

OIRA's Formative Years
George Washington University
30th Anniversary of OIRA
May 20, 2011

Jim Tozzi

Accolades to Susan Dudley for organizing a symposium around the history of OIRA.

My experience is that Americans have a disdain for history so it will be difficult for affected parties to take an interest in the subject matter but it is worth the effort.

Why is the history of OIRA important? An understanding of OIRA's history gives an insight into the regulatory oversight actions that have worked and those that have failed. I am struck by how little knowledge the OIRA career staff has of the history of the office. This lack of knowledge is not the sole result of the lack of interest on the part of desk officers but also because of the failure of OIRA management in a number of Administrations to address the subject.

Summary Points

I would like to make three points:

1. OIRA was launched with EO 12291 which was the first time OMB reviewed NPRMs before they were published on a government-wide basis.
2. OIRA is founded upon more than a statute and an Executive Order – it has a rock solid foundation made possible through a wide range of administrative, Congressional and judicial decisions made during the four Administrations which preceded the Reagan Administration.
3. OMB review when it is forcibly implemented, will, in the long run, provide a shield against special interests and acts as force against the dismantling of regulatory agencies.

Prior to addressing these three points let me raise several points regarding the management of OIRA.

Management Issues

I would like to identify a number of challenges which OIRA should address.

1. **Desk Officer.** The role of the desk officer has changed considerably over the past thirty years. At the inception of OIRA, the desk officer was in charge of a particular agency, meaning the desk officer was in charge of the transactions of a particular agency to ensure they complied with the relevant OMB directives. Over the years, in my opinion, the role of the desk officer has changed considerably from a manager of agency operations to a greater emphasis on writing white papers for action by the Administrator. Having the majority of the decisions flow through the Administrator reduces the clout of the organization. In addition, it appears that in recent years that there has been an emphasis on recruiting “book smart” desk officers; there is also a need for desk officers that are “street smart.”
2. **Budget Side.** At its inception, OIRA's career leadership came from the “budget side” of OMB; it appears that OIRA's connection to the “budget side” needs to be emphasized.
3. **Social Entrepreneurs.** OIRA was established around the fostering the growth of “social entrepreneurs” – individuals who develop a concept, market it and make it grow; an action similar to starting a for-profit firm in the private sector but in this case the payoff is in terms of improving the functioning of the government – not a hundred foot yacht. OIRA needs to have a re-emergence of social entrepreneurs.
4. **OIRA Staff Level.** Within a year of its establishment, OIRA was the largest office in OMB, even larger than the Budget Review Division. OIRA's personnel constraints must be addressed. A sustained staff level can only be accomplished through the social entrepreneurial skills of the OIRA SEA corps.
5. **Review of Independent Agency Regulations.** OIRA will continue to be plagued by accusations that it is singling out environmental regulations if it does not review the economic regulations of the independent agencies. OIRA has ample authority under the Paperwork Reduction Act and the Data Quality Act to review such regulations. See <http://www.thecre.com/pdf/blueprint.pdf>.

6. **Retrospective Review of Regulations.** OIRA should encourage the retrospective review of existing regulations by encouraging that petitions under the Data Quality Act be filed on such regulations and ensuring potential petitioners that OMB will participate in the review of the petitions.
7. **Public-Private Cooperation in Regulatory Enforcement.** Lastly OIRA should recognize that since its power flows from the President its regulatory powers may fluctuate over time, thus the need to support mechanisms which allow the private sector to assume a portion of their enforcement role through the use of procedural mechanisms such as the Data Quality Act.
http://www.thecre.com/quality/2010/20101219_regweek.html

Abbreviated History of OIRA

If the history of OIRA is to be complete it should be recognized that the review of regulations began in the Nixon Administration, years before OIRA existed. The Nixon Administration's Quality of Life Review laid the foundation for OIRA. First, it took the political heat for initiating a centralized regulatory review program, second it withstood the legal challenges to centralized regulatory review, and third, it developed a trained staff to review regulations.

