budget Examiners should also be invited"; number 9 said that recommendations on regulatory action should be coordinated with "the 'other side'" and reflect both the policy and analysis deputies' points of view.[89]

Even more fine-grained details and definitions were also needed. The agency needed to develop a standard cover sheet for submissions, computer-generated docket worksheets, a daily regulatory tracking system to ensure time limits were met (weekly deadline reminder memos soon sprang up), a system for responding to congressional correspondence, and a way of coordinating across the various OIRA and OMB budget divisions and the workings of the Task Force, as well as with the agencies

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[86] Jim Tozzi to Director, "Implementing EO 12291," memo (with handwritten addenda) of February 3, 1981. NARA, RG 51, Entry UD-WW 368, OIRA 1981-84 Division Office, Box 6, [M.5 Memos to heads of executive depts. and agencies 1981-82].
[87] Jim Tozzi to Jim Miller and Glenn Schleede, "OMB Compliance with Executive Order 12291," memo and attached material of May 18, 1981. NARA, RG 51, Entry UD-WW 281, Records of Information and Regulatory Affairs, Information Policy Branch, Box 4, [1.50.10 DO/MIS Executive Orders].
[88] Jim Tozzi to Jim Miller and Glenn Schleede, "OMB Compliance with Executive Order 12291," memo and attached material of May 18, 1981. NARA, RG 51, Entry UD-WW 281, Records of Information and Regulatory Affairs, Information Policy Branch, Box 4, [1.50.10 DO/MIS Executive Orders].
[89] Jim Miller to All OIRA Staff, "Standard Operating Procedure Memoranda," memo and attached material of May 15, 1981. NARA, RG 51, Entry UD-WW 411, OIRA Information Policy Branch FY1981-82, Box 1, [2.20.15 IP Operating Procedures].

themselves, singly or in crosscutting combination.[90] How should "ex parte" contacts be defined? When should an agency get a waiver or an extension? What needed to be kept on the record, and what didn't need to be?[91] Soon enough it became clear that "a written manual of procedures" would be needed, and a longtime regulatory analyst was hired so that his institutional memory could be codified, "captur[ing] in a written handbook the paperwork procedures, the underlying rationale for these procedures, and answers to common questions as they relate to the implementation of the PRA."[92] But long before that written guidance to external stakeholders had to be developed. The Interim Regulatory Impact Analysis Guidance issued on June 12, 1981, stressed that "the fundamental test of a satisfactory RIA is whether it enables independent reviewers to make an informed judgement that the objectives of EO 12291 are satisfied." Agencies were to present a series of "elements" making the case for the need for the action, providing information on its consequences and those of other options considered (including differing "stringency levels"), and calculating as specific an accounting of benefits and incremental costs as possible.[93]

A year later, the need for self-correcting feedback was raised, as part of OMB's regular spring review. Topics proposed for presentation to the Director included:

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[90] C. Louis Kincannon to Clearance Officers of Departments and Agencies, "More recent changes in Reports Management Practices," memo of February 2, 1981; Kincannon to Jim Tozzi, Gail Coad, John McNicholas, OIRA Desk Officers, "Processing of EO 12291 Submissions," memo of March 2, 1981; Kincannon to OIRA Desk Officers, "OMB Review of EO 12291 Submissions," memo of April 15, 1981; Kincannon to IRA Desk Officers, "Write-Ups on Regulations under Review by President's Task Force," memo of April 6, 1981. All in NARA, RG 51, Entry UD-WW 368, OIRA 1981-84 Division Office, Box 6, [M.2 Memos to all 3 Div's (Tozzi's) 1981-82]. Also: Donald Devine to Joseph Wright, letter of June 7, 1982 and attached material. NARA, RG 51, Entry UD-WW 368, OIRA 1981-84 Division Office, Box 2, [C.11 Civil Rights Coordination EO]; and Arnold Strasser to Reports Management Desk Officers, memo of November 5, 1981. NARA, RG 51, Entry UD-WW 368, OIRA 1981-84 Division Office, Box 1, [OIRA/HR 1981-82 Administrative Matters], which notes that "as you know, Chris DeMuth is very concerned that we have not been responding to our mail on a sufficiently timely basis."

[91] E.g., Nancy Wentzler to Arnold Strasser, Nat Scurry, Bob Bedell, "Records Maintenance and Access," memo of September 8, 1983. NARA, RG 51, Entry UD-WW 368, OIRA 1981-84 Division Office, Box 1, [OIRA/HR 1981-82 Administrative Matters].

