

PERSPECTIVES ON MODERN REGULATORY GOVERNANCE

ORAL HISTORY PROJECT

RETHINKING REGULATION @ KENAN INSTITUTE FOR ETHICS

SALLY KATZEN

Administrator of the Office of Information and Regulatory Affairs, 1993-1998

Interviewed by Edward Balleisen and Jonathan Wiener

October – November, 2012

Kenan Institute for Ethics, Duke University, Durham, NC

Interview I: October 24, 2012¹

[start of audio track 1]

Edward Balleisen: This is an oral history of Sally Katzen, conducted by Edward Balleisen, Associate Professor of History at Duke University, and...

Jonathan Wiener: I'm Jonathan Wiener, professor at Duke University in the Law School, School of the Environment, and School of Public Policy.

Balleisen: We're here at the Kenan Institute of Ethics on Wednesday, October 24th, 2012. We're mostly going to be discussing Sally's career as a lawyer, legal scholar, government official and policy consultant. We're going to be focusing particularly on Sally's engagement with the process and politics of regulation. Sally, good morning.

Sally Katzen: Good morning!

Balleisen: We'd like to begin with your formative years and educational experiences, and maybe hear a little bit about how those experiences led you into law as a career.

Katzen: Probably the earliest seeds would be found when I was in college. I went to Smith College expecting to major in math -- in part because I don't take SAT...exams very well, and I had done passably well in math and terribly in English at the time. I thought ..."if you can't fix it, flaunt it. I would be a math major." But, Smith refused to give me credit for a year of calculus that I had in high school, and so I had to take that course again, and I was, therefore, casting about for something of interest because Calculus wasn't, the second time around, any more interesting than it was the first time.

I took a course ... called Government 11 in the Political Science department, and first semester was Political Theory and the second semester was Comparative Government.

I had a section teacher who I thought was terrific, a guy named Bruce Carroll, and I found out that he was teaching something called Constitutional Law first semester of the next year and I signed up for it, totally oblivious to its being a level three course, and I was only a sophomore then. Totally oblivious to what it might entail. I liked him and I thought I would just take another course from him.

So, I found myself in con law, the structural side, with mostly seniors, mostly honor students and after the first day of slight tremors, I loved it! We were reading all these cases and I thought this was terrific and much more interesting than anything else that I had encountered.

Second semester was a professor named Leo Weinstein who was working on the Bill of Rights, First Amendment style, and he was so inspirational and made such a difference in my life. I chose him to advise me on my thesis. Being my thesis advisor, I took every course he offered

¹ Note – Sally Katzen has reviewed the transcript of the interviews and furnished minor edits to clarify or improve flow for the reader. These revisions occur within brackets.

and we remained friends until his death. Again, I just found the reading of the cases, the analysis of the justices' thinking, the probing, to be fascinating.

Smith had a program called -- I don't actually remember the name of it, but you spent the summer in Washington as an intern after your third year. I signed up. I ... ended up at the Senate Subcommittee on Constitutional Rights, chaired by Senator Sam J. Ervin of the great state of North Carolina and staff that mostly consisted of North Carolinian lawyers.

Bill Creech was the staff director. Robinson Everett, who was a very famous North Carolinian, was one of the staffers.

I think they were kind of curious, I guess, or whatever, with this little girl, though I'm not little, 6 foot, tall, but this young lady from Smith who had taken a couple of classes in con law and thought that she would be interested in this subject matter. They were more indulgent and humoring me than anything else, but very encouraging. That was the summer of 1963. That was the summer of the March on Washington for Jobs and Freedom. I was a marshal in the march and got to stand at the foot of the Lincoln Memorial when Martin Luther King gave his phenomenal speech. The earlier part of the summer was when President Kennedy sent what became the Civil Rights Act of 1964 up to the Hill [and] Bobby Kennedy as the attorney general, sat at the witness table, and I was the staffer. Each of the southern senators -- the judiciary committee was staffed with southern senators -- was going to have "extended remarks," the polite term for it, and keep Bobby Kennedy sitting there for day after day after day.

Senator Ervin suggested something on the order of 10 to 20 hours of a statement. He did not want to read the recipe for bean soup, which was frequently invoked when you wanted to filibuster. He wanted something on states rights, and he particularly wanted to show that North Carolina took its states rights seriously and was very advanced in the civil rights movement.

I'm sitting there writing away this long statement, even though I was for civil rights. As I said, I was a participant in the march in Washington -- a marshal. It was phenomenal to see all of this play out. Well, this was hardly how a bill becomes a law, because it was the formative stages.

There was one disastrous moment, when I was pouring water for the senators and I managed to pour water down the back of a junior senator from Massachusetts, named Ted Kennedy.

His little "Eek!" caused everyone to take a look...Aside from that momentary blip, it was relatively informative, interesting. I thought then, that I really should seriously consider law school. I had thought that maybe I'd be a paralegal -- we didn't really have paralegals then, but I'd do something. My professors, again, Leo Weinstein and Bruce Carroll, said you've got to go on to school.

I was terrified -- that's an overstatement -- I was very nervous about going for a Ph.D. because that was endless. It's only completed when you finish your thesis -- and that could be years. Law School had the attraction of only being three years, at the end of which time you had a degree, or you didn't.

Leo Weinstein gave me the very practical advice that you could go for just one year. If you do really well, stay, and if you don't, go do something else, but you will have had that experience of critical analysis and legal thinking.

So, with his encouragement, I took it very seriously.

Then on November 22nd, 1963, President Kennedy was assassinated. It was my 21st birthday, and I remember very little about that weekend, other than my parents had sent a huge sheet cake for 50 people to my dorm. To be greeted with that when you've just heard the President had died was a shocker.

That weekend, I think, was when I applied to law school. There are some interesting stories along the way, but I'll talk about getting into Michigan.

Balleisen: What was your experience like at Michigan? How many women were in the class with you?

Katzen: There were 12 to start, out of a class of 400 -- 2.5 percent, which was what Michigan was striving for. They had to scrape the bottom of the barrel to get 2.5. I'd mentioned I didn't do SAT tests very well. I don't do IBM tests very well. You give me a No. 2 pencil and tell me to fill in some blanks, all the answers are wrong. I had literally flunked the law boards. Back up for just a second, if I may. I really wanted to go to Yale. I mean, I was at Smith College. I couldn't get into Harvard, but I wanted to get into Yale. Leo Weinstein, every year, got to pick in effect the Smithy whom he would recommend to go to Yale Law School. It was me!

I had applied, I had taken the Law Boards, and I had an interview scheduled for a Monday morning. On the preceding Saturday, I got a postcard -- it was so embarrassing, a postcard in my mailbox, it's [Yale] rejecting me. I was crushed, and I called Bruce Carroll, who I had mentioned earlier, and said "I've just been rejected from Yale." And he said, "Are you 21?" I said, "Yeah." He said, "Do you drink Scotch?" I said, "Never." He said, "You're about to learn."

Katzen: He picked me up and we went down to Rahars, which is a bar in Northampton, and he started drinking scotch and I started sipping it. He told me this was not the end of my life, and I had other opportunities. Then he said, "Wait a second. Did they cancel the interview, or just reject you?" and I looked "They just rejected me." He said, "I'm driving you to your interview, Monday morning." We drove down Monday morning. I went in to see Dean Tate, who was quite a formidable Dean of Admissions. He had been in World War II and lost the greater portion of his arm. His suit jacket was pinned up on his sleeve at his shoulder. Stood behind his desk and said "Yes, Miss Katzen. Why are you here?"

I said, "Well, if you will offer me a seat, I will tell you." He said, "Have a seat, Miss Katzen." I said, "Thank you."

"Now, why are you here?"

I said, "I came to find out why I was rejected."

Bruce had told me on the way down "You have nothing to lose. Just be a pluperfect bitch if you need to."

"I came to find out why I was rejected." He said, "Well, I don't know" and I said, "Well, while I was standing, I noticed you had my file in front of you. If you could just open it up you might be..."

He opened it up and he said "Oh! Your boards. Your board scores -- they're terrible." I said. "I know, but I flunked my college boards."

I mean, I got a 420 in English when I took the boards, and I had straight As at Smith -- you think that would count for something.

He said, "You have straight As?" I said, "Well, a couple of A-minuses."

He said, "Who's recommending you?" I said "Leo Weinstein." He started reading the file. Then we started talking about different things, including my summer in Washington.

He then said, "I want you to resubmit -- I don't know that you'll get admitted -- but resubmit. I'm going to put in a word for you. If you don't get admitted and you go to any accredited law school, and you get ...a B average or better, I will assure you a place in second year class."

I said, "Well, thank you very much, but if somebody else takes me, and I do well, I'm going to stick with them, but I will reapply."

I did reapply, and I was re-rejected, and then Michigan did accept me, notwithstanding my low boards. All of my professors at Michigan knew, -- not all of them, some of them knew -- that I was the bottom of the barrel.

Whitmore Gray, who was my contracts professor, called on me every single, solitary day. After about 3 or 4 weeks -- this was Wednesday, Thursday, Friday, Saturday at 8.00 in the morning. After a couple of weeks of this, I went to his office I said, "Why are you doing this?"

He said, "Because you're going to flunk out if I don't help you. Your boards are low, you're the last person admitted in the class."

Thank you for sharing! This is confidence building -- like I really need it.

Anyway, he called on me every single day. Fortunately, they were all year-long classes in contracts, torts, property. There were two exams at the end of the first semester, which could help you but not hurt you. I set the curve in contracts, and so he stopped calling on me, when he saw that I was able to actually do some decent work in law school.

Socially, it was tough. This was the Vietnam [War] period. There was a draft. If you were in law school, you were deferred. My "taking someone's place" meant that somebody was dying in Vietnam because of me. That's how it was presented to me by some of my male colleagues. Some of the guys just thought I was weird. I mean, why would a girl want to go to law school? We were girls then, we weren't women. The assumption was that I was looking for a husband, and would never take the practice of law -- the profession of law -- seriously.

Actually, because there were two girls in each of the four sections -- I don't know what happened to the others -- there should have been three, but somehow somebody dropped out. Because I'm

tall, I'm sitting in the last row in contracts, and Harriet was in the first row in property. She was a Republican, so she was [told to] sit on the right, and I was a Democrat sitting on the left.

In criminal law, the professor suggested we sit together, because when we got to rape we would need each other -- for support. It was not a warm and embracing and inviting atmosphere. On the other hand, I wasn't surprised. I'd gone from an all-girls school to, essentially, an all-boys school.

...I remember in "Property," ...we spent weeks on "Pearson v Post" and I loved it. A little fox running around on the land. Who had the right to capture that animal? I thought that was really quite interesting. I had had this social conscience from the con law [class], and from the summer on civil rights. I participated in something called the Southern Student Exchange in my senior year at Smith, where I actually went down to a southern, all black, school for a couple of weeks. I did a lot of other things...

Balleisen: Where did you go...?

Katzen: Talladega College. There were eight of us [from Smith], and two went to an all-white girls school. Two went to an all-black girls school. Two went to an all-white co-ed. Two went to an all-black co-ed.... I went to Talladega, and I spent a week there. I never realized how white I was. ... I went into town to get a Valentine's card for my roommate, and they said, "You're that girl who's up on Nigger Hill." I said, "I'm the one at Talladega College, yeah." "I don't want your money." They wouldn't sell me a Valentine's card.

I was, I thought, socially conscious, and yet I loved property, I loved contracts -- offer, acceptance. Clearly, by the end of my first year, I had almost lost this drive and passion that I had as I just got immersed in ... law.

Balleisen: So, I think I saw that you made the Michigan Law Review. After those difficult beginnings, Yale rejecting and re-rejecting, and Michigan saying you are the last one in the class. How did that work out?

Katzen: At that [time], you [got on] Law Review based on grades. They took the top 30 people and you had to write a couple of publishable pieces. I think after the end of the first semester, I set the curve, not only in contracts but in property as well. The buzz was out that I was smart and I was good at this. Most of the guys, there were no other girls on Law Review my year. It was just me and the boys. Third year students were all men as well.

In any event, the questions about why I was there and how serious I was were generally dissipated. And they still assumed I was looking for a husband. Actually, I deserved to be there in some way. I published two notes. Then they took me off note writing and put me on editing. They had me edit a couple of articles. I remember going back to Pittsburgh for Easter break and telling my parents, "there's a 'chance' that I would be selected for articles editor."

This would be really good. I would be working with all these professors who write these knowledgeable things and I would be editing them. I [would be] number two. There was the editor-in-chief and then there was the articles editor.

I mean, there was just a chance that it wasn't going to happen. Then I went back and there was the luncheon where they announced the officers. They announced the notes editors, I wasn't there. I was relieved. Then they announced the articles editor, and it wasn't me.

I was trying to get myself in control, so that I didn't look like a poor loser. Then everyone came around and started congratulating me, and I was wondering what they were talking about. Well, I had been selected as editor-in-chief. It was so unexpected, and such a shock, and then the realization of "My God! Now what do I do? Are these guys going to listen to a girl? And what do I want? Do I want to earn their respect, or have them like me?"

This is the girl thing. You always want to be liked. You want people to have some affection for you.... I ... came to the point of thinking that it would be better to have their respect, and hope that they would have some residual affection for me at the end of the process. There were moments where it was difficult.

Wiener: Could I ask just quickly, how did that selection happen? This was the third-year students, all men.

Katzen: The seniors vote. The third-year students vote.

Wiener: Based on your writing and editing work for the year prior. Did you have to campaign or run for election? Because, in my experience on Law Review, there was a big multi-candidate campaign process and firing line interviews where the third-year students were firing questions at the second-year students.

Katzen: This was a big black box. No one knew anything. The [third years] went and they met and then they announced. The school was fabulous. They thought this was the greatest thing since sliced bread. And Michigan, I mean, I started having interviews. I was in *Time* magazine. I was on the front page of something called *Pace* magazine as typifying modern American feminism. These were the farthest things from my own mind.

...It was '66, '67. I graduated in '67. Brooksley Born, ...I can't remember her maiden name, was editor in chief at Stanford. Sally Determan was editor in chief at GW, either that year or the next year.... It was the first time since the war years when Yale actually had a woman editor in chief during 1944, when all the men went off to war.

...I'll close the ranks on Dean Tate. One of the things I had to do the summer after I was elected was to tour the law schools and solicit articles for the *Law Review*. I went to Yale for that purpose. I'm walking down the hallowed corridors and his door is open. I walked in and I said, "Dean Tate!"

He said "Miss Katzen, have a seat." He said, "I have never forgotten you. Here are letters from alums who said, 'She wanted to come to Yale and you didn't accept her.'" I said, "I came to thank you because I'm not sure I would've done as well here as I did at Michigan or had that experience. I just wanted to let you know that I've not forgotten your kindnesses to me."

[end of audio track 1]

[start of audio track 2]

Balleisen: Sally, could I ask you about your experience with the internship you had at the department of justice while you were in law school?

Katzen: Yes. I said that my interest in ...civil rights and social issues was somewhat sublimated as I went [through] my first year. Michigan used to bring out all sorts of people to talk to all the law students. I remember during my first year John Doar from the justice department came and talked. He was the assistant attorney general for the civil rights division. He was very imposing, tall, handsome and a positive energy exuding from him kind of guy. I went and I listened. I went up to him afterwards and said, "Do you take first year law students as interns?" and he said "Only if you have straight A's," and I said, "I will." He said, "Well you're hired," and I said, "OK. Can I get a confirmation of this somewhere?" He said, "Yeah. I will be back in Washington and I will make sure that you get...Let me have your mailing address or something." This was before the days of email.

Steve Pollack was his deputy. Steve, who remains a friend to this day, signed me up the summer after my first year. I was going to be a paid intern at the department of justice civil rights division. That was fabulous! It was really terrific. I went off to the justice department. The first, second, or third day they were sending a task force to look at educational standards or something in some of the southern states. And there were four or five of us [selected].

And we went to some place and then we went to Texas. And we were there for one day; the head of our group got a call saying, "Get out town now." We didn't realize we had a president that was from the State of Texas. The thought that there was a little group investigating civil rights in Texas was not going to go down well with whomever made these decisions. And we were ordered out immediately.

And whoever made the call said, "And Sally should go to New Orleans". I flew to New Orleans and there was a voting rights case involving Mississippi. John Brown, Judge Brown, was going to hear it. He was on the Court of Appeals of this circuit. He was going to hear the case sitting as a trial judge in New Orleans.²

There we were in New Orleans and I was the paralegal. What we call paralegal today. I was helping to put together the evidence and all the exhibits and summarizing all the depositions and doing all that good stuff. And John Doar came in for the trial, the night before the trial.

He looked and he said "No, this is not good, not sufficient, this has got to be redone with this, this has got to be redone with that, this has got to be redone with this." And I pulled an all-nighter, it may have been the second of two all-nighters....

[During the trial,] I was sitting in the front row and all of a sudden I felt this iron grip on my shoulder and I opened my eyes and there was John Doar who said "If you can't stay awake you get out of here. The last thing I need is my staff looking so bored they can't keep awake." I was mortified, totally mortified. I learned a very important lesson and stayed wide awake, wired for

²² In reviewing the transcript for this interview, Katzen explained that Brown heard the case because "all the district court judges were disqualified."

the rest of the trial, which we won and we went to celebrate where I learned a second important lesson, which is how to eat oysters.

John wanted to take everybody out for celebration and there was this place that he knew that had fabulous oysters. He called ahead, it was a party of 12. We got there in the second car, I was in his car. The first car was standing on the porch and they said "They won't let us in." And they wouldn't let us in because one of the lawyers was an African American.

John Doar said "That won't do." He walked in and he said "We made a reservation, we would like to be served." The guy said "I don't have to serve you and I won't serve you." He says, "You do have to serve us, you're a public accommodation, Title 4 of the Civil Rights Act," John started spouting off and the guy said "Who do you think you are, John Doar?" He looked down said "Doar? Yeah, we'll serve you."

They literally cleared out the restaurant. They took every single person at every single table and moved them outside to tables, which they moved outside. Then there was one table left inside and they brought us inside and John said to me "You sit next to Tony, it'll drive them crazy." Because I was the only girl and he was the only black. John sat on the other side of me. That's the first time I ever ate oysters, I love oysters.

Wiener: Did you begin in your second or third year of law school, while you were taking courses, and then the third year, while you were editor in chief of the Law Review, did you begin to think about the area of law that you would want to specialize in, or was it still very open ended for you?

Katzen: Very open ended. To the extent there was any draw, it was back to that old con law. I took con law second year. Had Paul Kuiper, who is well known [as a] smart guy. And I found those issues appealing and my summer in Washington had reinforced, had re-awakened, my interest in the social issues and the constitutional questions.... I liked labor law, I like restitution, I sort of liked whatever I took, I'm very fickle.

Balleisen: How did you end up as a clerk to Judge [Skelly] Wright?

Katzen: I had originally thought I would go to Arnold & Porter and...

Balleisen: Straight out of law school?

Katzen: For my second summer. They had a program then, which is probably something that, well, I guess I can put it on the record because it was the way they practiced then. They would look at all the applicants that they would be seeing when they come out to the law school, they would pick one, they would call the night before, they would offer a job. If you accepted they would go through this charade of interviewing students the next day while you had the offer in your pocket. They had done that with me and I had accepted. I was going to go there my second summer, but when I was elected editor-in-chief one of the requirements was that I had to stay in Michigan. It was actually a smart thing to do, because I took two courses during the summer and I was able to take a lighter load third year. I had to call [Arnold & Porter] and say can't do it. They said "Fine, but will you accept a job [after your] third year."

I had said yes. Once again, I had the offer in [my] pocket. That's where I thought I was going. Then roughly in February/March, I got a call from Yale Kamisar, one of the professors at Michigan, criminal lawyer, criminal professor, who's just a character. He said "So, do you want to clerk?" I said "Excuse me?" He said "Do you want to clerk? I got you a clerkship." I said "You got me a clerkship?" He said "Yeah, I got you a clerkship.... I was on a panel with [Skelly Wright] and he ... was saying that he'd like to get a girl clerk.... [Kamisar] said "Well, we've got a girl editor and chief." He [Wright] said "Really"? [Kamisar then] said "Yeah, she's something."

I said "Thank you." He [Kamisar] said "So, you want that clerkship"? I said "Yeah!" He said "OK, it's yours."

I said "Do I have to talk to him or does he want to talk to me"? He [Kamisar] said "Well, yeah, you probably ought to call." This is a story I told before, so I will tell it again. Skelly Wright is a very shy man and somewhat socially awkward. He was quite nice on the phone and he said very nice things about me and he would be happy to have me. [But] I had to understand that he had a clerk and a bailiff. They didn't have two clerks then.

The clerk earned \$9,900.00 and the bailiff earned \$3,900.00. He used the bailiff position for... he didn't use the work "experimentation," but [said] that he had taken someone the year before who wouldn't have fit the mold and he had taken one the year before who hadn't fit the mold. Now, I was a girl, so I didn't fit the mold.

Some of the judges split [the salary], but the other clerk whom he had already hired, who was from Yale Law School, was a boy and he was married and he had kids. So he was going to get the \$9,900.00 and I was going to get the \$3,900.00 to do the exact same job. Was that OK with me? I said "Sure, it sounds fine." \$3,900.00 was a lot of money then. So, I accepted the clerkship. I got to call Arnold & Porter and said "I'm not coming again." Seemed to be a common refrain.

Wiener: The year you clerked for Skelly Wright was that '67, '68?

Katzen: '67-'68.

Wiener: Did that also involve you in civil rights litigation on all of those issues that you've mentioned, being very captivated by, the years up to that, the March on Washington and working at the Civil Rights Division of the Justice Department. Was Skelly Wright when you got interested in administrative law and regulation?

Katzen: It was. The specific question was [did] we have any civil rights cases? He had authored *Hopson vs. Hanson*, which in effect desegregated D.C. schools. That had been either the year before or two years before and there was nothing comparable my year. There was no big civil rights decisions my year.

Balleisen: This was the D.C. Circuit.

Katzen: ...The United States Court of Appeals for the District of Columbia Circuit. What we had a lot of were administrative law cases. Those I found interesting, but I didn't really fall in love with it and say this is going to be the path I want to take. Again, I seemed to be interested in just about anything. One of the fun things that year was that he was invited to sit on the Fifth

Circuit and he chose me as the clerk, because I was the disadvantaged one, to get this perk of coming down.³ It was in New Orleans and John Minor Wisdom was on the panel.

Skelly had stopped in Atlanta on the way, to change [planes. His] plane was delayed, he got there late. Got a cold. When he arrived he was taken to the hospital. He was there for a week in the hospital, and I was the clerk without any supervision in the courtroom. Judge Wisdom asked his clerk, Tommy Sussman, to squire me around New Orleans. I had dinner at the Wisdoms's home. They couldn't have been more gracious. It was a fabulous week's experience. This is why I say I am so lucky, I just fall into these things. That was so exciting.

There was a Fifth Circuit case [that week] that involved civil rights, but Skelly wasn't assigned to write it. Otherwise, the bulk of the stuff was more administrative and contractual.

Wiener: Any cases in particular that stand out in your mind from that year?

Katzen: One does, but for not the right reason. I was studying to take the Bar, and one of the things that you do is you look at [decisions from the] DCCA, that's the Court of Appeals for the District of Columbia as opposed to the United States Court of Appeals for the District of Columbia Circuit. [It is] like the State Supreme Court. I had read some of the decisions and one of them had been appealed to our court. It had been heard by a panel in which Judge Wright was sitting, and in preparing for that I had read this [decision] and it was wrong, to my mind. I don't mean to sound arrogant. It was a jurisdiction case in which there was a divorce of a couple who were domiciled in Virginia. He had moved into the District, she followed him into the District.... She wanted him to sign over his half of the land in Virginia.

The court said they couldn't do that because they didn't have jurisdiction of the land, but they had personal jurisdiction of him and could have ordered him to do that. It was appealed to our court and I knew it was the wrong decision. Judge Wright had never seen anyone get excited about something as silly as that. He not only sat on the case, but he took it for himself and then he gave it to me to write up. I did, and it was a question on the DC bar. But our decision hadn't come out yet.

So do I say what I knew the DCCA had said or do I say what I knew the US Court of Appeals for the District of Columbia Circuit would say? I remember that case vividly.

I didn't know it was going to be there, so I couldn't get an ethics check before I took the exam. That was one case I remember. There was a bank case, Gray something-or-other out of Atlanta. There were a couple of FCC cases. The one thing that I do remember is, I realized the FCC was kind of related to the First Amendment stuff I was interested in, but not really clearly. I wasn't very sophisticated. I had very little knowledge, but it seemed to me that communications law might be interesting. I think my very original interest in what became my specialty started there.

Balleisen: So '67-'68 was the clerkship. You then had, I presume, options [for] where to go next? Was the door to Arnold & Porter now closed?

³ Katzen clarified on reviewing the transcript that this trip involved "traveling to another Circuit" to hear a case.

Katzen: Skelly at one point asked me, "What are you going to do?" I said, "I'm going to go work for Arnold & Porter." He said, "Why?" I said, "Well, it's a small firm. It's a very prestigious firm. It's very liberal Democratic." He said, "Well, you ought to talk to Wilmer Cutler." I had never heard of Wilmer Cutler. He said Lou Oberdorfer, who was a partner there, was a very good friend of his.

Wiener: Later a federal judge.

Katzen: Later a federal judge. John Pickering, who was one of the named partners, was from the University of Michigan. He was a good friend of the Wrights. They lived within a couple of blocks from one another. Really to humor him, I called and went over. I interviewed with about five or six partners. You know when you're having an interview and it's going well and when it's not going well? I thought it was going well. I was ushered into the hiring partner's office and he said, "You did very well. We'd like you to come back and meet more people." That had not happened to me anywhere. I had always been given offers. I said, "Well, OK." I came back the next week and I met with some more. They went well. I was back into [the hiring partner's] office. He said, "I'd like you to meet some more people."

I said, "What is going on here?" He said, "We take hiring very seriously. We want you to meet most of the partners, because if you come here and you don't trip on your own shoelaces, you might be our partner. We want to make our decisions with the full information." By this time, I was so interested in having them like me that when he called and offered me a job, I accepted on the spot. I realized, I had to call Arnold & Porter back.

Balleisen: That was a little uncomfortable?

Katzen: Yeah, that one was... The others were explainable. This one, nah.

Balleisen: Did you immediately move into communications law at Wilmer Cutler Pickering, or was that more of a process when you started to work there? What kinds of cases did they assign to you?

Katzen: One of the firm's clients was CBS, and they had a lot of work. I had a couple of different projects in different areas but I got into the CBS work fairly soon and some of that was appellate advocacy.... My, now husband ... was the one who was managing those cases -- Lloyd Cutler, Roger Wallenberg were the senior most people and Tim was the junior partner who managed the work.⁴ I worked for him for a couple of years on a number of things, one of which was a notice and comment "rule making" It was on what became the Financial Interest and Syndication Rules and the Prime Time Access Rule ... at the FCC....

Now I'm wondering actually about the order of all this, because we also represented the Communications Satellite Corporation. And it seems to me that after about a year or so Roger Wallenberg came into my office and said, "What do you know about rate regulation?" I said, "Nothing." He said, "Do you think you could learn by tomorrow at noon? We're having lunch

⁴ "Tim" is Timothy Dyk, Sally's later husband and currently a federal appellate judge in the U.S. Court of Appeals for the Federal Circuit.

with the people from Comsat and they're going to have a big rate hearing at the FCC and they want us to handle it."

There was a stack about three feet tall put on my desk. I went, "By noon, huh? OK this'll be interesting." I ended up being second chair and actually managing the rate case over a period of time. Somewhere in between all of this I was called into Lloyd [Cutler]'s office. He said that he had been contacted by a law firm in San Francisco, who represented the ...*San Francisco Chronicle*, which had a television station KRON-TV.

There was a license renewal challenge to KRON-TV and the challenge was based on a joint operating agreement that the *Chronicle* had with the *Examiner*, which was the other newspaper in town.

