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OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding

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OIRA'S FORMATIVE YEARS: THE HISTORICAL RECORD OF CENTRALIZED REGULATORY REVIEW PRECEDING OIRA'S FOUNDING

JIM TOZZI*

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INTRODUCTION

The Office of Information and Regulatory Affairs (OIRA) was established by Congress in 1980 through the Paperwork Reduction Act (PRA) for the purpose of reviewing proposed collections of information and developing government-wide information policies. Located within the Office of Management and Budget (OMB), OIRA's responsibilities grew to include reviewing agency rulemakings under President Reagan's Executive Order 12,291. This cemented the White House's role in reviewing agency regulatory actions. Executive Order 12,291 required that executive branch agencies submit virtually all proposed rules and final rules to OIRA for review. "Major" proposed rules¹ were to be accompanied by a Regulatory

1. See Exec. Order No. 12,291, 3 C.F.R. 127 (1982) ("Major rule" [is defined as] any regulation that is likely to result in: (1) An annual effect on the economy of \$100 million or

Impact Analysis which included a benefit-cost analysis. As discussed below, the passage of the Paperwork Reduction Act and the signing of Executive Order 12,291 did not mark the initiation of centralized regulatory review but were rather the culmination of a fifteen-year effort spanning the four previous presidential administrations.

OIRA recently celebrated its thirtieth anniversary with a conference at The George Washington University.² The focus of the conference was to draw upon the experiences of former administrators and deputy administrators of OIRA, as well as the current Administrator, to develop recommendations for the future of the Office.³ However, there seemed to be a consensus that the substantive centralized review of regulations began under President Reagan.⁴ This consensus mistakenly discounts the fifteen years preceding OIRA during which centralized review was developed and implemented by OMB and vetted in the agencies and by Congress and the judiciary. Although OIRA was created under President Carter and began operations under President Reagan, its beginnings should rightfully be traced back to President Johnson's Administration. Failure to recognize the crucial contribution of the four preceding administrations to centralized regulatory review is to ignore the formative decisions made by the Executive, Legislative, and Judicial Branches during the 1965–1980 time period.

OIRA was founded on much more than a statute and an executive order that, without an institutional experience base, would constitute thin reeds on which to support a substantive, government-wide change in the regulatory process. The experience base, which allowed the rapid creation of an effective OIRA, was established during the time period from the

more; (2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.”), *revised by Exec. Order No. 12,866, 3 C.F.R. 638 (1994)*.

2. Highlights from the 30th OIRA Anniversary Conference: Executive Oversight of Administrative Discretion, http://www.regulatorystudies.gwu.edu/images/pdf/20110524_30th_highlights.pdf.

3. See, e.g., Jim Tozzi, Remarks at The George Washington University OIRA 30th Anniversary Conference: OIRA's Formative Years (May 20, 2011), available at http://www.thecre.com/pdf/20110523_OIRA_GWU_2.pdf. The speakers included virtually all former administrators and deputy administrators. For a list of speakers, see OIRA 30th Anniversary Conference—May 20th 2011: Executive Oversight of Administrative Discretion, Draft Agenda, available at http://www.thecre.com/pdf/20110530_OIRA_30th_Anniversary_Conference_Speakers.pdf.

4. See Exec. Order No. 12,291, 3 C.F.R. 127; Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in 5 U.S.C. § 601 app. at 745 (2006)*.

Johnson through the Carter Administrations. It was during this pre-OIRA period that centralized regulatory review was debated, tested, adjudicated, refined, and established. This formative history of OIRA has not been well documented. Therefore, the purpose of this Article is to provide a detailed historical context for the development of centralized regulatory review and to supply future researchers with a rich database of material for analyzing developments during this critical time period.

Part I discusses the beginnings of centralized regulatory review under President Johnson. Part II provides details regarding President Nixon's Quality of Life Review (QLR) program. Part III outlines President Ford's continuation of centralized regulatory review under the QLR. Part IV describes President Carter's contributions to centralized regulatory review by discussing the development of the first office within OMB dedicated to regulatory review as well as an executive order that was the precursor to Executive Order 12,291. Part V discusses President Reagan's decision to incorporate OMB's institutional regulatory review expertise into his regulatory reform agenda. Part VI concludes that it is important to have an understanding of OIRA's history because it demonstrates that the OMB regulatory review process had been scrutinized for years and that any attempt to diminish the White House's authority over regulatory reviews would most likely be futile. Consequently, critical analysis of centralized regulatory review needs to include its pre-OIRA history.

I. REGULATORY REVIEW UNDER PRESIDENT LYNDON JOHNSON: ARMY CORPS OF ENGINEERS AND CENTRALIZED REVIEW

It should be noted that there has been some confusion as to whether regulatory review started in the Johnson Administration or the Nixon Administration, and the Author has been responsible for contributing to some of this uncertainty. Professor Percival highlights the muddle of regulatory review's origins:

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. Yet Tozzi himself subsequently has told interviewers that “[r]eviews of regulations began when Richard Nixon created the Environmental Protection Agency.”⁵

Although the Johnson Administration developed the blueprint for centralized regulatory review, the Nixon Administration initiated the actual

5. Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2496 (2011) (alteration in original) (footnote omitted).

review of regulations. The following discussion outlines the Johnson Administration's contribution to centralized regulatory review.

A. Origins of Benefit–Cost Analyses of Regulations

As it relates to the development of centralized White House regulatory review, Allan Schmid conceived⁶ of the concept of performing benefit–cost analysis of regulations while at an organization that oversaw the activities of the Corps of Engineers.⁷ Professor Schmid's idea of conducting an economic review of regulations began with a paper circulated to the Systems Analysis Group while he served as a visiting professor in the Office of the Secretary of the Army.⁸ Professor Schmid argued that benefit–cost analysis should be applied not just to the valuation of public works projects (such as flood control projects) but also to regulations. Professor Schmid stated, “Government rulemaking is usually analyzed outside of the [benefit–cost analysis] formulations. Yet, the issuance of a rule also directs the use of resources which have alternative employment. Can we then conceive of a benefit–cost ratio for a rule change as well as for item in the Federal budget?”⁹

The fact that an organization affiliated with the Corps of Engineers was proposing the benefit–cost analyses of regulations was of particular importance because the concept of conducting benefit–cost analyses of federal expenditures can be traced back to the Flood Control Act of 1936, which required the Corps of Engineers to perform benefit–cost analyses of its projects.¹⁰ The relationship between conducting benefit–cost analyses of

6. The Author does not rule out that other governmental benefit–cost analysis efforts were under way, but any such work did not lead to establishment of White House regulatory review.

7. A. Allan Schmid, *Effective Public Policy and the Government Budget: A Uniform Treatment of Public Expenditures and Public Rules*, in STAFF OF SUBCOMM. ON ECON. IN GOV'T OF THE JOINT ECON. COMM., 91ST CONG., 1 THE ANALYSIS AND EVALUATION OF PUBLIC EXPENDITURES: THE PPB SYSTEM; A COMPENDIUM OF PAPERS I 579–91 (Comm. Print 1969), available at <http://thecre.com/pdf/Schmid.PDF>.

8. Joe Greene Conley II, Environmentalism Contained: A History of Corporate Responses to the New Environmentalism 164 (Nov. 2006) (unpublished Ph.D. dissertation, Princeton University), available at http://www.thecre.com/pdf/20090423_conley_dissertation.pdf.

9. Schmid, *supra* note 7, at 580.

10. Pub. L. No. 74-738, 49 Stat. 1570, 1570 (“It is hereby recognized . . . that the Federal Government should improve or participate in the improvement of navigable waters or their tributaries, including watersheds thereof, for flood-control purposes if the benefits to whomsoever they may accrue are in excess of the estimated costs . . .”); see also JOSEPH L. ARNOLD, THE EVOLUTION OF THE 1936 FLOOD CONTROL ACT 44 (1988), <http://140.194.76.129/publications/eng-pamphlets/ep870-1-29/entire.pdf> (discussing the

Corps of Engineer construction projects and the idea of centralized regulatory review might not be obvious, but it is very real. One cannot have a meaningful benefit-cost program if there is not a central group which examines the work of the analysts in the component organizations—a central shop to review benefit-cost analyses conducted by the various parts of an organization.

