

OMB was ready for Stockman. Already in the last years of his Administration, Jimmy Carter had increased OMB's power to keep watch over federal regulatory agencies. The most important figure in this effort was tough-talking, colorful Jim. J. Tozzi, who had headed the Environment Branch (the OMB office responsible for EPA) since 1972. Years before, Tozzi had decided that there might not be much more that could be done to control federal spending, but that a great deal could be done to curtail federal requirements that made industry spend. He embarked on a campaign to give OMB the same kind of control over agency regulations that it already had over their budgets.

Tozzi's special target for all those years had been environmental regulation: "I thought, to start the process, the right horse was EPA...not because of the budget, but 'cause for all the regs." By 1980, Tozzi was close to what he calls his "objective for twenty years," the "set-up of a management control system on regulations government-wide." Through legislation and executive orders, Carter had left OMB, "the biggest grant of authority in the world." it was a perfect implement for the new Administration's attack on regulation. "You have to remember," says Tozzi, that "OMB is an institution which works with a sort of rebuttable presumption against anything." The presumption against regulation, especially environmental, was now Presidential Policy.

Stockman knew Tozzi and was in touch with him within a few weeks after the election to enlist his aid in preparing the assault on regulation. While Jimmy Carter was still President, two months before Anne Gorsuch was staff and David Stockman planned the rule-by-rule deregulation of environmental protection.

Tozzi says, "We had it all cranked up. I had these two big books that had all these analyses of [regulations, and they had]... their wish to control [those regulation]. It was time to put it all together."

What they put together were regulatory hit lists. In December Stockman asked former EPA official, Eric Stork, to survey industry and find "opportunities for regulatory changes to EPA." Stork met with two dozen business lobbyists just before Christmas, and by the turn of the year had sent their lists to Tozzi.

Tozzi was soon joined by James C. Miller III, a former economics professor and outspoken deregulator who became his boss, and C. Boyden Gray, counsel to Vice- President George Bush. "We hit the ground running," said Miller. "All the work was done in the transition period. We knew what we were doing the minute we came in. Stockman let me loose and said, 'Be tough.'" "It was really nice," says Tozzi, "because there was no one in the government, you see. I loved it! Got more done in that first four months... Things just moved real nice. It just went downhill when they started appointing people."

While things moved "real nice" at OMB, there was no one at EPA. Anne Gorsuch, even after she was nominated, stayed away. In the last week of the Carter Administration, EPA had produced a last-minute explosion of regulation seven major regulatory actions, two consent agreements, and \$200,000 in fines. Then EPA went quiet. "We just sat around for four months, doing nothing," says one top official.

On January 22, 1981, Reagan announced the first official step in the new administration's "regulatory reform" campaign. This was the constitution of a Presidential Task Force on Regulatory Relief, chaired by the Vice-President and composed of four Cabinet officers and three high-level White House officials. The Task Force included Stockman. It was staffed by the new Office of Information and Regulatory Affairs in OMB, headed by Miller and Tozzi. Along with Presidential aid Rich Williamson and Vice-Presidential counsel Boyden Gray, they would direct the Task Force in its mission; to "cut away the thicket of irrational and senseless regulation by both "review[ing] pending regulations [and] study[ing] past regulation with an eye towards revising them."

A week later, the President, following the advice in Stockman's memo, instructed agency and department heads to "postpone" for 60 days the effective dates of pending final regulations and to refrain from making proposed rules final. One hundred seventy-two final regulations and a hundred or more proposed rules were subject to the so-called "freeze" (although OMB exempted those regulations it wished to allow to go into effect). The freeze was designed to trap the regulations issued or proposed in the CARTER Administration's final weeks.

