Relief or Reform

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Introduction

The chief of the Occupational Safety and Health Administration (OSHA), Thorne Auchter, had displayed a willingness to challenge OMB’s efforts to move his agency further and faster in the direction of deregulation. After Burford’s fall, and apparently with some support from the business community, Auchter grew increasingly bold in his challenges to OMB.

There was an important change in personnel at OMB in June 1983. Jim Tozzi, one of the associate directors of the Office of Information and Regulatory Affairs, left the government. Tozzi’s involvement in regulatory oversight dated from President Nixon’s original Quality of Life Review, a process Tozzi had helped to set up. Over the years Tozzi had become a symbol of White House efforts to “rein in” environmental regulation. During the Carter years Tozzi was so controversial that environmentalists had been able to prevent his being named associate OMB director for management and regulatory policy. With Reagan’s election, Tozzi moved up to associate director of the Office of Information and Regulatory Affairs, where he controlled the OMB desk officers who play a crucial role in deciding whether any particular proposed rule will be held up or passed. Tozzi was widely perceived to have influence within the agency second only to Miller’s, and after Miller left, Tozzi became the de facto regulatory czar. He would talk informally with companies about proposed regulations that they were concerned about and then decide whether to permit the regulations to go forward. Few if any records were kept.10 He is reported to have once bragged, “I leave no fingerprints.” This operational style apparently was acceptable to the Reagan administration early in its lifetime, but not later.

When Tozzi retired, he was replaced by Robert Bedell, a career OMB attorney who had been deputy general counsel in both the Carter and Reagan administrations with an operating style quite different from Tozzi’s. The replacement of Tozzi by Bedell was symbolic of the White House’s altered attitude toward its regulatory relief program. Far from trying to attract attention to it, as had been the earlier objective, the White House was, by mid-1983, trying to play the program down.

Indeed, the words “regulatory relief” were heard less and less often, even from administration spokesmen. In testimony before the House Judiciary Committee in late July 1983, Christopher DeMuth, Jim Miller’s successor as administrator of OIRA, several times pointedly referred to the administration’s program as one of “regulatory reform.”11

The regulatory relief program enjoyed one last burst of publicity. On August 11, 1983, Vice President George Bush’s office announced that the task force was going out of existence because it had succeeded so well in its job that it had nothing else to do. The vice president’s statement took care to describe the administration’s program as having been aimed at “regulatory
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Precedents for Executive Branch Oversight

For as long as the federal government has been engaged in regulation, presidents and their aides have occasionally taken an interest in the outcome of regulatory proceedings. Because direct or indirect grants of valuable rights are often involved and politically well connected people sometimes stand to gain or lose from the outcome of such proceedings, sporadic White House attention is all but inevitable. However, continuing White House interest in the impact of federal regulatory activities either on the economy as a whole or on important industries and sectors dates only from the early 1970s.

As has been noted, Presidents Nixon, Ford, and Carter all experimented with institutional arrangements and procedural requirements designed to bring rule making by executive branch agencies more firmly under White House control. These experiments, beginning with Nixon's Quality of Life Review process in 1971, have been intensely controversial, provoking several lawsuits and numerous confrontations with congressional committees. But by the end of the Carter administration, the concept of presidential control over executive branch rule-making activity was firmly established, provided certain safeguards were maintained.

Some observers have attacked the efforts of recent presidents to bring regulation by executive branch agencies and departments more firmly under central control as unwarranted—and possibly illegal—attempts to inject political considerations into the activities of expert agencies. Other people have characterized the White House efforts as legitimate and necessary steps to
assure that executive branch regulatory policies are consistent across agencies, give due weight to important national concerns that otherwise might be overlooked, and are integrated appropriately into the complementary federal activities.¹

The controversy these activities has generated, reflecting the tensions mentioned in the first paragraph of this chapter, is inherent in the task of regulatory oversight. Only at the White House level can many important issues be identified and priorities set. But the White House cannot (and should not attempt to) become involved in every regulatory issue. This necessary selectivity inevitably raises the suspicion—sometimes with very good reason—that political considerations rather than a desire to achieve coordination have been the primary reason that a particular regulation has been singled out for attention.

Each president has faced the problem of asserting the necessary authority to oversee the operation of agencies staffed by his appointees in a way that the public, the Congress, and the courts find acceptable. No president has developed the perfect solution, but by the end of the Carter administration (and mainly as a result of Carter’s willingness to heed the experience of his two predecessors), the outlines of a permissible presidential role were becoming substantially clearer.

**The Quality of Life Review Process²**

Many of the procedures and institutional arrangements that would later be employed by Presidents Ford, Carter, and Reagan trace their origins to decisions made in 1971 by the Nixon administration. Indeed, the Reagan program most closely resembles an arrangement that was first considered and then discarded by the Nixon administration. An account of what the Nixon administration did—and, almost as important, did not do—about regulatory oversight is important to understanding the oversight programs of his successors.