B. *The First Centralized Regulatory Review*

The first centralized review of regulations was conducted by the Systems Analysis Group in the Office of the Secretary of the Army. The System Analysis Group initially reviewed only Army Corps of Engineer construction projects, a mandate which was then extended to the review of Army Corps of Engineer regulations. Regulations reviewed by the Systems Analysis Group included those related to the zoning of flood plains and controlling the water levels in dams for the competing uses of flood protection, water supply, power, and recreation.¹¹ The experiences of the

beginning of cost-benefit analysis by stating, “Wilson asked the Corps to give the Flood Control Committee a list of proposed flood control projects it had surveyed with the estimated costs and benefits of each project. The Corps had in fact prepared such a report. It was entitled, ‘Projects for the Development of Rivers and Harbors, Summarized From Reports by the Corps of Engineers to Congress.’ More commonly called the ‘Green Book,’ this document listed 1,600 projects, drawn primarily from the 308 reports, for flood control, navigation, irrigation, and hydroelectric power. The total cost was \$8 billion. The Flood Control Committee asked to see only the flood control projects, and this is what the Corps presented even though some of the dams, it was stated, had ‘incidental power features.’ General Markham later stated that the House committee looked over all the projects, selected those ‘that looked like the best ratios of cost and benefit, and incorporated it [sic] into the bill’” (footnote omitted).

11. Interview by Paul Musgrave, Richard Nixon Oral History Project of the Richard Nixon Presidential Library and Museum, with James J. Tozzi, Washington, D.C., (Mar. 26, 2009), available at http://thecre.com/video/National_Archive.html. Regulations relating to flood plains and reservoir controls are just two examples of the type of the regulations reviewed by the Systems Analysis Group. Review of regulations by the Systems Analysis Group was necessary because the Army Corps of Engineers was quickly transforming from a construction agency to a regulatory agency. As the Army Corps of Engineers grew into a more active regulatory agency, centralized review became necessary, as Professor Schmid's paper, *supra* note 7, supports.

An example of the increased regulatory role of the Army Corps of Engineers relates to the implementation of the permit program pursuant to the Refuse Act, 33 U.S.C. §§ 407, 408, 411, 413 (1970). The Refuse Act permit program was the federal government's answer to the public demands to control pollution of the nation's waters. Cecil E. Reinke, *The Refuse Act Program: The Corps of Engineers' Role in Enforcement and Administration*, 9 HOUS. L. REV. 683 (1971). Born from the Rivers and Harbors Appropriation Act of 1899, the Refuse Act prohibited the discharge of refuse into any navigable water, or tributary of any navigable water. This same section of the Act authorized the Secretary of the Army to “permit” the

Systems Analysis Group were instrumental in developing the detailed procedures to be utilized for the Nixon QLR's regulatory review. Such activities helped establish the Systems Analysis Group's preeminence in this field and contributed to the institutional expertise that was a prerequisite for OIRA's success.

Key personnel from the Systems Analysis Group and the Corps of Engineers, which included Robert Harrison, Jim Tang, and Jim Tozzi, eventually ended up either at OMB managing the QLR in the Nixon Administration or managing the OMB regulatory review program in the Carter Administration—or both.¹² Although the idea of instituting a centralized regulatory review program in OMB was developed by the Nixon Administration independent of the regulatory review process used for the Corps of Engineer projects, the implementation of the Nixon program was made possible by the aforementioned personnel from the Department of the Army.¹³

deposit of refuse in navigable waters. The Secretary of the Army began issuing permits pursuant to an executive order issued by President Nixon.

Exec. Order 11,574, 3 C.F.R. 188 (1971), *revoked by* Exec. Order No. 12,553, 3 C.F.R. 204 (1987), established a permit program under the Act to regulate discharges of pollutants into navigable waters, and the Secretary of the Army published regulations directing the Corps of Engineers to issue permits. In *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971), the permit program was challenged by an environmental group. The court upheld the program, but held that, pursuant to the Refuse Act, the Secretary of the Army may only issue permits for dumping refuse into navigable waters.

The Refuse Act provided the Army Corps of Engineers with immense regulatory powers. The fact that the Corps of Engineers was going to implement such a vast regulatory program based upon a statute that was nearly 100 years old was one impetus for the passage of the Clean Water Act. The emergence of this new regulatory program in the Corps of Engineers was another demonstration of the need for centralized regulatory review program in the Department of the Army.

12. Conley, *supra* note 8, at 164 ("To design and manage the new Quality of Life Review program, the Nixon Administration brought in a group from the Pentagon which had gained a reputation for applying strict cost-benefit tests to regulations issued by the Army Corps of Engineers.").

13. See Dan Davidson, *Nixon's 'Nerd' Turns Regulations Watchdog*, FED. TIMES, Nov. 11, 2001, at 22 (suggesting that White House officials played a key role in Jim Tozzi being recruited as Chief of the Office of Management and Budget's (OMB's) environmental branch).

II. REGULATORY REVIEW UNDER PRESIDENT NIXON: QUALITY OF LIFE REVIEW

A. *Regulating the Regulators—Creating the Quality of Life Review*

After the passage of the Clean Air Act and the National Environmental Policy Act (NEPA), President Nixon created the National Industrial Pollution Control Council (NIPCC) to address the concerns of the business community.¹⁴ According to President Nixon, the purpose of the NIPCC was to “allow businessmen to communicate regularly with the President, the Council on Environmental Quality, and other government officials and private organizations which are working to improve the quality of our environment.”¹⁵ The NIPCC focused its efforts on the “cost of increasingly stringent pollution control regulations.”¹⁶ In response to the rising cost of the environmental regulations, the Assistant to President Nixon for Domestic Affairs, John Ehrlichman, established a committee in the White House Domestic Council to study options “that affect the balance of many interrelated Quality of Life variables—particularly consumer and environmental interests, industrial requirements, and safety aspects—some decisions working to the disadvantage of others.”¹⁷ This Quality of Life Committee urged that the “central problem . . . is to insure that the action agencies make suitable analyses of benefits and costs and that outside viewpoints are taken into account in the decision process.”¹⁸

Even before the QLR was officially established, OMB had begun to review Environmental Protection Agency (EPA) regulations pursuant to a letter from OMB Director George Shultz to Administrator William Ruckelshaus requiring the EPA to submit regulations that were likely to impose significant costs to OMB for review.¹⁹ OMB required EPA to submit proposed regulations “thirty days before publication and to include analyses of the regulation’s objectives, alternatives, and estimates of costs and benefits.”²⁰ OMB’s review of EPA regulations created the framework for the QLR in OMB. Less than five months after the Shultz Memorandum to the EPA, OMB Director Shultz initiated the QLR. The QLR was quietly established with little fanfare, merely a several-paragraph

14. Conley, *supra* note 8, at 159.

15. Presidential Statement on Establishing the National Industrial Pollution Control Council, 1 PUB. PAPERS 344 (Apr. 9, 1970).

16. Conley, *supra* note 8, at 160.

17. *Id.* at 161–62 (citation omitted) (internal quotation marks omitted).

18. *Id.* at 162 (citation omitted) (internal quotation marks omitted).

19. Percival, *supra* note 5, at 2497.

20. *Id.*

memorandum 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.²¹

It should be noted that the use of a memorandum instead of an executive order was in keeping with how the Bureau of the Budget (BOB, renamed the Office of Management and Budget the following year) operated. Executive orders were reserved for a small handful of high-profile presidential announcements such as imposition of wage and price controls. Substantive management changes could be, and were, quietly instituted without the direct use of the President's name through various memoranda from BOB and OMB to the agencies.