[92] Robert Bedell to Darrell A. Johnson, "Contracting for Preparation of an OMB Paperwork Control Manual," memo and attached material of August 19, 1985. NARA, RG 51, Entry UD-UP 224, OIRA Program Records, Box 2, [H.6 OMB Paperwork Control Manual].

[93] Interim Regulatory Impact Analysis Guidance (June 12, 1981), attached to David Stockman to Rep. Lyle Williams, letter of May 16, 1983. NARA, RG 51, Entry UD-WW 257, OMB Program Records: Records of Regulatory Policy (OIRA), Box 1, [OIRA-RP-EPA-1980-84 EO 12291 (previously 12004)]. Costs and benefits were to be broken down as monetary; quantitative but nonmonetary; and nonquantifiable.

• Lessons from the Task Force: "What have we learned about reforming existing regulations through our efforts on the hundred-odd ongoing reviews? Should we change our criteria for selecting regulations for review, or our strategy for accomplishing reforms?"

• Calculating the benefits and costs of regulation: "What progress have we made trying to estimate the overall costs of Federal regulation? What measures do we have of the cost-savings due to Administration reform efforts? Is there any evidence that the Administration's actions have reduced the benefits of regulations (e.g., air and water quality, consumer and worker protection, etc.)?"

• General expansions of the 12291 process: "how can the Administration improve its ability to reform regulatory policy at independent agencies?" And, "should OMB begin to hold agencies accountable for the accuracy of the content and timetable in their agendas?"[94]

This last question ultimately led to the issuance of EO 12498 in January 1985 on the "regulatory planning process," requiring each agency to provide an accounting of its "regulatory policies, goals, and objectives for the coming year and information concerning all significant regulatory actions underway or planned."

This had been discussed in the Carter administration, but never implemented. Under the new order, OMB was authorized to reject agency rules that had not been included in this regulatory calendar unless they arose from new statute or judicial order. The hope was that this could be done in a way that "the agency representative attending the Cabinet Council will nod with assent rather than frown with dismay." Too often, it was argued, "EO 12291 review… comes too late," after the agency was de facto at least committed to the rule already, having invested time and money and having made commitments to constituents and members of Congress. Indeed, "the bureaucracy often presents agency heads with faits accompli. These random – and often undesirable – rulemakings do not constitute or reflect

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[94] Pete Modlin to Don Moran et al., "Topics for Spring Planning Review," memo and attached material of March 26, 1982. NARA, RG 51, Entry UD-WW 281, Records of Information and Regulatory Affairs, Information Policy Branch, Box 4, [1.31.15 Spring Review Planning and Policy Guidance 1981].

administration priorities." However, "agency heads will now have an annual review process within their organizations, for them to set the agency's priorities and assure that regulations are consistent with administration policy."[95]

3. "Should We Use the Executive Order…?": Leverage within OMB

"One of the more dismaying but predictable attributes of the Federal bureaucracy," an OMB official told the White House in spring 1981, "is its ability to start undermining the President's decisions as soon as the ink dries on the signature line."[96]

Obviously, the existence of the Paperwork Reduction Act had given OIRA its first piece of inter-institutional leverage. Still, OIRA found agencies had various tactics for evasion of regulatory review. Several get extended attention in the OMB archives: for instance, the use of "emergency rules" -- "a trend we are watching closely for indications of abuse," a desk officer reported in March 1981.[97] Agencies also sometimes outsourced their analysis to outside interest groups, OIRA worried.[98] (This was perhaps a bit ironic given the wide range of concerns about OIRA's early permeability to industry contacts [e.g., Eads and Fix 1984; Friedman 1995]).

Or, agencies might try – subtly, or not – to get courts to order them to do things that OIRA would not have approved otherwise. A 1981 summary notes "pending lawsuits in EPA," a complaint that had expanded a few years later into a "more general problem of EPA settlement agreements that may

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[95] Jim MacRae to Gail Coad, et al., "Talking Points for Cabinet Council Presentation," memo and attached material of June 2, 1985. NARA, RG 51, Entry UD-UP 224, OIRA Program Records, Box 1, [E.5.4 Executive Order 12498, 1985-86]. See also Gramm (2011, 30-31).