Two concerns apparently led to the establishment of the Quality of Life Review process, the first emanating from the senior White House staff, the second from the professional bureaucracy within the Office of Management and Budget (OMB). When the newly established Environmental Protection Agency (EPA) began to spew forth regulations in response to the various statutes it was charged with administering, the period of good feeling that had generated a broad national consensus that something ought to be done to protect the environment—a consensus that had led to events such as Earth Day—quickly began to come unraveled. Industry became alarmed about the potential costs of the regi Department and especi publicly urge EPA to go was “‘Wait a Minute’”), John Ehrlichman, Presid a task force to determine central control.

At about this same about the budgetary and EPA’s rapid staff expans certain EPA programs, s nificant budgetary implic controlling air pollution, areas of responsibility) fe program, which involves treatment plants, had an i

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Under the Budget Act, the budgeting decisions have been given a role in coil and congressional testimony the case at hand, these au would be determined larg If the budgetary and other to be scrutinized and some and departments achieve reviewed before they were

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across agencies, might be overtaken by other considerations.

But the tensions that emerge in the task of many important programs not (and should not) be underestimated where highly specialized expertise is required. The necessary coordination among agencies has been neglected in the past, and the President's necessity to have a staff with a broad range of expertise has been emphasized.

... that would later be written into the new regulations on the President's Counsel on Environmental Protection. This council, which included representatives from a variety of federal agencies, was established to provide a forum for coordinating environmental policy.

... that would later be seen as a precursor to the Council on Environmental Quality, which was established under Nixon.

... the Reagan administration had to deal with Nixon's legacy and the new environmental regulations that were being developed.

... the need for more effective coordination and oversight of executive branch activities.

Precedents for Executive Branch Oversight

potential costs of the regulations. This alarm was transmitted to the Commerce Department and especially to its secretary, Maurice Stans. Stans began to publicly urge EPA to go slow (the title of one of his more famous speeches was “Wait a Minute”). When Stans pressed his point with the White House, John Ehrlichman, President Nixon’s chief domestic policy aide, established a task force to determine how to bring EPA’s regulatory program under more central control.

At about this same time, officials within OMB were becoming uneasy about the budgetary and broader policy consequences of EPA’s programs. EPA’s rapid staff expansion required budgetary resources. More important, certain EPA programs, especially those attacking water pollution, had significant budgetary implications. Although the bulk of the costs imposed in controlling air pollution, pesticides, or noise (EPA’s other principal initial areas of responsibility) fell on the private sector, the water pollution control program, which involved substantial federal grants for sewage and water treatment plants, had an important impact on the budget.

In December 1970, OMB received a multimillion-dollar supplemental budget request from EPA including significant funds to enforce new water-quality standards. According to Glenn Schleede, a former OMB official, this request was instrumental in causing OMB to conclude that no one was looking at the impact of EPA’s growing number of regulations on the budget, presidential policy, other federal agencies, or the private sector—and that OMB should fill this void.

Under the Budget Act of 1920, OMB had clear authority to oversee the budgeting decisions of the executive branch. It had also traditionally been given a role in coordinating executive branch legislative initiatives and congressional testimony delivered by administration officials. But for the case at hand, these authorities meant little. The size of the EPA budget would be determined largely by the price and scope of EPA rulemaking. If the budgetary and other implications of environmental programs were to be scrutinized and some coordination with the programs of other agencies and departments achieved, the regulations themselves would have to be reviewed before they were issued.

But reviewing proposed regulations posed a legal problem. The formal authority to issue environmental regulations lay with the EPA administrator. To be sure, he was a presidential appointee and could be removed from office whenever the President wished—that is, “without cause.” But how could effective budgetary oversight and executive branch policy coordination be achieved short of taking this draconian step?

Events apparently moved along two parallel tracks. In a letter from OMB Director George Schultz to EPA Administrator William Ruckelshaus dated
May 21, 1971, OMB asserted authority to review and clear EPA’s regulations. Then in June, John Ehrlichman issued a memorandum establishing a Quality of Life committee composed of Domestic Council members, such as Council on Environmental Quality (CEQ) Chairman Train, EPA Administrator Ruckelshaus, and other members of the White House staff. The job of this committee was to explore the desirability of establishing a high-level, possibly permanent body to review important regulations affecting the “balance” between “consumer and environmental interests, industry requirements, and safety aspects.”

This group originally proposed that OMB and the White House share regulatory review responsibilities. OMB would identify actions requiring review by other agencies through monitoring by budget examiners and advance notice from agencies issuing regulations. When agency positions conflicted, either OMB’s assistant director for natural resources or a high-level staff member of the Domestic Council would review the specifics of the case and render a decision. If disagreement persisted at this level, the matter would be referred to Ehrlichman and the Domestic Council for a decision.

It soon became clear that this proposal, which explicitly shifted significant regulatory decision-making authority from the head of the agency in which it was lodged (e.g., the administrator of EPA) to the OMB and the White House, would encounter significant legal and political barriers. Therefore, the proposal was modified to downplay the decision-making role of the White House and OMB. In fact, in the memo from OMB Director Schultz establishing the Quality of Life Review process, the formal clearance requirement was not mentioned, and the role, if any, to be played by the Domestic Council in resolving interagency disputes was not addressed.