...This was before the Joint ... Newspaper Preservation Act was passed. It was a potential anti-trust violation for the two newspapers to enter into a joint-operating agreement. They were going to use that as a demerit in the FCC license renewal case. Danny Mayers, ... an anti-trust partner, and me were supposed to go out and work on this license renewal [hearing]. I brought the FCC; he brought the anti-trust. Lloyd said, "Could you go out there tomorrow?" I said, "Yeah."

He called and he talked to the managing partner of this firm and he said, "Yeah we can do it, we've got this expertise and Danny does this and Sally does this." Then there's this pause and he says, "Yes, she is a girl," and Lloyd said, "Well that's too bad because if you want to hire us you're going to have Sally and if you don't want to hire girls for your firm that's fine, but we stand by our people". I was shocked.

Here's a senior partner of a firm turning down a major client, because they didn't want a girl and he was going to stand up for...I took it personally, for me. He said, "I thought you'd think that way. They'll see you tomorrow, and by the way, you're going to like her." About a year later, two years later they called me. That same senior partner called me to tell me they had hired their first girl lawyer.

I felt, "OK, did something right in my life," which was very nice. Somehow I've had enough FCC experience when I went out to San Francisco, which I think was around '71, '72. I don't know whether it was the Comsat stuff or the CBS stuff or they were overlapping, but these were all part of the mix.

Balleisen: The Financial Interests and Syndication Rules ... was 1970, is that right?

Katz: Could be. Yeah, so that may have been the first.

Balleisen: That would have been one of the first things that you were working on. Then the Comsat rate regulation as I understand it was going on from almost the very beginning of the company, right through to 1975 so you would have entered in the middle of that I suppose.

Katz: Yeah, the actual rate case didn't come until later. They originally set up Comsat and there were all sorts of issues about the operating principles and I did actually work on some of those, direct access or whether you had to go through a carrier to get the [signal],...but [at first Comsat] ... set their own rates. They [the FCC] let them stay in effect for a fairly significant

period of time and then they said, "Well maybe we should see whether these are the right rates." That's when they launched the rate case, and for some reason I'm thinking 69' 70' is when they began the actual rate case and it went for several years.

Balleisen: I'd like to spend a little bit of time on this just because it's such a crucial element of the regulatory framework for so many decades continuing into the 1970's, this notion of rate regulation in particular markets involving public utilities. It might help a little bit to set the scene. What exactly did Comsat do?

Katzen: Comsat was [the] Communications Satellite Corporation and it was the U.S. signatory to Intelsat, the International Telecommunications Satellite system. This was the multi-nation launching of what became geosynchronous orbit, satellites, 22,000 miles [up]. For years, ... Trans Atlantic originally and then Trans Pacific had underground cables. This was using satellite to send a signal up and bounce it down and it had to be multi-national. In most instances the state-owned telecommunications company was the signatory.... In the United States, AT&T was the dominant carrier, then. This was before the split-up of 1986. And yet, they [Congress] didn't want to have AT&T, which ... owned the cables, ... to own satellites. They created this corporation, and it was a quasi public corporation, and boards of directors and there were all sorts of rules and regulations, I think it was maybe '61, which set up this company that was sort of private but more public, and the carriers had an interest and it was going to be heavily regulated.

Balleisen: Private ownership, but I believe the president of the United States still had power to nominate three of..

Katzen: Three of the directors.

Balleisen: But with an assumption that there would be public framework for rate setting from the very beginning.

Katzen: Exactly.

Balleisen: And that was vested with the FCC.

Katzen: Right. Then there was this direct access issue as to whether the carriers could directly access [satellites] or had to go through Comsat. If they could directly access it, there would be no reason for Comsat. It was a deliberate middle man that was put in there, but on the other hand, it was done for all sorts of other reasons. [The issue was] simply [the] societal costs and benefits of having the carriers directly access or having someone who would make sure the rates were [equitable for] all carriers and it was competitive....

Balleisen: What was it like to encounter this stack of files and reports about...not knowing anything about rate regulation, how did you begin to make sense of it?

Katzen: Slowly. Very slowly. I told you I don't take tests very well, I don't read fast. It's always been a handicap, it takes me forever to read things. I'm incapable of skimming, when I read something, I read each word, which you're not supposed to do. Then I remember each word, so that if I've read something, I can recall it, sometimes for a long time. It means, presented with the material I go, "oh my God." That's sort of my reaction.... Now, everyone does their research

online, they use a keyword, they go in and find a case that says whatever they want to say, or what they're looking for. I think we've lost a lot in today's way of doing research. So I found a treatise in the library that talked about rate regulation and I came across *Hope Natural Gas* which was, I think a FERC case.

Balleisen: A Federal...

Katzen: ...Energy Regulatory Commission case, or I think that's what it was. But *Hope Natural Gas* was, ultimately, a Supreme Court case, where they set out the parameters of rate regulation. You take the investment, that's the capital that's necessary for the business, that becomes your rate base. And you take a modest rate of return. You take rate base times rate of return, plus your expenses (this is not capitalized), that's all in the rate base, but all of your expenses, and that equals your requirements, your revenue requirements. And your revenue requirements, then divided by your services.

If you have more than one service, what proportion they should each bear. If you have only one service as Comsat did, then, among the users, what would the rate be to be able to realize this desired rate of return on the rate base while covering the expenses? And it was sort of like fair, in *Hope Natural Gas*, so I got through the whole pile.

Then I had to figure out who Comsat was and what they did and find the statute in the pile and what was relevant to this and to argue, obviously, one of the arguments would be that virtually every penny they spent in capital formation was, "used and useful." That was the standard for rate base, "used and useful."

If you were to build something which was a failure, it wasn't "used and useful" -- you couldn't get a return on that. But you're dealing with new technology, you're launching a satellite, for God's sake. You're going to have failures because that's what science is all about. That's what new technology's all about.

So shouldn't the capital sunk in a failure also be part of the rate base, because that was "used and useful" in teaching you important lessons so that you could get the satellite launched? Well this was a relatively new theory that we were going to advance but we had to do that because there were some failures along the way.

These were the kinds of issues ... as I got to know the company, and as I got to know the structure and history -- how they fit into the *Hope Natural Gas* equation, which was for an established utility that didn't have these challenges or didn't have these complications.

So we're going to be looking for exceptions here, and waivers there, and how to frame those, how to think those through, and that didn't happen by noon the next day. We're talking months of getting into it, understanding what the challenges were, and thinking creatively.

Balleisen: This was a very contested process?

Katzen: Yes, and no.

Balleisen: Was AT&T engaged in a significant way?

Katzen: Not really, because they passed their costs on to [their ratepayers].... Comsat's charges to AT&T were, in AT&T's world, its expenses. They just went right through. So they didn't really care whether it was a dime or a dollar. They were at the table, but they were more interested in our not setting precedent ... adverse to them. They took everything we did to see how it would apply to an established utility. It was contested by the trial staff of the FCC --... the Common Carrier Bureau ... had a trial staff. They had people who were very nice, very good, and wore blinders. They said, "used and useful, it has to be used." This wasn't used. It was never used, it was a failure. They couldn't get off of that, and so there was no persuading them.

We had a hearing examiner, this was before they became administrative law judges. Sharfman, our hearing examiner, we had to make our arguments to him as to why this was valid, and they opposed it because they took the traditional, I don't want to say rigid, but it was a narrow view, strict construction of the way the law should be. In that sense, it was contested. We did not have a free hand.

Balleisen: I take it that this whole process was also intensely formal -- that there weren't many *ex parte* interactions between you and the staff.

Katzen: Correct, although Sharfman, as the hearing examiner, was almost grandfatherly, and it was relatively relaxed. We were in a room and there was a transcript made every day, and whatever. I think we called him Your Honor, but I'm not sure. Then in the course of this hearing, they changed hearing examiners to administrative law judges, and he came in one day.

The other side stood up when he came in, which had never happened before, it was just a hearing examiner!

So I saw the world change in front of my eyes. He was definitely Your Honor, and it was Judge, and it was very weird. Yeah, it was conducted as an adversarial adjudication. Rate-making is formal rule-making under the APA so it's conducted under [Section] 554, 555 of the APA. I'm sorry, 556 and 557 of the APA.⁵

Balleisen: So the actual adjudication of this case came down, I believe, in 1975.

Katzen: That sounds about right.

Balleisen: Was Comsat happy with the outcome?

Katzen: Yes.

Balleisen: But they still appealed.

Katzen: Yes.

Balleisen: Could you explain a little bit as to how both of those things fit together?

Katzen: They didn't get everything they wanted.

⁵ Administrative Procedure Act.

Balleisen: What did they get and what didn't they get?

Katzen: I'm not sure I can remember precisely. I do remember that every time something good happened in the hearing, the stock went down, and every time something bad happened, the stock went up. When the decision came out, the stock went up. I thought they would have been happy about that, but actually they read it as something bad had happened. I think we prevailed on all of the normal things. No one contested any of our expenses or the rate of return we wanted.... There was some issue about the way we had designed the rates, and I'm not sure what I remember about that. They were not happy about that, and it would have to be redone. I think it was some of the rate-based questions, where we had prevailed on some but not on others, but I can't really recall.

One of the things that, and I'm not attributing this to Comsat but it's a fact of life, is that verdict delay is victory. So if it's not appealed, it goes into effect, it's then, whereas if you get another couple of years...

Balleisen: There are some advantages to that.

Katzen: Right. We had a theory...Deficiencies. If you charted from '61 to '71, which was the period I think we were using for the Rate case, a realized rate of return would have been -- I'm drawing a chart now which shows that they didn't earn anything close to what they should have earned in the first 5, 6, 7 years because there was no revenue coming in. They had to launch the satellite, they had to do the infrastructure, whatever. The revenue deficiencies - that's what they were called, that's what we called them -- revenue deficiencies from the early years, we said, should be capitalized and put in the rate base, because they were the start-up costs. Those, therefore, needed to be offset against excess earnings in the later years. That was the one thing we didn't get. I think we got the 'used and useful' ones and some of the stuff, but I don't think we got revenue deficiencies. I remember I argued the case in the Court of Appeals and I think that was one of the things that I argued, was that that should've been given to us....

Balleisen: So you were juggling this case and a lot of work for CBS at the same time.

Katzen: Mm-hmm. Although I cut back on my CBS work because I became involved with my now-husband, so it was deemed prudent not to work with him.

Balleisen: So CBS was significant for you until the early '70s and then less so?

Katzen: I think that's right. I think around '73, '74, I sort of cut back. There was another case that I remember with great fondness. The Seattle public schools had an FM station. This is the high school, had an FM station license, which ... taught kids how to run a station. This was almost vocational education, but, how useful! We thought radio communications would go for a long time. They had this license, and Pacifica, I believe, challenged that license and wanted to use it to put on music, which they could then [use to] attract advertisers, [so] they could then make money. Whereas the kids were using it and they were doing news, they were doing some shows, talk shows, whatever, but they didn't have any advertising. It was just sort of lying there as an asset, and their license was challenged.

I don't know how they came to our firm and how the firm brought it to me. We were going to take it as a *pro bono* matter.... I was going to defend the license of these kids, and they were just fabulous. So I spent a fair amount of time in Seattle, although fortunately the hearing was in Washington, ...but I had to learn about the school, the station..

I remember the first time I went out there, Nathan Hale High School, [and] walked in. I was told what room it was, I found it, and you could hear the sound coming out of the radio station. There was someone reading the news off of the ticker tape and was trying to provide some editorial comment, but not much, on the news. Then they switched on to some music. [in deep voice] "We'll be back in two minutes, three minutes."

The door opens, and this kid comes out who couldn't have been 13, with pimples all over his face. He said, [speaks with high-pitched voice] "Hi! How are you? Can I help you?"

And I said, "Yeah, I'm going to be working on the radio station license renewal. Is the person who's doing the news available now?" [deep voice] "Oh, that's me. That's my radio voice."

I just loved it. There were moments like this. We got the license, and they sent me a huge plaque of a picture of all the kids and they had all signed it, "With great thanks." That was one of the more gratifying...well, there were a lot of gratifying moments, but I remember that one.

So that was going on, and I think that was after the KRON-TV [case], so somewhere that was probably in the later '70s, it may have taken up some of the slack from the diminished CBS role that I had.

Balleisen: To what extent either in license renewal cases or with the work that you did for Comsat, were you drawing on external, outside experts? ...Asking for opinions from economists or...?

Katz: Certainly in the Comsat rate case.... [In] the Financial Interest and Syndication Rules, we retained NERA.⁶

Wiener: Could you explain those? Just the significance of the Financial Interest and Syndication Rules.

Katz: Financial interest and syndication rules. CBS invests a lot of...this is the way it used to work it doesn't work this way anymore. But CBS used to spend a lot of its resources developing plot, pilots and see[ing] what would work. To do that they had to hire the cast and get the screenwriters and put on these pilots and then they'd unveil their season and some of them would fail, and some would succeed. "Mash"! Succeeds! "All in the Family"! Succeeds! It makes money for them while it is on air by advertisements. The affiliated stations don't pay to [show] these programs, they are made available by the network. The question then becomes so what happens when they finish the network run? They're going to go into syndication, they're going to go into syndication to other stations, maybe foreign syndication.

⁶ National Economic Research Associates.

Where [does] the revenue [from syndication] go? Does it go back to CBS? Which financed this thing in the first instance? Or do the actors, the screenwriters, the other participants get it? Or do the stations get it or how does it work?

There was an allegation that there was sort of a tie-in. Most people would cede, would give the syndication rights to CBS and the theory was -- that was almost extortion. "You want your show on the air, you want us to do your show? Sign over the subsequent rights." It was sort of an anti-trust kind of thing and that was a piece of it.

This was all about network dominance, I mean it's hard to believe now, but then there were usually three major VHF channels in a city. NBC, CBS, The Red and Blue Networks. ABC was struggling to get in, that's before Fox.

Balleisen: And no cable.

Katzen: No cable. If you were a program, thought-person, scriptwriter, whatever you wanted to get on CBS or NBC. They had some leverage and so there was a question of that kind of tie-in....

The other piece of it in network dominance was that the stations would take the programming and the theory was the affiliates didn't really want to take all that programming. Some of that programming wasn't any good -- these shows failed, [so] the stations wouldn't have taken them. With failures, why would they do that? [The argument was that] they were being forced to do it by the network. "You want to get 'All in the Family,' then you've got to take this slop piece that we're going to be sending along with it."

Therefore we have to open up [the schedule] -- that was called the "prime time access" rule. One hour had to be available for local programming or other types of programming. This is where the local creative talent would say "We want to get on the Pittsburgh CBS station and we can't because it's all packaged!" This was the primetime access rule and the big supporter of this was Westinghouse, which was using [the rule] to leverage to get into ABC, to make that a real network. Of course then came Fox and all the rest of it.

That was the background of it -- ... you really needed to understand the economics of the industry, you had to understand where the relationships were, where the points of leverage were, where the money came in where it went out.... Actually it's not very different from the revenue deficiencies we talked about earlier in terms of lost opportunity costs.

I Remember Wilmer Cutler hired or maybe CBS hired NERA, National Economic Research Associates, which were then located in Cambridge. They did this massive study about reality, not myth, because a lot of the allegations were just that, allegations. We produced a lot of data and [the report] came from an outside...economic research [firm].

Similarly, in the Comsat case, ... we hired NERA there as well but we also had Gene Rostow, I remember, ... [from] Yale, who was going to talk about the theories of interpreting "used and useful" in a broader sense, or what it meant in terms of economic theory. You wanted to have some external validation of these theories that you had....

Balleisen: There was an underlying policy logic to much of the work that you were doing about limiting concentrated corporate power. Would that be fair to say in the Comsat case? Why did Comsat exist -- so that AT&T wouldn't have control over the satellites as well as the cables? [And then], [c]oncern about having the networks totally control the framework of what was going to end up on those channels.

Katzen: We were defending them. I was more on the other side of many of those issues. I was a corporate lawyer. For all intents I was a corporate lawyer. I was trying to argue from the company's points of view. And it's some of the arguments you hear now in public policy about what is the appropriate balance between regulation which reduces a company's assets, revenues, and the need they have to reinvest those assets or revenues or capital in research and development which might pan out to something great or might be nothing. How do you build a company, let alone an economy....

CBS was very interesting because at that time Bill Paley was the president or the chairman of the board of CBS. He cared about the First Amendment. He did not care about the bottom line. The news operation at CBS was phenomenal and characterized by integrity. There was absolutely no pressure on them to produce a profit.

"60 Minutes" went on air -- they never, ever, ever thought it would turn a penny. It was the capstone, it was the jewel. The entertainment was supposed to generate the funds, the money, and the news was to show...I mean this was Walter Cronkite, and he was a great man.

So I was defending CBS and I was saying "You don't censor us!" and "We're doing the right thing." There was actually a CBS[-owned] station in Philadelphia which had its license jumped and my husband handled that case. Notwithstanding that we were involved, I was brought in because there was some issue that I was particularly knowledgeable about and worked with him on that. The allegation [was] "Well CBS is rich!", yet CBS was doing all these other things that didn't show up. Anyway, so I was defending corporate culture.

Balleisen: The Financial Interest and Syndication Rule that was promulgated in the '70 did put some pretty substantial limits on the capacity of the major networks to control any of the flows of income in the afterlife of network shows. What's your sense of how the FCC came to that decision? What led them to...?

Katzen: At the time what did I think?

Balleisen: Yes.

Katzen: More emotional-political than rational. I thought that in terms of evidentiary basis, we had established that there had not been untoward pressure in extracting these rights and interests. There was not a firm basis for what was being alleged. At the same time, ... this was the very earliest stages of what we now see as the information age. A push for more sources of information. Cable was coming along at this point but there are always favorite, whipping dogs or whatever and the networks were very ... convenient for that.

I did not think that the decision was the right one but I thought that was the one that they reached for ... more political and emotional reasons than evidentiary reasons, which doesn't make it

wrong. Because political reasons can be the right reasons in certain circumstances, but I was, I guess, sad that we did not prevail.

Balleisen: Over the course of the 1970s, because of this focus you had on communications law, you had an opportunity to interact with the FCC on a number of different levels; different kinds of questions, license renewals, rate regulation, [the] notice and comment process associated with rule-making. What was your sense of quality of the FCC as a regulatory agency?

Katzen: I think it was pretty good.... Daniel Armstrong, was very, very sharp, very good, a great appellate advocate. I thought the team that we faced every single day in the Comsat rate case was mixed. There were people who were quite good and there were people who were not so good. I had very little sense of anything above the worker bee level. I sort of knew some people who were commissioners because I was president of the Federal Communications Bar Association during some of this period, but I can't remember when it was. That may have been in the '80s. I got to know commissioners and their staff....

It's not a court of law. A regulatory agency is more [about] policy, in many respects. When I thought of it, I wasn't appalled, but I wasn't blown away by the people at the agency.

Wiener: ... During this period in the 1970s and your work on, not only on communications law, but on administration law in Washington D.C. in general, you've mentioned already some, were there some other people and personalities with whom you crossed paths or worked? I'm thinking of people like Stephen Breyer who was working for the Senate Judiciary Committee chaired by, at one point, that was, led by Ted Kennedy that was whom you mentioned earlier. I think, Lloyd Cutler who also served in government around that time.

Katzen: ... When I saw your list of questions, the topics that you wanted to cover, I was thinking "What was I doing in the '70s?" I'm glad you've taken us through some of these things, which have brought back all sorts of stuff. I think I was doing my job. I wasn't particularly networking. I wasn't particularly active in professional associations. I loved what I was doing. It kept me busy, but I wanted to have a life as well. My sense is that I became a partner January 1, 1975. We're talking about the early '70s. I was concentrating on becoming a partner. There was a period at which someone said, "Well, she's only done communication stuff" or "She's done so much communication stuff, other people in the firm should get...[to see her work]."

I was put on some anti-trust something or other, ... and I was put on some other, oh, there was a CAB, Civil Aeronautics Board, which doesn't exist anymore, hearing on "no-show." Airlines would overbook and then people would cancel and they didn't want to have to pay [because] they had cancelled. But for the airlines that was a seat that went empty.

There was a hearing at the CAB, a policy hearing.... [T]he firm represented American Express and I was the one who was supposed to do that particular proceeding. I went off in a lot of other different areas, it was all work-related. I met Steve Breyer later. We became much closer, much later.... [U]ntil '75 I was doing my job and getting a lot out of it.

Wiener: You mentioned making partner in 1975.... [Y]ou've already spoken about ... breaking through the barriers in law school and getting the jobs in Washington and so on. Is there anything about making partner that...?

Katzen: I was the first girl associate [at Wilson Cutler]. Deanne Siemer was the second girl associate and she came a week after me and she was always slightly irritated that I had gotten a head start. But, I was also a year ahead of her in law school. She came up the year after. I would have been the first one anyway.

Even though I had been told that most people who are hired stay on to be partner, it changed in the early '70s and people who were associates started to leave the firm and some of them were encouraged to do so. Out of a class of, I think we had six or seven, it wasn't clear that all six or seven of us were going to become partners.

There was an element of anxiety -- ... not nearly what would be faced by people in the generation after me where the odds were so much worse, against them. It played in my mind, could they really turn down the first one? Would I in effect be an affirmative action? I didn't quite know how to think it through, although, there was nothing I could do about it. There was no way I could capitalize on it or minimize it, because it wasn't of my own making.

I thought could they really sit in a room, all these men, and say "This is the first woman"-- and we might have become women at this point, maybe girls -- "This is the first girl that we've actually even considered. She's the senior most girl we've ever had. We can say no to her?" When, at this point, in the mid '70s, that would not have gone over too well.

Plus, on the other hand, it was an all male establishment. After I became partner, ... John [Pickering] said "You know we have our partners lunch at the Metropolitan Club every week or every other week on Tuesday afternoons. Women can't go. How would you feel about that?"

I said "Not too terrific." They actually thought about continuing even though I was going to be a partner and I couldn't come to the meetings. They were going to continue [there]. This was a thought. Most of the people -- partners -- were members of the Metropolitan Club and they liked eating there. They had this big dining room and whatever.

.... I'll tell you my Mr. Coffee story because it's more where my head was. Second or third year, I was at Wilmer, got a call from Lloyd's secretary, "Can you meet him in the conference room? He's got a new client coming down from New York." I walked in and there are all these pinstriped suits.

I said hello and one of the pinstripe suits said "Could you get me some coffee?" I said "Do you take it with cream or sugar or would you like it black?" He gave me his order, I went out, I came back. Everyone was seated around the conference table. I gave him his coffee and sat down right next to him. You could see the color just starting to rise up his neck.

Lloyd came in and said "Oh, I'd like you to meet Sally Katzen, she's going to be the associate working with me on this case." They started telling us what this case was about. After about a half hour, 45 minutes, I said something completely inane and Mr. Coffee said "She's right, she's absolutely right on this. We should do this." Then a half an hour goes by, I say something else innocuous. "Yes, Sally's got it. This is what we should do, well stated." or something like that and [this] goes on for an hour, two hours. Then we're going to break for lunch. Lloyd says, "I want to see you in my office." I thought, "Oh God, what have I done wrong now?" That's, again, a gender thing, women always think they've done something wrong.

Wiener: Maybe everyone thinks that.

Katzen: Maybe everyone thinks that. So I go into Lloyd's office and he closes the door and he said, "Mr. So-and-so is a pluperfect son-of-a-bitch and you've got him eating out of your hand." I said, "No Lloyd, I have him drinking my coffee."

[I]t was a different time and I could have said, "I'm a lawyer. I'm not going to get you coffee." On the other hand, there was no reason to do it that way. Looking back I see that there was more path breaking than I ever thought when I was going down those trails. And so I don't think there was a whole lot going on in that sense with the women thing.

Balleisen: But maybe more so with clients than with co-workers?

Katzen: Yeah. This was a decade later, but in the 80's when I came back to the firm and was doing some work with Comsat and I actually had a child, I said I wouldn't go to any meeting before 9:30 in the morning. And I remember the chairman of the board of Comsat called and said, "We're having a board meeting. I want you there. I know you don't do early morning meetings and I respect that, but this is starting at 7:30. I need you there." And I said, "I'll be there. I can make an exception." And so the clients were actually understanding.

And he later told me that I had humanized the company, that people didn't have pictures of children on their desks, and then when I was out there flashing pictures of my child around, it became more acceptable. But the world was changing, so it wasn't just me for certain.

[end of audio track 2]

[beginning of audio track 3]

Balleisen: Sally, I think we might shift a little bit to the two years that you spent working for the Carter administration, in the Council on Wage and Price Stability, known as COWPS.

Katzen: COWPS.

Balleisen: COWPS. Which was from March '79 thru January, '81, if I am correct.

Katzen: You are.

Balleisen: What led to your appointment? How did you move from being an attorney, first [female] partner at Wilmer, Cutler & Pickering to this position in the Carter administration?

Katzen: When Jimmy Carter came in, in '76, he was interested in finding positions for women and minorities. The most obvious was general counsels, because women ... and African Americans were beginning to be [more] prevalent in the ranks of lawyers. My name got on a couple of short lists and for some reason I had an interview at the Department of Defense, for which I was singularly unsuited. It didn't go too well, and I never really thought twice about it. That would have been in '77. Then in February of '79 there was a snowstorm in Washington, and no traffic on Connecticut Avenue. I lived up in DuPont Circle and put on my boots and my jeans and trudged into the office to catch up on things. I got a phone call. It went something like this, "Is this Sally Katzen?"

"Yes, it is."

"This is Fred Kahn.⁷ We've never met, but I've heard a lot about you."

"Yes, and I've heard a lot about you as well."

He said, "One of the things I've heard about you is that you constantly interrupt people and that you jump to conclusions very quickly. Usually the right conclusion, but nonetheless you jump very quickly. I would like to talk to you about something, but I'd like to have some ground rules first."

"Yes," I said.

He said, "I don't want you to interrupt me. At the end of what I want to tell you, I will ask you a question which is susceptible to a yes or no and that's all I want to hear is a yes or a no."

It's snowing outside. I wasn't supposed to be in here anyway. What the hell. "OK, sure, go ahead." I'm sitting there taking notes and he starts to talk to me about the Council on Wage and Price Stability and how they had established these voluntary pay and price standards, a program which had been designed to combat inflation somewhat. It wasn't the big thing, but it was an important element in the total program.

It was designed by economists but it had to be run by an administrative lawyer. He had been looking around town for an administrative lawyer to be the general counsel of the Council on Wage and Price Stability. I thought, general counsel, Council on Wage and Price Stability, no.

This was a very important program for the administration and it was very complicated. He went on and on about this thing, and that he had called five or six of the major law firms in Washington and said tell me three administrative lawyers who you would have confidence in, you would trust, that you would put in a the position of high authority.

Your name was on every single list. Now, don't get swell-headed because it wasn't number one on anybody's list, but you were on everybody's list. I've done some checking and I'm obviously making this call and here's my question --- I'm writing "no, no." He said, "Will you have lunch with me tomorrow at the White House?" Oh my God, I'd never been to the White House, never eaten at the mess. I said could you repeat the question? He said "Would you have lunch with me tomorrow at the White House mess?" I said, "Yes, but," he said "That's all I need to hear."

This is before you needed all this security [clearance] ... and everything. He said "I'll meet you at noon at the White House mess." I went home, next day got dressed in my power clothes, trudged into the White House, and the mess is very seductive. I mean there's Jody Powell, there's Stuart Eisenstadt, David Rubenstein, all these people! There's Fred who is charming and funny and serious and smart.

I had thought about [public service], but I had just been a partner for four years. I was beginning to get my own clients. I was beginning to set my own schedule. I was beginning to be

⁷ Alfred Kahn, Chair of COWPS under President Carter.

responsible and developing my area of practice which was administrative law. This was not the right time.

I mean Council on Wage and Price Stability? Pay and price guidelines? I mean, no! We had lunch, he talked more, I said no, I told him why.