[96] Fred Khedouri to Craig Fuller, "Barnwell, Chapter II," memo of April 9, 1981. Ronald Reagan Library, WHORM Subject Files, FG 006-11 (OMB), Box 3, Folder [208300-226737], Document 219261.

[97] "General Notes: Regulations Received for Review under EO 12291," status as of March 18, 1981. NARA, RG 51, Entry UD-WW 368, OIRA 1981-84 Division Office, Box 7, [R.4.3 Regulatory Tracking System – Weekly Report to J. Miller 1981-82].

[98] "You are fully aware of the problems inherent in 'special-interest analysis' and our ongoing efforts to have agencies prepare their own, objectively-based Regulatory Impact Analyses and risk assessments," Wendy L. Gramm wrote to the Director and Deputy Director. "Data Collection Through Regulatory Proceedings," memo of July 9, 1987. NARA, RG 51, Entry UD-UP 276, Records of the Office of the Director, 10/15/85-1/10/89, Box 15, [OIRA Issues FY1987].

constrain our EO 12291 reviews."[99] A nice example, albeit outside the current timeline, comes from 1987. "You asked if OSHA had gamed us by using a court order to preempt OMB review," then-OIRA administrator Wendy Gramm reminded Jim Miller, now OMB director; her answer was yes. The agency had used "deadline brinksmanship," failing to avoid court-ordered action for two years and thus prompting an "angry court order" to issue a rule nearly immediately; it had made significant "regulatory commitments through Court briefs" without clearing them with OIRA. Then, when the court ruled against OSHA, the Labor department's legal team "made what appears to be a bad call" in deciding not to appeal against a "pro-regulatory" decision. "The increasing volume of court orders" generally "makes it likely that we will continue to have difficulty in ensuring consistency with EO 12291."[100]

In one interesting report on EPA risk assessment guidelines, a desk officer noted that EPA was trying to play the Budget side of OMB against OIRA by asking for lots of money for risk assessment research. Without it, EPA said, how can we do good analysis? -- while the budget examiners thought the request an "enormous and potentially unproductive funding sink."[101]

On the whole, though, intra-OMB resources were one of OIRA's key sources of leverage, given OMB's long-established history of administrative management and central clearance. Jim Tozzi reached out to the Program Associate Directors (PADs) – the political appointees who headed the budget divisions – very early on, in search of cooperation.[102] After all, as a desk officer later noted – in a memo

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[99] Ed Clarke to Tim Muris, "Pending Lawsuits in EPA," memo of April 7, 1981; Rick Otis to Bob Bedell, "Summary of EPA's Amendments to Petroleum Refining Effluent Guidelines," memo of August 14, 1984. Both in NARA, RG 51, Entry UD-WW 257, OMB Program Records: Records of Regulatory Policy (OIRA), Box 1, [OIRA-RP-EPA-1980-4, General].

[100] Wendy L. Gramm to Director and Deputy Director, "Court Orders for OSHA Rules – Impact on OMB Review," memo of September 4, 1987. NARA, RG 51, Entry UD-UP 276, Records of the Office of the Director, 10/15/85-1/10/89, Box 14, [OIRA Issues]. Earlier she had reported that "we have seen early drafts of the [OSHA] proposal and find it unacceptable. Major changes are needed before publication. In addition, the court order undercuts the Administration's legislative strategy to offer credible substitute legislation." Wendy L. Gramm to Director and Deputy Director, "Activities for the Week of June 1, 1987," memo of June 4, 1987. NARA, RG 51, Entry UD-UP 276, Records of the Office of the Director, 10/15/85-1/10/89, Box 15, [Weekly Reports, May 1987-July 1987].

[101] Gail B. Coad to Douglas Ginsburg, "EPA Risk Documents," memo of October 26, 1984. NARA, RG 51, Entry UD-WW 257, OMB Program Records: Records of Regulatory Policy (OIRA), Box 1, [OIRA-RP-EPA-1980-4, General].