Despite its quiet beginnings, legal scholars have commented that "centralized review of agency rulemakings has arguably become the most important institutional feature of the regulatory state."²² Scholars who argue that the Nixon Quality of Life Review was a modest effort toward the establishment of centralized regulatory review underestimate the significance of the QLR.²³ The first Chairman of Reagan's Council of Economic Advisors went so far as to assert that "many agencies ignored the [QLR] process and the OMB's authority was very limited."²⁴

Underestimation of the significance of the QLR is important for two reasons: 1) it fails to accord proper recognition to the lasting significance of the Nixon Administration's regulatory management initiative; and 2) it leads to overestimating the "revolutionary" nature of the Reagan regulatory reform program that built upon the work of its predecessors.

Economic analysis was the heart of the QLR. Specifically, the regulatory instruments (proposed and final rules, standards and guidance documents) submitted to OMB for review were accompanied by "a comparison of the expected benefits or accomplishments and the costs (Federal and non-Federal) associated with the alternatives considered."²⁵ On this point it should be noted that EPA's National Center for

21. Memorandum from George P. Shultz, Dir., Office of Mgmt. & Budget, to the Heads of Departments and Agencies, Agency Regulations, Standards, and Guidelines Pertaining to Environmental Quality, Consumer Protection, and Occupational and Public Health and Safety (Oct. 5, 1971), available at <http://www.thecre.com/ombpapers/QualityofLife1.htm> [hereinafter Shultz].

22. Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006).

23. Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review Of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1985) ("Modest initial efforts begun during the Nixon administration have been strengthened and expanded by each president who followed.").

24. Murray Weidenbaum, *Regulatory Process Reform: From Ford to Clinton*, REGULATION, Winter 1997, at 20.

25. Shultz, *supra* note 21.

Environmental Economics recognizes that Regulatory Impact Assessments (RIAs), nominally a Reagan-era development, are updated versions of the economic analyses conducted under the QLR.

Regulatory impact assessments (RIAs) trace their ancestry back at least as far as the Nixon administration. Then, EPA and other regulatory agencies were required to prepare Quality of Life reviews for proposed regulations. These reviews were to include consideration of alternatives and estimates of costs. The Ford administration enhanced the review requirement placing some emphasis on inflation and energy effects.²⁶

In understanding the significance and influence of the QLR reviews, it must be recognized that they were conducted by the budget side of OMB. This meant that they were often conducted or supervised by personnel who, as a result of their work on such analyses in the Corps of Engineers, were experienced in conducting benefit-cost analyses. It also meant that the budget powers of OMB could be brought to bear on the agencies.

Some scholars have stated that one of the changes between Reagan regulatory review as compared with the QLR was the requirement for “maximization of net benefits.”²⁷ Two issues need to be addressed with respect to this point. First, there is no doubt that economic tools for conducting cost-benefit analyses became more sophisticated over time; only two years after Professor Schmid’s paper was disseminated through the Army Corps of Engineers, analytic capabilities were not yet sufficiently developed to meet such specific criteria as “maximization of net benefits.” Second, within the analytic capabilities existing at the time, the combination of cost-benefit analysis, comparison to regulatory alternatives, and the need to justify the selected regulatory alternative was analogous to the subsequent maximization of net benefits requirement. The QLR did not undertake a cost-benefit analysis of regulations and their alternatives in order to select a less than optimally beneficial, or maximum net benefit, policy.

The QLR even anticipated Reagan’s second major regulatory executive order,²⁸ which required OMB review of regulations under development. The Shultz QLR Memorandum stated that agencies were to submit to OMB “a schedule . . . covering the ensuing year showing estimated dates of

26. ROBERT C. ANDERSON & PAUL KOBIN, NAT'L CTR. FOR ENVTL. ECON., U.S. ENVTL. PROT. AGENCY, *Regulatory Economic Analysis at the EPA* § 7 (June 2000), <http://yosemite.epa.gov/ee/epalib/riaepa.nsf/vwT?OpenView&Count=150> (follow “7. Reviews of the Economic Analysis/RJA Process” hyperlink).

27. SCOTT J. CALLAN & JANET M. THOMAS, ENVIRONMENTAL ECONOMICS & MANAGEMENT: THEORY, POLICY, AND APPLICATIONS 172 (4th ed. 2006).

28. Exec. Order No. 12,498, 3 C.F.R. 323 (1986), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638 (1994).

future announcements of all proposed and final regulations, standards, guidelines or similar matters in the subject areas shown above.”²⁹

Thus, the QLR set the template for actions taken by the Ford, Carter, and Reagan Administrations since it: 1) required that proposed and final regulatory documents, including but not limited to rules, be submitted to OMB for review; 2) required economic analyses of regulations including a cost-benefit analysis and comparison to regulatory alternatives; and 3) established a regulatory calendar subject to OMB review. As discussed below, the budget side of OMB’s oversight of the regulatory review process, combined with the determination of the White House to ensure its authority over agency regulatory actions, ensured vigorous enforcement of the QLR process.

The aforementioned actions cannot be ignored and should not be considered “modest” or, as in many academic articles, not mentioned whatsoever when compared with actions taken by subsequent administrations. Moreover, as discussed below, OMB under Nixon ensured greater agency compliance with its directives than did any subsequent OMB.

The strongest voices highlighting the power of the QLR were, as explained below, environmental activist groups such as the National Resources Defense Council (NRDC) who vehemently opposed the policy impacts of the QLR. The significance of the actions taken by the Nixon Administration is even greater than appears since the personnel who were involved with the development of the Nixon regulatory review program and its predecessor in the Corps of Engineers were later instrumental in the formulation and implementation of the Ford, Carter, and Reagan regulatory review programs.

B. The Review Process Under the Quality of Life Review

As was noted, the budget side of OMB—more specifically, the Environment Branch of the Natural Resources Division—managed the QLR. 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 a Notice of Proposed Rulemaking (NPRM) and send it to the affected agencies for comments. During the interagency review, if there was a substantial disagreement OMB would convene an interagency meeting and opine on the substance of the arguments. The procedural difference between the interagency review utilized in the QLR and the review process currently used within OIRA is

29. Shultz, *supra* note 21.

significant because OMB's role in the QLR was oriented toward, but not limited to, resolving differences among agencies in lieu of serving as an independent third-party reviewer. QLR's interagency review created a dynamic where OMB seldom acted on its own but rather worked in accord with the interests of one or more agencies.

All regulations had to go to OMB for review, not just the "major" regulations. OMB had the authority to designate any document in the regulatory process as being subject to the QLR. The depth of the review was unprecedented, and OMB could request the review of any agency document in the record, including draft and final agency guidance. The review was further strengthened by the fact that it appears that the Nixon White House maintained resignations on file of many agency heads, which they could, and did, use at will. Presidential control and authority behind OMB's review ensured agency compliance. Finally, 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.

Although the QLR applied to all executive branch agencies, the EPA was the only agency routinely subjected to QLR.³⁰ The EPA was at the center of the QLR because it tended to raise the most interagency conflicts.³¹

C. Impact of the Quality of Life Review

The QLR was unique. OMB has not administered a regulatory review in subsequent administrations that could compare with the force and depth of the reviews conducted under the QLR, even though such subsequent reviews exceeded the breadth of the QLR's mandate.³² It should be noted

30. Percival, *supra* note 5, at 2497.

31. Notes, Interview by Kathryne Bernick, Assistant Staff Dir., Am. Bar Ass'n, with Jim Tozzi, Env't Branch Chief, Natural Res. Div., Office of Mgmt. & Budget (July 18, 1977), available at http://thecre.com/pdf/Carter_ABA1.PDF ("Putting aside those regulations which have to do with the expenditure of funds, which were reviewed as part of the normal budget review, the other agencies were not subject to the Quality of Life Review. The reason was that they don't tend to raise interagency conflicts and the examiners didn't think it was very germane. However, some of FDA's regulations could have been subject to the 'Quality of Life Review.'").