OIRA's evolution was enhanced by the actions of three other Administrations:

- **Carter.** The Carter Administration, notwithstanding demands by its constituency to terminate OMB review of regulations, continued regulatory review albeit in a limited manner. In addition President Carter signed a law which gave a statutory basis to OIRA notwithstanding the fact that the majority of his cabinet opposed the enacted statute.
- **Reagan.** The Reagan Administration expanded OMB's review program by having the regulations of all Executive Branch agencies submitted to OMB before they were promulgated.
- **Clinton.** The Clinton Administration reinforced the bipartisan support for OMB review of regulations by signing an Executive Order similar to the Reagan Executive Order—failure by the Clinton Administration to take such an action would have terminated OMB's regulatory review.

It should be noted that the author has contributed to some confusion as to whether regulatory review started in the Johnson Administration or the Nixon Administration. Professor Percival stated,

The only source Calabresi and Yoo cite for the assertion that regulatory review originated with the Johnson Administration is an interview with former OMB official Jim Tozzi, cited in another article(68). Yet Tozzi himself subsequently has told interviewers that “[r]eviews of regulations began when Richard Nixon created the Environmental Protection Agency (69)

Fn (68)

68. CALABRESI & YOO, *supra* note 5, at 342 n.19; Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1, 9 & n.19 (1984) (citing Interview with Jim Tozzi, former Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA) Deputy Administrator (June 14, 1983)).

Fn (69)

69. Dan Davidson, *Jim Tozzi: Nixon's "Nerd" Turns Regulations Watchdog*, FEDERALTIMES.COM (Nov 11, 2002), http://www.thecre.com/pdf/20021111_fedtimes-tozzi.pdf. During the Johnson Administration, Tozzi was employed by the Office of Budget's Systems Analysis Group that argued for expanding reviews of the U.S. Army Corps of Engineers' budget to include review of Corps regulations. *See* Jim Tozzi, Commentary of Dr. Alan Schmid's Paper, THECRE.COM, <http://www.thecre.com/ombpapers/TozziAnalOfEconomicsOfRulemaking.htm> (last visited Apr. 20, 2011). The members of the Office of Budget's Systems Analysis Group later helped establish and manage President Nixon's Quality of Life Review process, which was the first presidential regulatory review program. *See id.*

Article at, http://www.fordhamlawreview.org/assets/pdfs/Vol_79/Percival_May.pdf.

To clarify the matter, the blueprint for centralized regulatory review began in the Johnson Administration; the actual review of regulations was initiated in the Nixon Administration.

History of OIRA: Johnson Administration

- **Origins of Benefit/Cost Analysis.** The first time I was exposed to the concept of performing benefit/cost analyses of regulations was in the mid 1960's as a result of a suggestion from a colleague, Alan Schmid who oversaw the activities of the Corps of Engineers.
<http://thecre.com/ombpapers/EconomicsOfRulemaking.htm>
- **Corps of Engineers Use of Benefit/Cost Analysis.** The fact that an organization affiliated with the Corps of Engineers was proposing the benefit/cost analyses of regulations was of particular import because the concept of conducting benefit/cost analyses of federal expenditures can be traced back the Rivers and Harbors Act of 1936 which required the Corps of Engineers to perform benefit/cost analyses of its projects.
- **Regulatory Review and Benefit/Cost Analysis.** The linkage between conducting benefit/cost analyses and the idea of centralized regulatory review might not be obvious but it is very significant—one cannot have a meaningful benefit/cost program if there is not another group which examines the work of the analysts—a central shop to review benefit/cost analyses of the various part of an organization.
- **The First Centralized Regulatory Review.** Consequently, the first centralized review of regulations which I was involved in was that of the Systems Analysis Group in the Office of the Secretary of the Army who initially reviewed Corps of Engineer projects which then extended the review to Corps regulations. (This extension to the review of regulations was so controversial that eventually the office was terminated by an act of Congress—a pedagogical prelude to establishing centralized regulatory review in OMB.)
- **Staffing.** Key personnel from the aforementioned Systems Analysis Group eventually ended up at OMB running the Quality of Life Review and assisting in establishing the regulatory review process in the Carter Administration.