[102] Jim Tozzi to Program Deputy Associate Directors, "OMB Review of Regulatory Proposals," memo of February 27, 1981. NARA, RG 51, Entry UD-WW 368, OIRA 1981-84 Division Office, Box 6, [M.2 Memos to all 3 Div's (Tozzi's) 1981-82].

with the marvelous title "Response to Request for Material for OIRA's 'We Need More $$' Briefing Book" -- regulations "often contain significant budget issues" especially when dealing with Medicaid, Medicare, Social Security "whose regulatory changes can result in costs or savings of hundreds of millions of dollars. OIRA plays a key role in resolving these issues by negotiating with appropriate HHS staff on OMB's behalf." Other issues could arise in paperwork reviews – perhaps dealing with IT, debt collection, or grants administration.[103] Various examples from the files. Bear this out. One report notes the provision of examiners with "information on the major civil rights regulatory programs. The Division is developing a system to assure that budgetary savings are achieved where reductions and regulations and paperwork reduce agencies' resource needs."[104] An Education rule received an extension "requested by OMB budget staff… [who] wish to consult with their PAD. They believe the rule…is unnecessary and programmatically unsound." Likewise at HUD "budget examiners requested an extension so that may further explore the budgetary impact of the change."[105]

Other functions could also gain leverage from OIRA's efforts. In 1982, for instance, an analyst observed that "the executive order enables us to enforce some management initiatives that other parts of OMB are working on." A recent set of EPA grant regulations in which "we had no strong interest" had nonetheless "conflicted with OMB circular A-102…. By refusing to find the regulations consistent with EO 12291 until EPA had satisfied OFPP [the Office of Federal Procurement Policy] and BRD [the Budget Review Division], we in effect gave teeth to the OMB Circular." More generally, "should we use the Exec Order to enforce OMB's other management authorities? I suspect that the answer…is yes."[106]

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[103] Judy Egan to Jefferson Hill, "Response to Request for Material for OIRA's 'We Need More $$' Briefing Book," memo of November 6, 1986. NARA, RG 51, Entry UD-UP 224, OIRA Program Records, Box 1, [A.2 Administrative Matters, 1985-86].
[104] Marialice Williams Daniels to Michael Horowitz, "Civil Rights Office Report," memo of July 23, 1982. RRL, WHORM Subject Files, FG 006-11 (OMB),Box 2, [FG 006-11 090500-093799], Document 093019.
[105] See Route Slips of July 11 and June 3, 1983, respectively. NARA, RG 51, Entry UD-WW 368, OIRA 1981-84 Division Office, Box 2, [E.2 Extensions, 1983-84].
[106] Geoff White to Jim Tozzi, "Extension of EPA Regulations Implementing the Uniform Relocation Act," memo of March 26, 1982. NARA, RG 51, Entry UD-WW 257, OMB Program Records: Records of Regulatory Policy (OIRA), Box 1, [General (#2) OIRA-RP-EPA 1980-84].

As Tozzi put it, OMB was "sort of a full-service bank" for agency rule-making. Indeed, as he pointed out, "The government works using three things: money, people, and regulations; the agency must get all three through OMB" (quoted in Friedman 1995, 60, 35).

4. "Religious Sessions": Leverage from the White House

Still, the structural separation between regulations and budgeting meant that the blunt force that was occasionally applied by the QLR process a decade earlier was harder to ensure. Thus OIRA often needed help from higher powers.

Back in 1978, OMB had warned President Carter that "the review of even a small number of major regulatory proposals will involve some highly contentious issues which heretofore have not been brought to the White House. Therefore, there are potential political costs involved in this procedure."[107] But for the Reagan White House, the high-profile nature of deregulation as a presidential priority meant that elevating proposals politically was largely seen as beneficial. Efforts to ensure White House buy-in to the process began with the linkage of OIRA to the Vice President's Task Force. They did not end there.

OIRA acted affirmatively on the relationship. Miller worked with OMB deputy director Ed Harper – who doubled as a domestic policy assistant to the president – to create "an early warning system" to give an "opportunity for White House reaction" to rules about to be published. Harper's views "and those of the senior WH staff members are of course critical," Miller noted, and need to "come early in the review process." Miller did not want to cede too much to the White House (which was hardly a fount of objective economic analysis.) "Agreed!" Harper replied. "But as of this date they are never

[107] Harrison Wellford to Rick Hutcheson, "Economic Impact Analysis," memo of September 26, 1977. Jimmy Carter Library, Office of the Staff Secretary, Presidential Files, Container 46, [10/11/77 [2]].

asked. We must have a system which does get their input." He added that "somehow the OIRA must get plugged into OMB. We must not have two OMB positions."[108]

One effort to serve both purposes was the creation of regular "Status Report on Regulatory Relief" memos from Miller to the Vice President and the OMB director, which evolved into an ongoing series of ""regulatory activity highlights" and "regulatory news bulletins" tracking "new," "changed," and "unchanged" categories of rules before OIRA.[109] The point, as Tozzi noted, was not just "benefit-cost…. We're just here to represent the President" (quoted in Friedman 1995, 60).