32. See *Office of Management and Budget Plays Critical Part in Environmental Policymaking, Faces Little External Review*, 7 ENV'T REP. (BNA) 693, 694–95 (1976) (reporting on the effectiveness of the regulatory review process).

The "most significant" examples of OMB's 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.

that in addition to reviewing regulations, OMB officials working on the QLR program, in concert with OMB's Legislative Review Division, also dealt with legislation that resulted in regulation. For example, OMB regulatory review officials opined substantively on the proposed Toxic Substances Control Act.³³

The impact of QLR soon brought OMB's leadership under the public microscope. The first edition of the Environmental Forum, published by the Environmental Law Institute, commented on a dialogue overheard on the Washington D.C. party circuit. The story, which on one level simply relates a trivial bit of gossip, is noteworthy since it indicates that the QLR regulatory review process had real teeth.

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

“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 [stated]. “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, [a congressional staffer] 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 specific instances.”

Id.

33. 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 the 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.

Id. at 696.

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.³⁴

The strength of the QLR process caught many off guard. Professor Allan Schmid stated, "Still, I had no idea that Nixon with Tozzi's help would use [QLR] to beat up on the EPA after passage of the Clean Air Act of 1970 and the National Environmental Policy Act of the same year."³⁵ Although the QLR also applied to health and safety regulations, EPA's regulations by far received the most intensive review. On a number of occasions, EPA made efforts to have the program terminated but were ultimately rebuffed in each instance by the Administration.³⁶ By the time the Nixon Administration ended, the QLR was an established component of the federal regulatory process.

III. REGULATORY REVIEW UNDER PRESIDENT FORD: A CONTINUATION OF THE QUALITY OF LIFE REVIEW

The Ford Administration kept the QLR in place. A common question asked by students of the regulatory process is whether the QLR suffered a reduction in compliance by federal agencies as a result of the new Administration. Such a phenomenon might have existed but it was limited, particularly since many of the career staff remained in place.

A. A Joint Program: Council on Wage and Price Stability and OMB

The QLR's regulatory review function was accompanied by a joint program administered by OMB and the Council on Wage and Price Stability (CWPS), which had a comment role after NPRMs were issued. CWPS's primary responsibility was to submit written statements on the

34. *Profile—OMB's Jim Joseph Tozzi*, ENVTL. F., May 1982, at 11, 11.

35. A. Allan Schmid, *My Work As An Institutional Economist* (Jan. 31, 2008) (unpublished manuscript), available at <https://www.msu.edu/user/schmid/My%20work.htm>.

36. After a heated argument with the White House over review of one of the Environment Protection Agency's (EPA's) first enforcement actions, Administrator Ruckelshaus pledged to resign "if environmental decisions are overruled because of political considerations." Administrator Ruckelshaus then insisted on written assurance from President Nixon that the EPA Administrator retained ultimate authority over policy decisions within the EPA; President Nixon only offered to verbally agree to this. Percival, *supra* note 5, at 2498–99 (quoting JOHN QUARLES, CLEANING UP AMERICA: AN INSIDER'S VIEW OF THE ENVIRONMENTAL PROTECTION AGENCY 68–70, 117–19 (1976)) (internal quotation marks omitted).

inflationary impact of proposed rules for the rulemaking record during the public comment period.³⁷ Under CWPS, President Ford did not seek to assert direct authority over the agency, but “[i]nstead [he] sought to influence agency decisions by having CWPS participate in rulemaking proceedings with CWPS officials often testifying at agency hearings.”³⁸

B. The Economic Impact Statements

Gerald Ford was the first President to issue executive orders requiring an economic analysis of regulations as part of OMB’s oversight activities. The Ford Administration issued Executive Order 11,821³⁹ and Executive Order 11,949.⁴⁰ Executive Order 11,821, administered by the Director of OMB, required all federal agencies to consider the inflationary impact of all major regulations. Specifically, agencies were required to consider a regulation’s: 1) “cost impact on consumers, businesses, markets, or Federal, State or local government”; 2) “effect on productivity of wage earners, businesses or government at any level”; 3) “effect on competition”; and 4) “effect on supplies of important products or services.”⁴¹

Executive Order 11,949 expanded upon Executive Order 11,821 by requiring that agencies prepare economic impact statements. The economic impact statement program was administered jointly by OMB and the Council on Wage and Price Stability. The OMB official responsible for the OMB/CWPS economic impact program was Stanley E. Morris, Deputy Associate Director of OMB’s Economics and Government Management Division. It should be noted that there was no overlap between the QLR and the OMB/CWPS program. The QLR 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, and its reviews were usually conducted after a rule was proposed.

IV. REGULATORY REVIEW UNDER PRESIDENT CARTER: OFFICE OF REGULATORY AND INFORMATION POLICY

The Carter Administration’s approach was not to reinstitute the QLR process, which was terminated at the end of the Ford Administration.

37. Council on Wage and Price Stability Act, Pub. L. No. 93-387 §§ 3(a)(7), 5, 88 Stat. 750, 751 (1974) (codified as amended at 12 U.S.C. § 1904 (1976) (repealed 1982)).

38. Percival, *supra* note 5, at 2500.

39. Exec. Order No. 11,821, 3 C.F.R. 926 (1975), *extended* by Exec. Order No. 11,949, 3 C.F.R. 161 (1977).

40. Exec. Order No. 11,949, 3 C.F.R. 161 (1977).

41. Exec. Order No. 11,821, 3 C.F.R. 926.

Instead, President Carter created a process by which the White House, on a selective basis, undertook regulatory reviews subsequent to the issuance of an NPRM.

A. An Important Accomplishment: A Regulatory Review Executive Order

The Carter Administration made some remarkable contributions to centralized regulatory review, including issuing the first executive order specifically on regulatory review, Executive Order 12,044,⁴² which established the principles for regulatory review. Stanley Morris was instrumental in the formulation of Executive Order 12,044—"Improving Government Regulations"—which was the first executive order to identify OMB in a regulatory oversight role, albeit a very limited one since it did not provide for the review of regulations before they were proposed. Nonetheless, the Order was another stone in the foundation for OMB review of regulations before they were issued.

B. An Office Dedicated to Regulatory Review: Office of Regulatory and Information Policy

Alice Rogoff, the Special Assistant to the Director of OMB, worked with Wayne Granquist in making one of the most significant contributions to the establishment of centralized regulatory review in OMB. It was Ms. Rogoff's idea to establish one office in OMB which had responsibility for reviewing regulations. Consequently, she was instrumental in combining the executive order activities of the management side of OMB with the capability to review individual regulations, which resided on the budget side of OMB, into one office. The office was called the Office of Regulatory and Information Policy. As will be discussed in greater detail below, since OMB's review of regulations was controversial, the Carter Administration entered office with obstacles to overcome with respect to advancing centralized regulatory review.

Although the newly established office did not have the authority to review regulations before they were issued, it did participate in a number of reviews subsequent to the issuance of an NPRM. It also conducted the reviews of proposed information collections under the authority granted the Bureau of the Budget by the Federal Reports Act of 1942 and had oversight

42. Exec. Order 12,044, 3 C.F.R. 152 (1979), *revoked by* Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

over privacy issues and information technology, as well as over information policy. This responsibility became the seedbed for the Data Quality Act.⁴³

The establishment of the aforementioned office during the Carter Administration was a major determinant of the success of the Reagan regulatory program because when the Reagan Administration assumed office there was already in place a trained staff reviewing regulations. If the Reagan Administration had to establish an office, recruit staff, train the staff, and then establish the channels for regulatory oversight by OMB, the Reagan program would have gotten off to a very slow start at best and possibly would have withered in the bureaucracy.

C. Regulatory Analysis Review Group

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, co-chaired by OMB with the other chair being rotated among participating agencies or the Council of Economic Advisors (CEA). The staff of the 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.

In some instances, information obtained through the RARG reviews was used by CEA to convene White House meetings on costly rules before they were promulgated. These White House interventions are well documented in the writings set forth by the then-Professor Paul Verkuil in Part IV.E below.