History of OIRA: Nixon Administration

- **Regulating the Regulators.** The Nixon Administration responding to criticisms from industry that the regulators needed a regulator, established the Quality of Life Review (QLR) in OMB.

- **OMB in Charge.** The Quality of Life Review (QLR) was managed by the budget side of OMB, the Environment Branch of the Natural Resources Division.
- **Review Quietly Established.** The QLR was established with little fanfare, merely a several paragraph letter to the heads of agencies stating that environmental, health and safety regulations had to be submitted to OMB for review prior to their proposal or promulgation. A history of the QLR and the regulatory review programs of other administrations is available on the website, www.TheOMB.US.
- **The Review Process.** The QLR process was markedly different from the one presently utilized in OIRA in that it was patterned after OMB's legislative clearance process, meaning OMB would receive an NPRM and send it to the affected agencies for comments.
- **Interagency Review.** If there were a substantial disagreement OMB would convene an interagency meeting and opine on the substance of the arguments.
- **Low Profile Process.** The QLR came out of nowhere and was in existence for some time before the Congress, the press and advocacy groups took exception to its existence.
- **Comprehensive Review.** All regulations had to go to OMB for review, not just the "major" ones. OMB had the authority to designate any document in the regulatory process as being subject to the QLR.
- **A Unique Review Process.** I know of no regulatory review process administered by OMB in subsequent Administration's which could compare with the degree of force and depth of the OMB reviews as was the case with the QLR.

The following 1976 quote from the Environment Reporter gives a sense of the effectiveness of the regulatory review process:

— The "most significant examples of OMB objecting to an EPA regulatory approach concerned the EPA staff's desire to differentiate between the 1977 and 1983 requirements for municipal sewage treatment works under the Federal Water Pollution Control Act. The EPA staff would have made the 1983 requirement more stringent than the 1977 requirement.

The Proposal would have increased the demand for federal funds by several billion dollars at a time when unfunded demand exceeded available appropriations by many billions of dollars. EPA told Moss, "As a result of OMB's observations, the EPA staff recommended that the agency retain the prior level of required treatment"

— Despite its influential role in affecting EPA regulations, Brown said, OMB "has remained an untouchable. Its decisions are usually final and unquestionable. The Congress has not probed into the effect OMB action has on statutorily mandated programs except in a few instances."

The Quality Life Review not only involved the review of regulations but it also dealt with legislation that resulted in regulation. In 1976 the Environment Reporter stated:

As an example of the OMB role on legislation, one might consider the toxic substances bill, (HR 14032) passed by the House.

Following a compromise between House Commerce Committee Republicans and Democrats, the legislation appeared to gain the general support of the majority and minority parties in both the Senate and the House. The measure appeared also to have gained support of key agencies and departments within the Ford Administration including EPA.

In addition, the bill was endorsed by the major industry trade group, the Manufacturing Chemists Association, although Dow Chemical Company continued to oppose it. Furthermore the legislation was backed by labor and environmental groups.

On August 6, however, the apparently unanimous support for the toxic substances control bill developed a gaping hole, as OMB unofficially announced it was opposed to the legislation after all.

OMB's leadership was under the public microscope, even to the point of the DC party circuit conversations, please see the first edition of the Environmental Forum, published in 1982 by the Environmental Law Institute:

There's a story, a true one, about several people who during President Ford's Administration were informally discussing the one individual who, in their opinion, was the single most influential person in shaping environmental policy nationally.

"A passerby at the cocktail party, hearing just scant parts of their conversation, was intrigued. Giving it some thought, he stopped and, interrupting the group politely, speculated that it must be one of four people they were discussing, Russell E. Train, then Environmental Protection Agency Administrator; Senator Edmund S. Muskie (D-Maine), who then was chairman of the Public Works Subcommittee on Environmental Pollution; Leon Billings, Muskie's aid whose influence and personality had earned him the nickname of "Senator Billings; or Jim Tozzi, chief of the Environment Branch at the Office of Management and Budget. He guessed Jim Tozzi.