The chain up the hierarchy led to Reagan "troika" member Ed Meese. In November 1981, for instance, Harper asked Meese to see if he (or better yet the president) would meet with the heads of "key" regulatory agencies to address "significant backsliding" from "the President's strong deregulatory philosophy" so as to achieve "short-term political gains." Reagan, said Harper, could use this opportunity to "visibly… and publicly reemphasize his dedication to deregulation."[110]

Harper's successor as OMB deputy, Joe Wright, went even further in complaining to Meese of a "run on E.O. 12291." An OSHA regulation had been sent to the *Federal Register* without OMB clearance. This wound up being discussed with Labor "all the way from the staff level to [Secretary] Ray [Donovan] himself for nearly a week" and now the regulation will be published.

But "what concerns me now," Wright continued, "is that this appears to be a deliberate attempt to undermine the Executive Order process. In fact, [the OSHA administrator] told me that 'he ran his agency,' did not really agree with the Exec Order process, and was not going to comply – period! I understood his feeling – but the process should be changed if it's wrong – not just ignored…. This is the

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[108] Jim Miller to Ed Harper, "Handling Sensitive Regulatory Matters," memo of September 10, 1981. NARA, RG 51, Office of the Director: Deputy Director's Subject Files: Ed Harper, 1981-82, FRC 51-82-50, Box 3, [Regulatory Relief].
[109] NARA, RG 51, Office of the Director: Deputy Director's Subject Files: Ed Harper, 1981-82, FRC 51-82-50, Box 3, [Regulatory Relief]; "OMB Regulatory News Bulletin," October 29, 1982 [item 107789], and "Regulatory Activity Highlights: Significant Regulations Under Review at OMB, Week Ending November 5, 1982" [item 109305], Ronald Reagan Library, WHORM (White House Office of Records Management) Subject Files, FG 006-11 (OMB), Box 2, [FG 006-11 107600-107813].
[110] Ed Harper to Ed Meese, "Proposed Actions in Regulatory Reform Area," memo of November 20, 1981.

second time they have 'tested' the Order and had to pull back)…." Some sort of appeal process or review board was needed: "we're trying to develop a way to do this without drawing you and Jim [Baker] into any" issues that would verge onto shaky legal ground (since, again, agencies have the statutory authority to promulgate regulations.)

Meantime, though,

> A premeditated attempt to circumvent a Presidential Order should not be allowed to go unnoticed as if nothing had happened. I would strongly suggest that you bring in [OSHA] and [the Secretary of Labor] and that we have a very serious discussion about future attempts to circumvent Executive Orders. Last year, we brought in several Administrators from the Department of Transportation to have "religious sessions" – I certainly think another one is required in this case. [111]

Generally, the chief inquisitor of such sessions was either Meese or George Bush – one thing OIRA had in its favor in establishing itself with agencies was that the Vice President was rather more powerful than RARG had been. Over the course of 1981, the Task Force selected a usefully symbolic 100 regulatory and paperwork issues for departmental reconsideration. An October 1981 status report said that of the 61 selected by April, a little more than half had resulted in agency revision to regulation and another 20% "are going well."[112]

The search for regulations to review could be a bit surreal. State and local governments, for example, were asked for nominees for a "regulatory hit list" – but OIRA director Chris DeMuth was told that desk officers were not always been able to match up the resulting complaints with actual rules on the books.[113] Nor was the Task Force infallible. The status report noted above had to concede that the remaining fifth of targeted rules were "going slowly,"

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[111] Joseph R Wright, Jr. to Edwin Meese III, "Run on E.O. 12291," memo of October 3, 1983. RRL, WHORM Subject Files, FG 006-11 (OMB), Box 3, Folder [208300-226737], Document 219282.

[112] "Attachment C: Status of Regulatory Relief Efforts as of 24 October 1981," attached to Ed Harper to Ed Meese, "Proposed Actions in Regulatory Reform Area," memo of November 20, 1981.