Were the White House regulatory review discussions any less intense than those in the Nixon Administration? Although there were far fewer regulatory conflicts between the White House and the agencies than in the previous administrations, when the Carter Administration did become engaged on a pending regulation it was every bit as determined and forceful as its predecessors. Although there has been a widespread perception that the Carter Administration was proregulatory, it played hardball when it came to defending its regulatory review prerogatives. Consider the *Washington Post* article *If you Don't Like It, Get Out, White House Tells EPA Staff*, citing Carter Administration official Jody Powell: "White House press

43. See Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, 114 Stat. 2763, app. C at 2763A-153 to 2763A-154 (2000) (setting forth OMB's responsibilities under § 515 of H.R. 5658 to "provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information . . . disseminated by Federal agencies").

secretary Jody Powell yesterday invited disgruntled officials of the Environmental Protection Agency to resign if they disagree with President Carter's attempts to loosen federal regulations in the fight against inflation.”⁴⁴

D. Carter's Additional Contributions

The resolve of the Carter Administration to reign in the regulators demonstrated the White House's bipartisan recognition of the need for a centralized regulatory review function housed in OMB.

Major changes in governmental operations do not just happen; they require an environment in which individuals are able and willing to make controversial decisions. The Carter Administration created an environment where career civil servants could take controversial actions that advanced the White House's objectives. The actions taken by the Carter Administration, described below, should serve as a template for discouraging partisan considerations in the operation of the civil service. In part, this action by the Carter Administration was in keeping with the views of Wayne Granquist, OMB's Associate Director for Management and Regulatory Policy, who was one of the fathers of President Carter's Civil Service Reform Act. One of the lasting lessons from the Carter Administration for all subsequent presidents is that empowering and supporting the career civil service is essential if their administration is going to achieve its policy goals.

The actions by the following three individuals in different types of positions (an executive branch career civil servant, an executive branch political appointee, and a congressional staffer) exemplify a broad-based federal commitment, at the time, to the civil service that made possible the achievement of the Administration's regulatory review goals.

Donald E. Crabil, OMB's Deputy Associate Director for Natural Resources, brought into OMB the diverse expertise needed for conducting regulatory reviews by hiring officials from the agencies, such as the Department of Defense.

Alice Rogoff provided the political support for the Administration to appoint a career civil servant to lead the first OMB office dedicated to regulatory issues.⁴⁵

44. Edward Walsh, *If you Don't Like It, Get Out, White House Tells EPA Staff*, WASH. POST, Feb. 23, 1979, at A14.

45. Ms. Rogoff started the Federal Page of the *Washington Post*. In response to a request from her, I granted a rare on-the-record press interview. The interview included the oft-quoted statement, “I don’t want to leave fingerprints.” Peter Behr, *Office of Management and Budget: If There’s a New Rule, Jim Tozzi Has Read It*, WASH. POST, July 10, 1981, at A21.

Leon G. Billings,⁴⁶ Staff Director for the Senate Environmental Pollution Subcommittee that was chaired by Senator Edmund S. Muskie, also played an important role in protecting the nonpartisan character of the civil service. Specifically, Billings worked with Eliot Cutler, OMB's Associate Director for Natural Resources, to ensure that the career official in charge of OMB's environmental programs was not reassigned when the Carter Administration assumed office even though that official came to occupy a prominent OMB position during the Nixon Administration. In appreciating the significance of Mr. Billings's support for the civil service, it needs to be recognized that Senator Muskie had a vehement dislike for OMB review of EPA regulations and was a strong congressional voice criticizing centralized regulatory review. A *Washington Post* article discussing Senator Muskie's criticism of OMB Director Shultz's regulatory review role stated, "He [Muskie] added that 'it's not Shultz's business to write the laws,' and criticized the White House for trying to influence regulations 'off in a corner, ad hoc, without the safeguards of exposure to public opinion.'"⁴⁷

The fact that the Carter Administration, with congressional support, resisted any efforts to have the Nixon-era White House official reassigned, and subsequently promoted that official to the position of Assistant Director of OMB, speaks to its commitment to advancing its regulatory goals through the nonpartisan career civil service. This commitment was reinforced when President Carter, over the objections of the majority of his cabinet, signed the Paperwork Reduction Act,⁴⁸ which gave a statutory basis for OIRA.

In order for OMB to be able to establish a centralized regulatory review program, it needed to confront criticisms on a number of fronts, including Congressional opposition. In doing so, the Carter Administration had to cope with some extremely powerful members of Congress.

The Carter Administration realized that they were establishing an important precedent by issuing Executive Order 12,044, which gave OMB oversight authority over agency regulations. For this reason, they submitted it for public comment. Thomas D. Hopkins, who held a series of increasingly senior positions at CWPS prior to becoming Deputy Administrator of OIRA, and Jeffrey Lubbers, who served as Research

46. Currently President of the Edmund S. Muskie Foundation.

47. Margot Hornblower, *Muskie Criticizes White House Meddling With EPA Rules*, WASH. POST, Feb 27, 1979, at A2.

48. Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified as amended at 44 U.S.C. §§ 3501–3521 (2006)).

Director of the Administrative Conference of the United States (ACUS), provided extensive analysis of the public comments.⁴⁹

The Carter Administration also established the Regulatory Council, an interagency group tasked with eliminating duplication of regulations. In addition, the first prototype regulatory budget for an operating agency was formulated under the Carter Administration.⁵⁰ The Carter Administration also established by executive order the preparation of the first government-wide annual paperwork budget,⁵¹ under the able leadership of Louis Kincannon.

One of the boldest proposals developed in the Carter Administration was the Regulatory Cost Accounting Act, which was a proposal to require agencies to develop consistent and continuous estimates of the costs of its regulations on an annual basis.⁵²

An even bolder action was OMB's creation of the first trial regulatory budget for EPA.⁵³ This document was prepared by the leading career economists, attorneys, and regulatory analysts throughout the Executive Branch under the leadership of OMB.

Each of the aforementioned efforts were initiated by members of the civil service.

The actions taken by the Carter Administration also laid the foundation for the Federal Information Triangle,⁵⁴ which is a concept of the flow of information into, through, and out of the Executive Branch. The apex of the Triangle is OIRA, the overall manager, with one base being the

49. See generally *Oversight of Agency Compliance with Executive Order 12044 "Improving Government Regulations": Hearing Before the Subcomm. on Oversight of Gov't Mgmt. of the S. Comm. on Governmental Affairs*, 96th Cong. 150 (1979) (statement of Office of Management and Budget on *Improving Government Regulations—A Progress Report*).

50. See OFFICE OF MGMT. & BUDGET, TOWARDS A REGULATORY BUDGET: A WORKING PAPER ON THE COST OF FEDERAL REGULATION (Jim Tozzi ed., 1979), available at <http://www.thecre.com/ombpapers/regbudget.html>; see also CHRISTOPHER DEMUTH ET AL., JOINT. ECON. COMM. OF THE U.S. CONG., THE REGULATORY BUDGET AS A MANAGEMENT TOOL FOR REFORMING REGULATION (1979), available at <http://www.chrisdemuth.com/id55.html>.

51. Exec. Order 12,174, 3 C.F.R. 462 (1980), revoked by Exec. Order No. 12,291, 3 C.F.R. 127 (1982); see also OFFICE OF INFO. & REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, INFORMATION COLLECTION BUDGET OF THE UNITED STATES GOVERNMENT (1998), available at http://www.thecre.com/pdf/Clinton_FY98InfoCollectionBudget.PDF.

52. Office of Mgmt. & Budget, Regulatory Cost Accounting Act of 1980 (proposed bill), available at http://thecre.com/pdf/Carter_ProposedBill.PDF. For a section-by-section analysis, see REGULATORY COST ACCOUNTING ACT OF 1980: SECTION-BY-SECTION ANALYSIS, http://thecre.com/pdf/Carter_SectionBySectionAnal.PDF.