He was right.

- **Depth of Review.** The "depth" is of note because OMB could request the review of any agency document in the record, including draft and final agency guidance.
- **Presidential Authority.** The "force" was of note because the Nixon White House maintained resignations on file of agency heads which they could—and did use at will.
- **Significant of Budget Side Involvement.** The "force" of the OMB review was accentuated because of its presence on the budget side of OMB which also controlled agency budgets and legislation.
- **All Challenges Defeated.** The QLR established the legitimacy of OMB review in the courts, the press, the Congress and the public.
- **Legality of Review Upheld.** The QLR had to fend off legal actions by some hostile members of the Congress fueled by an acidic press. If one had a weak stomach, the QLR was a process to avoid. Establishing the legality of OMB's review process was initiated during the Nixon Administration and continued in large part through the Carter and Reagan Administration's. A large number of academicians, professional associations and other groups addressed the matter;

virtually all of which concluded on legal—but not on a policy—grounds that the President has the authority to review agency regulations before they are proposed.

- The fact that the OMB review of regulations is based upon a strong legal foundation continues to be reported by legal scholars. In fact, this very month there is an article in the Fordham Law Review written by Professor Percival of the University of Maryland found at:
http://www.fordhamlawreview.org/assets/pdfs/Vol_79/Percival_May.pdf.
- **Organizations Agreeing that Regulatory Review was Lawful.** Organizations which addressed the OMB review process and concluded that the President has the authority to review regulations before they are proposed include:
 - **Department of Justice**
http://thecre.com/pdf/Carter_DOEHWMemo011779.PDF

“For the reasons that follow, it is our conclusion that there is no prohibition against communications within the Executive Branch after the close of the comment period on these proposed rules. Nothing in the relevant statutes or in the decisions of the D. C. Circuit suggest the existence of a bar against full and detailed consultations between those charged with promulgating the rules and the President’s advisers.”
http://thecre.com/pdf/Carter_DOJOpinion072277.PDF
http://thecre.com/pdf/Carter_WhiteHouseMemo120977.PDF
 - **National Academy of Science/ Environmental Law Institute**
<http://thecre.com/pdf/TozziMemo.PDF>
 - **American Bar Association**
http://thecre.com/pdf/Carter_ABA1.PDF
 - **GAO**
http://thecre.com/pdf/Carter_GAOLet100478.PDF
 - **Academicians**
http://www.thecre.com/pdf/20070730_Bagley-Revesz.pdf

“Born out of a Reagan-era desire to minimize regulatory costs, and not fundamentally reconsidered since its inception, the centralized review of

agency rulemakings has arguably become the most important institutional feature of the regulatory state."

http://thecre.com/pdf/Carter_PresPowerAdminRulemaking.PDF

In an influential article entitled Presidential Administration, Kagan [prior to appointment to Supreme Court] argued that where Congress has not acted expressly to restrict the President's ability to direct an agency decision, regulatory statutes should be interpreted to permit the President to do so."

http://www.fordhamlawreview.org/assets/pdfs/Vol_79/Percival_May.pdf

➤ ACUS

Jeff Lubbers, the former director of research at ACUS, made two important points:

- (1) ACUS made an unequivocal recommendation in support of OMB review of regulations when it stated:

"Presidential review should apply generally to federal rulemaking. Such review can improve the coordination of agency actions and resolve conflicts among agency rules and assist in the implementation of national priorities."

- (2) Judge Wald, in *Sierra Club v. Costle*, ruled on the legality and desirability of Presidential review of regulations.

- **Legality Upheld in Subsequent Administrations.** The legality of OMB review of regulations was first raised in the Nixon Administration and was resolved in large part by the end of the Carter Administration.
- **A Firm Foundation.** Had not the aforementioned issues been vetted in these prior Administrations, Executive Order 12291 which launched OIRA reviews would have been on a rocky start which probably would have curtailed its timely implementation.
- **EPA in the Spotlight.** Although the QLR applied to environmental, health and safety regulations, EPA regulations by far received the most intensive review.