At the very end he said "So, bottom line, will you do this?" I said, "Regrettably no. I always thought I wanted to be in public service, but no, I don't think so Fred, although I've greatly enjoyed our lunch." He said "All right. Well, you've never been here, I'll show you around." We walked down the hall. We walk up a flight of stairs. We walk past the cabinet room. We walk into this small office. Then we walk into this bigger office, which is oval. President Carter [was] sitting behind his desk.

Fred says, "Mr. President, this is Sally Katzen. I want her to run our program. She will not say 'yes' to me. She will not say 'no' to you." I bowed. My tongue was like a big cotton blob. I'm standing there with the President of the United States! He stood up!

He said, "Sally..."

I said, "Yes!"

That's how I came to do it. It was the best decision I ever made, because it was transformational in a number of respects. I learned so much and I grew so much. I was able to contribute a tiny little bit. It was just remarkable. I am forever indebted to Fred for his approach, which was quite remarkable under the circumstances.

Balleisen: It might help to set the scene a little bit with the agency, with COWPS. This was an entity that began in the Ford administration.

Katzen: Correct.

Balleisen: I think 1974?

Katzen: Nixon had had a ... Quality of Life Council. It lapsed. [There] was a statute that created this agency in the Executive Office of the President a couple of months later. '74 sounds about right.

Balleisen: It might make sense as well just to say a little bit about the broader macroeconomic context.

Katzen: Well, the 70s saw a rise of inflation. Slowly, but surely, and increasing attention paid to the economic circumstances of the country. By '79 when I was involved in it, we had a misery index of 21, if I remember correctly. Which is unemployment plus inflation. We had long gas lines. It was really quite unfortunate, but it was mostly the inflation that was driving the concerns. Even Ford was concerned about the increased inflation. He created COWPS as -- it wasn't a regulatory agency, and it wasn't an enforcement agency. I think in the original statute it specifically disavowed any kind of regulatory overtones, of having pay or price guidelines -- or standards, which is what the Nixon one had tried.

Balleisen: Actual controls?

Katzen: Actual controls. [Our statute] disavowed that. [COWPSSD] was designed to be a think tank -- gather information, write reports, look at various sectors, be concerned about productivity. Productivity had slowed, which was one of the reasons inflation was increasing. You had a decline in productivity, with rapidly increasing wages.... [We were] to look at different sectors. To look at what was actually happening in the market, and to look at government actions, to see the extent that something like a regulation might be inflationary, might contribute to the economic situation. COWPS was set up by Ford as a sort of a think tank, report[ing] ... to the economic policy group, which in different administrations consists of different people. Now it's like the NEC in more recent administrations...

Balleisen: The NEC is?

Katzen: The National Economic Council....

This was low-key. My recollection is that even when Fred called me, in March of '79, I'm not sure I was even aware of its existence.... It was just another little pocket inside the Executive Office of the President.

Balleisen: President Carter had issued, in 1978, Executive Order 12044, asking for economic impact analysis of regulations. But he hadn't assigned that duty ... to a specific office. There was a Regulatory Analysis Review Group, the RARG, which, maybe, you can say something about. What role, if any, did COWPS, or your position at COWPS, play in those kinds of issues? [Was COWPS] already involved in regulatory oversight?

Katzen: 12044 came out in '78. That was supposed to be a major initiative, which built on the Ford experience, and the Nixon experience. It was trying to bring ... some discipline to the process. It was procedural rather than substantive. They weren't trying to rewrite the environmental rules, or the Occupational Safety and Health rules.... They were trying to do the process, which is, if you're going to implement these laws, do it in a sensible way. One of the things [in] 12044 was to get input before you do something.

This was [for] notice and comment. This was [process for] pre-notice. 12044 was looking at before you even did the notice, you should get some input. You should think about what you're doing. This was designed to get other government agencies to think about it, to get the public to think about it.

This was the beginning of public participation, actually. Carter was ahead of his time, in that regard, the aspect of having some input.

This was manifest by the Regulatory Agenda, which it may not have been called the Regulatory Agenda, that year, in that Executive Order. [The Regulatory Agenda] ... was -- every year, agencies, what are you thinking about doing? What subjects are you going to address? What topics are you going to consider? What solutions do you think you're going to come up with?

Let's put it out there so that you could look at a book and see all the different regulatory agencies, and all the different things they were trying to do. If you were an affected entity, either because you were going to benefit, or you were going to be burdened, you would be able to look

through this book and say, "That's one I don't like," "That's one I love," "That's one I can work with," whatever.

That was one part of the discipline, this advance notice and increased public participation, which is a pale, pale version of what we have now.

The second discipline, and the one that you were referring to, ... was -- think in terms of the regulatory impact.... [It] was called an RIA, Regulatory Impact Analysis, but that may have been a term that came later. But I think it was in 12044.

That was, consider the effects. What are the costs? What are the benefits? What alternatives are there -- regulatory, non-regulatory -- within the regulatory scheme? Different types of approaches. Before you leap, think. When you think about it, think about it in something approaching a disciplined way. I don't remember that there was a lot of attention to quantification and monetization. But there was clearly the think-it-through approach. That was [issued] in '78. [The President] didn't assign it to anyone in particular. But COWPS was there, and COWPS was going to do some staff work.

Shortly thereafter, in one of the legislative amendments to the COWPS Act, which started in '74 - it may have been in the initial one, but it may have come in amendments -- they gave COWPS the authority to comment, during the comment period. Not pre-notice but post-notice, during the comment period. COWPS was tasked with the mission of filing comments in these proceedings. Particular focus on efficiency, on the economic principles that would govern. That was one aspect. COWPS, also, was going to do the staff work, along with people from CEA, the Council of Economic Advisers, and OMB [Office of Management and Budget], which was only the budget side at that point. They had an office that worried about these things. These staffs were going to work together to do some analysis.

You mentioned RARG, the Regulatory Analysis Review Group. What they did was, shortly after the notices came out -- this was not pre-notice, this was post-notice, after the notices came out -- they would identify those Executive Branch agency proposals that would be subject to RARG, or would be "RARGed". We turned it into a verb. To be "RARGed" was to be reviewed by the COWPS staff working with the CEA staff, and the OMB staff, to analyze what was [proposed] and comment on what was happening. That was distinct from COWPS filing comments in the notice and comment process.

That wasn't very clear, so let me try this again. Agencies would issue Notices of Proposed Rulemaking. At that point COWPS would, [for] 50-[rules]-a-year, or 60-a-year, actually file comments in the rulemaking proceedings during the comment period, like anybody else on the record.

COWPS alone would do that, although, sometimes we would share the drafts of some of those [comments] with some of our colleagues in the Executive Office of the President. Most of the time, COWPS people did that. That was not only for Executive Branch agencies, but also for independent regulatory commissions because those were in the public comment period.

In addition, ...there would be 10 [rules] or so, ...that would get special RARG focus. RARG would be where COWPS would do some drafts of issues of concern. And then [they would]

conven[e] people from OMB, from Treasury, from Labor, from Commerce, from the issuing agency, usually EPA, and they would [discuss] RARG comments.

RARG comments were not necessarily filed in the public docket. These are, "Does the administration want to have a few words with [the] issuing agency"? Frequently, there would be a COWPS version of the RARG comments that would be filed in the docket. In fact, I think in almost all instances there were. But this was going to be something where "Should we talk to these people"? And not necessarily on the public record. And this would be done by the end of the comment period. Not done after the close of the comment period. They kept that piece of it sacred....

There was a staff within COWPS. Their primary function by the time I got there was the pay and price standards. But this regulatory oversight piece was headed by Tom Hopkins. Tom Leonard, John Morrall, Art Fraas were on the staff. Very smart economists. Very thoughtful people....

Wiener: So what would happen if COWPS took a very dim view, had very critical comments in the comments period? Or if the RARG thought one of these regulations is a bad idea, very poorly justified. How much impact would that have?

Katzen: Probably a little bit more than if the regulated entities had come in and had a very dim view. I mean, it was a comment in the public proceeding. And when COWPS filed, there were no follow up conversations. There were no preceding conversations. Because we filed the comments and so the agency would look at it and go "Oh, we don't agree" or "Maybe we do agree". I think there was a report that was drafted at the end as to whether we should get rid of COWPS altogether or not after Carter lost -- I'm really now leaping ahead to the transition for the Reagan Administration -- ...I think we came up with like five to ten instances where we felt the COWPS comments did make a difference.

[In those instances,] the agency did change its view. Would it have changed its view if those same comments had been filed by another entity? Probably [ours] got a little bit more weight.... RARG, on the other hand, if you were selected... if you were RARGed, then there was this meeting at which the head of the issuing agency or assistant secretary level of the issuing agency would be meeting with Charlie Schultz from CEA and Fred Kahn, and Jim McIntyre... --actually Jim didn't go, it would be ... Elliott Cutler and Bo Cutter, and George Eades -- and all these other really smart people who would be quite persuasive. And we think the RARG process probably produced more changes, so you'd have to sort of distinguish those two.

Balleisen: In your day to day work as General Counsel what was the balance of time that you put into the sort of RARG process as opposed to the pay and price standards?

Katzen: In the beginning, maybe 90 percent pay and price, 10 percent RARG. I brought on a special assistant, Rob Sedgewick ... out of Wilmer Cutler, ... and ... he was exceptionally talented at knowing when to raise issues to me. So I didn't have a lot of hands on day-to-day contact with these guys. Art remembers coming to my office and meeting because Rob had teed up [an] issue. Art remembers coming to my office and meeting because there was a problem that had come up and he remembers several meetings, so I know I spent time on it.

Balleisen: That's Art Fraas.

Katzon: Art Fraas, But I did not have a strong economics background. Barry Bosworth had to explain to me "incomes policy," and the rationale for pay and price standards and how it fit into economic theory. Barry Bosworth is one of the most articulate, intelligent people I've ever known as an economist.... I had to learn about the underpinnings. This was a new adventure for me, number 1. And number 2, the job that Fred brought me in for was to establish procedures for reviewing company compliance. This was a voluntary program, but we were going to monitor it. If we found someone had exceeded the profit margin standard, or the pay standard, what were we going to do and how were we going to do it? He wanted me to actually write the procedures for this.

Balleisen: To bring in the perspective of administrative law into this framework.

Katzon: Right, This was not going to be an adjudication, and it wasn't going to be a notice and comment rule-making. But what did we need to import into the process to ensure fairness?...

Balleisen: So, there was already a structure of rules for determining a legitimate setting of pay or prices?

Katzon: There were standards.... The pay standard was seven percent. [The] price standard ... was very complicated.... [I]t had prices, but it also had profit margin exceptions and had gross margin exceptions....

Balleisen: There were lots and lots of exceptions.

Katzon: Lots and lots of, not exceptions as much as alternative ways of measuring. So all that was going on and companies had to file -- quarterly? Monthly? I don't remember exactly what. And the price office and the pay office would go, "Whoa, these guys are exceeding the standards. Now what?" That was what Fred wanted me to [deal with].

Balleisen: What was the basic approach that you came up with?

Katzon: I wrote procedures. It's interesting. I guess they're published someplace, but I'm not sure where to tell you to point to. I certainly don't have a copy of them or remember them very well. I remember the history of them.... [I]t was essential that the company be told what the concern was. This is not a hidden, a closed black box. We would bring in a company and say, "You've chosen to use profit margin. Here are the data you reported. Here are the data we have. Here's the calculation we made. You're out of compliance." It was essential that, that information be revealed to the company.

Second, the company had to have an opportunity to respond. To either agree with what we had done or say no, you don't understand. Or even at that late date select an alternative, "OK, we've failed that one? How about this one?"

Balleisen: Could they also ask for an exemption on the basis of extenuating circumstances?

Katzon: Not really, because most of the circumstances had been taken into account. I don't remember that being a significant part, but maybe it was part of the procedures. There had to be

this data dump and there had to be an opportunity to answer. Then ... they would have a hand in crafting the remedy. Try to be a partnership kind of thing. In any event, it was fairly skeletal, but I thought hit the fundamental concerns. I remember vividly that it came out, and it was either in the *Federal Register*, or it was published in a White House press release or whatever. I'd love to get my hands on it. I'd love to see what I did, actually, now that you raised this question.

The American Bar Association's Administrative Law Council put it on their agenda, and called me four or five days before their meeting in -- Texas, Florida, somewhere outside of Washington -- saying that there was enormous concern about the adequacy of these provisions, that there wasn't enough process. They wanted me to know that, at this council meeting, they were going to severely criticize this work product.

They may have even sent me a critique, either they told me on the phone or they sent me a critique.... I said, "You guys have no clue what we're doing. You don't understand the program. You don't understand what these words mean. I was close to belligerent." And they said, well, you could come and address the council if you want.

Now at this point, I did not know about the American Bar Association. I did not know about the Ad Law Council.⁸ I did not know what a council meeting did. I did not know what the process was. I didn't know anything, but I said yes. And I remember going down the hall and saying, "Barry, we've got a potential PR disaster on our hands. I can't have the American Bar Association Ad Law Council saying that we haven't provided sufficient procedure. I've got to get their blessing. I've got to go in person. That's the only thing I can think of." He said, "Go." And I went.

I had never been in a council meeting. I had no clue who was there, what rules there were, what happens. I'm sitting, and my subject comes up and the chair, who I now have figured out is the chair, calls on this person who starts agitating and saying all these things, and then council members started piling on.

I'm sitting there. "Now what, smarty pants,... are you going to do? I decided to raise my hand, and they said, "Would you like to address the council?" And I said, "Yes." I remember standing up there and just thinking, be calm. You have to win their hearts and minds. And their hearts are more important than their minds right now.

So with some humility, which wasn't necessarily genuine, and with some patience, which was certainly not genuine, I tried to provide context; I tried to provide what we had done. I was interested in their critique of this because I thought that's what we had done. I was interested in their comment on this because, how did they see that working? Did they really want our data to be made publicly available so that competitors could see it? I mean we're dealing here with...

This was a key factor in this entire process. The information we had, the reports we were getting, were all proprietary. I bet I was turning down FOIA information requests daily, of competitors who wanted to know the pricing information of the competition. That's not what FOIA is there for....

⁸ The ABA section on Administrative Law.

“Do you want me to make this data available? So that US Steel knows what Jones & Laughlin Steel is charging?” I mean, we have some constraints here. I went through this, and I think it was Clark Byse who stood up and adopted his posture, which was one arm...

Wiener: Administrative law professor at Harvard Law School.

Katzen: Administrative law professor at Harvard Law School who was probably in his 70's at the time. And he crossed one arm over his chest and the other elbow on that crossed arm and said "I think we have someone who has done the right thing here. She's thought about everything, and has made reasonable judgments. And I think we should go on to the next subject on our agenda."

[slaps table] I love Clark Byse!

I think there was a little bit of discussion and then I think that he was the one who basically called a halt to it.

Balleisen: You received his blessing.

Katzen: I received his blessing. And it was in part not because of what I had done but what I had thought about and what I said I'd thought about.

[end of audio track 3]

Interview II: October 25, 2012

[audio track 4]

Edward Balleisen: We're going to continue the oral history with Sally Katzen this morning. It's Thursday, October 25th and I am Edward Balleisen, Associate Professor of History and Public Policy at Duke University, and I am here with Sally Katzen and also with...

Jonathan Wiener: This is Jonathan Wiener, Professor at Duke Law School, Nicholas School and Sanford School.

Balleisen: Sally, welcome again.

Sally Katzen: Thank you.

Balleisen: We're going to pick up with the discussion of your role at the Council on Wage and Price Stability, in the Carter Administration. When we closed the conversation yesterday, you were talking about some of the nuts and bolts associated with the pay and price standards at COWPS, in the context of the problems with inflation in the 1970s. I wanted to begin by asking ...if you could take us through the basic process of how COWPS dealt with a company that appeared not to be in compliance with either the price or the pay standards?

Katzen: Sure, but let me take one step back to put this all in some context. I think I mentioned yesterday that the pay and price standards -- which were voluntary -- were a critical component of the efforts to deal with inflation, but were not the be all and end all. There were fiscal and

monetary components as well. The reason this piece was there -- this is incomes policy. The idea is that in inflationary times, there's going to be a legitimate demand by workers to increase their wages to cover the costs of inflation. This is also known as COLAs, Cost Of Living Adjustments, which are common features of most collective bargaining agreements. As their wages go up, then the cost of doing business goes up, and so then the prices go up and we're in an inevitable rising spiral.

At the time, the labor costs were roughly 60 percent of the cost of production. If you could constrain the increases in wages -- in pay -- you would have a constraint on the increase in prices, and it would be equitable, if you are going to proceed to constrain [prices].

Wages are easier to constrain than prices, because you've got a natural ally -- that is the company, the employer. You tell an employer "It's national policy to keep wages at seven percent." He says, "I'm patriotic, I'll do that, I'll keep the wages down." The workers say, "Hey, but there's 12 percent inflation." They say, "Too bad, it's national policy, I'm patriotic. You only get seven percent."

It's relatively easy for voluntary pay programs, except for organized labor situations, where the collective bargaining process gives leverage to the workers who say, "It may be national policy, but we need to be made whole." There's that piece of it.

Prices are more difficult, because it's more diffuse. Everybody has their own way of [setting prices]. There are any number of ways of pricing. We found, in the pay standards, it's a relatively short succinct statement. It was seven percent the first year and then it went to a range of 7.5 to 9.5 for the second year.

But for prices, we had all sorts of variations of actual pricing -- profit margins, gross margins, all sorts of other kinds of things.

We get these reports, which are going to be treated confidentially, and we also have some independent analysis in either the price office or the pay office, but we focus on price. [We] would look at the sector and see what the aggregate pricing was doing, and then track that against the individual [company] reports that we were getting, to see what were the drivers, [where] were the leaders, where were the laggards.

If we found information, based on either the sectoral analysis or the individual reports, that a company was in violation of the price standard, we would notify them. This was, I think, called "Notice of Probable Non-Compliance." As I mentioned yesterday, this was private to the company.

Sometimes we'd definitely indicate which standard we were judging them against and where we thought they came down, but did not necessarily lay out in loving detail all of the background information. It was private to the company, rather than being made publicly available.

Balleisen: And the concern about making it publicly available was...

Katzen: Giving information to their competitors. And the possibility we didn't have it right, and then we were putting out erroneous information.

Balleisen: And that could harm the...

Katzen: Harm the company. It could harm the company. It could harm the sector, conceivably. It could harm the credibility of the program. If they thought we were wild and reckless, and just sending out all sorts of notices, making them public, and telling people that they were doing the wrong thing, then we would lose credibility. Trust in government is currently at an all-time low. It was then a little higher, but [we] wanted to maintain it, and not dilute it. When a company received this, it had a relatively short period of time to request a conference. I remember that it was not a hearing. We gave them the opportunity for a conference.

This was the result of a long discussion in house about how formal this meeting would be. Did we want a judge in a black robe? Did we want a transcript of everything that was said? Did we want an adversarial proceeding? This is a litigious nation, and did we want to add to that? Or did we want to try to come to a reasoned decision that would probably better emerge from a less formal structure?

We came up with the term "conference" rather than "hearing." A term that did not have a lot of precedent -- we didn't find any -- we didn't look. I didn't know of any examples of this kind of thing, but we were going to have a conference. At the conference, we would disgorge all of the information that we had and show them how we got to where we were.

The company could come in with all of its information and say, "Well then, if that doesn't work..." -- as I mentioned yesterday -- "...we'll go to the profit margin standard." "We'll go to the gross margin standard." Or, "We need an exception."

You asked about exceptions yesterday. I said they were few and far between. One of the ones [we had was] if it [was] going to put a company out of business. That's not something a company would want to say publicly. Particularly, if it is listed on the exchange....

There would be this conference, and at the end of the conference we would say. "Well, you've convinced us. Go in peace." Or, "You haven't."

We had a limited amount of time to reach a decision and then we were going to list non-compliers. This was to bring shame to the company, because this was a voluntary standard. It wasn't against the law. We were just going to bring shame, scorn and derision to those who would flaunt the national policy of restraint.

A company could then seek reconsideration. A request for reconsideration produced an automatic stay in the listing of a company. If the reconsideration was ultimately denied, then three days later, they would be listed. They could come off the list as soon as they agreed to come into compliance if they took any [one] of [a] series of corrective actions.

Balleisen: What was the group or individual who determined non-compliance on this? Were the same individuals then hearing the request for reconsideration?

Katzen: I don't remember very many requests for reconsideration. It would have, in my mind, been an elevation. In other words, the Price Office would have convened the first conference. Probably, I wouldn't even be there, but one of my deputies who did price work would be there. If it turned out that the decision was made that they were still not in compliance, that would have

probably been taken to the Deputy Director and to me as the General Counsel. We would say, "Yeah, they did not comply." If there were reconsideration, then probably it would go to the Director, and the General Counsel to do it. I am sketchy on this, because I don't remember very many of these.

Companies knew what they were doing, and, for the most part, we knew what we were doing. We usually got it right. I don't mean to sound arrogant, but it just was the way it worked out.

Balleisen: Do you have a sense of how many firms ended up with at least an initial determination of non-compliance?

Katzen: Not many.... The first year that I was there, there was on the company's side a desire not to be the first one listed. That's never good. And so, until we had listed the first one, we could use that as part of our negotiating. Do you want to be the first one? And that was particularly effective with companies like pharmaceuticals, where trust and credibility was an important part of their brand. You list them as a non-complier, it has nothing to do with the safety, soundness and efficacy of their pills, or their medications, but it adversely affected their brand. And they could not sustain that.

I remember there was a pharmaceutical company, and I remember speaking with the representatives from that company, saying, "I know how significant this is. But then, you know how significant this is. If you're contesting the information, it's one thing, but if you're not, if you've actually exceeded the standards, is this what you want the company to endure? It will be unpleasant, and unproductive."

Now, I said there were no hearings, but we did actually in the procedures have a tiny provision. If there was a substantial and material question of fact, then we would have a real hearing, with a hearing examiner and an [adversarial proceeding]. But the burden was on the company to specify what the substantial material question of fact was. And we never had them. It just didn't happen. Because the data that we were relying on was the data they gave us.

[Sometimes] they came in and said, "We had a typographical error and it didn't mean that." "Can you give us your backup sheets? Oh yeah, you added two and two and got 12. No, that's not quite right." So there was an attempt to work with the companies. We didn't want to punish. We wanted to achieve compliance. It obviously affected the way we communicated with the companies.

Balleisen: On the whole, did most companies accept the process as fair? Were there any firms that just really groused about the whole enterprise?

Katzen: The firms that hired lawyers, the lawyers groused. Because that's what lawyers do. I think that's one of the reasons that Fred had wanted a lawyer to be helping to run this program -- ... I would grouse back. As I mentioned in yesterday's session, about the ABA, when they first looked at the procedures they said "Conference? What conference? Conference has no standing." Then I explained what we were trying to do, and that we were not trying to punish, we were trying to get compliance.... And so, usually when we worked with a company, if there was a meeting and I was in the meeting, and there was a lawyer and there was a businessman, I made eye contact with the businessman.

I talked to the businessman, I responded to the businessman. The lawyer started grousing. I would sort of give him an "OK" and go back to the businessman because I wanted to achieve a sense of credibility, competence, cooperation, compliance.

That was the path that we were on. I remember vividly one instance where I was accused of being extremely heavy-handed. I think that would be a polite way of describing what I was accused of. And that was actually by my own staff, not by the company lawyers. They were almost shocked at how I handled the situation which I thought was the right way to handle it.

Balleisen: Could I ask you to talk a little bit about the inputs into COWPS decision making, ... the specifics of either the pay or the price standards? Both of these had advisory councils, a price advisory council and a pay advisory council.... [W]ho [was] on those advisory councils, and [to what] extent ... did they help to shape the actual standards that emerged?

Katzen: I'm not sure how active they were in the first year standards, because this program had been designed before I got there. So we're talking about what would happen at the end of the first year going into the second year. We did convene a price and a pay advisory committee. I don't remember very much about the price advisory committee, ... probably because there were very [few] problems. We had tried to be sensitive. We had done a lot of outreach and I think the price advisory committee primarily consisted of people in various sectors of the economy who were able to speak about the way we were measuring [price increases].

On the other hand, the pay advisory committee was, politely, a nightmare.... [O]rganized labor was very resistant to giving up their COLAs, cost of living adjustments, and how those COLAs would be counted, if at all. The role they would play was a serious substantive question.

I was in a Democratic administration and one of the strong, vibrant constituents of a Democratic administration is organized labor, and one does not treat lightly the concerns that are raised by organized labor. So we [took] them very, very seriously.

I think it was Fred Kahn who came up with the idea of having John Dunlop chair [the advisory committee]. He had been former Secretary of the Department of Labor and [was] a well-known labor economist....He took his job as chair of this committee very seriously. He approached being an advisory committee chair as being the one who would set the next year's standards. They weren't just going to give us advice. They were going to give us the standards. We would take them by gosh, by golly. He was going to get this group together. This group consisted of -- and I'm thinking seven and seven, but it might've been six and six -- people from labor and employers. It was going to include both sides of the equation. John was going to convene these meetings.

There's something called FACA, the Federal Advisory Committee Act, which was enacted during the heyday of public participation, [of] "government in the sunshine." FACA said that when you have a government advisory committee, on which there are government employees as well as outside advisors, that it has to be open to the public. This means you give notice of the meeting, the agenda for the meeting, that you put this out in the *Federal Register*, and you open the room for people to be there.

John Dunlop said, basically, "Hogwash. Nothing gets done if it's open to the public. I will not conduct business in an open meeting." I am the General Counsel, on the Council on Wage and Price Stability, and I have responsibility for enforcing the law. Whatever my personal feelings about FACA might be, I was supposed to make sure that it was adhered to. John was determined that it not be.

What he intended to do was to meet with all the labor folks -- but that was more than a quorum, so he couldn't do that, legally -- find out where they were, then go meet with all the employment folks, and, again, shuttle diplomacy back and forth, and get it all set. And then we will have his meeting, where he announces what the decision is, and everyone would vote yes. It would be this Kabuki theater. I said, "No, John, we can't do it that way."

He basically told me that I was young, naive, inexperienced, incompetent, sniveling, law-abiding to the nth degree. He really dressed me down, on a number of occasions. I kept saying, my own personal view is that you would be enormously effective doing this, but that's not the way the law is set up. Do you want the program to work? He threatened to resign a couple of times.

Then he would say things like, "Well, I'm just going to go do it." I would say, "You can't tell me that." "Oh, so if I don't tell you, I can go do it?" I said, "You can't tell me that." There was this tension between the legal fiction, of how this was supposed to run, and the reality of how it could run. And how do you thread that needle? When you ask me about the Pay Advisory Committee, I just get nauseous. I relive these experiences of John Dunlop, who...I don't think I ever saw him again after that. I'm not sure what my reaction would have been. Which is why I had the reaction I did to you. There [was] a curmudgeonly quality to him as well.

Wiener: ...[I]f Congress had thought about the need for shuttle diplomacy, which they might have appreciated from the Vietnam War and later from Jimmy Carter negotiating with the Israelis and the Egyptians, and so forth, they might've put a provision for that in the statute. But they didn't necessarily expect the FACA provisions to prevent COWPS from doing shuttle diplomacy.

Katzen: Well, there are exceptions in FACA for national security and foreign policy, where shuttle diplomacy really exists, but I think your point is well taken. That shuttle diplomacy could actually work on the domestic scene, in areas that are covered. It's the same issue with the Government in the Sunshine Act. As a result of the Government in the Sunshine Act, more than a majority of any commission...Take the FCC, you can't have three of them going to the men's room at the same time, or the ladies' room at the same time, because that would be a violation of the Government in the Sunshine Act.

Glen Robinson, who was a professor of law at UVA, after he left the FCC wrote a brilliant article, in which he said, "We have now reached absurdity. I am smart, I am talented, I am knowledgeable. I suffered through Senate confirmation, I serve as commissioner, and I can't talk to my fellow commissioners. Instead, I send my wet-behind-the-ears special assistant to go deal with a special assistant of another commissioner.