53. See OFFICE OF MGMT. & BUDGET, *supra* note 50.

54. See Jim Tozzi, *The Federal Information Triangle*, 8 RISK POLICY REPORT (Sept. 18, 2001), available at http://thecre.com/quality/20010924_fedinfotriangle.html.

Paperwork Reduction Act, which manages information going into the government, and the other base being the Data Quality Act, which manages information leaving the government.

The purpose of the above information is to emphasize that even though the Carter Administration did not have a specific process for reviewing individual regulations on a government-wide basis, it did:

- institute a White House review process for the most controversial regulations;
- implement a wide range of institutional changes aimed at improving the regulatory process;
- provide an environment which allowed for experimentation with new and innovative ways to improve the regulatory process; and
- achieve the accomplishments cited in this section in a manner that did not disturb its political base.

E. Establishing Legality of Centralized Review

Although the legality of OMB review of regulations was first questioned during the Nixon Administration, it was largely resolved through actions that were initiated by the end of the Carter Administration. During the Nixon, Ford, and Carter Administrations, the legal foundations of OMB review were questioned, most notably in the legal challenge *Sierra Club v. Costle*⁵⁵ discussed below; centralized regulatory review was also questioned by the agencies,⁵⁶ the Congress,⁵⁷ and the press.⁵⁸ If one had a weak stomach, the OMB regulatory review was a process to avoid.

A very detailed attack on the QLR was written in 1976 by the NRDC, a prominent environmental advocacy organization, which argued:

The initial and continuing focus of the review has been to protect the business community from the long overdue public interest legislation being enacted by Congress.

....

Persons at EPA speak very gingerly about the problem and are hesitant

55. 657 F.2d 298 (D.C. Cir. 1981).

56. See, e.g., Letter from Thomas E. Carroll, Assistant Adm'r, U.S. Envtl. Prot. Agency, to Donald Crabbill, Chief, Natural Res. Program Div., Office of Mgmt. & Budget (Dec. 11, 1972), available at <http://thecre.com/ombpapers/QualityofLife3.htm>; see also Memorandum from Douglas Costle, Adm'r, U.S. Envtl. Prot. Agency, to Charles Schultze, Chairman, Council of Econ. Advisors (Aug. 24, 1977), available at http://www.thecre.com/pdf/Carter_CEA.PDF.

57. See Hornblower, *supra* note 47 (discussing Senator Muskie's disdain for OMB's centralized regulatory review).

58. See, e.g., Timothy B. Clark, *Carter's Assault on the Costs of Regulation*, 10 NAT'L J. 1281 (1978) (criticizing President Carter's approach to regulatory review as being too costly).

to mention specific examples; but they freely admit that were it not for the OMB review procedure, environmental regulations would usually be stronger.⁵⁹

Eight years later, an equally detailed attack against OMB's intrusion into the regulatory process was written by Erik Olson, an attorney in EPA's Office of General Counsel. Of note, Olson's concerns were specific to information collection reviews conducted under the PRA. His article demonstrates that OMB wielded multiple tools in exercising White House authority over regulatory policy. In his article, Olson concludes:

A third source of OMB influence is its administration of the Paperwork Reduction Act. Enacted during the Carter Administration, this Act's seemingly innocuous mandate that any agency information-gathering effort must bear the OMB imprimatur "allows OMB to get at a lot of rules." Even a cursory survey of the comments filed in OMB's Paperwork public docket reveals that industries are keenly aware of OMB's power to bottle up EPA programs by denying paperwork requests.

....

While OMB review has sometimes succeeded in encouraging agencies to bring their policies into line with the thinking of the Office's staff, OMB has not, for the most part, increased the accountability or rigor of analysis of the rulemaking process.⁶⁰

The court decision that definitively established the legality of White House regulatory review was rendered in *Sierra Club v. Costle*.⁶¹ There are several reasons for this conclusion. First, the opinion was authored by Judge Patricia Wald, a highly influential jurist on the U.S. Court of Appeals for the District of Columbia Circuit who was appointed to the federal bench by President Carter. The arguments were briefed during the Carter Administration and the decision was issued during the early days of the Reagan Administration. Second, because the decision was issued only two months after the Reagan Executive Order was issued, it made clear to the

59. J. GUSTAVE SPETH ET AL., NATURAL RESOURCES DEFENSE COUNCIL, OMB AND EPA: WHO SETS ENVIRONMENTAL POLICY? 2-4 (1976), <http://www.thecre.com/pdf/QualLifeReview6.PDF>.

60. 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. OF NAT. RESOURCES L. 1, 6, 80 (1984) (footnotes omitted).

61. 657 F.2d 298 (D.C. Cir. 1981). The circuit court decision of Judge Wald was reinforced by the Supreme Court decision in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984). See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2373-74 (2000) (arguing that the "Chevron" deference rule had its deepest roots in a conception of agencies as instruments of the President").

agencies that their job was to comply with the Reagan Executive Order—not fight it.

However, it is important to note that the strategy and arguments used to frame this seminal decision were made during the Carter Administration, not the Reagan Administration. Of particular note are the following statements in the opinion:

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. Regulations such as those involved here demand a careful weighing of cost, environmental, and energy considerations. They also have broad implications for national economic policy. Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. 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.⁶²

Judge Wald also reasoned:

Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall. As judges we are insulated from these pressures because of the nature of the judicial process in which we participate; but we must refrain from the easy temptation to look askance at all face-to-face lobbying efforts, regardless of the forum in which they occur, merely because we see them as inappropriate in the judicial context.⁶³

Finally, Judge Wald held:

We have already held that a blanket prohibition against meetings during the post-comment period with individuals outside EPA is unwarranted, and this perforce applies to meetings with White House officials.⁶⁴

As the old marketing axiom states, “you can eliminate the middleman but not his function.” There will always be a mechanism for the President to regulate the regulators; having the review mechanism housed in OMB managed by congressionally confirmed appointees is a process based upon management by publicly accountable officials in lieu of one based upon midnight calls made by White House staff.

62. *Sierra Club*, 657 F.2d at 406 (footnotes omitted).

63. *Id.* at 400–01 (footnotes omitted).

64. *Id.* at 404.

In arriving at her decision, Judge Wald quoted an article by Paul Verkuil, the present Chairman of the Administrative Conference of the United States.⁶⁵ In his article, Professor Verkuil addressed the issue head on, stating:

The Carter Administration has had confrontations with agency policymakers over health, safety, and environmental rules proposed by executive agencies that White House economic advisors consider more costly than necessary to achieve what they view as a tolerable level of benefits.

....

In a strong clash of views, Costle ultimately wrote Kahn a letter stating why the EPA's toxic effluent control program was proceeding properly. The White House press secretary had perhaps precipitated that exchange by inviting EPA officials who were allegedly dissatisfied with Administration involvement to resign.

....

After the closed meetings between the Council and the Department and the issuance of the regulations, the public interest plaintiffs sought to discover what discussions had taken place and what documents had been introduced. The court denied the motion for discovery.⁶⁶

Although Professor Verkuil discusses the presence of a regulatory review function in the Carter Administration, it would be an exaggeration to go as far as one reporter did:

Between the prerulemaking functions of the Regulatory Council and the analysis and commentary function of RARG, the Carter Administration created coordinating bodies that achieve results similar to those attained by the OMB "quality of life" review used in the Nixon and Ford Administrations, but without the same political costs.⁶⁷

The record clearly indicates that, although the Carter Administration's centralized regulatory review program included some noteworthy improvements compared with the QLR, it did not approach the force of the Nixon-initiated review process.

The Verkuil article that the court cites in *Sierra Club v. Costle* concludes:

Any limitations on off-the-record contacts by the President should be applied cautiously. Such limitations should apply principally to independent agencies; they should relate only to informal adjudication or valuable-privilege rulemaking, not to "pure" informal rulemaking; and they

65. Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1980).

66. *Id.* at 944–46 (footnotes omitted).