- **EPA Rebuffed.** On a number of occasions, EPA made efforts to have the program terminated, but were rebuffed in each instance by the Administration.
- **Attempts to Undermine Centralized Review.** Advocacy NGO's made continued attempts to undermine the QLR in both the Courts and Congress and failed each time.
- **Regulatory Review—An Established Process.** By the time the Nixon Administration ended, the QLR was an established component of the federal regulatory process.

History of OIRA: Ford Administration

- **Continuity.** The Ford Administration kept the Quality of Life Review in place.
- **Compliance Maintained.** A common question asked by students of the regulatory process was whether the Quality of Life Review suffered a reduction in compliance by federal agencies as a result of the new Administration. Such a phenomenon might have existed but it was short lived.
- **A Joint Program.** The Quality of Life Review, which had a clearance role, was accompanied by a joint program administered by OMB and the Council on Wage and Price Stability which had a comment role after the NPRM was issued.
- **Executive Orders.** It appears that the Ford Administration was the first Administration to issue Executive Orders requiring an economic analysis of regulations with oversight by OMB. The Ford Administration issued Executive Order 11821 and Executive Order 11949, Economic Impact Statements.
- **Council on Wage and Price Stability Involvement.** The economic impact statement program was administered jointly by OMB and the Council on Wage and Price Stability.
- **Leadership.** The OMB official responsible for the OMB/CWPS economic impact program was the talented Stanley E. Morris, Deputy Associate Director, OMB, Economics and Government Management Division.

- **Distinction Between Types of Review.** It should be noted that there was a stark difference between the Quality of Life Review and the OMB /CWPS program, the Quality of Life Review was conducted prior to the issuance of a proposed rule and OMB had to opine on the merits of an NPRM before it was issued. CWPS had no line authority over regulatory agencies.

History of OIRA: Carter Administration

- **An Essential Contribution to Centralized Review.** Alice Rogoff, then the Special Assistant to the Director of OMB, working with Wayne Granquist, made one of the most significant contributions to the establishment of centralized regulatory review in OMB.
- **An Office Dedicated to Regulatory Review.** Ms. Rogoff had the idea of establishing one office in OMB which had the responsibility of reviewing regulations. Theretofore the “budget side” reviewed individual regulations and the “management side” issued policy statements. The Office was called the Office of Regulatory and Information Policy.
- **The Need for the Office.** The establishment of a central regulatory office in OMB was extraordinary because, as noted above, on the last day of the Ford Administration an EPA political official unilaterally announced that the agency was no longer going to comply with the conditions of the Quality of Life Review (QLR).
- **Office Did Not Review Final Regulations.** Unlike the Quality of Life Review, the newly established office did not have the authority to review regulations before they were issued but it did participate in a number of reviews subsequent to the issuance of an NPRM; it also administered the review of requests for information collection and had oversight over privacy issues, information technology and information policy, the latter became the seed bed for the Data [Information] Quality Act.
- **A Political Issue.** In fact, the OMB review of regulations while not a Tier I issue was at least a Tier III issue in the presidential campaign because a number of the environmental and consumer advocacy groups had considerable disdain for OMB's “meddling” in the regulatory process. Consequently the Carter Administration entered office with a lot of obstacles to overcome in respect to centralized regulatory review.