"They reach a deal. Come back and tell me. I say, no, I would change this. He runs back and tells them that. They work it out again. They come back. I'm sitting in my office thinking, why am I confirmed? Why am I doing this? Because it's the kids, the pups, who are doing all of the

policy-making, and making all of the decisions. Because the Government in the Sunshine Act says, oh no, if I talk to my [fellow] commissioner, there has to be a spotlight on me."

Anyway, I think it's an excellent article, and it raises an issue that has never been fully appreciated in all of the public participation, let's live in a fishbowl, Government in the Sunshine Act, FACA [world]. They're all of a set and they're all of a series. This administration, which is very big on public participation and transparency, has pulled the veil a couple of times.

Balleisen: You mean the ... Obama administration?

Katzen: Yeah. So even if you profess it, it doesn't necessarily work....

Balleisen: ... Can I ask whether you encountered pressures of any kind from representatives of the unions or employer groups, the National Association of Manufacturers, or the Chamber of Commerce, separate from their ability to participate on the pay or price advisory councils?

Katzen: Relatively little. Barry Bosworth, who was the director, and Bob Russell, who was the deputy director, were the face of the agency. They were the ones who were out giving speeches to NAM or Chamber of Commerce. If there had been pushback, they would have gotten it, rather than me, although Barry ultimately asked me to do a lot of the public speaking, and I would take questions. In that context, I don't think there was a lot of pushback. I mentioned earlier there was an instance where my staff thought I was very heavy-handed. I think that there's a lesson in that. I'd like to actually tell that story, if I may, without identifying the company. It was an instance where there was a notice of probable non-compliance.

The company did not dispute in any way our data or our decision, so the conference went fairly comfortably, and they basically had some issues as to whether the standard was the right standard, [and] whether this was good national policy, which was above my pay grade. We had this discussion, and then it turned to what they were going to do about [their non-compliance].

They had talked about they wouldn't raise their prices anymore, and I took the position that that was not sufficient, they had to roll back. They had to roll back their prices so they were currently in compliance. We talked about it for a while, and it was roughly noon, 12:30, 1:00, and he said, "Let me get back to you in a couple weeks," and I said, "No. You can get back to me in a couple of hours." It was a Thursday or a Wednesday.

I said, "I have been asked what you're doing." This is a major company. "I have been asked what you're going to do about this violation, and I have to get back to the President. [You] are going to tell me you're going to cooperate or you're not. Tomorrow, [the President] is going to go into the press room and he's either going to say, 'This is a great company. They're rolling back their prices,' or 'This company is a noncomplier.' I've got to write his talking points tonight, so I want you to get back to me by 4:00."

There was this gasp, mostly from my staff, but also from them. 4:00, we're talking about hours. I said, "Yeah. " "We can't do it. This is a major decision for the firm." I said, "Come on, I was in private practice." I looked straight at the lawyer they had brought from another major firm in Washington. I said, "I was in private practice. What you need to do, and what you can do...First of all, you've considered all these options before you walked in this room. By not contesting the

data, you've actually gone through in your head what kind of steps might be taken, because you wouldn't walk in here without that pre-meeting briefing.

"Now you're going to go and you convene a meeting. You can do it by telephone conference of the executive committee, telling them that you are out of compliance, and you have been given a choice, roll back or be listed as a non-complier, and those are the only two things on the table. They have to make a decision now, which they're prepared to do.

"They can do that. You get the executive committee together, you get a conference call together. You can get back to me by 4:00." They snarled a little bit and left. My staff went ballistic. "How could you do that? Two weeks seems so reasonable." I said, "Two weeks, [they] will just have a conference call two weeks from now. They can do it this afternoon."

I said, "They will call me at five [minutes] to 4:00, and they'll roll back their prices. At four [minutes] to 4:00, they called and said they would roll back their prices. I said, "Great, because that's Appendix A here, which I've got for the President, praising your company, giving you all sorts of good publicity.

"There's a [sentence] in here that I've put in that [says it was] inadvertent, and now you're going to correct it. Is that OK with you? Do you want to see the press release we're going to put out before we put it out? Very cooperative, very friendly. They were actually happy as a clam, and it did actually make the headlines in the paper the next day, so that sort of worked well....

I think if I had not been in private practice, if I had not actually counseled corporate clients, understood how they work, more importantly, how they make decisions, I would never have taken that aggressive approach, and they knew it. I had credibility because they knew I had been in private practice and that I knew what I was talking about.

The preparation for the position, I think, was very important and, in that particular instance, significant.

Wiener: Was the threat that you would give these talking points to the President, who was going to make an announcement the next day, arranged to put pressure on this company? Why did the President need to go public with this the next day? Or where you worried about your credibility if the President's schedule changed and he didn't need to make this announcement till the next week?

Katzen: I wasn't worried about my credibility on this. I had talked to the Director ahead of time. This was a major, major company and they were out of compliance, clearly. We had talked in advance about what the real options were and the real options were either shame them, or praise them. I said it would help immeasurably if I can say that Fred [Kahn], or the President, is going into the briefing room the next day. The decision was made and I don't remember whether we called Fred or not on this one, but what Barry and I had talked about was that the program needed credibility, it needed corrective action, it needed a series of companies saying "We will do this." He said, "Go for it, if you can get it," and so I went in knowing that I had his support, and knowing where we stood. It was a genuine statement.

Balleisen: How frequently would you interact with the White House staff, to set strategic direction like this? Was this an unusual instance because the issue was so important and was at a crucial moment in your estimation and that of the staff, or was [such interaction] a more regular occurrence?

Katzen: I had relatively little interaction with the White House staff. I normally would interact with Fred, who was White House staff, I guess, Assistant to the President. Fred Kahn was an amazing, absolutely amazing person, and able to do twelve things at once, and keep you laughing the whole time. You never knew when Fred was going to call. My phone would ring and it would be Fred asking something which I had absolutely no clue what he was talking about or it was the last thing which I would have thought would have come to his attention.

There was constant interaction with Fred and his staff, with Ron Lewis, who was one of his people who was definitely on the COWPS case. On the regulatory side, I did have meetings with the RARG group and the EPG, the Economic Policy Group, so I remember meetings with Charlie Schultz who was the Chair of the CEA⁹ in his office and I would have contact with them....

[T]here had been a challenge to the legitimacy of this program, *AFL-CIO versus Kahn*, that had been raised by organized labor, that this was illegal because there was no statutory base for it. I had worked a little bit with people from the Justice Department when this was being heard in the District Court.

I did not think that they were really up to speed on this, and I went to Fred and said "I want to argue this." I had been an appellate litigator in a lot of the CBS cases, Comsat cases. I had been to the Court of Appeals on a number of occasions. I said I want to argue the case and Ben Civiletti, who was the Attorney General, called me and said he wanted to argue the case. This was a very important program for the President, and he was then Acting Attorney General, he hadn't yet been confirmed or there was some intervening step, and he wanted to make his reputation on this case.

He promised me that I would be in every moot court, that I could be second chair, but he wanted to argue this case. In the run up to the argument, there had been a number of questions from the White House, "What's this all about? Could we really lose this whole program? What was at stake?" and I would have conversations with Stu Eisenstadt and David Rubinstein, who was head of DPC, Domestic Policy Advisor to the President, [and] some other people.

Then the day the decision came down..., the Clerk's office called and said "the decision will come down at two o'clock. You can come see it at 11," because they knew it involved the White House and that I would need time to read it, digest it, brief the President, brief Jody Powell, the Press Secretary, so they could have a statement instantly ready when the case came down.

I didn't know things like that happened. I thought cases just came down, so I raced up to the Court and I was given this tiny little room and they said, "You can't copy down anything just read it," and I'm reading the decision and we won. I remember going back to the White House. I

⁹ The President's Council of Economic Advisors.

remember getting into the cab and very dramatically saying "to the White House as fast as you can get there!" [laughs]

I ran into the West Wing and I said to the President's secretary "I've got to talk to the President!" I don't know what the hell I was doing. He was meeting actually with Charlie Schultz and Fred and somebody else, and I came in. I went up to Fred, who was my boss -- I thought that was better-- and I said, "I'm sorry to interrupt but I just wanted you to know the decision in the Court of Appeals will be out in about an hour and a half and we won."

Fred who was exuberant beyond belief started jumping up and down "Mr. President, Mr. President, we won! We won!" Then they brought in Jody Powell, and this is where I have real respect for the Press Office. He said, "What's this all about?" and I went through it. I tried to be clear. I tried to be simple, I tried to put it in layman's terms, and he said "OK I've got three questions," one, two, three and I gave him three answers.

[As soon as the decision issued,] [w]e went into the Press Room. He announced it, and we got three questions, two, one, three. He knew what would be coming, he knew what he needed to know, and that was all he wanted to know. I'm sure it went in one ear and out the other. So that was my big fun, that was my triumph ..., a moment of great good feeling in the White House.

Balleisen: Did you have much interaction with Congressional staff or Members of Congress [during] your time with COWPS?

Katzen: No, not that I recall. Barry testified a couple of times. The Director testified a couple of times, and I would have gone up there to protect him, as though I could do anything to protect him, but that was my job. This was not a highly partisan controversial thing even though you'd never do something like that today, but the country was in a different place then.

Wiener: Where was the COWPS office?

Katzen: We had what is known as the Winder Building, which is a magnificent building on the corner of 17th and F [Street], right across the street from the EOB, from the Executive Office Building, so all we had to do was run down the front steps and run in the first arch, and up three flights of stairs to Fred's office. Now the Winder Building had just been reconstructed, or re-done. It was a building that dated back to the Civil War and ... the story was that this is where the prisoners, who were captured during the Civil War, were kept in cells in the basement. This [was] the perfect place for us. Here we are, the Voluntary Pay and Price Guidelines, sitting in a building that had the cells, prison for the prisoners who were picked up during the Civil War from the South, the Confederate soldiers, the officers were held in our building, downstairs.

It gave us a certain cachet, I guess. We always thought it was funny.

Wiener: Is that the building that's opposite the United States Trade Representative...?

Katzen: Yes, USTR is now there.

Wiener: And so for you to run into a meeting with Fred Kahn and, you said the President, to say that the Court just decided that case, you had to get into the West Wing also.

Katzen: Oh yes but I was cleared for West Wing. It was not as security conscious as it is now.... I can remember I took a cab, dropped me at Pennsylvania Avenue, went in what is known as the North West Gate now, and just flashed a badge.

Wiener: No metal detector.

Katzen: No metal detectors, no nothing, and just went up the drive, went in the visitors entrance at the little oval at the end right before where the West Wing lobby is, took a quick left and a right, and I was in his secretary's office, saying "is the President in?" I think I had actually, at some point, called -- maybe from the Court because we didn't have cell phones then -- and found that Fred was with the President. So I think I knew that going in, so I just went right in.

Balleisen: I wonder if we could ask about your evaluation of the COWPS program from the perspective of, say, late 1980. How successful was it in light of its goals? Either in terms of just the process of getting the key players to go along, [or] its charge of doing something substantive about breaking the wage-price dynamic that was driving inflationary pressures, that wage price spiral.

Katzen: I think that the first year standard was constraining and produced some break in the spiral. Could you sustain it for a second, or then even a third year? We tried. I think it was less successful the second year, as you got more companies that said "I don't care if I'm out of compliance" -- these would be smaller companies. I'm not saying small businesses but smaller, I think about \$250 million net sales was one of our cut-offs, We're talking about significant companies but, they're not pharmaceuticals. They'd [say], "You want to list me as a non-complier? Go right ahead...!" The more of those, the less credibility the program had.... [I]f a few could do it then a few more would do it, and we knew that even if Carter had been re-elected, the likelihood of a third year producing any significant results, let alone modest results, was very, very low.

The pay side was totally out of control because the unions were prepared to be restrained for maybe a year, but in the face of 4percent inflation, excuse me, they were not going to take a seven percent pay raise. There was a building up. I think these kinds of programs are good for relatively short periods of time with relatively modest expectations.... Any system like this that would stay in place would lead to a number of inequities over time, which would completely undercut the program.

When I tell people that I was at COWPS, a lot of people just roll their eyes and go "Yeah. That was a failed experiment." I would not say it was a failed experiment. I think we did accomplish something, but not much, and you said, relative to its expectations, it's not clear exactly how significant it's expectations were because, in all the speeches that Barry gave, and all the speeches that I gave, we said that this was a piece of an approach to inflation.

It was not the be all and end all. It was not what was designed to cut 19 percent inflation to 7 percent. We didn't expect that to happen. Curiously, it had a more lasting contribution on the reg review side that we touched on yesterday, with the filing of comments, and the use of cost-benefit analysis, and the whole involvement of agencies outside the issuing agency and of the White House itself, in commenting on proposed regulations. There, its contribution was probably

more significant and it was the body, the group, the division within COWPS that did that [work], that ultimately became OIRA....¹⁰

Balleisen: Could I ask you to elaborate a little bit more on what you saw at the time as the advantages and disadvantages of voluntary regulation of this sort?

Katzen: The advantage was that you could do it. Mandatory, we didn't have the statutory authority, and we would not have been able to do it. We would not have been able to get the legislation through Congress to give us the authority. Agencies are not free agents. They can only do what Congress has told them to do. Congress would have to have established a mandatory program and it wasn't going to happen even in the face of 19 percent inflation. So voluntary was the only option. Clearly, voluntary versus mandatory has significant implications for both the written procedures, and the implementation of those procedures. One of the lessons that I took away, and I carry to this day, is if you look at the written record then you get a pretty good idea of what was planned and what was expected. But, unless you actually understand or have a window into how it was implemented, the paper trail can be misleading.

[For] a voluntary program based on these standards, these procedures seemed clear. There was always the judgment, there was always the application, there was always the strategy, and what company you were talking to, what collective bargaining group you were dealing with, that had to be considered in a voluntary program. Much more so than in a mandatory program where if you wanted to just follow the letter of the law, [you] follow the letter of the law. We didn't have that luxury.

Balleisen: It sounds like this was a particular challenge for those intermediate firms that sold mostly to businesses rather than to ultimate consumers, that wouldn't have to worry necessarily about the reputational effect of non-compliance.

Katzen: Exactly.

Wiener: The point you made ... about the legacy of COWPS for regulatory review and OIRA, but also COWPS's role on wage and price instability itself and working with these companies in the 1970's, both speak to the President's political accountability for economic performance -- that the public is going to hold the President accountable for high inflation or high unemployment, whatever. I'm wondering how immediate or intense was that political pressure at the time -- that President Carter's re-election depended on being able to bring inflation down. I'd say that was a strong theme at least at the time. Did you feel in the pressure cooker on that in COWPS at the time? Did that influence the ways that, as you just said, it wasn't always what you could read in the paper trail but how it was actually implemented, or how tough you were on that company, that you were describing a few minutes ago? Those kinds of things?

Katzen: Fred's original pitch to me on the phone the day he invited me to lunch was based in terms of "This is the issue facing this country." Barry Bosworth, in explaining to me, the economics of incomes policy, was predicated on -- he was there, he'd come from Brookings I think and went back to Brookings -- he was there because this was the number one issue facing the country. I think that there was a little bit of denial on my part. If it was so important, what the

¹⁰ Office of Information and Regulatory Affairs, in the White House.

hell was I doing there? I didn't want to say I'm working on the key issue that's facing the country. But I think it was more of a self-protective mode. I'm just here doing my job. I'm here to help, and whatever. But I think Fred certainly felt the pressure as we went into the 1980 election. There was some discussion as to whether it was "the misery index," inflation plus unemployment, or the hostages in Iran that was going to be the downfall of the President.

We got to share the stage with another calamity, but I did feel that this was important and when I said that ... the decision to go into Government ... was transformational, I came away from that experience feeling that there are very, very difficult things facing our country. That they're not susceptible to easy answers, but that they are worth addressing, worth deploying my limited talents to try to make some modest gain in this area because it is so important.... What I realized was the marvel of public service and the opportunity to make a difference even a little bitty difference and to feel good about what I was doing. That's what I took away.

It may mean that I'm more "rose-colored glasses" in giving you an estimation of how much it achieved because so much was invested in it, but I think I'm fairly clear that it did achieve something. It was the issue that was of paramount attention in '78, '79, before the Iran hostage [crisis] took center stage.

Balleisen: How did the staff at COWPS think about the questions of transition once Carter had lost the election?

Katzen: Fred immediately resigned so the office of the chairman was disbanded and we were left floundering on our own. Bob Russell said, "I guess we've got to write ... a transition memo that will explain what we were, what we did, what we didn't do, and what issues should be considered." [There were] a large number the employees at COWPS, and we had been at our high around 250.

Balleisen: There was a big increase once the monitoring of the standards kicked in.

Katzen: Yes, because the regulatory piece was about 40 to 50 people. The chairman's office, the congressional affairs, the director's office, the administration. That might account for another 50 people altogether if you throw everybody in there. Then there were the pay and price offices which just got expanded. I know within the general counsel's office, and I think I had maybe 20 -- almost all of them were detailees from other agencies -- I knew they would go back to their agencies. They would not be out on the street. Those who had been hired for COWPS, they were in a different position, and I think Bob was trying to figure out how best to protect their interests. We wrote a memo that...

Balleisen: And Bob is?

Katzen: Bob Russell. I'm sorry, he was then the director. I think Kip Viscusi who ... had come from the academy..., went right back. Bob and I, we ultimately gave up office space because I think some of the Winder building was turned over to the transition people as our people were moving out and going back to their agencies. We knew that COWPS would be disbanded. We knew that the Reagan administration would not perpetuate this voluntary system.

Balleisen: They sent very clear signals about that during the campaign?

Katzen: If not during the campaign, then certainly, immediately thereafter. We were the first agency demolished, or dismissed, disbanded. Whatever happened to us. I remember staying until January 18th, 19th, in this office, writing this report, trying to capture whatever it was that we had accomplished.

The one issue that Tom Hopkins, who was the head of the Regulatory Review Section, that he was struggling with was, what happens to this function of regulatory analysis? We got very clear signals that the Reagan administration did not want to throw that overboard.

Where was he going to put it? Was he going to move it intact to another place? Was [he] going to spread it out, among a number of different offices? Would it go back to CEA? Would it go back to OMB¹¹? When I say go back, we had worked with these staffs... Maybe the Department of Treasury would pick it up. What would be the best place to house this unit, if it was going to be kept together as a unit? Those were the kind of issues. There was also a major question that consumed a lot of my time. What to do with the records? Particularly the confidential, proprietary business information.

We had a lot of data. Is it to be burned? Is it to be preserved for archival purposes? Historical purposes? What protections could we put on it, so that companies which gave it to us, in confidence, would not feel betrayed?

This is the arrogance of people who are in authority. What confidence do they have that their successors will live up to their representations of protecting the information? I spent a lot of time on that particular issue, I remember, reverting to my General Counsel kinds of [concerns].

Wiener: Did you, in that process, discuss this issue with your successors? Was there some kind of deal?

Katzen: No, because there were no successors. They were going to disband COWPS. It wasn't going to exist. We were headless. Fred was gone. The transition wasn't there. We were absolutely headless. It was the weirdest sensation. There we were, early November to January 20th, a good two months. We had no leadership other than ourselves. We had no direction. We had no instructions. I would sometimes turn to Bob Russell and say, "What are we doing here? I mean, give me a clue?"

Wiener: I understand that. I just meant on the issue of keeping information confidential. Say, White House Counsel's office, or some entity that would be responsible for that issue in the incoming administration. Did you actually have contact with them? Or did you have to try to nail this down without getting any assurances from the incoming administration?"

Katzen: It was the latter. We were so headless. Right after the election, a number of people started thinking about their futures. I assumed I would go back to Wilmer Cutler if they would have me and I thought they would. I wasn't preoccupied. Bob Russell was going to go back to San Diego, UC San Diego, which was where he was a professor of economics.... We were all crunched into one little office, with piles of papers trying to figure out what to do with zero

¹¹ White House Office of Management and Budget.

guidance and nobody wanted to talk to us. We were an anathema to everybody. We were just out there, twisting slowly in the wind.

Wiener: ... I have heard both Art Fraas and Kip Viscusi speak favorably of their time at COWPS, I haven't heard them say "What a disaster that was." Or...

Katzen: No! I'm just talking about a very limited period in the wind-down. I believe that during the wind-down, Art and Tom Hopkins group continued to file comments. They just kept working. I think they felt a high degree of confidence that their future would be secure somewhere. They didn't know where, but, I think, they were fairly confident, as was I, that this function would continue. It was the price office and the pay office that knew that they were toast. ...I too would say that my tenure at COWPS was a very important time in my life, that I very much felt fulfilled professionally, enjoyed the experience, learned an enormous amount about how government operates, and some of the friendships, including with Art Frost, Bob Russell, and Barry Bosworth, have lasted a lifetime. So, I would speak favorably as well.

I'm just saying that [at] the last..., you didn't feel all that excited about celebrating Christmas because you'd just lost an election, and you knew you were winding down the agency, and, oh, we just lost the second floor of the building. People were moving and packing up. You were saying goodbye to people that you had spent an extremely intense period of time with, and that was a very moving experience.

I would join anyone who said that they had a good experience there.

Balleisen: One last question about the decision making and the administrative oversight of COWPS, and then we'll maybe move into the 1980s. The Carter administration at various points articulated a set of goals for regulatory policy in general, and two themes that the administration tended to stress was the importance of making regulations ... simple and ... flexible. Did COWPS live up to those goals, in your estimation?

Katzen: Our own standards?

Balleisen: Yes.

Katzen: Our pay and price standards?

Balleisen: Yes, for simplicity and flexibility.

Katzen: Certainly the first year. The second year got a lot less simple. A lot more complicated, as we were confronted with the realities of the marketplace, and Mr. Dunlop, on the pay side. Things became much more...Sub-parts A, Part One, Two and Three. Little "i," little "ii," little "iii." It lost the elegance of simplicity.

Did that make it more flexible? I think of flexibility more in the implementation. To the extent that flexibility speaks to a performance standard, rather than a design standard, I would say probably yes. In that, if a company didn't like the standard it was on, it could go to another standard if that worked, or it could go to another standard, if that worked. That enabled us to...I would call that flexibility, in the implementation.

I would say generally it lived up to those goals. Did it achieve them to perfection? No. I don't think that's possible, in a complicated area like this. But, I think it did rather well.

[end of audio track 4]

[beginning of audio track 5]

Balleisen: You did return to Wilmer Cutler and Pickering, after your time at COWPS. What lessons did you bring back to the firm about how to engage effectively with regulatory institutions, and the government more generally?

Katz: It occurred to me that we were woefully deficient in serving our clients' interests. Our *modus operandi* at the time...I don't mean to sound arrogant, or presumptuous. What our firm was so good at, was drafting comments, or legal briefs, in which we assembled the information, spoke with clarity and directness to the issues, and presented persuasive argumentation. These were phenomenal documents. I still have in my basement boxes of briefs I have filed, because each one was, to my mind, a gem. That's what we did, full stop. What I learned, by being in government, is that that's the first step, not the end.

That having done that work, is good. It clarifies in your mind, what it is that is the most important, and most direct way, of approaching something. But, it needs to be communicated other than, or in addition to a written document. A written document has to be read. It has to be read by an open and receptive mind. It has to be read by an understanding mind.

What happens when an agency gets 3,000 comments? That's an overstatement. What happens when it gets 300 comments? What's the sentient intelligence of the people who are reading these comments?

In some instances (and I don't think the Federal Communications Commission was one of them), agencies contract out to firms to summarize the comments. So you've got someone who is not even on the agency's payroll per se, summarizing our brilliant prose and trying to distill our arguments.

[Our work] may or may not reach the working bee level, let alone the decision-making level. And so, I felt very strongly that each representation should include visits with the commissioners or the senior staff people, consistent with *ex parte* laws -- following up.

I also learned that when you have a meeting scheduled with somebody, that person I, not going to walk into the meeting unprepared. So if, for example back in COWPS, a company was going to come in to see me about something, I would turn to one of my people and say, "What's their last filing? What issue are they concerned about? What have they said about it?"

If it was relatively short, I would read it, so I knew what it was they were going to talk to me about. If it was long and detailed, I'd ask for a summary, a two-pager, a three-pager of where they're coming from, what they want to do.

If I didn't have a meeting with that company, I wouldn't have read that. I wouldn't have asked for that summary. If you want to reach the decision makers, you need to meet with the decision makers. We hadn't done that. Now, in court you can't do that. You can't meet with the judge after

you file the brief, you can't meet with the judge before you file the brief, but in agencies you can. Each agency has its *ex parte* rules.

In an adjudicatory proceeding, or a licensing proceeding, or a rate making proceeding you can't, but [in] notice and comment proceedings, you can. There's nothing that restricts an agency.

Sometimes you have to give a summary of what you ... talked about, put that in the record -- the disclosure that's called for from *Sierra Club versus Costle*, Pat Wald's very good decision from the United States Court of Appeals District of Columbia Circuit in the early '80s. But you've already done that because you've written these comments. You just take the executive summary of the comments, that's what you're talking about, so it's not a heavy lift.

It also means establishing your credibility with the agency. You can stay in your beautiful law firm with nice décor and comfy furnishings, lovely conference rooms, and you meet with your clients, or you can get out and meet with the regulators, having lunch with bureau chiefs or staff members, even if you don't discuss the subject.

If I had to do it all over again, I would've had lunch with some of the people on the COMSAT rate team for the commission, and say upfront, "You're buying your lunch, I'm buying my lunch." But rather than sit across the table from each other and only have this adversarial relation -- "I'm curious, do you have kids? Do you have a dog? Where do you live? What's your commute like? Let's not talk about the case at all. Who are you as a human being?"

When you know somebody you tend to be more trusting of them. One of the problems that we live with now is a total lack of familiarity. Republican senators do not know Democratic senators, because they all leave town on the weekend to go home to do fundraising. They don't go bowling together or play golf together, so it's very easy to demonize the other guy. You play golf with somebody, it's tougher to demonize them, it really is. Eighteen holes is a long time to walk a course, and you can't turn them into something that you know they're not. But if you don't know who they are, it's very easy.

The personal connections, the follow-up, were things that I took away from my limited experience, as a decision maker, of how to proceed in "rule-making" world.

Balleisen: When you returned to Wilmer Cutler & Pickering, did the character of your portfolio pick up where it had left off? Were you still mostly a communications lawyer?

Katzen: Yes. It was worse than that, actually. I remember showing up at work. I had taken two or three weeks off to get my head together and clean out my medicine chest or whatever else I wanted to do around the house. I walked into Roger Wollenberg's office, who was the Senior Partner in the communications area, and I said, "Well I'm back. What you got cooking?" He said, "Remember that brief that you were working on a year and a half ago? Something had come up, it was delayed, it was shelved. It's [now] due, but it's due very quickly."

I went, "Oh my gosh. Oh yeah. I remember that issue." It was literally where I had left off. It was due in only four weeks. I thought, "Four weeks! My God." Because the warp speed at which you work in the government compared...Four weeks, I could have written twenty briefs. I said, "It's due in four weeks?"

He said, "I know, I know. It's really fast, but..." I said "Not to worry, Roger, I can deal with this." It took me a while to be able to get back into the more thoughtful, time-consuming, maybe you would call it leisurely, pace of the practice of law. Even though you put in a lot of hours, it was not the same as the little gerbil wheel that you were on when you were in the government, where you just kept going, and the wheel kept spinning, and you kept going, and the wheel kept spinning. Yes, so I did a lot of COMSAT stuff. They had some new issues, as well as some old issues. There were a couple of other things that I did in the communications area.

I also was interested in expanding my practice to the Hill. I noticed that we did not have any ... group that thought about legislation, and I wanted to try to sell to the firm, a legislative practice that would reinforce a regulatory practice and use the Hill to echo our views, or amplify our views, and how that would work. There were some ... difficult issues in the economics of law firm practice that emerged from that particular attempt. I did spend some time, thinking about that, the lobbying area.

