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A Blog from the Yale Journal on Regulation and the ABA Section of Administrative Law & Regulatory Practice

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A Syllabus on OIRA, by Jim Tozzi

by [Guest Blogger](#) – Friday, Dec. 2, 2016



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In any incoming Administration there are two unique appointments which could have a significant impact on the ultimate success or failure of an Administration, the Director of OMB and the leader of one of its component offices—the Office of Information and Regulatory Affairs, OIRA. The former helps develop and enforce Presidential policies using the annual budget as its medium of expression and the latter is the President’s regulatory pilot who operates from the cockpit of the regulatory state (OIRA); both positions are confirmed by the Senate. A number of the issues discussed in this post, among others, are addressed in the ABA AdLaw Section’s Report to the President-Elect on Improving the Administrative Process, which you can read in full [here](#).

The following is a very brief history of OIRA aimed at educating incoming personnel of its strengths, limitations and options for improvement. The material that follows is not the conventional “hit list” of troublesome regulations nor a compendium of must pass legislation but instead provides structural and process options which will govern the effectiveness of OIRA. To this end care should be taken not to allow the short term goal of eliminating troublesome regulations to completely overshadow a longer term goal of improving the regulatory process; centralized regulatory review owes its very existence to the fact that a select number of predecessor administrations did not permit short term goals to crowd out long term goals. The material presented herein is based on [working](#) in or with OIRA and its predecessor organizations for more than a half a century.

OIRA is the office in charge of “centralized regulatory review.” Decisions made in the previous eight Administrations defined the breadth and depth of centralized regulatory review by the White House Office of Management and Budget, the most significant institutional feature of the regulatory state.

Academicians are basically of two schools of thought, one believing that Presidential involvement in the regulatory process should be limited to oversight of the process but not the review of individual regulations and the other believing the President should exercise both functions.

The first centralized regulatory review program was implemented by the Nixon Administration and was titled the *Quality of Life Review* which was designed in part by the Johnson Administration. The Nixon program gave OMB both an oversight role and the authority to review individual regulations. Unlike the implementing mechanism of choice today, the Executive Order, President Nixon did not issue an Executive Order; instead he issued a Memorandum For The Heads of Agencies and Departments.

President Carter decided not to reinstitute the Nixon program; instead he issued the first Executive Order, [Executive Order 12044](#), which gave OMB oversight of the regulatory process but not the authority to review individual regulations.

Section 5 (c) of the Order states:

The Office of Management and Budget shall assure the effective implementation of this Order. OMB shall report at least semiannually to the President on the effectiveness of the Order and agency compliance with its provisions. By May 1, 1980, OMB shall recommend to the President whether or not there is a continued need for the Order and any further steps or actions necessary to achieve its purposes.

Within the Carter Administration the contents of the Executive Order were debated endlessly with OMB review of individual regulations being taken off the table and instead Presidential oversight being the adopted policy. A number individuals, including veterans of the [Nixon Quality of Life Review](#), were not satisfied with the limitations and worked to preserve the precedent of OMB review of individual regulations. The compromise was the establishment of the [RARG](#), the Regulatory Analysis Review Group, which was a CEA-OMB lead interagency review of select regulations made on the record subsequent to the issuance of a proposed rule.

The [Nixon Quality of Life Review](#) was the most stringent of all centralized regulatory reviews conducted in the Executive Office of the President because it was conducted by the “budget” side of OMB meaning that those conducting the reviews not only reviewed an agency’s regulations but also its budget, personnel level, information collections and its overall policies to assess, and enforce, their compliance with Presidential policy. In addition the Nixon program granted OMB the authority to review guidance and related quasi-rulemaking documents.

When the Reagan Administration issued [Executive Order 12991](#) although it incorporated in large part the elements of the Nixon Quality of Life Review it was a weaker directive for a number of [reasons](#); the paramount reason was that the regulatory review function had to be separated from the budget function as a result of the eventual [decision](#) to create OIRA and secondarily because it did not apply to guidance documents. A related concern was that assigning a single entity within the powerful Office of Management and Budget—an agency’s budget examiners—with the sole authority to implement all Presidential policies for a particular agency could stifle debate and could also detract resources from OMB’s statutory goal of developing and implementing the federal budget.

[Executive Order 12886](#), issued during the Clinton Administration, reduced the strength of centralized review even further in that it limited OMB review to only those regulations classified as significant. Nonetheless the Clinton Executive Order was precedent-setting in that the entire concept of centralized regulatory review was in jeopardy as a result of potent opposition to its very existence by a few key leaders in the Clinton Administration.

The Obama Administration, while adhering to the Clinton Executive Order, also made a very significant contribution to centralized regulatory review because it continued the centralized review of regulations after a *de novo* review of the matter. The Obama implementation of centralized regulatory review cemented its place in history because with its endorsement eight consecutive sitting Presidents had supported its implementation. Here is a [complete history](#) of the contributions to centralized regulatory review made by the previous [eight](#) Administrations.

The end result is that the current process for centralized regulatory review (Obama) is considerably more encompassing than that utilized by the Carter Administration but considerably less stringent than that of the Reagan Administration and most certainly less stringent than that of the Nixon Administration.

Thirty five years have passed since the founding of OIRA and if a decision were made to revisit the operation of this priceless institution it should be noted that there is:

1. a [list](#) of historical suggestions which are primarily administrative which can be undertaken without any action by the Congress and there is a [scoreboard](#) of key actions taken to date and planned,
2. one particular [action](#) that could be taken which would permit each American to act as a regulatory watchdog thereby transitioning the reformation of federal agencies from one that is Washington based to one that is people based,
3. a recognition that an OIRA that is understood is an OIRA that is respected; consequently there is a need to [reform college curricula](#) to address the inner workings of this important institution,
4. a need to develop a [national constituency](#) for OIRA, and
5. a recognition of the fact that any subsequent decision to increase OIRA's responsibilities without first recognizing the need to provide it with a substantial increase in personnel would be a complete fantasy; it would constitute a fantasy because presently OIRA is operating at a fifty percent reduction from the personnel level it had when it was established some thirty five years ago.

Jim Tozzi served as a regulatory official in five presidential administrations starting with Lyndon Johnson and ending with Ronald Reagan. He is presently the head of the [Center for Regulatory Effectiveness](#).

This post is part of the Symposium on the ABA AdLaw Section's 2016 Report to the President-Elect. An introduction to the symposium is [here](#), and all of the posts are collected [here](#). The views in this post, which expand upon the recommendations set forth in the Report, are the author's own and do not necessarily reflect the views of the ABA AdLaw Section. The full Report is available [here](#).

This entry was tagged OIRA, OMB.

Cite As: Guest Blogger, *A Syllabus on OIRA*, by Jim Tozzi, YALE J. ON REG.: NOTICE & COMMENT (Dec. 2, 2016), <http://yalejreg.com/nc/a-syllabus-on-oira-by-jim-tozzi/>.