- **An Important Accomplishment: A Regulatory Review Executive Order.** Notwithstanding these obstacles, the Carter Administration made some remarkable contributions to regulatory review. They issued the first Executive Order on regulatory review, Executive Order 12044 which established the principals for regulatory review. Stan Morris of OMB's Economic and Government Division was instrumental in the formulation of Executive Order 12044—Improving Government Regulations.
 - Executive Order 12044 was important because it was the first Executive Order which identified OMB in a regulatory oversight rule, albeit very limited—no review of regulations before they were proposed. Nonetheless it was another stone in the foundation for OMB review of regulations before they were issued on government-wide basis.
 - The Carter Administration also established the Regulatory Analysis Review Group (RARG) which reviewed a select number of regulations after the NPRM was issued but prior to issuance of a final regulation.
 - RARG was an interagency group which was co-chaired by OMB, the other chair being rotated among participating agencies.
 - The staff of the Council on Wage and Price Stability (CWPS) provided reviews of a limited number of regulations identified by the RARG.
 - All reviews were conducted during the public comment period and contacts with agencies were limited to discussions during the public comment period.
 - The Carter Administration realized that they were establishing an important precedent by issuing an Executive Order which gave OMB oversight authority over agency regulations; for this reason they submitted it for public comment, see the very extensive analysis of public comments by Tom Hopkins and Jeff Lubers (document in five parts due to large size):
 - Part 1 (pgs 151-207)
http://thecre.com/pdf/CarterAgency-by-AgencyPerform_Part1.PDF
 - Part 2 (pgs 208-267)
http://thecre.com/pdf/CarterAgency-by-AgencyPerform_Part2.PDF

- Part 3 (pgs 268-327)
http://thecre.com/pdf/CarterAgency-by-AgencyPerform_Part3.PDF
- Part 4 (pgs 328-431)
http://thecre.com/pdf/CarterAgency-by-AgencyPerform_Part4.PDF
- Part 5 (pgs 432-470)
http://thecre.com/pdf/CarterAgency-by-AgencyPerform_Part5.PDF
- **An Interagency Work Group.** The Regulatory Council, an interagency group tasked with eliminating duplication of regulations, was also established by the Carter Administration.
- **A Regulatory Budget.** The first prototype regulatory budget for an operating agency was formulated under the Carter Administration.
<http://thecre.com/ombpapers/regbudget.html>
<http://www.chrisdemuth.com/id55.html>
- **A Paperwork Budget.** The Carter Administration also established by executive order the preparation of the first government-wide annual paperwork budget.
<http://www.thecre.com/pdf/EO12174.PDF>
http://www.thecre.com/pdf/Clinton_FY98InfoCollectionBudget.PDF
- **A Bold Proposal.** The Carter developed the Regulatory Cost Accounting Act of 1980; a proposal to require agencies to develop consistent and continuous estimates of the costs of its regulations on an annual basis. The Environment Reporter, May 5, 1980 reported:

Tozzi's Bill

The proposed legislation comes from OMB's Office of Regulatory and Information Policy, headed by James J. Tozzi....Edward H. Clarke, management analyst in Tozzi's office, told Environment Reporter information on the total costs of regulations could and might be used for a regulatory budget....

<http://www.thecre.com/ombpapers/RegCostAccounting1980.htm>

- **A Different Approach to Regulatory Review.** The approach taken by the Carter Administration was not to reinstate the Quality Life Review process whereby

OMB would review regulations before they were issued, but instead to create review processes subsequent to the issuance of the NPRM.

- **A Culminating Achievement – The Paperwork Reduction Act.** Finally, legislation, Paperwork Reduction Act, creating a statutory base for OMB review of regulations was proposed and enacted during the Carter Administration. This effort was lead by Wayne Granquist, Associate Director and Jim Tozzi, Assistant Director of OMB with the support of Jim McIntyre, Director of OMB. These individuals, along with Bob Coakley, made the PRA happen – Congressional sponsors were Congressman Brooks with the support of Congressman Horton and Senator Chiles.
 - It is import to note that President Carter signed the Paperwork Reduction Act after he lost the election, not withstanding opposition by the majority of his cabinet.
- **Setting the Stage for the Next Administration.** It is unlikely that the Reagan Executive Order 12291 would have been successful if the Carter Administration had not established and had in operation a central review office in OMB for several years.