67. *Id.* at 949 (citing *Office of Management and Budget Plans Critical Part in Environmental Policymaking, Faces Little External Review*, 7 ENV'T. REP. (BNA) 693 (1976)).

should focus on contacts between private interests and White House staff that affect the outcome of rulemaking. These principles should form the basis of any legislative, judicial, or administrative solutions to the problem of presidential intervention.⁶⁸

A large number of legal scholars,⁶⁹ the Administrative Conference of the United States,⁷⁰ the Office of Legal Counsel,⁷¹ and other groups addressed the matter; virtually all of them concluded on legal grounds that the President has the authority to review agency regulations before they are proposed. Had not the aforementioned issues been vetted in these prior administrations, Executive Order 12,291, which launched OIRA reviews, would have had a rocky start. This likely would have either impeded its timely implementation or resulted in its complete demise. Washington is

68. *Id.* (citing *Office of Management and Budget Plans Critical Part in Environmental Policymaking, Faces Little External Review*, 7 ENV'T. REP. (BNA) 693 (1976)).

69. See Bagley & Revesz, *supra* note 22, at 1260 ("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."); see, e.g., STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008).

70. Jim Tozzi, Remarks at The George Washington University OIRA 30th Anniversary Conference: OIRA's Formative Years (May 20, 2011), available at http://www.thecre.com/pdf/20110523_OIRA_GWU_2.pdf ("Jeff[rey] 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 [that] '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.").

71. See Memorandum from Larry A. Hammond, Acting Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Cecil D. Andrus, Sec'y of the Interior, Consultation with Council of Economic Advisers Concerning Rulemaking under Surface Mining Control and Reclamation Act 2 (Jan. 17, 1979), available at 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."); Memorandum from John M. Harmon, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Simon Lazarus, Assoc. Dir., Domestic Council, President's Authority to Impose Procedural Reforms on the Independent Regulatory Agencies (July 22, 1977), available at <http://thecre.com/pdf/Carter DOJOpinion072277.PDF>; Memorandum from Simon Lazarus to Wayne Granquist, Applicability of Executive Order to Independent Agencies (Dec. 9, 1977), available at http://thecre.com/pdf/Carter_WhiteHouseMemo120977.PDF.

littered with executive orders that never had any impact because they were issued without a proper vetting among governmental stakeholders.

Congressional and press criticism of centralized regulatory review peaked during the Nixon Administration, which was followed by judicial review of centralized regulatory review under the Carter Administration. However, during both the Carter and Reagan Administrations a number of actions were taken within the Executive Branch to legitimize centralized regulatory review. None was more significant than the ACUS statement made in 1988. ACUS includes ranking executive branch attorneys and its positions are accorded considerable weight. In the midst of the heated discussions regarding central regulatory review, ACUS concluded:

Some form of presidential review of agency rulemaking has been the practice since at least 1971. Like its predecessors, the current program is established by presidential executive order. The responsible officer (Administrator, Office of Information and Regulatory Affairs, in the Office of Management and Budget) is appointed by the President, subject to Senate confirmation.

The Conference believes that there is sufficient experience under these executive orders to warrant continuing such review with certain guidelines as to its implementation. The Recommendation below sets forth standards that should be followed whether review is governed by executive order or by a general statute. It also assumes that the President has the authority to enunciate principles to guide agency rulemaking, even though the programmatic responsibilities are by statute delegated to agencies. In addressing the presidential review process, the Conference recognizes that some of the issues are analogous to congressional involvement in agency rulemaking, but it does not address this latter subject at this time.⁷²

F. Setting the Stage for OIRA and the Paperwork Reduction Act

President Carter is responsible for creating the statutory base for the Paperwork Reduction Act,⁷³ which codified OMB's role in reviewing regulations. This effort was lead by Wayne Granquist, Associate Director of OMB with the support of Jim McIntyre, Director of OMB, and Jim Tozzi. These individuals, along with Robert Coakley, an aide to Senator Lawton Chiles, and Congressional sponsors—Congressman Brooks, Congressman Horton, and Senator Chiles—made the PRA happen.

72. Presidential Review of Agency Rulemaking (Recommendation 88-9), 1 C.F.R. § 305.88-9 (1990).

73. See *Paperwork Reduction Act of 1980: Hearing Before a Subcomm. of the H. Comm. on Gov't Operations*, 96th Cong. 88–98 (1980) (statements of Wayne G. Granquist, Associate Director for Management and Regulatory Policy, Office of Management and Budget and Jim J. Tozzi, Assistant Director for Regulatory and Information Policy).

V. REGULATORY REVIEW UNDER PRESIDENT REAGAN: EXECUTIVE ORDER 12,291 AND “REGULATORY RELIEF”

A. *The Reagan Regulatory Review Executive Order: The Signing of Executive Order 12,291 by President Reagan Was a Regulatory Tsunami*⁷⁴

The timing was impeccable. By 1981, there was widespread acceptance by the agencies, courts, and interest groups that OMB fulfilled a legitimate role in reviewing agency regulations. This acceptance of centralized review coupled with a highly trained OMB staff as well as a president and director of OMB who both advocated for a more efficient regulatory process, created the conditions under which the Reagan regulatory agenda could thrive. A president and director of OMB who had made numerous statements prior to the election concerning the need for 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 all played a significant role in the success of the Reagan Administration’s program.⁷⁵

B. *Regulatory Relief Program*

The Reagan Administration’s Regulatory Relief Program got off to a very fast start, in large part because of the initiative of the Carter Administration, which resulted in a very experienced OMB staff. Well before the inauguration, Jim Tozzi was selected to be Deputy Administrator and subsequently Jim Miller was appointed Administrator of OIRA. Administrator Miller requested that Tom Hopkins, who was then at CWPS, and Jim Tozzi draft an executive order empowering OMB to review regulations before they were proposed. As is inevitable, the initial draft of Executive Order 12,291 underwent considerable changes as a result of White House Counsel review and Department of Justice (DOJ) review by Cass Sunstein. Two days short of his first month in office, the Reagan Administration issued a comprehensive Regulatory Relief Program as a result of the pioneering work of Jim Miller and the invisible hand of Boyden Gray. Executive Order 12,291 was the cornerstone of the program, although it also contained a number of precedent-setting actions including:

74. An important aftershock was when the Clinton Administration issued Executive Order 12,886, which cemented the bipartisan support for OMB regulatory review.

75. See Dick Kirschken, *The 20 Years War*, 15 NAT'L J. 1238 (1983) (detailing how this perfect storm came about).

1. The first government-wide freeze of regulations which had not gone into effect;⁷⁶
2. Establishment of the Presidential Task Force on Regulatory Relief, a level program dedicated to regulatory policy chaired by the Vice President;⁷⁷
3. Termination of the CWPS Wage Price Program; its able staff of economists were transferred to OIRA;⁷⁸
4. Signing of Executive Order 12,291 requiring all proposed regulations to be submitted to OMB;⁷⁹
5. Issuing of a detailed report on the accomplishments of the Vice Presidential Task Force;⁸⁰
6. Designation of OIRA employees as desk officers with the responsibility to oversee the regulatory actions of each agency;
7. Issuing of a second executive order (12,498) which allowed OMB to review the regulatory agenda of agencies;⁸¹
8. Initiating of a program to review existing regulations;⁸² and
9. Initiating of a program to review legislation that results in onerous regulation.⁸³

C. Agency Opposition to OMB Review.

Although the agencies had grown accustomed to the OMB review of their proposed regulations before they were issued during the Nixon and

76. Memorandum from President Ronald Reagan to his Cabinet, Postponement of Pending Regulations (Jan. 29, 1981), available at <http://www.thecre.com/pdf/ReaganMemo.PDF>.

77. Remarks Announcing the Establishment of the Presidential Task Force on Regulatory Relief, 1 PUB. PAPERS, 30–31 (Jan. 22, 1981).

78. Exec. Order No. 12,288, 3 C.F.R. 125 (1981), reprinted in 12 U.S.C ch. 20 app. at 377 (2006).

79. OFFICE OF THE VICE PRESIDENT, FACT SHEET: EXECUTIVE ORDER ON REGULATORY MANAGEMENT (1981), available at <http://www.thecre.com/pdf/EOnRegMgmt.PDF>.