Balleisen: Maybe we could start with COMSAT, since that seems to have been a fairly substantial chunk of your focus in the '80s.... COMSAT got into a process of diversification in the 1980s..... They got involved with ... providing business services over [the] domestic satellite network -- conference calling, video conferences. Then there was satellite television service (STS), that they developed in conjunction with CBS for a time, which had the goal of creating a direct-to-home satellite model to compete with the emerging cable systems of the era. There were a number of issues around the rules that were going to be put in place for each of these emerging markets.

Katzen: Those are specific business ventures that came about from a growing awareness that their long-lived, and I'm being facetious because the company came into existence in the early '60s and we're talking about 20 years later, hardly long-lived, was about to end. The monopoly that they had as the US signatory to Intelsat was being threatened with something called direct access, which I had mentioned.... It was taking on new force because with Ma Bell's being broken up and lots of other carriers [starting up], and those other carriers could compete with Ma Bell. They didn't have to use the under-seas cables, but could use satellite. They didn't want to go through COMSAT. COMSAT was as much a middle man as AT&T would have been. They wanted direct access. That was a significant legal issue that was much stronger.

We had, I think, played with that in the rate case, but it was tangential to what became a very important thing. In other countries there was now diversification.... Deutsche Telekom was the signatory for Germany, et cetera. In other countries competition was emerging, and it was changing the rules. Would even Intelsat last? Was this a grand experiment, and if the future was not the continuation of the past, what would it be?

Balleisen: Not a single framework for international satellite communication, but perhaps competing systems.

Katzen: Right. Then they was something called Inmarsat, the International Maritime Satellite consortium, which was not in competition with Intelsat, but it was different because it was different satellites serving ships. Ships move, whereas if you're a [land-based] thing your antenna is stationary. Now there's a whole new technology with moving satellites and linking them up. Inmarsat came into being, and they were all these different components of the industry. Would

COMSAT continue as the favored preferred route to this? How could it show value-added? Within the ranks of COMSAT, my recollection is that they were hiring or promoting, or both, more entrepreneurial types, who were saying, "We don't need the protectionism of the monopoly. We don't need the FCC to give [us a] blessing. We want to be our own entrepreneurs, we want to be able to go do something free of regulation."

The culture of the company was undergoing significant change; ... and the character of the presidents, chairmen of the board [who] had been ... president, he was consistent, but there were all these new ideas swirling around.

Some of them were very interested in taking advantage of whatever expertise we had about the regulatory system. Some of them were completely and totally disdainful -- "Well we don't want regulation and we don't want what you have to offer.... We're looking for business advice." There was a change, and the new issues were confusing at best.

Balleisen: It sounds like there was some internal conflict within the company about what posture to take with respect to particular issues with the FCC, whether that was rate regulation or questions about whether the FCC should license competing satellite networks.

Katzen: Correct. There was a school of thought that [said], "...let's have competition. We got a leg up, we know what we're doing, we have smarter people. We can get ahead. Don't stop competition, encourage competition." Then there [were] the laboratories which were out in Clarksburg, which were unbelievable. These laboratories. What were we going to do with them, because the overhead of that would not be something that a small startup could carry. Just give it up? What happens to all these brilliant scientists? The land is now, 20-30 years later, the land is vacant. The labs are no more. COMSAT is no more, and Intelsat is no more. They're gone. There was a dramatic change going on.

Balleisen: It sounds like, at least with respect to COMSAT, and I'd be curious to hear about this with other of your clients as well, [that] the new regulatory regime that had ... been emerging in the 1970s, and received a substantial push from the Reagan administration, emphasizing privatization and deregulation, [and] an emphasis on market mechanisms when you were going to regulate one way or another -- that this was percolating through to your clients?

Katzen: It was, and on the broadcast side. We talked earlier about the Financial Interest and Syndication rule, and I have spoken of an industry which was characterized by having three major players. And you had said "Cables weren't there yet." Well they were now. You had CATV, which was Cable Television. The firm made a decision, and I can't remember whether it made it before I left, or when I came back. I wasn't part of that decision, that we could not represent both. We either had to represent broadcasters or cable companies, because they were in business competition with one another, a conflict of interest, we couldn't represent both.

Under those circumstances, our work was limited to the broadcast side. That's the one we chose, but all the activity was happening on the cable side. The growth that you're talking about in the telecommunications market was all coming from that direction. I think, personally, I had a number of not-for-profit PBS type stations, which I enjoyed working with.

Balleisen: Mostly around license issues?

Katz: Yeah, and interpretation issues. I remember one time getting a call from a public radio station, actually this one might have been a commercial station. Silly things. like, "Sally, I think we're in trouble." "Why?" "The disc jockey this morning said, 'It's seven o'clock, time to get your ass in gear.'" I said, "You can't use ass on the air. It's one of the seven dirty words. You [have] to reprimand him, maybe even suspend him for a day." This was long before the ... wardrobe malfunctioning thing that we've experienced more recently. But I told them the steps they had to take to tell him what to do and to educate him, et cetera. And then two days later he called and he said, "OK, I've got a question for you." "Today," he said, "It's 7 o'clock, time to get it up and out." I said, "That's OK." He's not using one of the words.

Now, this is almost silly, but it was the kind of questions that they would sometimes call their outside lawyer, if they didn't have an inside lawyer. And for some of these stations that were relatively small, we served as that. And that was kind of fun.

We also had to file these ownership reports, and financial disclosure reports. And all sorts of other reporting for the FCC, which were mind boggling. For some reason I became a specialist in it, maybe because of my work at COWPS. But I was able to sort of do these reports relatively easily and keep track of the information that needed to be provided.

So I was doing a lot of that stuff, but it was [all on the] broadcast side, whereas the real action was taking on the cable side. I think that's when I first started thinking about the legislative [work]. Let me branch out because where I am is a box that's not expanding.

Balleisen: How did the FCC change under Reagan?

Katz: Much more market-oriented, and fewer requirements for rules and for monitoring, But one got the impression that there was not a complete sea change. They still thought they should regulate the networks, because the networks were on the scarce frequency, but they should not regulate the cable companies. This was [also] the break-up of Ma Bell and the new carriers, the MCI's of the world.

Balleisen: Did you develop different sorts of relationships with people on the FCC staff, in light of your recognition on the basis of your experience with COWPS that those sorts of personal relationships mattered?

Katz: A little bit, but not a lot. Because when I voiced my concerns when I returned [to the firm] about the need for contacts and follow-up, it was not well received. It was the old guard.... I was essentially told that's not our brand. Our brand is these brilliant briefs. Our brand is these brilliant comments.

Wiener: Because there were certainly law firms, or individual lawyers, whose ... Whose Rolodex was their resource, right? They weren't writing briefs, so much as they knew whom to contact to help a client with any regulatory issue.

Katz: That was considered by some of the senior people at Wilmer Cutler as a different type of lawyering, thank you.

Balleisen: Knowing that some of your partners at Wilmer Cutler went into the Reagan Administration, am I right, that...

Katzen: Boyden went in...

Balleisen: Boyden Gray?

Katzen: ...as George Herbert Walker Bush's then Vice President's Counsel.... He wrote 12291.¹²

Balleisen: Exactly. [Could you talk a bit about] regulatory review and cost benefit analysis, and giving the newly created OIRA more authority? At that transition point when you were coming out of COWPS and he was going into the Administration, was there a chat in the hallway or the lunch room at Wilmer Cutler about how to handle regulation, or did that come up at all?

Katzen: He had already left the firm, by the time I got back. He had been sitting in my office, and I then sat in his office. Talk about revolving door.

Balleisen: You mean the same physical office at the law firm.

Katzen: Yes.

Same furniture. I remember one, very brief, encounter. Boyden was swept up in the post-inaugural ... and didn't have a lot of time, and didn't socialize during that period. There was not the kind of swapping of stories that I would have otherwise expected, and have enjoyed with other people.

Balleisen: The FCC, during the Reagan years, revisited at least a couple of issues that had been percolating in the '70s, and CBS and the other networks cared enormously about. One was the Financial Interest and Syndication Rules which resulted in, I think, an adjustment in 1983. Another was the consideration of the Fairness Doctrine. I was wondering if you could maybe talk a little bit about those processes and maybe why they ended up the way they did, how CBS ... evaluated those outcomes, your sense of what the politics of that looked like.

Katzen: I can't, really, because by this time the person who's handling [these issues was] now my husband, and I was not working with him, and he's the one who worked on the Fairness Doctrine and those other proceedings. All I know is what I know from him and I don't think that would be a sound basis for the record. The one that I did was Action for Children's Television. I don't know if that came up in your research. There was a lot of work, I think this was the '80s. Yes, it had to have been the '80s, on what was the broadcaster's responsibility for children. Saturday morning, and even now Saturday morning is programming for children. There used to be no break, and you would go straight from the "entertainment" material to the "advertising" material.

When I say there was no break, there was not only no break, but there was no change of personnel. So the person who was telling you about "Mary Had a Little Lamb" is now telling you about Twinkie Flakes. There were serious questions. Mike Pertschuk was chair of, this may have been...

¹² The Reagan Executive Order on regulatory review.

Balleisen: Federal Trade Commission.

Katzen: Federal Trade Commission. That may have been during the early Carter...

Balleisen: But he stayed a commissioner into the early years of the Reagan Administration.

Katzen: There was proceeding going on there and the FCC was having a proceeding, which ultimately led to the separation you see now on Saturday morning, "We'll be back after these messages", as though this is going to get through to a two year old, that this means there's some sort of break. No hosts selling. I had been very interested in this whole area, children's cognitive development and how much they knew, could they distinguish. And CBS, I thought, was being extraordinarily responsible. They had someone named Robert Keeshan who was Captain Kangaroo....

Now Bob Keeshan turns out to be an incredibly wonderful human being. I was [representing CBS] in a hearing. He was my witness. I'm having a hard time placing it in chronology. I think Bob Keeshan actually testified at the FTC not the FCC. There was a rule-making proceeding which ultimately went to the Court of Appeals. I remember arguing Action for Children's Television 2, Action for Children's television 3, or Action for Children's Television 4. I remember Ginsberg and Scalia were both on the panel. It was the first time I had ever argued before Ruth Bader Ginsberg....

Balleisen: Did you, in that context, interact at all with the consumer groups that were concerned about that issue?

Katzen: Yes.

Balleisen: What was the nature of that interaction?

Katzen: The attempt was to try to diffuse any hostility they had, and to bring some greater rational perception of the bigger picture.... Action for Children's Television was the lead litigant, which was better than CBS versus FCC. Actually my husband had come up with this [strategy] and had used it [successfully] in a couple of instances. Saturday morning is not a profit center for the networks. They're doing children's television in part because of the public interest requirements, and in part because Saturday morning kids are in the audience, and they want to do programming for them. If you make it so onerous with all these restrictions, you'll just lessen the quality.

Peggy Charrin was the head of Action for Children's Television, a very sensible, committed advocate for quality children's television. She liked Captain Kangaroo. He was a lot better than Mickey Mouse, or whoever the competition might have been. It was an understanding that there are pragmatic bounds. I think it was in that context that they were part of this coalition that took on a number of different FCC rules, which was trying to tighten certain things. We were willing to have them tightened, but wanted the full ramifications, the costs as well as the benefits, to be on the table.

Balleisen: Was CBS satisfied with the outcome in those determinations?

Katzen: I believe so. In the Court of Appeals.

Balleisen: But also ... the overall structure of decision-making?

Katzen: They were an industry leader. When CBS was CBS (and I'm not speaking by implication to where they, or any of the networks are now, it's a different situation), Bill Paley was chairman of the board.... He cared about shining star quality, public interest, free speech and the First Amendment. Really, a model leader of the company in terms of bringing values to bear in what was a profit making enterprise, and making sure that that star was always still shining.

Balleisen: Did the evolution of regulatory oversight within the Reagan Administration, the emergence of OIRA as the institutional home for regulatory review within the White House, did that have any implications for your practice as a lawyer in the '80s, early '90s?

Katzen: No, because almost all of my practice was at the FCC, which is an independent regulatory commission, and was, therefore, not covered by Executive Order 12291, which is the charter that was signed by President Reagan within the first 30 days after his inauguration. I was not practicing or involved with some of the other agencies and knew it was my old colleagues from COWPS who were doing it, but wasn't really paying too much attention until fairly late, in the late '80s, very late '80s, when a client called me to represent them before the Competitiveness Council. Then I thought I'd better find out what it was all about.

Balleisen: Would you be willing to talk a little about that experience?

Katzen: OK. I received a call and there was a regulation, and I'm going to have to be very discreet here, if not somewhat opaque, perhaps. There was a regulation which would have imposed significant financial burdens on a particular enterprise and other inconveniences in the way that ... entity did business. I was told that the issuing agency had sent the regulation, I don't remember whether it was a proposed or a final rule, to OMB, to OIRA, and would I reach out, meet with them and kill this rule. I hung up the phone. "Sure," I said, "I'd be interested in looking into it."

Balleisen: Which administration was this? Was this still Reagan or, now, Bush I?

Katzen: ...I think it was Bush I, based on who I called.... I did a little bit of research and I found 12291, which was the executive order that set up OIRA. It didn't seem to have a whole lot about openness and transparency. I did a little bit of looking at the Competitiveness Council.... [T]he Democratic Congress had been hostile to the operations of OIRA during the early '90s, during the Reagan Administration, they had refused, after the Reagan Administration when George Bush came in, to confirm his nominee for head of OIRA. Someone from Tennessee, Bloomberg, Blumstein.

Wiener: Blumstein, Jim Blumstein...

Katzen: Jim Blumstein.

Wiener: ...from Vanderbilt...

Katzen: As a result, it was leaderless and [they] created the Quayle Council. It was called the Competitiveness Council.... It was headed by Dan Quayle who I don't think played a very active role. There were other people who were very active in the Competitiveness Council, and the staff

work was done by the OIRAnians, the people who had been in OIRA, which I don't know if I've identified here in this. It's the Office of Information and Regulatory Affairs, which was created under the Paperwork Reduction Act that was signed by Jimmy Carter in the very last days of his administration, but became the office that was tasked with centralized regulatory review in a much more formal way and [was] much more sophisticated and aggressive. I don't use that in a bad term -- just more robust regulatory review than anything we had seen from the Council from Nixon, from Ford, or from Carter.

This was a ginormous step forward in creating decisional criteria, a process, and in effect giving OMB, OIRA, the opportunity to review every proposal, every draft final rule, and unless they cleared it, it was not going to become published in the *Federal Register*, it was not going to become effective. This was the 12291 that I've been referring to, that was the executive order.

The Competitiveness Council was going to be the parent organization, or the political leadership of this. I did this investigation, and I called some people that I know, and said, "I've been retained" or, "I'm considering being retained by an entity that is concerned about a rule that is currently pending, and I'd like to come over and talk to you all about it." A meeting was set up. The client and I went in and we said how pernicious this was, and how terrible this was.

While we were in the office the person picked up the phone and called the desk officer at OIRA and said, "Do you have a rule from this agency dealing with this subject" and the person apparently said, "Yeah." He said, "Kill it." and hung up the phone. I said, "Thank you. This is a very interesting process," and we left, and the client who was very sophisticated said to me, "So, what was the most significant thing that happened in that meeting?"

I said, "When he asked if they had a rule from this agency on this subject matter, he never said, "Hi, I'm here with someone from X, do you have a rule?" He said, "Yeah." Never identified that we were there, it was just a phone call out of the blue, killed the rule.

I'm not sure he said, "Kill it." I think it was more like, "I don't think it should ever see light of day." Somewhat less violent disposition, "I don't think that one should ever see light of day." I think those were his exact words. The key was, he never said we were there, so there were no fingerprints. None. Interesting process.

Balleisen: Were you thinking about that later when, maybe I'm getting ahead, but in 12866,¹³ when you wrote all the transparency provisions?

Katzen: Yes.

Balleisen: Did any of these types of issues come up in your civic engagement with the American Bar Association or with the Administrative Council of the United States, because both of those roles entered into your public life from the late '80's I think. Is that right?

Katzen: Yes, I mentioned in yesterday's session that when the procedures that we had drafted for COWPS were going to be the subject of an ad law council meeting, I ... I flew down to wherever it was I wanted to attend and then I had no clue how this body operated. You go into a

¹³ The Clinton Administration's Executive Order on regulatory review.

court, you know where the judge sits, you know where the people stand, you know the processes, who speaks first. I knew nothing and I had mumble-bumbled through that meeting. Following that, I came back and I got a telephone call that was from the head of the nominating committee saying, "Would you be willing to serve on the Council of the Ad Law section?" It had 20 to 25 people from the academy, from the private sector [and] government people. I said that I could not, in good conscience, say "Yes" because of the demands of my job, but I had very much enjoyed the limited exposure I had and, if these were the kinds of issues that they deal with I would be interested at some point.

Then came the election and I went back to Wilmer and got a call saying, "Now will you go on the council?" I said yes and was selected, elected, I can't remember what it was. I was on the council of the Administrative Law section and ultimately was selected to be the chair; you go through a variety of different positions.

In that process I went to various ad law council meetings. At least one meeting is always in Washington, one is in Chicago, the other two are in relatively pleasant places around the United States. I did some networking, because I know that is important. I particularly networked with people inside the government because I had understood, from my experience, that it was nice to get their perspective.

Some of the issues that we took up had to do with the Competitiveness Council and the way centralized review of regulations was being carried out under the executive order. I can't remember off hand whether there were particular resolutions, but I think there was at least one. I remember having seen it from both sides.

I felt that I had something to contribute to the discussion because it was not as bad as they made it sound, but it certainly should have been more transparent and there were different kinds of questions. These issues certainly did come up in the ad law section. There were some people who felt I was a "Middle-of-the-Roader," a moderate, someone who could see it from both sides rather than one of the extremes, which often populate these discussions.

Balleisen: Did you feel, at all, that the concerns within the ABA emphasized process to the exclusion of substance?

Katzen: Yes, to your question, but the implication of your question I would challenge. I think it's appropriate. I think process is the key to good decision making. I think, if you start tinkering with substance, you run the risk of not knowing what you are doing. An organization like the ABA, which is very large, very diverse, represents lots of different interests, can reach compromises which may or may not make substantive sense. Process, if you get it right, should lead to the right substantive decision. The ad law section is devoted to process and discusses process *ad nauseum*. I used to say, "You due process things to due death."

Balleisen: I suppose that is what I meant, without consideration for the implications of delay or the capacity to actually come to a resolution.

Katzen: No, delay is a factor. You do not want to build in so many processes that you can't get a decision. So the process includes timeliness. But, yes, the amount of participation, the amount of opportunities, without providing too many vehicles for unwarranted delay. And, so, what is

warranted? What's undue? These are questions in which there can be different judgments. For most instances, a regulated entity would rather defer. Because deferring something means victory, at least temporarily. For most who favor regulation, they want it done more quickly, as long as it is their view of what is being done. You have a lot of conflicting views and you want to try to get it right without going to one side or the other. ACUS also, and I think I was on the committee on rule making...

Balleisen: Maybe you should quickly describe what ACUS was.

Katzen: ACUS is the Administrative Conference of the United States, which is a very unique agency. It's sort of a public-private thing. It ... includes an executive committee ... of 10 people and the chair, [who run the organization]. It includes roughly 30, 40 members in its general assembly who are government officials, [usually] general counsels of agencies or regulators of some sort and probably an equal number, 40 people, who work the private sector, [and another 30 people from] academy who are interested in administration. It looks at issues of adjudication, of rule-making and also of judicial review.

They explore issues of interest. They usually have consultants who do reports, come up with recommendations. They go through an elaborate committee process, a lot of deliberation. Then they go to the general assembly where they are continually tinkered and tweaked to come up with these recommendations, some of which have lasting importance and some of which do not.

It was something that I was asked to be on sometime in the mid '80s and I think it was the committee on rule making [where] I started. I think I ultimately chaired the committee on judicial review and I may have chaired something else. Then it continued and I was a member from the private sector, which makes me a public member. It's like English schools, the name is backwards.

...I was a member from the private sector. Then when I went into the government later, in '93, as the Administrator of OIRA I was ... a government member, and then was the acting chair for a while right before it was defunded. It was not a good moment. It was defunded by the Republicans in Congress so it was terminated. It has been revived, like a phoenix out of the ashes -- it's back with us.

During the '80s, I think I was on the rule-making committee. I think we [worked on] some issues about centralized review and I think ACUS's position was again sort of moderate. You need some centralized review. The president has the right to do this, but it shouldn't displace the expertise of the agency....I don't know whether openness and transparency was a part of that recommendation or a later one for those kinds of issues. Yes, I worked with this, I was involved with the discussions of this on ACUS as well.

Balleisen: Let's move forward a little bit to the Clinton electoral victory in 1992. In the aftermath of that electoral outcome, you received an appointment to become the Administrator of OIRA. What were the circumstances that led to that appointment?

Katzen: When I was at the ABA and working my way up to be chair of the administrative law section, the ABA created something called a Commission on Women in the Profession. They asked the wife of the governor of Arkansas, someone named Hillary Rodham Clinton, to chair

that commission and to explore the status of women in the profession. Hillary, as she is want-to-do, decided that before she would explore the status of women in the profession, she ought to take a look at the status of women in the ABA itself. She went through *The Red Book*, which is the color of the cover of a book that lists all the people in positions of leadership.

She came up with seven women's names, including me because I think I was then chair of the ad law section at that point. Unfortunately, one of the names she came up with was Marion Harrison, who is a man, so we had to exclude him. So there were six of us left. She met us for lunch and we talked about different issues, and that was when I first came to know the woman who became the first lady. I am very, very fond of her. I remember her calling me and telling me that her husband was going to run for the presidency and I thought to myself, "Wrong one. She should be doing this, not him!"

And then there was a fundraiser in Georgetown, and I went to see her. We were talking and chatting. She said something about Bill, and I said, "Oh, is he here? What does he look like? Who is he?" I had never met him, and she introduced me to him and introduced me as someone who had expertise in the field of regulation.

And I don't know whether it was that particular...because Bill Clinton doesn't forget anything...whether it was that particular introduction or whether others that she arranged or that the campaign arranged. But there was a period in '92 when regulation became an issue in that campaign. Hard to believe. Boyden Gray was the speaker for George Herbert Walker Bush. They sent me out as the surrogate speaker for the candidate Clinton.

Balleisen: What kinds of arguments were you making, in that role?

Katzen: That there was a role for regulation.... Part of it was defensive, that these broad-brush attacks on regulation sounded good, but, let's think about what we're really talking about. Clean air, clean water. Bring it back to what matters in people's lives. That you can rail against regulation, as Republicans sometimes like to do, but that is to consider only one aspect. They will talk about the costs. Boyden has been talking about "rent seekers" and costs, and costs, and costs. I'd like them to focus on benefits, and benefits, and benefits.

It was more, almost theoretical. I think probably in the course of it, I did invoke a little bit of the secrecy. The lack of transparency [and] delays [in] the processes that this had administration put in place, meant that some very good ideas died a very unhappy death, because they couldn't see light of day.... Those are the kinds of things that I would talk about.

Not to forget that the agencies are the repositories of expertise. They were created for a reason.... He, Boyden, is very proud of the EPA and what it does, and the Clean Air Act, and others that he speaks favorably of. The same is true of OSHA, the Occupational Safety and Health Administration, workplace safety. Same is true for NHTSA....¹⁴

Remember, we had lived through seatbelts and airbags. Then with the Reagan Administration, what became the *State Farm* case said we won't have airbags. And the Supreme Court said well,

¹⁴ National Highway Transportation Safety Administration.

if you [want to] do that, you have to have a whole new rule-making proceeding, and they ultimately kept with airbags.

I said, "So for 20 years we've been arguing about whether we should have airbags. How many people died while we were waiting for this process?" I was trying to make it real, and sounded awfully pro-regulatory as I think about it. That was, I thought, an appropriate thing, and I could tag the Reagan/Bush administration with rolling back, [though I] did not focus a lot on the deregulation of the economic sector.

Fred Kahn had helped lead that in the Carter days. I sort of thought that was mostly appropriate, the demise of regulation, whether it be COMSAT, or more importantly, of trucks, or of airplanes. I thought it was appropriate. There had been a steady decline in economic regulation, but I was trying to justify the ramping up of the social regulation. We had the wherewithal, the capacity to do these things. We should do them. I think it's important in times of prosperity to use your assets wisely.

In any event, after the election I got a call from Little Rock, Arkansas, from someone who was doing personnel for the President-elect. He asked if I would be willing to serve in the cabinet or sub-cabinet. I had said, "Yes, for the right position." He said, "What is the right position?" I said that I wanted to be Administrator of OIRA. There was dead silence at the other end of the phone.

He said, "What else would you be interested in?" I said, "I guess anything involving regulatory activity." He said, "That's what you're down here for, Regulation. Where do you want to work?" I said, "OIRA, the Office of Information and Regulatory Affairs." He said, "Where's that?" I said, "OMB, the Office of Management..." He said, [agitated] "I know where OMB is." OK.

A couple of days later, I got a call from Alice Rivlin, who was the nominee for Deputy Director of OMB. She said, "We have been told..." I think they were told this by Boyden Gray... "We have been told that the most important position that we have to fill is the Administrator of OIRA. We have been given an extremely short list. I'm wondering if you could come over and talk to Leon Panetta"...who had been the Director designee..."Leon Panetta and me and tell us what this office does and why you want to do it, or why they want you to do it."

I came over that afternoon [or] the next day. I met with Alice and Leon. I talked about OIRA and how it functions in large part [like] the way the budget side functions... for regulations, how it does quality control and second opinions, and a review from a cost-benefit point of view. Thoroughness and analytical, which is what OMB is known for. I was trying to relate it to the budget processes, which they knew so well. Then [OIRA] presides over this inter-agency process, so that other agencies have the opportunity to talk about regulations. Because it might come from one agency, but the President's accountable for the entire administration, and it's going to affect what other agencies think, and they should have an opportunity.

Anyway, she said, "You'd be great." I said, "Thank you." There was some slight delay, because they then nominated someone to be Deputy Director for Management, who thought that he should select the Administrator of OIRA. He didn't know what OIRA did, and he saw the information technology component, which was part of the statutory scheme, and he wanted to get a computer guy in there, someone who would be ahead of the curve. The two people that he

called in to interview knew nothing about regulation. I thought, "Well, this will be interesting." Then I had an interview with him, and things went well and I was nominated.

Balleisen: You went through the nomination process for that position in the context of some degree of political controversy around regulatory issues and particularly regulatory review. What was your sense of the key critiques that were circulating in Congress, and that emerged in the context of your nomination?

Katzen: Congress, at that point, was Democratic controlled. They were very unhappy with the Regan-Bush years. They thought, with some basis, that they had delegated discretion to regulate to the agencies, who were the repositories, as I said, of expertise and experience. They told the EPA, "Set the appropriate level for different pollutants, requisite to protect the public health, et cetera." They did not delegate it to the President, they gave it to EPA, and they certainly didn't give it to OMB. Now, we've got a system, somehow, where EPA is sending its proposal, based on its expertise, its experience, its connection with its stakeholders. It's sending it over to this black box in this building, next to the White House, where it's going to be politicized, where there are no scientists, and no one knows squat about clean air.

What in God's name is going on? We don't know what's happening, because [are] no fingerprints and it's all secret and it's not transparent. This is a hell of a way to run the government.

There was a kernel of the Democratic members' complaint ... [about] using cost benefit analysis. Cost benefit analysis, any economist will tell you, is skewed to the deregulatory rather than the pro-regulatory because it is easier to quantify and monetize costs than it is benefits. It's a tilted table that we're working on and that makes no sense.

Reagan put [cost-benefit analysis] in to deregulate. You can't have this. That's the wrong standards. Who has this kind of faith in economic analysis? Certainly, we don't. That was the second tier [complaint]. It was complicated, because by now economists started publishing their work, and even some of the people at OIRA had started publishing their work. There was this huge thing about risk-risk trade-offs that was prevalent at the time.

This was [led by], among others, John Morall who had been on the staff at COWPS and had gone over to OIRA. [He] had written about the fact, that if you impose additional costs on business, they will have to raise their prices or they will lower their compensation to their employees....