Announcing the freeze, Miller explained simple that "a lot of things were pushed through that won't pass the litmus test in this Administration." There were questions about the legality of the freeze, and even about what "freeze" meant, says Tozzi, but "that's why it's good...to be a non-attorney in the job, because...if you're gonna move the government around you can't be constrained by little things. You have to take a risk"\*

Having accomplished the "defer" portion of Stockman's strategy, Miller sought a further expansion of OMB's power, an Executive Order requiring agencies to give OMB advance notice of and virtual veto power over forthcoming regulations, as well as a broad retrospective mandate to "revise and rescind" both frozen and existing regulations. Stockman's influence and Tozzi's experience enabled them to act before the agencies could resist. "This was really action," says Tozzi. "Jim Miller came in here...And he was really hep on an Executive Order. And I wanted one too. So that was a happy marriage; ...we got the Executive Order out in a month after the President came in. And Miller was so right. We'd never get that out now."

The President signed Executive Order 12291 on February 17. It gave OMB extraordinary power and, as Miller testified, "established the preeminence of the task force in matters involving regulatory relief." It requires an agency to write a "regulatory impact analysis" before proposing a major new rule. The analysis must quantify the costs and benefits of the rule, and the agency must adopt the least costly even if not the best approach that the law permits. As Gary Dietrich, a former EPA official says, "Executive Order 12291 gave Jim Tozzi the power to regulate the government's power to make private industry spend, and that a big deal."

The Executive Order allowed OMB to review and hold up all regulations as one Task Force member, conservative economist Murray Weidenbaum, observed: OMB is the agency that sits astride proposed legislation, proposed budgets, proposed executive orders, and now also proposed regulations." Jim Tozzi, who knew his power resided largely in the simple requirement that everything be cleared by him, puts it another way: "If you roll me on the substance, that's

okay. But if you roll me on procedure, I have a very long memory. I get very attentive. Some people have tried it, and funny things have happened to them." OMB had a clear White House mandate to cut back on regulation and the agencies knew it. Free from any responsibility for substantive action – to ensure clean air or control hazardous wastes – OMB could focus on costs. That was their imperative.

Already notorious for its secretive ways, OMB deemed itself free of the legal requirements imposed on agencies to maintain reviewable records of their work, contracts, or sources of information. "I see no problem in off-the-record contracts with us," said Miller. And they left no tracks. "We will not maintain a file and a record," Miler proudly told Rep. John Dingell. If a rule is rejected or returned to an agency, "It will be communicated over the telephone." Putting things in writing would of course mean that OMB, would be easier to trace. Tozzi candidly says, "I don't leave fingerprints."

The procedures required by law for federal agencies issuing regulations have a basis in common sense. They allow everyone to comment on proposals and also reveal who is saying what to the government and how the government responds.

Before an agency proposes a regulation, the agency staff analyzes relevant data, assesses the agency's legal authority and prepares a decision document for the head of the agency. The agency head decides policy questions presented by his staff and a formal proposal is published in the Federal Register. Anyone who may comment on the proposal, offering new data, criticizing the agency's analyses, and arguing issues of policy. When the period for comment ends, the staff reviews this entire "record." The agency is required to consider and record to each substantial issue that commenters raise. Based on the record, the agency head makes the final decision on what the agency should do. If the agency is challenged in court, the court reviews the legality of the agency's actions on the basis of the record. The safeguards built into the law – the Administrative Procedure Act – have evolved over decades of experience. They are designed to assure basic fairness even at the cost of a little delay.

Under Executive Order 12291, the Office of Management and Budget reviews agency actions on the basis of gut instincts and industry complaints. Tozzi says he could "tell in about four minutes if a rule made sense." When industry had complaints, he did not want long legal analyses; "I needed to know why you thought it was bad, whether it was economically blah-blah, why did it impact you?" the long rulemaking record, the legal basis of the rule, the opportunity for public comment were just too cumbersome for OMB. "We should read the record," says Tozzi, "but we didn't." When OMB reviews a rule, Miller testified, "We are not evaluating a record."

Since OMB has enormous power but makes no record of what it does or why, it does not worry about procedures the law requires. No court can effectively review what OMB does. Thus, if a statute requires EPA to regulate pollution to protect the health of the most vulnerable members of the public, OMB can still insist that EPA adopt a standard that protect fewer people, and costs industry less.