[113] Robert Neal (OIRA) to John Knapp (HUD), "Regulatory Hit List," memo of March 1, 1982; LaVerne Collins to Chris DeMuth, "State and Local Regulations," memo of March 24, 1982. Both in NARA, RG 51, Entry UD-WW 368, OIRA 1981-84 Division Office: Box 2, [E. 3 Education, Department of, 1981-82] and Box 7, [R.4.2 Regulatory Relief, Presidential Task Force on, 1981-82].

especially in EPA, though also in Labor and Justice. Complaints that the Task Force "openly courted advice from regulated interests" helped undercut its hierarchical advantages (Kirschten 1983).

And, of course, OIRA didn't always win even its pitched battles. In a well-known 1983 dispute with Labor over what industry needed to do to protect workers against inhaling cotton dust, OIRA was upset that "a much more fundamental reassessment of" a 1978 rule setting standards for exposure to such dust had not been completed and that Labor's analysis did not contain any assessment of the cost-effectiveness of various alternatives (in violation of EO 12291).[114] OIRA favored giving workers respirators, rather than requiring complete clean-up of a given facility. The matter escalated; notes several months later reflect that "VP Task Force met on this last week. Most members opposed Labor…. [The]Task Force, divided, figured this should go to President. [Labor] wants a meeting, prior to 'going to President,'" with OMB and high-ranking White House staff. "I think we should do this since Labor feels so *strongly*."[115] And, in fact, Labor's position prevailed; a later book on the topic argues that the administration was under so much pressure in the press and Congress because of its regulatory battles with EPA that it didn't want to open up another front (Botsch 2014, 136).[116]

5. Protecting Autonomy

Consistent with the theoretical discussions of institutionalization above, OIRA sought to define its boundaries and fend off proposals that would limit its autonomy. Partly this was a matter of using the various forms of leverage traced above to build a reputation for competence but also for ruthlessness –

[114] Christopher DeMuth to T. Timothy Ryan, letter of January 27, 1983 and attached material. RRL, WHORM Subject Files, FG 006-11 (OMB), Box 3, [FG 006-11 144100-150199], document 144127.
[115] Ibid.
[116] "US to Keep Order to Install Dust Controls at Textile Mills," *New York Times* (May 20, 1983), A16.

"a Charles Atlas transformation," as the *Washington Post* put it (Behr 1981a). One scholar of the process (Friedman 1995, 147) found that "my efforts and those of other researchers to extract information from officials about cases in which OMB caused a regulatory proposal to die provoked a kind of *fear*, even panic." As OIRA administrator Jim Miller told Congress in 1981, "You know, if you're the toughest kid on the block, most kids won't pick a fight with you" (quoted Friedman 1995, 35).

Sometimes these efforts forced OIRA to hold its ground against other parts of OMB. This could require promoting expertise over expediency: one OIRA staff member recalled pushing back when OMB director Stockman would push for "an unjustifiable change" in a proposed regulation (quoted in Friedman 1995, 61). Or it could mean a less exalted turf war – as when, a few years later, OIRA administrator Wendy Gramm was urged to hold her ground against a new PAD who had just arrived from the White House and was cutting deals with Health and Human Services about budget-related regulation. "OIRA should be represented in all meetings with agency officials on regulations…. Rather than you pushing OIRA regulations and Debbie pushing [her division's] regulations, we believe that you should be the OMB policy official pushing both, and hope you can suggest this delicately."[117] Sometimes the White House was the target. One draft executive order (and accompanying legislative proposal) dealing with "crosscutting issues" being coordinated by regulatory initiatives "would address a problem that does not exist," grumbled one OIRA official. "The indiscriminate implementation of crosscutting requirements by regulation can be very counterproductive" since it would actually add many more formally-issued regulations when informal administrative policies served the same purpose. Institutionally, it would put OIRA and OMB in the middle of "delicate cabinet-level negotiations" over which department would take the lead on a given regulation, which itself "dilutes OMB's central EO 12291 and 12498 review authority."[118]

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[117] James MacRae, Jr., to Wendy L. Gramm, "Your Meeting with Debbie Steelman," memo and attachments of March 13, 1986. NARA, RG 51, Entry UD-UP 224, OIRA Program Records, Box 2, [H.1 Health and Human Services Department, Part II, 1985-86]

[118] Ibid.