If you are lowering your compensation, or not raising it as quickly as you otherwise would, then you're giving the workers less income. With less income, they will have less health care, or they will have less money to spend on healthy food. Therefore, they will be in jeopardy, and they will be less healthy. There's a risk-risk tradeoff. You try to clean the water, but you end up making the workers sicker.

I'm greatly simplifying this theory that you should consider these risk-risk tradeoffs. This kind of analysis was not welcomed by the Democrats in Congress, to the extent they even understood it. What they had been told is risk-risk analysis was pernicious and it was designed to kill regulations. I think that was part of this reliance on economic considerations translated into real human life.

Balleisen: In fact, this theme came up in your nomination hearings. You were asked specifically about this.

Katzen: Yeah. Yeah... Yes, I was.

Wiener John Morrall, Kip Viscusi, Ralph Keeney, and some others wrote about ... the health impacts of income decline, just as you've described. In my view, that's standard. That's just translating the costs of regulation into health effects. And when John Graham and I wrote about risk-risk trade-offs in our book *Risk vs. Risk* (1995), we were not trying to do that. We were trying to say, in effect, on the benefit side there's a larger portfolio of benefits and dis-benefits. There are other effects on other risks, some of which are additional benefits and some of which are additional dis-benefits and those aren't being considered.

So there was even a terminological overlap or confusion. I remember when we published our book in '95, Cass Sunstein wrote the forward and he included a paragraph on the John Morrall kind of analysis, income loss, and I asked him to take it out. And Cass was, I think he was surprised that I asked him to take it out, but he did.

Katzen: What you're speaking to is something which I referred to earlier, not very elegantly, when I talked about when you know the people, and you know them as human beings, it's more difficult to demonize them. In this instance, no one knew who John Morrall was. What they knew is this was coming out of some economist, some staff economist at OIRA. And OIRA was not to be trusted. So you start with demonizing OIRA because you're demonizing Reagan-Bush, and you're demonizing the Executive Order. And everything that flows from it therefore is suspect. Everything is bad. And you don't even take the time to see if there's a kernel of merit.

Getting ready for my hearing, I was told this may come up. And there's the classic confirmation hearing response that says, "Yeah, that's a very tough question. I look forward to working with you further, Senator, and figuring out how best to approach it." The next step towards running over the cliff is to say, "Yeah, that's an interesting issue because on the one hand there's this, and on the other hand there's this. And I'm not sure where I come out on that."

And then you can really run over the cliff by saying, "Yeah, you know, he's got some merit to that," or, "It has no merit." You can run over either cliff at that point. Where on that scale, how do you temper your responses to questions?

But remember, first of all I knew John Morrall when he was at OIRA, at COWPS. And then he was in one of the mock boards that I went through getting ready for my confirmation hearing. And he was the one who would pose the question, and we talked about it.

So I understood sort of where he was coming from, and I didn't think it was so bad. In fact, I thought there was some merit to it. And they all said, "Don't say that. You have got to be absolutely neutral on this one or ignorant." And I said, "Well, I don't want to be ignorant." And they said "Well, you know, sometimes it's better to be uninformed than it is to have an opinion, because you'll just piss somebody off."

Balleisen: My recollection from reading the transcript is that your finessing of that involved describing unintended consequences with other regulatory domains. As a separate kind of concern that clearly was legitimate.

Katzen: It's called diverting. Diverting the attention. Instead of discussing risk-risk, I move to something else in the hopes that they would never come back. There are very few follow up questions in congressional hearings.

Wiener: But you mean unintended consequences of other domains like a regulation adopted by one agency might cause adverse impacts to the constituency or issue area of a different agency?

Balleisen: That's right. That's right.

[end of audio track 5]

[beginning of audio track 6]

Wiener: Just that those issues of risk-risk tradeoffs -- meaning cross-domain, cross-agency, unintended conflicts, or even within an agency like mandating airbags might protect a lot of adults but put children in the front seat at risk -- those were the kinds of things we were worried about. Steve Breyer in his 1993 book called *Breaking the Vicious Circle* also wrote about that. When he came up for confirmation, I think the year after you did, he was criticized by Senator Joe Biden, who said, "I'm glad we're confirming you to a position where you won't have any influence over these issues." That was a raw issue then too. Among Democrats, you and Breyer and Biden and other Democrats in the Senate, I think, there was an internal debate over how to view those questions. I guess I'm asking you if you think there was that?

Katzen: I think there [were] different levels of awareness. In many instances one cannot expect Senators to be as knowledgeable about what terms mean. They've heard terms. They take on a meaning. There's a constituency for or against and that carries the day. I'm not faulting them for that because they've got a lot on their plates and they have a lot of things to think about. I would suspect that Joe Biden, if you asked him now about risk-risk, he'd look at you and wouldn't have a clue what you were talking about. So, I don't think there was necessarily a debate.

What I was answering was Ed's question about what were the critiques that were coming. There were considerable voices [saying] that, now that we've elected a Democrat, we can get rid of this monstrosity of OIRA that the Reagan/Bush people have foisted off on us. Hopefully, he [Clinton] will kill it.

I was being confirmed for head of OIRA, which is a statutory office, which includes information technology, information policy, information dissemination. These are all parts of the Paperwork Reduction Act and review of paperwork.

There is not one word in the statute that authorizes ... centralized regulatory review, review of rules. The thought was: we'll confirm her for all these things she's -- supposed -- to do and maybe she'll get rid of this other stuff which we never authorized in the first place but comes from an executive order.

That was where a lot of the Democratic senators were coming from, whereas the Republican senators were coming from the position that -- please, please, please, keep OIRA and do it right. They had different views of what that meant.

There was the concern that OIRA had gone off on a rogue mission of reviewing regulations, which wasn't in the Paperwork Reduction Act and is now the demon of the...devil of the regulatory world.

[end of audio track 6]

[start of audio track 7]

Balleisen: We've been talking quite a lot about issues of process at OIRA in the Clinton Administration. I'd like to turn our attention now to issues involving substantive decision making at OIRA in those same years. What would you characterize as some of the most significant decisions that OIRA had to grapple with?

Katzen: Well, let me use as a bridge from process to substance - HACCP. HACCP is the Hazard Analysis -

Balleisen: and Critical Control Points.

Katzen: ...and Critical Control Points regulation. And this first appeared with seafood inspections and seafood safety - shellfish, fish cakes, etc. Food safety is a very complicated issue, and actually one on which I spent a lot of time. It's divided within the government between USDA, the Department of Agriculture, which has meat and poultry, and eggs, and the FDA, the Food and Drug Administration, which has all other food.

USDA has an enormous amount of resources and has established an elaborate inspection system. So in any meatpacking plant, if you go in there at 7:00 in the morning or 8:00 in the morning, whenever they open, you will see these USDA inspectors, who ultimately will put the seal of approval at the end of the process on the package which appears on your grocery shelves. You'll see these gentlemen in a white coat, with a whistle, and they will check to make sure the straw is clean, that the knives have been washed, and that everything is hunky-dory, and then they will blow the whistle, and they stand there -- and they're there all the time, and they're checking out to make sure that the meat is being treated in a sanitary fashion.

Contrast that with the FDA, whose resources are much more limited, particularly for this kind of inspection of food, and we were told that a seafood plant, someone who makes cod cakes that would appear in your grocery, gets inspected approximately once every 22 years.

The disparity is disconcerting, particularly to someone who likes seafood, and what the FDA wanted to do was to come up with a rule to enhance or increase food safety. And, I remember some of their staff people coming over to meet with us, at OIRA, and some of our staff people, and sitting around a table and discussing a different approach -- instead of command-and-control, "you will do this, temperatures will be kept at this particular [level], you'll wipe the knives every five minutes, or you'll sweep the floor every half hour," or whatever, that they were going to

think about a different way of doing it.

And I don't know whether the idea came from someone on OIRA's staff, or someone from FDA, but as a result of the discussion, what emerged was, HACCP. In other words, saying to a seafood packaging plant or processor: "YOU do an analysis of your process, see where the critical control points are in the process. If you've got to keep something frozen, what's the temperature? If you've got to keep something clean, how clean, how often? And YOU do a plan, a HACCP plan, and then we'll hold you to it. But the concept was, in effect, self-regulation of a more sophisticated type than just saying, "Hey, keep your plant clean."

And, this was, I thought, an important step forward in ensuring food safety, which I thought was a very critical issue, and the reason I say it bridges process and substance is that while it is substance-based, it reflects better working relationships between OIRA and the agency.

The meeting itself was a collaboration. It wasn't us telling them what to do, or them defending their position. We worked towards a rational accommodation, and I thought that that was a good step forward in improving the relations between OIRA and the agencies, because it was always my view - strengthened with experience - that OIRA cannot police the regulatory world. What it can do is help inculcate a culture of analysis in the agencies themselves. And, we can consult, and we can critique, and there are times when we can criticize.

But, the solution, the way to get to better regs is to have the agencies undertake the analysis in the first instance, and that is to develop a culture where that's the accepted way of doing it, and I saw this meeting as "we want your input early" - because it's so much easier to give comments early, than at the eleventh hour. Nobody wants comments at the eleventh hour. They've already invested all their time and effort, they don't need to hear any comments. Do it early, and that was what was happening here.

I remember distinctly, when this was rolled out in the final rule, and I got a call from FDA, I think it was from the Commissioner, who said "Have you seen the headlines?" I think it was the Seattle, Washington, editorial page. And I said "No," and he said "It says 'FDA Issues Sensible Regulations.'" He was so pleased that this major step that they had taken, it wasn't challenged in court, it was applauded by industry, it was applauded by the public health groups, this was a win-win. We have used HACCP, and HACCP has grown now into a variety of other areas, including some where USDA has jurisdiction as well, but that was one that sticks in my mind as a high point.

... Another issue that we had dealt with ... was ergonomics. This was not a success story at the end, because of the CRA.¹⁵ But -- this was [an] unusual situation, in which, in the very earliest days of the Clinton Administration in '93, OSHA had set about to propose a rule to deal with repetitive stress injuries, and the [proposed] rule was quite aggressive - some might say overbearing. And when the [proposed] rule came out, the proverbial stuff hit the fan, and business just reacted violently.

¹⁵ Congressional Review Act of 1996, which created an expedited process for Congress to disallow a federal regulation through legislation.

And this was "the government is going to walk into every office space, every nook and cranny of our building, factory, whatever, there is nothing that would be left to us, this is the ... the worst of Big Brother." I believe it was cleared through OMB before I was confirmed, because I don't remember it at the notice stage, I just remember hearing about it afterwards.

The reaction was so adverse, that it was the subject of a series of riders over a number of years. A rider is attached to an appropriations bill, which, essentially in this case said, "Thou shalt not spend any of the aforementioned dollars working on this particular regulation." In other words, "shut down the process," period. These would appear from time to time, every administration says it wants a clean approp bill, every Congress decides that it's not necessarily interested in sending along a clean approp bill and attaches these riders, and they're called riders because they wouldn't make it on a standalone basis, but they're attached to a vehicle - an appropriations bill - that has to go through. And so we had, for a number of years, riders saying "don't do any work on this." And no work was done on it.

But ... when the last rider expired, and I'm thinking this was about '98, OSHA recrafted the notice, substantially cutting back the scope, and the burden, and the penalties. It was a mere shadow of its former self, it was almost precatory, "Hey, guys..." and it was a little bit like HACCP, "Think about where your employees are calling in illnesses, or your people who are lifting packages in storehouses, or putting boxes on trucks, are they calling in with bad backs, are your secretaries calling in with carpal tunnel syndrome from typing, keep track of what your own employees are complaining about, and then think about what could be done."

The girdles, for example, for those people who have to lift heavy things; changing the position of the keyboard and the ergonomic improved settings; those who sit in office chairs all the time, are they sitting in [one] that's ergonomically sensible, because if there's a backache, your guy is out, you need to put a temp in, who may not know how to do the job. This is in your own business interest to do it, and here's a way of doing it.

I may be underselling what was in the final rule, but not by much. It really was a very slimmed down version. Nonetheless, ergonomics took on ... it became a watchword, the way Obamacare has recently become an epitaph for the Affordable Care Act. Ergonomics was the symbol of oppressive government. We got it through, and of course it was then defeated by the CRA.¹⁶ That was another one that I remember.

One of my happy - hard to call it happy, memories, because it was so sad - but one of the success stories came about because of a couple of instances, no more than a handful, and I think there were only two or three, where young babies were put in car seats in the passenger seat. That's not where they belong -- they belong in the center of the back seat, that's the safest place for a baby in a car seat to be in case of an accident.

But you could understand a young mother or young father who suddenly is driving and hears [mimics baby crying] coming from the backseat and doesn't know whether the baby has swallowed the pacifier, or has strangled himself in the car seat or whatever, and is sort of afraid

¹⁶ Congress overturned the Ergonomics Rule, using the procedure of the Congressional Review Act, in the last months of the Clinton Administration.

to look around, because they're supposed to be looking forward. Why not just put the baby in the passenger seat..., so you can look over, and go kitchy-kitchy-coo all you want, with the baby right there and keep track - even though that's not the safest place. A lot of parents did that.

If they were in an accident, the airbags would deploy, and the airbags would come out with such force, that there were, as I say, two or three instances of babies being smothered by airbags. When a safety device is killing a baby, this makes the headlines. And I remember seeing, [in] the White House [news]clips, ... a picture of a baby getting smothered by an airbag, and I remember thinking, oh my, this is not good. Here's a safety device that is actually causing death.

I remember calling the General Counsel of the Department of Transportation, saying, have you seen the clips? Do you know what happened in - I don't know if it was Kansas, or Missouri, and she said, "Yes, and we're on it. Our engineers met this morning, we think there's a solution, which is to decrease the rate of acceleration, of the gas that expands the airbag, and we're ready to go out with a notice that would give automobile manufacturers the right to make this change. I was going to call you later this afternoon, to say, can you expedite review of this so that we can get this out."

And I said, "I can do you one better." I said, "Why don't I send..." -- and I mentioned the person in my office who does transportation rules -- "why don't I send him over. [He can]sit in your conference room with you, draft the thing with you, we'll be able to clear it in two seconds when you get it done." And there was a notice that was put out in a matter of days, and I think we gave - you normally have a 60-day comment period at a minimum - I think we gave 30 days, and said that this was important to move on quickly. Then we turned it around in a matter of days, and had the final rule go out. Again, cooperation between our staff and the staff at NHTSA.

This was a very interesting substantive issue, because we talk about cost-benefit analysis. Well, the benefit of decreasing the rate of acceleration was saving the lives of a couple of children, and apparently also what were known as short-stature women, small women, who were similarly adversely affected by these things. The cost is, curiously, that an unbelted, large adult sitting in the passenger seat might not be saved by an airbag. And, I'm making this up, but, a 250 pound man is going to go right through the windshield and die, and there were going to be more of them going through the windshield and dying than saving the babies. Our cost-benefit analysis - the costs were greater than the benefits.

So I've often been asked, why would you put out a rule where the costs are greater than the benefits? And I use this as an example, because here, the costs of these grown men who could be going through the windshield - they could put on their seatbelts! Their fate is in their hands. Whereas the babies, they don't have a choice. Mum puts them either there or in the backseat, it's up to her where to put them. The [babies] don't have an opportunity [to protest], and sometimes the mothers will have less knowledge, even though we have these big signs, placards, saying "put the baby in the backseat." So here, the costs are greater than the benefits, but the distribution -- who bears the costs, who enjoys the benefits -- was such to shift the discussion. And so here's an instance where cost-benefit analysis is informative, but not dispositive. And we went ahead and [allowed the reduction in] the rate of acceleration for these cars. And so that was another substantive one that I remember, it happened kind of in a flash, but it was really very interesting.

There[were the] hot pants and chicken shit rules, which I remember only because I was once introduced as the woman who does everything from hot pants to chicken shit. That's a line I've used a number of times. It shows the breadth of the substance that is considered by OIRA, if you want to talk about substantive issues: hot pants to chicken shit. "Hot pants" was a Department of Labor / OSHA rule that required protective covering on the limbs of those working on road construction, because that tar and asphalt and boiling oil gets ... I don't care how much hair you have on your legs, how macho you are, it's gonna get right to the bone, and it's ...not very good. And there were some people who were very much opposed to this who worked construction crews which normally occur in the summer when it's normally hot, and they would just as soon wear short shorts than protective clothing, so that was that issue.

"Chicken shit" has to go with how often poultry are to be cleaned during processing..., because once the chicken is killed, it loses all bodily functions and it makes messes. This produced a funny story which I will not tell, because it happened in the Oval Office.

One of the major substantive issues, because [until now] I've avoided [discussing] the environmental area, was the soot and smog rules, and I want to come to that if I can now, because that was a major substantive issue.

Balleisen: So these are the National Ambient Air Quality Standards.

Katzen: Right, otherwise known as NAAQS. N-A-A-Q-S, the NAAQs. The Clean Air Act requires that the EPA Administrator keep track of pollutants, and every five years, review the level of these pollutants, and set it at a level "requisite to protect the public health with an adequate margin of safety." Now this is a health-based standard. The courts have held that.... Set the NAAQS at the level requisite to protect the public health with an adequate margin of safety. Costs and benefits are not to be included in the consideration. We're saying, "At what level is it healthy?" The two pollutants that were subject to review in the mid-90's were soot and smog.

Smog is ozone, and ozone had an existing standard, and the question was, is that at the appropriate level, or should it be made more stringent, or should it be relaxed? Ozone is something which affects the respiratory system. Typically you see a lot of people who are adversely affected with respiratory problems in the summer months when you hear "code red," "code orange," don't go outside, and for god's sakes don't exercise outside. If have young kids on soccer teams who are out there running around, and all of a sudden they have asthma, they're unable to breathe, that's ozone.

Soot, is particulate matter -- I think its micro...not micrograms? mg's? Maybe it is micrograms, well, it's size 10. It's a tiny little particle, thinner than a strand of hair, but it's the kind of particle which can get into your lungs, and can get embedded into your lungs, and can cause problems. There was not a standard for pm (particulate matter) 10. We had a standard for particulate matter 2.5, a slightly larger strand of hair, but not for pm 10, and EPA was investigating and determining [what it should be].

This became an extraordinarily contentious issue for the administration, and consumed weeks, if

not months, of time for analysis, debate, consultation, interagency processing. I think, in our discussions, I had indicated that when OIRA receives a rule, it runs a parallel process. On the one hand it does its own analysis to fulfill the requirement, or the task of providing a dispassionate, second opinion of quality control. It looks at the cost-benefit analysis, it critiques the document, it does this itself in house. Our staff, very good, was all over this like a big puppy dog looking at the reg that comes in.

At the same time, we run an interagency process, whereby we send the draft to other agencies that might care about this. In that context, OIRA operates as the honest broker, and OIRA presides over an interagency process, in which other agencies can comment on a [proposed] reg. This is very important, because we have a single administration, and whatever comes out should be copacetic with the entire executive branch, they should be on board or it should take into account the different perspectives of different agencies. And the issuing agency wants to be responsive to the other agencies, even though it is its turf, its decision, its statutory mandate ... because next week it's going to be faced with another proposal from another sister agency and it wants its voice heard on that.

So if you run an honest program, an honest process, then all will feel more comfortable, and the interagency process on soot and smog went on for days, weeks, because it was so contentious. The reason it was so contentious, was twofold: the data on ozone were pretty solid, we knew what the levels were, how large would the margin of safety [should be] was an issue, but the science was pretty good on ozone. It was not very solid on pm-10 at that point. EPA had estimated that it would result in saving 15,000 premature deaths.

When you just hear it that way, yeah, let's save 15,000 people from dying prematurely, but how premature are the deaths? Are we talking about a week? Are we talking about month? Are we talking about 50 years? Where? How much is life cut short because of pm-10, and what's the distribution of people who are going to be affected by this? Are we talking about 10 year-olds dying prematurely, or are we talking about 90 year-olds dying prematurely? and the science wasn't too terrific on this, in part because i think this was a subject that was contracted out to some Harvard people, who gave the results, but who refused to yield the data or the methodology. And therefore, it was very difficult for commenters to comment on the data underlying the science.

So soot and smog stood at different places, but the second reason is that even though this was a health-based standard, and we've got the health-based proposal, we live in a world in which we wanted to know what the costs were going to be, and so, EPA did a cost-benefit analysis, and it demonstrated two things: 1. the cost of compliance was enormous - we were talking, I believe in excess of tens of billions of dollars a year, for each one of these. And [even] that would not put them in compliance.

There was no amount of money that would bring them into compliance on the ozone standard as proposed in the California basin where there's a valley of air that gets sucked in, and everyone who lives in Los Angeles knows about it, or on the east coast, where the air comes across the country, west to east, and picks up as it goes, and even if you had no pollution on the east coast, you're going to get the product of the Midwest power plants drifting east out to the Atlantic

Ocean.

In any event, this meant that billions of dollars were going to be spent, and we wouldn't even get compliance. Not happy bottom line, even though this is a health-based standard, this is what Congress said we should do, but it was problematic. This is not as crazy as it seems, because the Clean Air Act was deliberately written as a technology-forcing statute, the theory being, you set the standard, American ingenuity will come up with the technology that will produce this, and this will therefore lead to reduced costs. OK, and we're pretty confident in American ingenuity, but, at what point how much will it take, will it really happen, what will be the short-term effect, long-term effect?

It presented a dilemma - a substantive dilemma - of what to do, and I remember the interagency meetings, because we had all the different agencies, and some were highly supportive of EPA. HHS, Health and Human Services, they were, "go for it!" because this would mean fewer hospital visits, so they wanted to keep healthcare costs down, and they were in favor of a stringent standard. Interior was with them, they too wanted to see a stringent standard. They were concerned about something called regional haze, which would drift from California over the Grand Canyon, and some days you just can't see across the Grand Canyon, and that's an American icon. You want to be able to see across the Grand Canyon. They wanted to keep their National Parks clean and all this kind of stuff, so they were with them.

On the other side of the table was the Department of Transportation. If an area is not in compliance with the standards, if it's in a non-attainment area, its transportation funding is vulnerable, and so they were very concerned. The Department of Commerce was very concerned because this would impose additional costs on American manufacturers, who have to compete in the global marketplace and would be put at a disadvantage. And mostly, the elephant in the room was the Treasury Department. These billions of dollars were obviously going to reduce profit margins, and as a result of that there would be less revenue coming into the Treasury.

And we were trying to balance the budget then, and were hoping for surpluses as far as the eye could see, which we ultimately achieved, but they were very worried about the costs of this on the economy, and the deleterious effect that that would have. So we had these sessions going around and around and around, and was there a different way of tweaking this, was there a way of looking this way, and how would we do that?

These meetings went on, and there was one process point that I thought was really important. That is, when we first convened, I said that I wanted to have a full, candid discussion, and that this could be done only if everybody was committed to no leaks. I think I put it kind of crudely, "you leak, you're dead meat, you'll never come back to a meeting that I chair." Somehow, we met for weeks on end, and not one word leaked out. There were a lot of press inquiries, public interest groups, and businesses, all wanting to know what was going on in 248 of the EOB. Nobody talked, and I was really very proud of all of them, and we came up with what we thought was the right conclusion.

EPA bought some of it, but not all, and this is the one instance where we actually had to invoke

... dispute resolution¹⁷ ... and we ended up - for this purpose, to discuss this rule in the Oval Office. So it was a very significant substantive issue during my tenure.

Balleisen: Did any of that debate involve analysis of risk-risk tradeoffs, just within the health sphere, not within the costs that might occur as a result of the requirements that might be placed on automobile manufacturers, or coal-fired power plants, but rather, the possibility that greater levels, say, of ozone might provide protection to skin?

Katzen: Well, actually, that was an issue.... Skin cancer is caused by exposure to the sun, and ozone actually acts as a protective shield. There was a piece of this that was discussed. How significant is that, how solid is the science on that, and that was something which I think that was something that ultimately emerged in the litigation.

Balleisen: So there was litigation subsequent to the –

Katzen: Oh, after the rule ultimately came out –

Balleisen: and it came out in 1997.

Katzen: 1997. The American Truckers went to the United States Court of Appeals for the D.C. Circuit, and complained that we had not taken into account costs, and had not taken into account sufficiently the salutary effect of the ozone layer in reducing skin cancer, but their main argument that got traction in the Court of Appeals - it was a panel [opinion] that had been written by Judge Stephen Williams, and I think Doug Ginsburg, joined him - was that EPA had violated the non-delegation doctrine. Probably beyond the scope of this particular conversation, but the non-delegation doctrine is that in the Constitution, all legislative power rests with the Congress. [Some therefore believe that] Congress may not delegate its legislative power to the agencies.

That isn't quite the way it has worked, Congress may delegate power to the agencies, so long as it is pursuant to an intelligible principle. There have been people who have alleged that unless the intelligible principle is sufficiently constraining, that it would be a violation of the non-delegation doctrine.

In 220-some years of constitutional law history, the non-delegation doctrine has [had] one good year. There was a case decided, I think *Schechter Poultry*, or somewhere around that period, in which the delegation had been, "do whatever you think is best" - it had almost been that open, and the court said, "that's unconstrained, and therefore that's unlawful delegation."

Here, they were saying [that under], "requisite to protect the public health with an adequate margin of safety," EPA had not carefully defined and confined that standard, and they remanded it to the agency to come up with an intelligible principle. And it went to the Supreme Court who said, no-no-no-no-no, it's Congress who has to do the intelligible principle, and "requisite to protect the public health with an adequate margin of safety" is clearly sufficient. Look at any number of statutes which simply say "do something in the public interest," and if we were to hold that this is not sufficient, then we would necessarily have to strike down the entire - they

¹⁷ The Executive Order on regulatory review included a procedure for dispute resolution between/among agencies.

don't say this - but the implication is the entire administrative state would fall.

The decision was written by Justice Antonin Scalia, who is one of the conservatives, and it was a 9-0 decision in the Supreme Court, reversing the U.S. Court of Appeals. The irony of that is that it was decided in the 2001 term in June, where Carol Browner's name, [which] had been attached to the case at the Court of Appeals level, had been substituted by Christie Todd Whitman's name - so the case is *American Truckers v. Whitman*, or *Whitman v. Truckers* ...and Carol Browner has always said that she deeply regrets that her name is no longer associated with that important case.¹⁸

Balleisen: Another arena within the environmental domain that I think had some significant new types of regulatory policymaking during your tenure at OIRA involved the Project XL initiative. Could you say a little bit about how that emerged and OIRA's role with it?

Katzon: Project XL was an approach to regulation that kind of got away from the transaction by transaction, reg by reg, enforcement factory by factory, kind of command and control approach - that was all one long modifier to "command-and-control" - and it said that if you'll meet some standards, you can do it your way.

Balleisen: Performance standards.

Katzon: Performance standards. If you reduce pollution, or if you clean up toxic chemicals or something, then we would give you - you the industry, you the factory - the opportunity to do it in a way that was most sensible from your point of view to achieve it. It was in some sense, an elaboration and extrapolation of the bubble concept that was approved by the courts in *Sierra Club v. Costle*, in which pollution was to be measured factory-wide. The definition of "stationary source" was to be the whole factory, as though it was all under one bubble, rather than smokestack by smokestack by smokestack by smokestack. Project XL was a more holistic approach, so we at OIRA thought it had an enormous amount to commend it.

Balleisen: So it came initially from EPA?

Katzon: Ah ... I'm pausing only because I think CEQ played a role in it as well. Katie McGinty was the -

Balleisen: CEQ -

Katzon: The Council of Environmental Quality, a White House office, an office in the Executive Office of the President. Katie McGinty was the chair of CEQ, and I remember her in all the meetings. I don't know whether she was part of the formulation, or simply the facilitation of having it be accepted by the administration. Project XL sounded good and I thought would work, but it didn't, because when they would negotiate agreements, they wanted performance better than the standard. If the pollution level was 100, they wanted the company to commit to 90, and then they could do what they wanted. Getting the extra cleanup, was the price of getting the

¹⁸ Browner was EPA Administrator in the Clinton Administration; Whitman replaced her in the George W. Bush Administration.

freedom, rather than just doing what you're supposed to do. This did not sit well with industry, which was more than willing to make all sorts of accommodations, and it may have been the degree of the extra that was the sticking point in some [negotiations].... It was as if those who were administering XL were being too greedy. That was my sense of it at the time.