OIRA History: Reagan Administration

- **The Reagan Regulatory Review Executive Order.** The signing of Executive Order 12291 by President Reagan was a regulatory tsunami. (An important after shock was when the Clinton Administration issued Executive Order 12886 which cemented the bi-partisan support for OMB regulatory review.)
- **Improving the Regulatory Process.** The timing was impeccable, a President and Director of OMB who had made numerous statements prior to the election of the need to have a more efficient regulatory process, a trained OMB staff, and the acceptance by the agencies and the courts that OMB fulfilled a legitimate role in the review of agency regulations as result of the work of four prior Administrations.
 - However, Washington is littered with Executive Orders that never got off the ground.

- The actions by the previous four Administrations played a significant role in the success of the Reagan Administration's program.
- **Expert Staff Crucial to Success.** The Reagan Administration's "Regulatory Relief" program got off to a very fast start.
 - Well before the inauguration, after Jim Tozzi was appointed Deputy Administrator, and with the subsequent appointment of Jim Miller as Administrator, Miller requested that Jim Tozzi and Tom Hopkins draft an Executive Order empowering OMB to review regulations before they were proposed.
 - The initial draft Executive Order underwent considerable changes as a result of White Counsel review and DOJ review by Cass Sunstein.
- **Regulatory Relief.** Two days short of the first month in office, the Reagan Administration issued a comprehensive "Regulatory Relief" program. The program had a number of precedent setting actions including:
 - The first government-wide "freeze" of regulations which had not gone into effect;
 - Established the Presidential Task Force on Regulatory Relief, a level program dedicated to regulatory policy chaired by the Vice President;
 - Termination of the CWPS Wage Price Program, its able staff of economists were transferred to OIRA;
 - OIRA "desk officers" were assigned to oversee the regulatory actions of each agency;
 - Issued a second Executive Order which allowed OMB to review the regulatory agenda of agencies;
 - Initiated a program to review existing regulations; and
 - Initiated a program to review legislation that results in onerous regulation.

http://thecre.com/pdf/Reagan_RegainInitiatives.PDF

- **Agency Opposition to Review.** Although the agencies had grown accustomed to the OMB review of their proposed regulations before they were issued during the Nixon and Ford Administrations, the lapse under the Carter Administration empowered the agencies to oppose central review by OMB. In a number of instances the agencies turned to the press and the Congress to oppose OMB review.

The Washington Post, September 28, 1983 quotes an EPA official:

That evening I received a call from an OMB official—Jim Tozzi. He said....there was a price to pay for doing what we done and we hadn't begun to pay.

Virginia Journal of Natural Resources Law, 1984

The OMB official noted, "The government works using three things: money, people and regulations; the agencies must get all three from OMB." [Interview Jim Tozzi, June 14, 1983]

National Journal March 14, 1981, comparing the Carter and Reagan Executive Orders:

"It differs in important respects from an executive order in effect during the Carter Administration, notably in the powers given OMB to influence agency action. While well-intentioned, President Carter's regulatory management system was merely "hortatory", Miller said, and his appointees to key agency and OMB posts "had a point of view" that favored regulation. "When the chips were down, OMB would not stand up to the constituencies" demanding regulation, he said. [Interview Jim Miller]

- **An Informed Debate on Regulatory Review.** Since the legality of OMB review of regulations was thoroughly vented during the Nixon Administration, the debate changed to a more informed debate regarding the merits of such a process. A landmark article on the merits of the OMB regulatory process was presented in a Commentary written by Alan B. Morrison in the Harvard Law Review [March 1986]:

This Commentary focuses not on the legality of this practice, but on its wisdom.

Contrary to the ostensible aim of the original Executive Order, the system of OMB control imposes costly delays that are paid through the decreased health and safety of the American public.

- **Legality of Review Not Significantly Challenged.** In that the legality of OMB's process was vetted extensively in the Nixon and Carter Administrations, only in rare instances during the Reagan Administration was the legality of the process questioned.
- **A Confirmation of OMB Regulatory Review Authority.** More recently, in testimony by David Vladek to the U.S. House Committee on Science; Subcommittee on Investigation and Oversight 2007, while conceding that the courts opined in favor the legality of OMB review, reminded us of the anguish members of Congress have to this day to the Reagan government-wide mandate that OMB review the regulations of Executive Branch agencies:

And when the first challenge to the constitutionality of OIRA's meddling in agency rulemaking came before an appellate court, the Chairmen of the five House Committees having jurisdiction over regulatory agencies filed a brief setting forth a blistering critique of OIRA review.