Most often though the threat came from Congress (Eads and Fix 1984; Friedman 1995, Ch. 6). Going back to the days of the QLR, legislators (largely, but not exclusively, Democratic) had been concerned with White House interference in agency rulemaking – one reason, of course, that IRCs had been exempted from the sequence of orders imposing regulatory review even as administration lawyers insisted they could be included. Starting in June 1981, Rep. John Dingell (D-MI), chair of the Energy and Commerce Committee's subcommittee on Oversight and Investigations, kicked off a long series of hearings on OIRA and regulatory review. This made OMB's Ed Harper nervous that legislative action could limit White House involvement in the process to purely "advisory": "we believe such limitations would be unconstitutional and are opposing them."[119]

Meantime, as its series of newsletters to the White House noted above makes clear, OIRA kept close tabs on regulations that could be politically sensitive. A 1982 memo warned DeMuth about "the possibility of adverse reaction to a Department of Education final regulation currently under review," while DeMuth in turn kept in touch with White House chief of staff Jim Baker about the pressure Baker was receiving from Senators concerned about possible regulatory changes.[120] The idea in general was to avoid "Congress taking the initiative with legislation which will impose stricter, more rigid, and more expensive requirements" limiting OIRA flexibility where (as in many places) they felt policy was "more appropriately contained in regulation rather than statute."[121]

As noted in more detail below, the occasionally fierce hostility between OIRA and Congress was submerged in a deal in the mid-1980s that led to a sort of détente. Barry Friedman's critical review of

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[119] Ed Harper to Ed Meese, "Proposed Actions in Regulatory Reform Area," memo of November 20, 1981.

[120] Karen Sagett to Chris DeMuth, "Education Department Student Loan Regulation," memo of July 22, 1982. NARA, RG 51, Entry UD-WW 368, OIRA 1981-84 Division Office, Box 2, [E. 3 Education, Department of, 1981-82]; Chris DeMuth to Jim Baker, "Senator East's Letter on Redefining Federal Financial Assistance and the Dispute between the Departments of Education and Justice," memo of January 15, 1982. NARA, RG 51, Entry UD-WW 368, OIRA 1981-84 Division Office, Box 2, [E. 3 Education, Department of, 1981-82].

[121] Wendy L. Gramm to Director, "Call to Secretary Bowen Regarding Regulations on Conditions of Participation for Long-term Care Facilities," memo and attached material of September 23, 1987. NARA, RG 51, Entry UD-UP 276, Records of the Office of the Director, 10/15/85-1/10/89, Box 14, [OIRA Issues].

OIRA in this period argues that "Congress…extracted procedural concessions from OIRA and shone a spotlight on some of OMB's most egregious violations of due process" (1995, 5). But in return legislators and bureaucrats accepted the principle of regulatory review: Reagan obtained a "surprising degree of cooperation, compliance, and comity among entities that might have been expected to act with determination to overcome and defeat Reagan's advisers and to eliminate the centralized review process" (1995, 4, and see 118). Regulatory review had become institutionalized.

Summing Up Early Institutionalization

The date of that result can be debated, of course. Another logical break point is Bill Clinton's endorsement of the concept of regulatory review in 1993, with the issuance of Executive Order 12866 – which limited OIRA's purview to "major" rather than all rules, and which remains largely in effect. Far earlier, Eads and Fix (1984, 3) argue that the "most active days" of the regulatory relief program were over quickly -- by June 1981! Yet the *Sierra Club v. Costle* case decided that same year put regulatory review on a sounder legal footing. The Bush task force declared victory over regulation in August 1983 and shut down; however, it renewed operations in November 1986, with a focus on legislative proposals that would lead to deregulation (Friedman 1995, 39-40).

By then, Jim Miller (who had returned to OMB in 1985 as its director) had cut a deal to ensure the future of OIRA. The office had not been reauthorized since fiscal 1983, except in annual appropriation bills, giving critics such as Reps. Jack Brooks (D-TX) and Dingell a vehicle to block its funding. In a long plea to Appropriations Committee chair Jamie Whitten (D-MS), Miller noted that the agency had been extremely responsive to Congress, testifying more than 30 times before 21 committees and subcommittees. "Quite frankly, our understanding from our oversight hearings has been that Congress has increasingly *supported* our activities," he wrote. To charges that "that OIRA has contravened congressional delegation of statutory authority to certain regulatory agencies" or "imposed

substantive regulatory standards foreign to statutes" -- a reputation that had served as at least an informal bolstering of OIRA authority, as Miller's own comments in 1981 had suggested -- "we obviously do not agree." Instead, "all statutory authority that is vested in a subordinate official of the executive branch remains that official under our regulatory review program. These statutes do not preclude the president from supervising and guiding the exercises of that authority."[122]