We kept urging flexibility, and performance standard, and collaboration, rather than heavy-handed regulation and enforcement, and it didn't sell. There was an ideological - I think - ideologically-based determination, that if we were going to give them something, give industry flexibility, that we were going to extract something in return. That's how the project was being implemented. And we went to the Congress. I think it was approved for a while, and it was in existence [but] it was not renewed, because industry said this isn't worth it.

Balleisen: The opposition that you're describing was within the Administration exactly where?

Katzen: I think it was the implementation by EPA. The Administration was in favor of XL, and thought that it would be highly desirable, that's my recollection. Katie McGinty may have a better recollection of its fate - but, I think it was an idea that was supported by the Administration, promoted by the Administration, and I would include EPA in there, at least as an ally. Congress had adopted it, because there was some concern that you needed to have congressional imprimatur, because it meant that you would be violating the technical terms of one regulation to achieve something under another regulation.

There were tradeoffs there, so you needed some sort of Congressional waiver of some sort, and we got that, and then they started negotiating, and EPA was the implementer. They sat down with some companies and started negotiating, and the companies felt that the goalposts were being moved, and did not believe this was being implemented in the spirit in which it had been offered and authorized.

Balleisen: One theme that you've mentioned in several different contexts during your tenure at OIRA is the search for flexibility, an emphasis on collaboration, on delegation - not just to the agencies, but to regulated entities that could handle it - did this crystallize as a philosophy of regulatory governance within OIRA, under your tenure? Was it there when you came in? Was it coming from the staff? Was it even seen as an overarching approach, or rather did it emerge as a specific response to specific problems?

Katzen: I think closer to the latter. OIRA is a transaction-based entity, a reg comes in, a reg is reviewed, a reg is approved, a reg goes out. Another reg comes in, it's reviewed, et cetera. There is -

Balleisen: And the initial review process is by that line officer who has that responsibility --

Katzen: Who may elevate it to the branch chief..., who may elevate it to me, but ... yeah ... it's one transaction, one transaction, one transaction, that leads to a couple of problems. I've testified as to what I think is an important step away from - not to not do the transaction by transaction, but to add on top of it an understanding of the cumulative impact of a series of regulations from the same agency and from different agencies.... [M]y recollection of my tenure there, is that we

were just overwhelmed with the inflow.

Whether it was the transactions, the regs, coming in ... or the proposals from the Congress, coming down ... or the day-to-day crises of the infant in the carseat, every day was pressure packed. Every day we were working to try to move through the material that was seemingly coming at us. We were doing our best to keep up.

We did not have the luxury, I would say, of thinking, contemplating, how can this whole system be improved? What can happen, what initiatives can we take that would be comprehensive and ameliorative in this environment? That's one thing that I regret, that there was not enough of an opportunity, and that I didn't seize what little opportunity existed, to reflect on what we were doing. And so –

Balleisen: Even with the greater selectivity, and the...?

Katzen: Absolutely. Because - truth to tell - all those little regs, they didn't take any time, because they weren't of any importance. So - how we responded was our own bias. Yes, I was interested in flexibility, I was interested in collaboration, I was interested in finding a solution to a problem. I think of myself a little bit as a problem solver.... I was trying to solve problems as they came down the pike, and that would require one approach one day, a different approach another day, depending upon the circumstances.

I wasn't going to have any hard and fast rules, you must do a-b-c-d, in that order. I was going to appraise the situation and say, okay, let's see how we can move this one forward.... I thought it was important to be flexible, because there might be circumstances of which I was unaware, facts that I didn't know, analysis I had not been told about.

[end of audio track 7]

Interview III: November 8, 2012

[beginning of audio track 8]

Balleisen: We're continuing the oral history with Sally Katzen. I'm Edward Balleisen, Associate Professor of History at Duke, and we are here on November 8th at the Kenan Institute for Ethics. In our last conversation, Sally, we had gotten up to the point where you had entered service in the Clinton Administration. But, I thought ... before really digging into your experience as the Administrator of the Office of Information and Regulatory Affairs, that we might circle back just for a little bit more discussion about the 1980s and early 1990s.

One issue that I wanted to connect with again involved a different movement for regulatory review that emerged alongside the proposals for some kind of analysis like that [which] occurred with RARG -- The Regulatory Analysis Review Group -- and then in the Council on Wage and Price Stability, which came from the consumer movement.

In the 1970s, there was a movement to create a Consumer Protection Agency, with Ralph Nader being the most vehement proponent of this proposal, which in some ways was a kind of parallel structure to what emerged as OIRA, in the sense that it involved having the creation of a group within the government ... [that] would review regulations from the perspective of consumer interests and then would be able to advocate from that perspective within the regulatory process.

I was just wondering whether this alternative approach was part of the conversation when you were at COWPS. This is actually going back into the 1970s, but I did want to ask this question.

[With] the development of benefit-cost (or cost-benefit) analysis and that version of regulatory review, did people see that as a competitor to this other set of proposals that was circulating through the Congress and that came very close to passage at various points in the 1970s?

Katzen: My recollection of that alternative or parallel universe as you're calling it is not very clear. To the best of my recollection now we had a very different focus. Our program at COWPS and the development of cost benefit analysis was because of the economy. It was that need to restrain inflation. It was under Fred Kahn, who was assistant to the president for inflation or some such title, [and] an economist. It was done on economic theory. My very first introduction to Barry Bosworth was for him to explain to me incomes policy and how it fit in macroeconomics theory and practice.

It was almost tunnel vision. It was the only thing we cared about. The benefits of regulation in terms of saving lives were...I don't want to say just a piece of the equation, but we were operating on the assumption that the agencies were protecting the public and that what they proposed would likely achieve the benefits.

Could those same benefits be achieved in a more cost effective way, was our question. Not because we wanted to diminish the benefits, or not protect the consumers, or clean air, or whatever other benefit was at stake, but more [because] we wanted to protect the economy, if you will, from undue, and I have to emphasize the undue, costs. Can you get the same benefits for fewer costs? It was not, "Is this going to do something good?" That was an assumed piece.

I think the emphasis ... [in that alternative universe] was, is this going to actually protect consumers? Is it going to make sure that cars are safe? That was Ralph Nader's [interest]. I drove a Corvair, until he got started, and quickly dumped it. The emphasis there, I think, was on the benefit side and making sure that there were sufficient benefits.

Our emphasis was more on the cost side, but I say that in hindsight. I say that retrospectively. I'm not sure we actually thought about it at the time. We had a mission. We had a statute. Like any agency, we were supposed to carry out the mandate of our statute, and our statute had us looking at these issues from the cost side, [using a] cost benefit approach. So, what else was going on? Maybe the more the merrier, but we didn't see it as threatening. We didn't see it as intervening in our mission in any way.

Balleisen: I also wanted to ask you a bit more about the nature of your regulatory practice in the little more than a decade that you spent in between your stints of government service. We talked last time about the restricted nature of your communications law work because your husband had taken over some of the really big clients at the law firm.

Katzen: Well, he was doing a lot of the CBS work, so I was doing other communications work within the firm. The firm as a whole had erected walls to keep us in broadcasting as opposed to going into cable, which was the growing field.

Balleisen: I just wanted to inquire about whether that led you to broaden the nature of your practice, whether you were doing significant work outside communications regulation?

Katzen: I started in the '80s. There was one thing that was happening, and I'm not sure when, but it was the Exxon Valdez spill in Alaska. The trans-Alaska pipeline entity was a client of the firm. We were representing them, and I was brought into that. It had several prongs. One was the straight litigation of the issue of liability and compensation for those who were injured. But the other was...and I think there was actually a statute that established this entity and that established a very skeletal administrative process for the processing of claims. We had all sorts of claims.

Think about more recently 9/11, or Katrina, or any other horrific event in which there are a number of claimants from landowners, to people who lost all of their goods, to people who lost their jobs, to people who suffered serious illnesses as a result of inhaling fumes, or whatever. Different types of claims.

How best to try to establish a process to hear those claims, to resolve those claims? At what point do you make the administrative process exclusive? If you're going to choose this route, which doesn't have all of the baggage of full-scale class action litigation and could conceivably reach its end in your lifetime, as opposed to some of these class action suits that go on for years and years and years. At what point do you have to opt out of other avenues in the court? I remember spending a substantial amount of time working through the administrative processes to see if they were, to my mind, adequate for the claimants and efficient for the fund managers. I think we were representing the fund managers and so we were interested in doing this as efficiently as possible.

I was concerned that we strike the right balance and [was involved] because of the work I had done at COWPS in establishing the procedures for that process, which was very different but at base quite similar. How do you afford notice? How do you assemble facts? How do you reach decisions? How do you provide for appeal? How do you do this all in real time? I know I did a lot of work on the trans-Alaska pipeline issue.

Balleisen: So this is another instance in which your experience in government service powerfully structured the kinds of legal advice that you would develop in the later years or in that interval between your stints.

Katzen: Yes, I vaguely remember that at first I was simply an asset for the firm, when the team was handling this client said, "Oh, my! Look who we have in the firm!" and put me forward to the client as sort of one of the world's experts in devising these kinds of procedures. It was ... a selling point. Because they had lots of different law firms doing lots of different things and, "Look what we have to offer you!" Then it was sort of several months into the project where I remember one of the more litigating type partners, kind of hard-edged and cynical, said, "You really have made a substantial contribution here." I thought, "Well, thank you!" I was more than just an asset, and then I became actually a contributor. And yes, it was the government experience that framed not only how I could think about it, but how I could sell it to the client.

Balleisen: I noticed in looking back at your nomination hearings that you also did at least some work for ... Fannie Mae and also Freddie Mac.¹⁹

Katz: I did some work for them. I'm not sure whether they were the client or whether it was a bank. There was something called "FIRREA. " In the late, mid '80s we had the savings and loan meltdown. Again, I'm not clear on the timing of this, but a number of savings and loans went belly up, and [Congress] passed something called FIRREA, "Financial" something. I can't even remember what FIRREA stands for. F-I-R-R-E-A, and there may have been an extra vowel in there somewhere else. It basically was the way in which savings and loans and those who had assets from savings and loans would recover.... I remember before the legislation was passed, because I was on the executive council or the chair of the Ad Law section, and because of my background... in government, I remember meeting with the congressional staff. It was one of the first times that I sat down with staff people on the Hill. I had never been up on the Hill. I had been occasionally, but I hadn't really worked with congressional staff. I remember going up there and saying, "You're drafting a section of the bill, and it provides this but it doesn't provide that, and you're not doing this. What is all this extra step for?" And walk through some of this section of FIRREA. It was a discrete section.

Balleisen: That's the "Financial Institutions Reforms, Recovery, and Enforcement Act."

Katz: Thank you so much. Needed that. I remember the staff person saying, "Well how would you write it?" Sort of my jaw dropped. How would I write it? I started drafting language. I said, "Can I go back to my office where I can actually work on this and I'll send you some language?" I went back to my office and I sat at my desk. I think we were using yellow pads then. Maybe it was a rudimentary word processor and I wrote up what I thought that section should look like. I sent it up to the Hill. That's what it was in the bill when it was marked up. "That's how you make legislation," I thought. "Is that how you make legislation?" I asked.

I thought this was fascinating. Then I became known as...I never acknowledged or publicized the fact that I had done anything more than advise. I never said I had drafted actual words.

Then there were some clients of the firm at Fannie May and Freddie Mac, or it was some of the Home Loan Bank boards, [who] sought advice on how to proceed under this section and I was able to provide some advice on how to proceed under the section, which again, I didn't claim responsibility for writing, but I had. It opened my eyes to how legislation was drafted. From the good, the bad and the ugly.

Congressional staff simply do not have the resources, or sometimes the experience or knowledge to be able to craft specific language that is going to solve a particular problem. They welcome input. My hope is that they take input from lots of different sources, and make a judgment based on rational reasons selecting one or the other path, then it's locked in. This is sausage making, and whether you put it in before mark-up or at the hearing or conference at 2:00 AM in the morning, you just slip it in.

This is where I learned about how legislation is made. That was a process. I'm a little fuzzy on which clients, because they weren't my clients. I was being brought in by a partner at the firm

¹⁹ The Federal National Mortgage Association and the Federal National Home Loan Corporation.

who was representing them, and said, "Oh, wait a second, if this is a process question, let me see what Sally has to offer." Or "Let me consult with my partner Sally Katzen, she understands these things." Then I would be brought in, do what I was asked to do, and then I would disappear.

Balleisen: Do you recall what the specific controversies were that this process that you drafted, and then advised about, entailed? What were the specific issues raised by the response to the Savings & Loan crisis...?

Katzen: ...Not offhand. It's like those procedures that I drafted. The first time I think about them, then I have to rethink them to go back.

Balleisen: I also wanted to circle back a little bit to your service within the American Bar Association, and also the Administrative Conference of the United States. One question I had was the position that the ABA took on reform at FERC. The Federal Energy ...

Katzen: Regulatory Commission.

Balleisen: That had to do with the question of staggering terms for commissioners. I was wondering whether you recalled those discussions and...

Katzen: The position that the ad law section took?

Balleisen: That they should be staggered. That they were not staggered and that this was creating...

Katzen: Sounds sensible. I don't specifically remember them. This is sort of a hypothesis. Certainly I would have supported staggering because it produces institutional memory and consistency. One of the important things of administrative law and administrative practice is continuity predictability. To have that, you have to have a solid institutional base. If I had chirped up, and I probably did since I was on the executive Committee and then Chair, I would have argued for staggered terms for commissioners of a multi-headed agency, FERC or any other similarly stated agency.

Balleisen: How much of your time was going into this type of civic engagement and public service ...in the late 1980s, early 1990s, before you moved back into government service?

Katzen: A lot. If I had to quantify it, I would say a good 35 percent of my professional time. Wilmer Cutler was unusual as a law firm in encouraging public interest *pro bono* public service. John Pickering, one of the named partners, was very clear that it was every lawyer's responsibility to do something beyond the very limited money making kinds of opportunity. We were all expected to take on *pro bono* cases....

John had been very active in the American Bar Association and had been an officer of one of the sections and a leader, and thought that this was very important for young lawyers to be involved in these associations....

It's not like it is today where billable hours is the be all and end all. I don't even remember keeping hours, which is why I would have a hard time putting a number and couldn't

reconstruct...because I couldn't even remember keeping time, although I must have. But it wasn't the looming omnipresence that it is now.

I had gotten involved in the ABA ad law section because of my visit to them while I was at COWPS. But I found the process interesting and useful for something bigger and better than myself, and something which I think I touched on when we were talking last time, but the striking, transformative nature of public service in my life having spent a couple of years in the administration...

Balleisen: The Carter administration.

Katzen: ...the Carter administration, I came away feeling that there has to be more than simply the institutional private practice. And when I came back to it, I think I told you this story of having forever to write a brief, I found the private practice of law...I liked the firm, I liked the clients, I liked the work, I liked my colleagues tremendously. If you asked me "Are you having fun? Do you feel good about what you're doing?" Absolutely. Was it completely fulfilling? No. Something was missing after I had been in government. I wanted to do something more. It was just not enough. It was good, but it was not enough.

And it was that wanting ... to have the sense of a contribution that got me involved with the ABA [and] ACUS. I was also during this period active in the Federal Communications Bar Association and ... served on the executive committee and then became the president of that organization.

So I was doing a lot of this type of professional service, professional work. And that gave me some, albeit not the same, gratification that I had when I was in the Carter administration. And it's difficult for me sitting here today trying to say how much in the 80s and early 90s, before Clinton and how much after Clinton, I came to appreciate how meaningful public service is. How very special it is to be able to serve in government. I certainly feel it now. Was it reinforced during the Clinton days, did I feel it when I came out of the Carter administration, was it just the beginnings of it?

But today I would say, and I know we're jumping two decades, that it is the most rewarding, fulfilling, and humbling experience that one can have. That instead of representing a client, you're thinking about the public at large. Instead of arguing positions, you're making decisions.

It's just a world different. One person can make a difference in any level at any time. That sense of making a contribution that is so much bigger than this client matter that you've been retained to think about is so fulfilling. I keep using that word. I think I got that a little bit out of the FIRREA instance. Part of it was shock -- that this was how it was done. But part of it was "Woah, I just wrote a statute," kind of thing. The sense that yeah, I'm making a difference.

I think people want to be able to put their talents to maximize social utility. I hate to use those kinds of terms, but being in the executive branch did that. Now how much of that I felt in the '80s as opposed to now after the Clinton administration on top of Carter, I don't know.

But I do know that returning to the law firm, practicing law, as much fun as it was, as nice of an environment as it was, wasn't enough. I did move into the professional activities that you have talked about.

Balleisen: Let's now move more substantially into that experience and the Clinton administration. Did you feel more substantially prepared in entering the offices of OIRA than you had when you emerged on that first day at COWPS?

Katzen: Absolutely. [Before COWPS], I didn't really think about economics, I didn't know anything about the program. I didn't even know anything about the White House. But I went in. I had agreed to go, [but] I had no idea what I was getting into. [At OIRA], I understood better what public service was about. I understood better the constraints of working in government. I understood better the fishbowl of operating in government. By that time, I knew something about what OIRA was doing and how it operated. So I felt uniquely well qualified. There was one moment where I did courtesy calls with some of the senators on the Oversight Committee, Senate Government Affairs it was then called.

Balleisen: This was before your nomination hearing?

Katzen: This was before the nomination hearing. What happens is, once you're nominated, you then need to be confirmed. Ordinarily, the Office of Leg. Affairs in your agency will arrange meetings with the Chair, the Ranking Member of the committee and any other Members who want to meet you beforehand.

Balleisen: This [was] early 1993?

Katzen: This [was] early 1993. Now, the difficulty was, Office of Management and Budget..., all they cared about was the budget people. Leon Panetta had already been confirmed and, I think, Alice Rivlin was, also. This OIRA stuff they...

Balleisen: Panetta was the director of OMB?

Katzen: He was the director of OMB. Alice Rivlin was the deputy director. I think, they were both in place and had already been confirmed. The Office of Leg. Affairs was far more interested in budget matters than in getting this person confirmed for this office. They didn't even know what it was exactly... Leon brought in all of his people from the House Budget Committee. Well, A, it was the House so they didn't know anything about the Senate confirmation process. B, it was the House Budget Committee and they were interested in the budget. New administration, they had to send a budget up in early February. How that sailed through the House and the Senate, that's where they were focusing their attention. She said, the head of Leg. Affairs, I remember saying to me something like, "Well, if you want to arrange courtesy calls for yourself, that's fine. You've been around this town a long time. You know what you're doing." I said, "Well, thank you so much."

I had called the Chair and the Ranking Member's offices to say that the President had nominated me to be the Administrator of OIRA. I wanted to see if there was interest in the Chair's meeting with me to put a face to a name and to discuss any issues that might be of concern. This is on the theory that it is essential that you know people on a personal level. If it's just a name, it's easy

to either demonize or, I suppose, turn into a hero if that's your ilk. I think it's important to, actually, have a face-to-face.

John Glenn was the Chair. He wanted me to come up and I must have spent an hour [with him]. John Glenn was a hero of mine. He was an astronaut, and he had done all these fabulous things. His knowledge of OIRA, and some of the things that it stood for, had been affected by his staff member who only cared about the Paperwork Reduction Act and the information [issues].

The Paperwork Reduction Act has certain sections about paperwork reduction, information dissemination and other such things. That's what he was interested in. He was not interested in the regulatory piece virtually at all. We talked mostly about the statutory functions of OIRA rather than the reg. review functions of OIRA. It was a fabulous, for me, opportunity to meet Senator Glenn. He seemed to be very, very nice. I have a picture on my wall of him hugging my son at the hearing. It was a meaningful experience....

Bill Roth, from Delaware, was the Ranking Member. He was a very moderate Republican. He, too, cared about the statutory functions of OIRA. He did know a lot more about the regulatory review function and he wanted to know what some of my positions were on some things. It was like a pre-confirmation hearing. Then I remember meeting with Levin...

Balleisen: Carl Levin from Michigan.

Katzen: Carl Levin from Michigan, Joe Lieberman from Connecticut, Senator Lieberman. There was one senator, a Republican senator from the south, I remember calling the office. They would always have me speak to his LD who does this stuff or his person on the committee.

Balleisen: His legislative director.

Katzen: His legislative director or his staff person on the committee. I said, ... "Hi, my name is Sally Katzen. I have been nominated by the President to be the Administrator of the Office of Information of Regulatory Affairs in OMB. At some point, the committee will be having a hearing on my nomination. I wanted to know if you, or the senator, were interested in discussing any issues in advance, or putting a face to a name." This person said, "Professor Katzen, I'm in your administrative law class at Georgetown. I know who you are."

"I know you are uniquely qualified for this. I've told the senator, "No problems. She's good." I said, "You sit in the middle, sort of the right-hand middle, about the fifth or sixth row back?" I had 120 students. He said, "Yes, that's me." I went, "Well, nice to be talking to you in this context."

So that's in the small world department. I had ... started teaching during the 1980s, as well.... I taught an administrative law course, team taught it with Judge Laurence Silberman of the DC Circuit. It was nice because we had boy, girl, Republican, Democrat, judge, practitioner kind of balance. I think the students got a lot out of it. We had over 100 in the administrative law lecture.

There was another Republican on the committee. I will not mention who it was for what will become obvious reasons. We had this wonderful conversation. He did want to meet with me. He was a lawyer and he was very interested in how I thought centralized reg. review should operate.

At about 15 minutes, 20 minutes, he said, "I can't tell you how pleased I am that you've been nominated for this position. Dan Quayle didn't know anything about this subject. The people who ran the Competitiveness Council were absolutely obtuse on these issues. You're knowledgeable. That's wonderful."

...For the first eight years of Reagan there was an Administrator of OIRA, but then when George Herbert Walker Bush came in, he nominated someone from Tennessee who was not confirmed because the Democrats were holding [him] up for openness and transparency.

In an effort to have a political appointee running this thing, it had been moved over to the Competitiveness Council [with] Dan Quayle, then Vice President, as the titular head. He, obviously, didn't know and could care less about what was going on, and the people he brought in were also not very well informed on certain aspects of this. So this Republican senator was really very happy. I ended up having a very easy time in my nomination for this position.

Balleisen: I had a quote I thought I would read to you, from John Glenn. This is from the actual nomination hearing. Glenn said, "OIRA's paperwork reduction effort was harnessed to an ideological attack on the government's legitimate regulatory role, along with looking out for special interest favors and loopholes." Was that a fair distillation of the kinds of growing complaints or critiques associated with the review process of OIRA in that period right before your nomination?

Katzen: It's a tad more strident, but it captures the sentiment of most moderate to liberal Democrats, who felt that they had established OIRA to do paperwork reduction, information dissemination, [and] information technology policy. It had been given the regulatory review function from the Council, and with Executive Order 12291, had been given the task of centralized reg. review. And that was the dog. And everything in the statute was the tail, at best. And this dog of reg. review was being used for deregulatory purposes, for minimizing the burden on companies rather than thinking about the benefits. That's the ideological bond, or anchor, that they were using. As I hear that it strikes me as a tad strident, but there were people who were even more strident.

Balleisen: After your confirmation, the first task ... that you confronted, was what to do about that Reagan executive order, 12291, which had given OIRA this responsibility for centralized regulatory review.

Katzen: And which had remained unchanged through eight years of Reagan and four years of George Herbert Walker Bush.

Balleisen: I wondered if you could talk a little bit about the internal debate within the administration as to what to do with that executive order, whether to rescind it, whether to leave it alone, or whether to, as happened, develop a new executive order.

Katzen: I don't recall a lot of debate or dissension on the path forward. The particulars, yes, but the path there was fairly clear. We could not live with 12291. You heard John Glenn describe it, and the Democratic members of Congress, the Democratic constituencies, would not under any circumstances accept a mere continuation. Nor could we simply tear it up and walk away, even though some people wanted us to do that.

Balleisen: Who were the constituencies calling for that, do you recall?

Katzen: Labor unions, environmental groups, the more liberal members of Congress, who said enough of this experiment. Forget it. And the members of Congress were quite clear, "We delegated our authority to the agencies. Let the agencies do their stuff. What are you doing mucking around in what we have told them to do? We told them to do regs on this subject, let them do regs. And they shouldn't be reviewed by you, changed by you, that's not appropriate." But my recollection is that that was not even a real option. The discussions were for the most part between OIRA and the office of the Vice President. The President, the White House staff, had much more important things to think about than this, in their view. The Vice President had been one of the severe critics of OIRA. He knew about OIRA and had not liked how Reagan and Bush had used OIRA.

His Counsel, at the time, was Jack Quinn, who was a Washington lawyer. I think he had come from Arnold and Porter, very knowledgeable and able to read the Vice President quite well. Most of the conversations that I had were with Jack rather than with the Vice President directly. Although, I came to spend a lot of time with the Vice President over the next five years.

In this phase of it, my recollection is that there was no question that if we hadn't had an OIRA, we'd have had to invent one. The Vice President was sufficiently interested in this area that he would want to be aware of, if not influence, how agencies carried out their statutory mandates, whether that was to do more regulation, as opposed to deregulation, or what his ultimate purpose was.

We have a single, some would say unitary executive, although that carries extra baggage as a political science theory. We have a single executive who is head of the executive branch. It's the President and the Vice President. They are responsible for everything that their agencies do, so they ought to, at least, be informed. They ought to influence and they ought to have some say in this because they are accountable.

Each agency is going to focus like a laser on its statutory mandate, but its actions are going to have an effect on other departments and agencies. Since it's a single administration and it's a single country, it would make sense to have the input of these other agencies and these other departments before a specific agency takes a particular step. You don't want agencies to be inconsistent. You also want them to be supportive of one another.

What OIRA was doing in conducting an interagency process would have been the essence of good government, so we couldn't scrap it. There we were. We couldn't live with it. We couldn't scrap it. There's only one other alternative and that's to rewrite it.

The task that I had was to sit down and write a new Executive Order that would solve the problems of the past and, hopefully, not have any unintended consequences that would be adverse. So I started drafting. It was relatively easy to do the drafting because we knew clearly what the main complaints were. The main complaints, if you want me to go into those?

Balleisen: Please do.

Katzen: The main complaints were first, this, not necessarily in this order, but there was an inordinate trust in economics. The idea of cost-benefit analysis would provide “The Answer,” capital T, capital A. That did not seem to be appropriate because there were some things that could not be quantified or monetized, particularly, on the benefit side of the equation. Our objective there was to be clear that cost-benefit analysis was informative, but not dispositive. The cost-benefit analysis was to be done to the maximum extent possible, but not where it was ridiculous, not where the cost and benefits of doing a cost-benefit analysis grossly outweighed not doing it. I'm being very unclear here.

...Let's start back with [the fact that] costs are more easily quantified and monetized than benefits. If you just look at monetized costs and benefits, you're going to have an un-level playing field. What you want to do is consider benefits that cannot be quantified or monetized, but are nonetheless, important to consider.

You want [benefits] to get the same weight that you would give to these quantified, monetized costs, and you want to make sure that you included in the universe of costs and benefits things like equities, which did not appear anywhere in 12291. It was -- how you do the cost benefit analysis in the first instance and then whether its dispositive or whether its simply informative -- [that] was one of the complaints.

The second complaint, again not necessarily in this order, was as reflected by Senator Glenn's comment, that it had been hitched to a deregulatory or anti-regulatory wagon. We wanted this to be neutral principles, principles of good government, and so it could be pro-regulatory as well. And that's why we start 12286 with talking about, the American people deserve a regulatory system that works for them not against them, that promotes clean healthy air, safe food, well-functioning markets.