The review process that was established emphasized prior notice and opportunity for interagency comment. At least thirty days before the publication of any “significant” proposed rule, an agency was to submit the rule to OMB, along with an analysis including the principal objectives of the regulation, alternatives to the proposed action that had been considered, a comparison of the expected benefits and costs of the proposal and its alternatives, and the reasons for selecting the proposed alternative. OMB would then solicit the views of the other agencies and departments on the proposal, review the comments, and forward them to the agency proposing the regulation.

A similar set of requirements was to apply to final rules. Twenty days before a final rule was to be published, the agency proposing to issue it was to provide OMB with a copy of the draft final rule, a summary of public comments, and a statement of any new issues that had been raised. The interagency review process would then be repeated if necessary.
The Quality of Life Review Process in Practice

The operation of the Quality of Life Review process did little to quiet the fears of people who had been concerned that it represented nothing more than an attempt to "rein in" EPA. Although Schultz's memo establishing the program had indicated that it was to apply to the proposed rules of a number of executive branch agencies, in practice only EPA's rules were singled out for review under the Quality of Life Review procedures. One observer provides the following explanation:

The reason for the narrow focus stems from the program's creation: it was the Natural Resource budget shop within OMB which developed the procedure, stimulated by White House interest which in turn was influenced by Secretary Stans' abhorrence of environmental regulations. The budget examiners for agencies other than EPA apparently made no moves to implement the procedures; the budget examiner for the FDA reported that he "simply ignored" the Schultz memo.

The reviews themselves reportedly consisted of heated arguments between EPA and the Department of Commerce, its principal antagonist, with OMB at times playing a mediating role and at times pressing its own institutional interests (which generally were opposed to EPA's). At first, the main "analysis" presented during such reviews was industry-prepared information presented by the Commerce Department. Later, however, and as much for defensive reasons as anything else, EPA established its own Office of Planning and Evaluation to prepare analyses.

Participation by other executive branch agencies and departments and by executive office bodies like CEQ, CEA, and the Office of Science and Technology Policy, was sporadic. Certainly these bodies did not as a rule supply independent analyses of the impact of the proposed regulations.

We noted earlier that the issue of who would ultimately resolve conflicts that existed after the interagency review process was completed was deliberately not specified in the Schultz memo. But the White House apparently did take a hand—though quietly—in this dispute resolution process. A memo written by a White House participant in January 1973 reveals this information:

EPA receives, consolidates and synthesizes these comments, and gives reasons why they are not following any other advice. The Executive Office agencies look over their shoulder at this point and resolve remaining differences either by papers or meetings.

And former EPA Administrator John Quarles noted in a book published in 1976 that Ruckelshaus required as a condition of his remaining EPA administrator after the 1972 election that Nixon clarify that final authority over
the issuance of rules lay with the EPA administrator. He reports that Nixon agreed to this, but that written confirmation of this point was not received until the summer of 1973.\textsuperscript{12}

Although controversial and sometimes acrimonious,\textsuperscript{13} the Quality of Life Review process did have benefits: (1) As already noted, it persuaded EPA that the agency needed to have its own in-house analytical capability. (2) It led EPA to begin informal consultation with industry and with other affected agencies and departments earlier in the regulatory development process in order to head off controversy at the formal interagency review stage. (3) Finally, it prompted EPA to establish an elaborate internal clearance procedure whereby proposed regulations of one program area were reviewed in EPA working groups and, if necessary, by assistant administrators or other program areas. But the seemingly arbitrary operation of the review created ill will among environmentalists, their allies in Congress, many of the professional staff at EPA, and former EPA officials. This legacy would haunt all future White House oversight efforts and become especially virulent during the Reagan administration.\textsuperscript{14}

**Innovations during the Ford Administration**

Concern about the possible relationship between regulation—not merely EPA regulation, but regulation of all sorts—and inflation surfaced during the economic summit President Ford held soon after taking office. As a result, Ford issued an executive order requiring that "major proposals for legislation and for the promulgation of rules by any executive branch agency must be accompanied by a statement which certifies that the inflationary impact of the proposal has been evaluated." The order also empowered the OMB director "to the extent permitted by law, to develop criteria for the identification of major legislative proposals, regulations, and rules emanating from the executive branch which may have a significant impact on inflation and to prescribe procedures of their evaluation."\textsuperscript{15} Although this order maintained the impact on the federal budget as one criterion for determining whether a regulation was "significant," the order clearly focused on the private, not the public, costs of regulation.

The Quality of Life Review process was still operating (indeed, it would operate until acting Administrator John Quarles sent a memo to OMB in January 1977 stating that the agency would no longer comply), but this new authority to require inflation impact statements was not lodged in the "budget" side of OMB but in the "management" side. It appears, at least originally, not to have been viewed as a substantive regulatory oversight tool