Miller, along with OIRA administrator Wendy Gramm, agreed with key legislators that Gramm would issue a memo detailing "additional procedures concerning OIRA reviews" under EOs 12291 and 12498 (Friedman 1995, 114-16; Gramm 2011, 29-30). This locked in place new internal guidelines expanding disclosure of OIRA staff contacts with and materials received from outside interests – all issues which had concerned agencies, advocacy groups, and lawmakers, who charged (sometimes accurately) that the neutral rationality of cost-benefit analysis had been swayed by favoritism to industry importuning. Further, the appointment of future OIRA administrators would be subject to Senate confirmation. In return, OIRA was funded and reauthorized for three years, and legislative efforts to impose time limits and even wider disclosure of review operations were dropped.[123]

This marks a logical place to date the end of the first phase of OIRA's development. By the "closing years of the Reagan administration, the regulatory review process settled into a routine," one close observer concludes (1995, 163). Controversies continued, of course – President George H.W. Bush's use of a Council on Competitiveness under Vice President Dan Quayle undercut some of the agreed-upon disclosure, and Bush's nominee to lead OIRA was never confirmed. But this meant the office was headed by a career civil servant, acting director James McCrae, for the whole administration, tamping down provocation and helping solidify a useful division of labor separating "policy rationality"

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[122] James C. Miller III to Jamie Whitten, letter of July 16, 1986 [October 20 is also stamped on the letter]. NARA, RG 51, Entry UD-UP 224, OIRA Program Records, Box 1, [A.2 Administrative Matters, 1985-86].

[123] However, some limits were placed in specific statutes, requiring that agencies issue regulations by a date certain. (See Friedman 1995, 117.)

(in OIRA) from a focus on "policy outcomes" elsewhere (see O'Reilly and Brown 1987). As far as those outcomes went, administration priorities such as the Clean Air Act amendments and the Americans with Disabilities Act led to massive increases in regulatory activity rather than the "reforms" the White House sometimes claimed. Indeed, Bush OMB director Richard Darman was moved to scrawl on one memo that "Clean Air and ADA increased regulatory burden by more than all that Bush Task Force cut in 80's!"[124]

In any case, by 1986 the regulatory review process had benefitted from fifteen years of development that aggregated its resources and enhanced its autonomy. This included the growth of staff, expertise (including better analytic techniques), internal procedures and routinization, legal authority, and extra-legal leverage stemming both from the gradual embrace of the process by OMB and the increasingly aggressive deregulatory preferences of successive presidents. It is worth adding the tireless role of a bureaucratic entrepreneur to this mix, something too little noted in institutional development (but see Skowronek and Glassman 2007): in this case, Jim Tozzi, who left for the private sector in 1983, built allies across five administrations over 19 years. OMB Director David Stockman's memo to the agency regretting the "astute" and "effective" Tozzi's hailed his "pioneering work in establishing a central oversight process for regulatory policy."[125]

Regulatory review did not immediately become beloved – by the wider executive branch or by many in Congress -- but it did become accepted, and expected. In a 1990 exchange, Sen. John Glenn (D-OH) asked an anti-OIRA activist whether he "would prefer to have OMB completely out of the loop?" "Right," was the reply – "but we recognize that that is not likely to happen." To laughter in the hearing room, Glenn said in return, "I think you're correct."[126]

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[124] Richard Darman handwritten notation on C. Boyden Gray and Michael Boskin to the President, "Proposed Regulatory Reform Initiative," memo of December 23, 1991. NARA, RG 51, Entry 388, Records of the Director's Office: Director's Office Files, 1989-92, Box 5 [Darman Notes 1991].

[125] OMB Office Memorandum 83-12 (May 6, 1983).

[126] The exchange with Public Citizen Congress Watch attorney David Vladeck is from a Senate Governmental Affairs Committee hearing on S. 1742, quoted in Friedman (1995, 119).

The creation of a new office and top-level process was necessary for that adjustment but not sufficient for it. Regulatory review began as a far more limited endeavor but as its utility became clear to three pre-Reagan presidents they built an infrastructure of staff, analytic expertise, and political capital which Reagan could cement together.

The key to institutional effectiveness, then, is not simply a matter of process. Indeed, a focus on *process* can sometimes be a substitute for, rather than enabler of, an impact on *substance*. It is not the issuance of executive orders but the provision of resources that make those orders function in practice. President Trump's attempt to resuscitate regulatory relief should pay attention to that history.

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