The court did not constrain OMB review of regulations.

- **GAO's View.** The GAO made a series of in-depth studies of OIRA's operations, lead by the balanced reviews of Curtis Copeland, who opined in 2003 on the operations of the Reagan Administration:

OIRA's responsibilities expanded when Executive Order 12291 authorized it to review all proposed and final regulations from non-independent regulatory agencies—between 2,000 and 3,000 rules each year. OIRA's regulatory review function under this executive order was highly controversial, with concerns raised about its effects on separation of powers, public participation, transparency, and the timeliness of agencies' rulemaking efforts.

Concluding Observations on Centralized Review of Regulations

1. **The Importance of Budget-Side Involvement.** In my view, solely from a compliance point of view, the apex of OMB's role in the review of regulations was during the Nixon Administration when the review was located in the "budget side" of OMB. The fact that the reviewers had leverage over budget, legislation and regulation, made for a greater impact.
2. **The Need for OIRA.** However it is not feasible to keep the regulatory review function in the budget side of OMB; therefore the move to establish a separate organization, OIRA. OIRA, however, must be mindful of its responsibility to create value—namely, insisting and obtaining meaningful changes to onerous regulatory proposals however politically unacceptable.
3. **OMB Review of Regulations: A Shield for Regulatory Agencies.** A forceful review of agency regulations is a shield against the dismantling of regulatory agencies. A case in point is EPA; notwithstanding the enormous number of new environmental statutes and regulations passed during the Nixon Administration, EPA was not subject to near the degree of hostility as it has been in the last decade, in large part because its regulations were vetted through OMB in a forceful manner.

Jim Tozzi Bio in Brief

Jim Tozzi was appointed as the Assistant Director of OMB for Regulatory and Information Policy and subsequently served as the first Deputy Administrator of OIRA. Mr. Tozzi managed the first OMB review of agency regulations under the Quality of Life Review of the Nixon Administration, having served in a group in the Johnson Administration which developed a blueprint for centralized regulatory review.

He also served as the Chief of the Environment Branch in OMB. He has a B. S. in Chemical Engineering (Carnegie Institute of Technology), a masters in Market Research (Retailing – University of Pittsburgh) and a Ph. D in Economics and Business Administration (University of Florida) and was a member of the faculty of Tulane University. He also served as a Captain in the US Army. He was elected to the American Men and Women of Science in 1965. **For more information, please see,** http://www.thecre.com/emerging/Jim_Tozzi_Bio.html.

References

TheOMB.US: <http://thecre.com/ombpapers/centralrev.html>

National Archive Interview with Jim Tozzi
http://thecre.com/video/National_Archive.html

Quality of Life Review: <http://thecre.com/ombpapers/QualityofLife1.htm>

History of OIRA: http://thecre.com/pdf/20060130_conley_dissertation_excerpt.pdf

Federal Information Triangle: http://thecre.com/quality/20010924_fedinfotriangle.html

The Quiet Shift of Power (document in eight parts due to large size):

- Part 1 <http://thecre.com/pdf/VAJournalNatResLaw1.PDF>
- Part 2 <http://thecre.com/pdf/VAJournalNatResLaw2.PDF>
- Part 3 <http://thecre.com/pdf/VAJournalNatResLaw3.PDF>
- Part 4 <http://thecre.com/pdf/VAJournalNatResLaw4.PDF>
- Part 5 <http://thecre.com/pdf/VAJournalNatResLaw5.PDF>
- Part 6 <http://thecre.com/pdf/VAJournalNatResLaw6.PDF>
- Part 7 <http://thecre.com/pdf/VAJournalNatResLaw7.PDF>
- Part 8 <http://thecre.com/pdf/VAJournalNatResLaw8.PDF>