80. Press Release, Office of the Press Secretary, White House, Statement by the President on Regulatory Relief (June 13, 1981), reprinted in WHITE HOUSE, MATERIALS ON PRESIDENT REAGAN'S PROGRAM OF REGULATORY RELIEF (1981), available at <http://www.thecre.com/pdf/ReaganRegReliefMaterials.PDF>.

81. Unfortunately, this innovation, led by Chris DeMuth, was terminated or reduced in significance by subsequent administrations.

82. Press Release, Vice President George Bush, Statement by the Vice President Regarding Actions Taken by the President's Task Force on Regulatory Relief (Mar. 25, 1981), available at <http://www.thecre.com/pdf/VPStonTskFrceRegRelief.PDF>.

83. Press Release, White House, Fact Sheet: President Reagan's Initiatives to Reduce Regulatory Burdens (Feb. 18, 1981), available at http://www.thecre.com/pdf/Reagan_RegainInitiatives.PDF.

Ford Administrations, a reduction in the number of regulations that were reviewed 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 Congress to oppose OMB review:

1. Quoting an EPA official, the *Washington Post* reported, “That evening I received a call from an OMB official—Jim Tozzi. He said . . . there was a price to pay for doing what we had done and we hadn’t begun to pay.”⁸⁴
2. The *Virginia Journal of Natural Resources Law*, quoting a statement by an OMB official, stated, “The Government works using three things: money, people, and regulations; the agency must get all three through OMB.”⁸⁵
3. The *National Journal*, comparing the Carter and Reagan Executive Orders, said,

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.⁸⁶

It should be noted however that agency opposition to the Reagan Executive Order was not successful because the Nixon QLR had withstood scrutiny as did the Carter CEA intervention in rulemaking as upheld in the *Sierra Club v. Costle* decision. To ensure the agencies could raise no legal challenges, the DOJ Office of Legal Counsel issued an opinion in support of the OMB regulatory review program.⁸⁷

D. An Informed Debate on Regulatory Review

Since the legality of OMB review of regulations was thoroughly vetted during the Carter Administration, the debate changed to a more informed discussion regarding the merits of such a process. A landmark article on the merits of the OMB regulatory process was presented in a commentary

84. Mary Thornton, *OMB Pressured EPA, Ex-Aide Says*, WASH. POST, Sept. 28, 1983, at A1.

85. Olson, *supra* note 60, at 6 (footnote omitted) (internal quotation marks omitted).

86. Timothy B. Clark, *OMB to Keep Its Regulatory Powers in Reserve in Case Agencies Lag*, 13 NAT'L J. 424, 426 (1981).

87. Memorandum from Larry L. Simms, Acting Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep’t of Justice, Proposed Executive Order Entitled “Federal Regulation” (Feb. 13, 1981), available at <http://www.thecre.com/pdf/DJMemeReaganEO12291PDF.pdf>.

written by Alan B. Morrison in the *Harvard Law Review*: “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 for through the decreased health and safety of the American public.”⁸⁸

Antipathy toward the regulatory review process has remained long after its legality was upheld. For example, in 2007 David Vladeck, in testimony to the Subcommittee on Investigations and Oversight of the U.S. House Committee on Science, emphasized the vehement policy-based opposition that exists 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 rule-making 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.⁸⁹

The Government Accounting Office made a series of in-depth studies of OIRA’s operations, led 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 nonindependent 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.⁹⁰

Regulations are the governor of a capitalistic system; a strong and effective OIRA is a shield against the wholesale dismantling of regulatory agencies that could occur in a politically charged, economically challenged climate if OIRA did not eliminate those regulations which demonstrate a tunnel vision that excludes awareness of the complex, multi-stakeholder environment in which regulations function.

88. Alan B. Morrison, *OMB Interference With Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L REV. 1059, 1059–64 (1986).

89. *Amending Executive Order 12866: Good Governance or Regulatory Usurpation?* Hearing Before the Subcomm. on Investigations & Oversight of the H. Comm. on Sci. & Tech., 110th Cong. 26 (2007) (statement of David C. Vladeck, Director, Institute for Public Representation; Associate Professor of Law, Georgetown University Law Center).

90. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-03-929, OMB’S ROLE IN REVIEWS OF AGENCIES’ DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 3–4 (2003), <http://www.gao.gov/new.items/d03929.pdf>.

VI. CONCLUSION AND RECOMMENDATIONS

If the history of OIRA is to be complete, it should be recognized that the blueprint for centralized review of regulations was crafted in the Johnson Administration and the first OMB central review of agency regulations began in the Nixon Administration—years before OIRA existed. The Nixon Administration's QLR laid the foundation for OIRA because the Nixon Administration took the heat for initiating a centralized regulatory review program. Furthermore, the QLR developed a staff trained to review regulations. The foundation developed by the Nixon Administration was then built upon during President Ford's Administration and greatly enhanced by the Carter Administration. This not only created OIRA and its predecessor organization but also established a number of mechanisms which fostered the centralized review of regulations. Lastly, the Reagan Administration adopted the workings of previous administrations and combined them into one comprehensive government-wide regulatory review program. It is within this historical context that the following recommendations are rendered.

A. 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 responsible for the review of the transactions of a particular agency to ensure they complied with the relevant OMB directives. The role of the desk officer has changed considerably from acting as an overseer of agency operations to a more passive role with 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 recently there has been an emphasis on recruiting book smart desk officers; there is also a need for desk officers who are street smart.

B. 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 strengthened if OIRA wishes to capitalize on the strengths of the institution. In particular, consideration should be given to assigning primary jurisdiction for the review of select rules to budget examiners in order to foster a continued working relationship with the budget side and to ease work load in OIRA.

C. Social Entrepreneurs

OIRA was established with the aim of fostering growth of social entrepreneurs, i.e., 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. Within OIRA this means that when an agency sends over a poorly designed regulation, OMB staff would go beyond objecting to the rule by devising a solution to the agency's problems through the appropriate use of sugar and vinegar.

D. OIRA Staff Level

Within a year of its establishment, OIRA was the largest office in OMB based on personnel—even larger than the Budget Review Division. OIRA's personnel constraints must be addressed. More specifically, sustaining necessary staff levels requires the active, directed use of the social entrepreneurial skills of the OIRA Senior Executive Service Corps.

E. 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. The review of financial regulations will ensure that OMB's watchful eye is not focused solely on social regulations but also economic regulations. OIRA has ample authority under the Paperwork Reduction Act⁹¹ and the Data Quality Act to review such regulations.⁹²

F. 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

91. See, e.g., 44 U.S.C. § 3501 (2006) (explaining that whenever an agency proposes to collect information from the public, the agency must seek OMB review and clearance for such information collection request. Under 44 U.S.C. § 3502, the definition of *agency* includes “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any *independent regulatory agency* . . .” (emphasis added)).

92. See CTR. FOR REGULATORY EFFECTIVENESS, A BLUEPRINT FOR OMB REVIEW OF INDEPENDENT AGENCY REGULATIONS (2002), available at <http://www.thecre.com/pdf/blueprint.pdf>.

regulations and ensuring potential petitioners that OMB will participate in the review of the petitions. Although the retrospective review provision of President Obama's Executive Order⁹³ is a promising start, it still allows the agencies, not the White House or the affected parties, to make the final decisions regarding retrospective review. Injection of the Data Quality Act into the process will change this imbalance.

G. Public-Private Cooperation in Regulatory Enforcement

Lastly, OIRA should recognize that because its power flows from the President, its regulatory powers might fluctuate over time; thus the need to support mechanisms that allow the private sector to assume a portion of its enforcement role through the use of procedural mechanisms such as the Data Quality Act.

The above recommendations focus on the career civil servants who are essential to presidents being able to achieve their goals.

93. Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3822 (Jan. 21, 2011).