There's a value to regulation and we did not want this to be [construed as anti-regulatory]..., whereas 12291 starts with language that says I think, "To reduce the burdens...." We wanted to say, "This is good stuff." That was a second thing that we knew we wanted to put in there. The third was this whole idea of secrecy [versus] openness, transparency. It had been a black box, we wanted to make sure that it was accountable.

A fourth principle was -- the agencies are the primary repositories of expertise and experience and it is to them that congress did delegate [authority]; so the primacy of agencies. If you go back to, and I don't know if you have a copy of 12866 in front of you right now, but if you go back to 12866 the first paragraph sets forth again, [that] the American people deserve a regulatory system that works for them, not against them, and it speaks in the next sentence I believe about the primacy of the agencies, but then also the importance of centralized review because of the accountability of the President.

I'm not sure that the words “accountability of the President” are in there but that was the concept that was there, and the primacy of the agencies was the first thing that was mentioned in that second sentence.

Those were the points and it was relatively easy. We just started writing. Then came the hard part. We were aware that 12291 was signed by President Reagan within a month of his having taken the oath of office. That it had been drafted by Boyden Grey and Jim Miller and had been

signed by Reagan.... Boyden had invited all the regulatory people [from the agencies] into the Roosevelt room.

They sat around reading this thing, shaking their heads, making editorial comments, opposing all sorts of things, grumbling, gnashing of teeth, the whole bit. Then they got to the last page and saw that Reagan's signature was already on it. There were no edits that were going to be taken. There were no changes that were going to be made. This was a fiat. This was done, period, full stop.

Was that the model? We didn't think so, and the issue we had was, how much inclusiveness should we have? And I'm not sure we had at the beginning a clear vision of where this was going to take us, but I know that we had a meeting with all of the regulatory people at the agencies. Now at this point a lot of [the agencies] did not have confirmed political officers so they may have been senior career staff, but ... some of them were beginning to filter in and so we had some political people and we met with them.

We met with them, I think, with this rough draft that I had created and said it is just a draft. It's draft number one. I'm going to pass it out, I want your input, and then I'm going to collect it because I don't want these things running around town, and I want your honest appraisal. Well they just unloaded.

Everything from, "You have no right to even be here and you ought to just tear up the whole document and rescind it" to, "You haven't stressed how important the agencies are enough" to, "There isn't enough openness. There's too much work you're asking us to do. These cost benefit analyses that you're calling for are onerous and take away from our being able to fulfill our mission."

I kept saying let's work with what we have here..., and we kept track of the suggestions, [we] had one or two staff people from OIRA with me in the meeting, [and then we] collected all the documents.

Then I had a meeting with all of the public interest groups: OMB Watch; the unions; enviros [like] David Hawkins; ... public safety, public health, different groups. I passed this out, the first draft. I said this is just a draft, but I want your input. Once again, I got a range of comments. These [were] very heavily skewed to just tear this thing up – “what are you doing?”

I said, "Let's try to be constructive." These meetings would take sometimes two, three hours. I would get their feedback, and I would collect the documents back. One person was starting to make a lot of notes and I said, “Let's have some ground rules here. I want your input, but I don't want any of these leaked. It's really important to me, and it should be important to you, that we operate within a cone of silence here.”

"Well, what about transparency?" I said, "Transparency in an executive order is not the rule. I'm looking for your input. Please. If we can have candid conversations, we can have a candid conversation. If we're going to be on television or you're going to leak everything, we can't have a candid conversation." Basically, they bought into that. They tore up their notes. They gave me back their drafts with all their edits on it.

Then I had a meeting with the business groups, from the big businesses, the Business Roundtable, to NAM, the National Association of Manufacturers, NFIB,²⁰ small independent businesses, Chamber of Commerce, all of the ... [major] business groups came in. Well, they looked at the first draft and said, "This is ridiculous. What's this primacy of the agencies? You've got too much openness here, you should have more meetings, da-da-da-da."

And they were the counterfoil for the public interest groups. I did the exact same thing. "I'm going to pass these out, I'm going to collect them. I don't want you to take notes and I don't want you to have any conversations about this. We have to do this in a way [by] which we can speak candidly with one another."

Then I had a meeting with the Big Seven. Representatives in the National Governors Association, State Legislators, Conference of Mayors, Association of Towns and Townships and all of those people,. Same process. I had a meeting, I think at this point but maybe not, with some of the Hill Staffers. I think that may have come in the next round.

In any event, I looked at all these comments and I went, "Oh my God" and [went through] my piles of edits, and we produced draft two. Then I had another meeting with the regulators. They would say, "Well, you said this, thank you. But, you didn't say this." And I said, "No, and I didn't because..." And I told them what I was hearing from somebody else, or what the issue was, or why this was important... [Was there] a way that we could say what they wanted to say in a way that would meet these other objections?

This was actually a dialogue in which I communicated the problems that other people had with their suggestions. They gave me a whole set of edits, a whole set of comments. [But] they stopped talking about tearing it up. That wasn't on the table anymore. They stopped talking about no role or only a limited role and they became much more constructive in this meeting. I had a meeting with the public interest groups giving them draft two. Same process. Same results.

I had a meeting with the business community, draft two. A meeting with the Big Seven. This, I think, is when I brought in the Hill people from the House and the Senate, who came at this from an entirely different view. I got their comments.

Then we did draft three. [Same process].... Before I had these meetings on draft one, draft two, I would check with Jack Quinn and get a green light that this was OK. It was a "draft." He approved the process I was handling. I remember him saying at one point, "If this does leak, these meetings stop. We're not going to have this in the front page of the *New York Times* or the *Washington Post*."

I understood the ground rules. He did not attend any of the meetings. These were all conducted by me with some of my staff. I think then we got to draft four, which I made sure Leon was comfortable with -- Leon Panetta and Alice Rivlin at OMB. [They] started showing some of the people in the West Wing what I was working with. Jack was showing it, I think, to the Vice President at that point. We were pretty comfortable with draft four.

²⁰ National Federal of Independent Business.

On draft four, we reversed the order. We did the public interest, and the businesses, and the Big Seven, and the Hill and then the regulators. Because when we got to the regulators, we said, "This is kind of it." We had gotten through "Thank you for taking this," "I still don't understand why you didn't do this," "Well because of this," "Oh, OK." We would have those kinds of conversations in the first four meetings.

Then with the regulators we said, "This is it. You can't take it out of this room. You know what we're doing. You know what we're striving for. You have to tell me that your senior agency official is good to go."

At EPA, the Administrator was there. Will Carol Browner sign off on this? Will the General Counsel of DOT sign off on this? Will so-and-so...we just went through all the different agencies. I need to have every cabinet department or agency tell me that this is now good to go.

There were a few squabbles at that point. There were a few modest changes at that point. I think I remember at least one of them. You'll notice in the first paragraph, the second sentence says something about the primacy of the agencies. So does the last sentence of that same paragraph about deference to the agencies. Why would you have the same thought twice in one short paragraph? That's because the agencies wanted...isn't there something in the last sentence of the first paragraph?

Balleisen: You want the last paragraph?

Katzen: No, the first paragraph.

Balleisen: The first paragraph is "The American people deserve a regulatory system that works for them, not against them. A regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society."

Katzen: There we put the benefits first and then the costs. We said regulations are good. They're going to do good things without doing bad things.

Balleisen: It continues, "Regulatory policies that recognize that the private sector and private markets are the best engine for economic growth. Regulatory approaches that respect the role of State, local and tribal governments. And regulations that are effective, consistent, sensible and understandable. We do not have such a regulatory system today." That's the end of the first paragraph.

Katzen: That's the first paragraph. The next?

Balleisen: "With this Executive order the Federal Government begins a program to reform and make more efficient the regulatory process. The objectives of this Executive Order are to enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the decision-making process."

Katzen: "Reaffirm the primacy of the regulatory agencies in the decision process." That was critical.

Balleisen: "To restore the integrity and legitimacy of regulatory review and oversight."

Katzen: Then comes us. After we have the primacy of the agencies, then comes OIRA. It was the placement of those two clauses. Now, the last sentence of that paragraph.

Balleisen: "And to make the process more accessible and open to the public. In pursuing these objectives, the regulatory process shall be conducted so as to meet applicable statutory requirements and with due regard to the discretion that has been entrusted to the Federal agencies."

Katzen: "Due regard to the discretion that has been entrusted to the Federal agencies." Again, it's the agencies that are primary. It was in the second paragraph. I forgot the first one is completely hortatory, but the second one where it describes the primacy of the agencies, in the second sentence and the last sentence. I think that last sentence, with deference to the agencies, was put in at the very last meeting. In any event, we did that. They all got back to me and said they could live with it. It was then presented to the President, briefed to the President. I don't think I want to talk about conversations between the President and myself. We went into the cabinet room. This was September 30th. He said I have an executive order here that I'm about to sign, revising the charter for OIRA on centralized review, which rescinds 12291 and establishes in its place a process for review of agency regulations.

I was there. He said is there any objection to this? I sat there with my heart in my throat. He picked up his pen, signed it, handed the pen to me as a souvenir, gave me the executive order. Said you better go into the briefing room and tell the world what we've just done.

One of the things that I was asked was who the reporters could talk to. I said you can talk to anybody. You can talk to business groups like NAM, Chamber of Commerce, Business Roundtable. They all know about this stuff. You can talk to public interest groups like so and so, talk to the agencies.

The next day, multiple papers that wrote it up all had called different people who had been in one or more of my meetings. Most of them said things like, "Don't agree with everything in there, but the process was inclusive. They listened to our concerns. They were responsive to our concerns. We're prepared to live with this."

Something that had been so divisive, and that you had heard Senator Glenn talk about in those terms was accepted by all who were affected because of the process that we conducted. And I thought that was one of the really important aspects of the rewriting of 12291.

Balleisen: Are there any particular, more specific changes in that document of the mechanics that come after the preamble that you would want to highlight as especially significant on these areas that you stressed as being important for adjusting the previous regulatory order?

Katzen: Yeah, there was one particularly important feature. In the past, all regs had been submitted to OIRA. All notices of proposals, we were making and all draft final rules.

We chose to limit review to only those that are "significant." The selectivity was a very important feature, in part because of resources, in part because of timing. And there were at the time probably roughly 2000 to 4000 regs a year, regulatory transactions, I should say, notices

and finals, 2000 to 4000. They covered everything, from what time you changed the locks on the St. Lawrence Seaway to setting a course for the America's Cup, that are almost ministerial. They're inconsequential. The agencies should be doing these on their own. They should follow the principles of the executive order, but there's no reason for there to be centralized review of these kinds of things.

It just bogged [everything] down. There were so many regs coming in that ... it took forever to process them. So let's winnow it down to the most important, and the most important were called "significant regulations." And we have a definition in here in 12866 of "significant", which is a four part definition.

The first part is that it have an annual effect on the economy of a \$100 million or more. That's either costs or benefits, a \$100 million. I want to come back to the hundred million in just a second. But that's called "economically significant." It was a \$100 million or more[, annually] for economically significant rules.

[The] second category of "significant" was those that have a material effect on the budget.... The second one was more because of the budget side of OMB, than of the reg side. Take, for example, how much Medicare is going to reimburse doctors for a mammogram? Well, once you set that figure, you are affecting the marketplace, because if that's what Medicare is going to pay, that's going to be the charge that's going to be given. It has market effects for sure.

But also if you raise that reimbursement by \$5-\$10, \$100, whatever, you're going to have an effect on the budget because the budget covers the entitlements, which is Medicare. Same thing with, whether it be small business loans, or veteran's benefits, all kinds of things. Social security, whatever. If you adjust those, it's going to have a material effect on the budget. That was the second criteria.

The third was if you're proposing or taking action which is inconsistent with action proposed or taken by another agency, then we considered it significant. So the Department of Transportation is telling you, "Well, when you're transporting hazmats, you have to do A, B, C, and D". And the Department of Labor, OSHA, the Occupational Safety and Health Administration, says, "So when you're transporting hazmats..."

Edward: Hazardous materials.

Sally: Hazardous materials. "You have to do F, G, and don't do A." You've got a problem, because the people say, "Excuse me, which government agency are we supposed to follow?" Obviously, hopefully it doesn't happen, but we did find some inconsistencies where at least the incentives to go in one direction from one agency were different from the incentives created by another agency to go in a different direction. We wanted to bring the agencies together.

The fourth was a novel legal or policy issue. This was the one where I got the most questions during our informal meetings. "What is a novel legal or policy issue? How do you define it?" I tried being cute. "Well, it's sort of like pornography, you'll know it when you see it." "How does that help us when we're trying to figure out if we need to send it to OIRA or not?"

I ultimately said, "Actually there's somebody in your office or your agency who knows perfectly well whether it's a novel issue of law or policy. That's your communications shop. When you're about to roll this out, and your public affairs people, or your communications shop thinks about it. Do they think it's going to go into the trade press? Or do they think it's going to go into the general press?"

Is this going to end up in the *New York Times*, or the *Washington Post*, or the *Wall Street Journal*? Is this going to end up on the front page of the *Washington Post*? Then it's a novel legal [or] policy issue. You know when you see it. If you're really doing something that is not economically significant, but is going to cause a splash, it should be reviewed by OIRA first."

I would say that in five years that I was Administrator, there was only one instance where something didn't get sent to OIRA on the ground that they didn't think it was novel. It hit the front page of the *Washington Post*. I read about it at breakfast. I came in and said to my desk officer for that department, "What's this? How did this get through in this shape?" It was a proposal.

He said "We never saw it," went back and checked they had said that it was not significant. We called the department, and it was withdrawn, and it went through the right processes. It sounds vague, but it was actually easily [applied].

In any event that was the selectivity. So of the 2000 to 4,000 we expected to see 200 to 400. The good news [for an] agency is that freed them up to do their regs as they saw fit. From our perspective, we could concentrate on those that were really important. Why spend our limited resources at OIRA on things that were relatively trivial? We could focus much more on the key ones.

I said I wanted to come [back] to the \$100 million. \$100 million had been in 12291. The question was, that was 1980, we were now talking 1993. There had been a certain amount of inflation. Should we raise it? Should we lower it? What should we do about it?

We decided, or at least I think we -- I'll use we because [I'm not] sure if it was completely I, that we ought to have a data driven decision here. I asked [the OIRA staff] to go back over the preceding three or four years, and do a distribution [curve] of the costs, or the benefits of the regs, that had come through OIRA, with a line through \$100 million, and see whether there were a lot of \$99 million, or \$110 million [regs].

What we found was the vast majority were either \$1 million or \$2 million, and then \$250, \$350 [million]. We didn't have billions then, but there was nothing right around \$100 million, so we chose to leave it. There was no reason to change it. By raising it, we weren't going to suddenly free up the agencies of a lot of \$99 million, or \$110 million regs....

So that was the selectivity. I think that helped the agencies. As I say, they were able to process their regs without having to go through OIRA, and it helped us.

Another point that I mentioned, but I wanted to come back to, is we really emphasized that costs or benefits, and it was more likely benefits, that could not be quantified or monetized nonetheless had to be considered. If you look at 12286, it says, "...that are essential to consider." I don't

remember exactly where that comes in, but it's somewhere in section one, not in the first paragraph, but in section one....

Balleisen: I think it might be clause B-6, "Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the attendant regulation justify its costs."

Katz: That's "benefits justify costs." Can I see?

Balleisen: Yeah.

Katz: OK, in section 1-A, the regulatory philosophy, this is the third sentence, second sentence. These are long sentences, very long sentences. It's the third sentence. "Costs and benefits shall be understood to include both quantifiable measures to the fullest extent that these can be usefully estimated." In other words, if you're going through all sorts of impossible chores to do this, let's be reasonable, to the extent that they can be usefully estimated. And qualitative measures of costs and benefits that are difficult to quantify, here's the clause: "But nonetheless essential to consider."

And the "essential to consider," I spent about a half an hour with a thesaurus looking for the word "essential." These are benefits that are difficult to quantify but useful to consider? Important to consider? Desirable to consider? Really important to consider? And we hit upon essential. Crucial to consider?

"Essential" seemed to capture the strongest most imprimatur and you've got to consider these. When we found the word "essential," I felt very happy because I felt that was a great word to stick in there. You can't quantify it, but you've gotta consider them! And let's be very clear about this.

So that was part of the "We're going to make benefits, unquantifiable benefits, have the same weight." In there was the distributive equities that is also one of the things that's in there. We had a couple of those kinds of 'squishy' benefits, that are hard to describe and that was a piece of it.

We also had all the openness [provisions], and you may want to do that separately or just have me keep rambling, but the whole section 6... We had...ok...

[end of audio track 8]

[start of audio track 9]

Balleisen: Sally, would you like to continue just discussing some of these specific provisions that emerged out of this, I think it was a six month long, process of writing the...

Katz: Yes, it started in very early May. June, July, August, and September it was finally signed -- five months or six months. It was signed by President Clinton on September 30th 1993. There were a couple of [other] things that I think are noteworthy in 12866. First, Section Four, which is called Regulatory Planning, or the Planning Mechanism, took from the Carter Executive Order, which had been followed during Reagan and Bush, the idea that agencies should plan

ahead, and let people know ahead of time what they are thinking of doing in the regulatory space. So there is a unified agenda, which comes out every six months, that is an opportunity for agencies to say, "We're working on these regs that have this effect on this time schedule."

This had become very much a paper exercise. One of the things that we wanted was that a fairly senior political officer in the agency sign off on these things. So it's not just the churning of the career staff, and would actually reflect the priorities of the current administration.

Once a year they would add to the Reg Agenda the Reg Program -- the Regulatory Program -- in which they would write up what their priorities were. These would be submitted in advance to OIRA. OIRA would circulate them to other agencies, so other agencies would see what their sister agencies were working on. There would be an opportunity for some centralized review of where this administration is going.

One of the interesting aspects is that this was made applicable to the independent regulatory commissions. Those multi-headed agencies whose heads do not serve at the pleasure of the President. From the FCC -- the Federal Communication Commission, the Securities & Exchange Commission, the Federal Election Commission, the Consumer of Public Safety Commission, to the FED....²¹

We wanted the independent agencies to just tell us what they were doing. Let other people know what they were doing. These are made available for the public, so the public [could] anticipate and be involved in the very earliest stages of an agency's thinking about these things. So extending that to the interdependent regulatory commissions was a serious step that we took. Part of that section, 4D, created a regulatory working group. This was an idea that I had, which was to convene the heads of the regulatory agencies. Sit around the table, get to know one another, understand their problems, share their concerns, be happy in their successes.

We established this, and what was interesting, which I might as well bring up right now, is how we implemented it, because I'm not sure it really had much of a life thereafter.

But for the five years that I was there, I structured these things so that, first of all, if the designated regulatory policy officer -- and these were usually the Deputy Administrator of EPA or the general council of DOT. These were the senior people -- if they could not be present, they could not send a deputy.

Because what happens in government is you set up these cabinet-level type of things, and the first meeting everyone shows up, the second meeting they all send their deputies, the third meeting the deputies send their special assistants, and the fourth meeting they send their secretaries, and it just goes from there.

So I said, "If you can't be present, then you're not going to send a substitute, unless you're testifying in Congress or you're out of the city on official business, in which case you can send an observer, who will not sit at the table." That was rule one. I got remarkably high attendance.

²¹ The Federal Reserve.

When somebody needed an excuse ... not to come, they would call and they would say, "Please, let me send somebody! I have to do this. The secretary asked me to go and do this, and I told them I had this reg working group meeting, but..."

I tried to be fair, but I wanted the senior people. This became particularly important after '94, when we were faced with a hostile Congress that was introducing all sorts of reg bills. We were able to discuss some of those provisions. What would happen very frequently is that certain agencies would receive communications from the Hill -- "What's your position on this or that?"

We were able to then coordinate responses. I became the point person for answering letters that had gone to individual agencies on general [regulatory] questions. I did not become the point person on specific rules, but on general questions. The agencies, I think, found it useful to be able to discuss, "Well, how are you responding to this committee inquiry?" "How are you responding to this committee inquiry?" That was a very good thing, post '94.

There were also times when we would think about things [common to many agencies]. For example, we issued risk assessment principles and guidelines on how to do cost benefit analysis, Circular A-4 originally, the original draft.

Balleisen: ...and that came out?

Katz: Those were coming out of OMB. I would circulate them around the Reg Working Group. An agency would say, "We can't do that." Another agency said, "We can, why can't you?" There was a sharing of information. It was always very helpful to have the input of all of these different agencies. The Reg Working Group process served many functions. I always would have coffee and brownies or cookies. Once in a while we'd have special guests, like the Vice President or something. These helped get the attendance up there. I would circulate an agenda in advance that would have topics that really would be of interest to the vast majority.

What was interesting were the relationships that were formed between agencies. EPA and DOT, or Labor and Interior, agencies that might not otherwise get to know one another very well, suddenly developed relationships and were able to work more smoothly.

It is so much more productive, when you know somebody, to be able to discuss an issue, than if it's just a name and you've been told by the staff, "Well, they're taking this position." OK. How do you deal with that? But if you know them, you know all about them, and you've shared milk and cookies at the reg working group with them. It works more smoothly. So that was the Reg Working Group. That was in Section 4.

Section 5 of the order was the look back. Everybody has a look-back. Reagan had a look-back, Bush had a look-back, we had a look-back. George W. Bush had a look-back. Now Obama has a look-back.

Look-back says, at some point when we wrote these rules, we thought we were doing the right thing. Were we? Have they worked out? Do they need to be modified? These are an attempt to find low-hanging fruit. Things that can be wiped off the books and claim credit, because you're reducing burden. But at least our experience was it's not the most productive use of assets,

because for the most part, once a regulation is issued and the regulated entity complies, the costs are internalized.

Take something like seat belts, or air bags. When it comes out you've got to change the assembly line, you've got to get the materials, you've got to train the employees. There are serious costs. But once you've complied, the remaining annual costs on that are generally the material of the air bag, which is a little bit of nylon, and the gas that inflates it.

Even if it was costly at the time [the rule was issued] to remove that, well, what are you saving? Are you going to have them redesign the assembly line? That's going to cost money rather than save money. Retrain the employees? So on certain types of regulations having to do with processes and installation of capital investments, you're not going to save very much money [by rescinding a rule].

The other thing is, on air bags -- cars now sell safety. How many times do you see the advertisement of the car running into the wall, and the air bag comes out and saves the dummy who's in there? Car [maker]s want safety. So what does it do to look back? Is that the best use of your resources?

There are some look-backs that can yield cost savings. Those normally are where technology has changed, and it was either a design standard in the first place or it's a monitoring issue and technology has enabled you to do it electronically, so it doesn't have to be done manually, and you can cut down on man hours or the frequency of information being reported.

There are a variety of different things that can still be done. In any event, we had our look back and I thought it was sending the right signal, but it was not going to yield a great treasure trove.

Balleisen: So it seems like the principle of selectivity is relevant there as well. The same way that you were describing a sort of determination to have a clear filter for what OIRA was going to look at. You would want the same for figuring out what rules that are already on the books need a close examination, and which ones don't. Maybe most of them don't.

Katzen: I think that was our predisposition, but this was one where unless they were going to do a major deregulatory move, which would require initiating a new rule-making proceeding, this would be left to the agencies themselves, rather than through OIRA. OIRA would not be there except to urge them onward and upward in the process.

Balleisen: I'm hearing several goals that you had for OIRA in this process of creating a new Executive Order that would create a framework for the way the agency would function. More cooperation, more coordination, greater selectivity, a pushing down of analysis to the agencies where possible. Were there any other really substantial, initial goals that you would want to stress as being part of this process?

Katzen: The other major goal was the transparency, the openness, the public participation, and I suppose the dispute resolution piece at the back end of the Executive Order. Let me talk about transparency, because we did some things right and some things wrong. We learned some lessons along the way. In terms of openness, again, we were operating in a system where the previous administrations had conducted OIRA with no fingerprints, big black box, no time

limits, no nothing. So there was no accountability. So we had structured section 6A is what the agency had to do and 6B was what OIRA had to do. One of the things was that we gave ourselves a 90 day time limit for review. This was, I thought, eminently sensible and that we would not have the situation where it went into a big black box and never, ever came out and you never knew what happened.

Didn't quite work that way. A couple of the agencies used the clock against us. For example, the reg comes in on day one -- this is the draft notice or draft final -- comes in on day one. By day six or seven, the OIRA desk officer has reviewed it and sent back comments. "This doesn't quite work", "The methodology is screwed up", "You ought to look at this", "You ought to think about that", "This paragraph is totally unclear", "This provision has been tried by your agency 15 times and is not very efficacious. What are you going to...?" Et cetera.

Day 88, the revised draft comes back with a little note, post-it. "We were able to do 1 and 6 on your list of 12 of things, but we ran out of time. It's Day 88 so here's the rule back," with the clear expectation that we would have then 2 days and that was it. They used the clock against us.

"OK. This is not working. How do we get it so that the time that they're working on, it comes off our clock?" As soon as we send it back to you, we stop our clock. We have 90 days when it comes back. Well, that's not what the order said. The order said 90 days. I was stuck with 90 days.

Now, we had written into the order that there could be an extension of time of the 90 days. It was written with an interesting comma. It said that there could be an extension one time only by the director of OMB for 30 days or at the request of the agency.

Well, did the 30 days apply to the agency request or did it only apply to the director's request? The way it was written, one could read it that the 30 days only applied if it was the director of OMB who was giving you the extension, and that if it was the request of the agency, it was open-ended because it was the request of the agency.

If that was the case, then I needed to convince the agencies that they needed to request an extension. That was actually, in fact, relatively simple because the very first time it happened, we got the rule back on day 88. The desk officer came in and said, "Well, we've been gamed." I think that was not the word that they used. Probably started with an "F" rather than a "G."

I said, "OK. I'm going to call the agency." I said, "Here's the situation. We've got a 90 day time limit. Your guys have done 2 of the 12 things we've asked them to do and the others are, actually, quite simple. I can only view this as obstinacy, or gaming us or whatever. I deeply regret this, but we now have two choices under the Executive Order. You can request an extension so that we can deal with this thing in real time, sensibly."

"I would promise to commit my resources and you would promise to commit your resources and we would go and solve this problem. Or we can use the 30 days only at the request of the director who has to sign something and put it in the *Federal Register*. I don't know what your preferences are, but I know that Leon is extraordinarily busy with the budget right now, and is wrestling with some very serious issues. I will have no trouble getting time on his agenda, on his schedule, on his calendar. That's not the problem."

"The problem is -- before he signs something, he reads it. So I'm going to have to type up something that says that you have presented us with a rule. That there is additional work to be done. That there has not been sufficient time to do it. And that -- because you don't want to request an extension -- he is going to have to provide notice that there is an extension. And put that in the *Federal Register*."

"And he's going to have to sign it. Do you really want Leon Panetta to spend the time necessary to read and ask me questions about how we got to this stage? To sign that? Is that really what you want done?"

Given that ordinarily they think of Leon Panetta as the budget man -- and the budget is pretty important to most agencies -- that's the last thing they want. For me to have to tell Leon that x agency is being obstreperous. That they are gaming us. That they are stonewalling us. Or whatever expression I choose to use and I probably will use the f-word and Leon will not take kindly to that. "He will certainly sign this, but is that really what you want to do?"

And the agency says, "We'll request the extension." I go, "OK. Good. Now, we're sending this back to you, and let's see how quickly you can turn it around and I promise you, we'll turn it around quickly at our end." And we did.

All you had to do was [that] once with each agency and we stopped this. But that's where setting a deadline, which sounds such good government, actually had perverse incentives for the agency. I didn't know that at the time, but I now understand it a lot better, and fortunately we had this very opaque clause that I could read. No one ever challenged the interpretation of the clause, that the thirty days only applied to the [OMB] Director. But I was prepared to argue it vociferously.

There was [also] the openness [issue] generally, and openness generally had a couple of pieces. One is that meetings would be logged, any meetings at OMB we would put in the public docket, who came to the meeting. And for the meetings we would always invite a representative from the agency, so that the companies or the public interest groups would not tell us things they hadn't told the agency. Because there'd be an agency representative there.

Now this worked out [to be] highly beneficial in a number of respects. We made a provision in the Executive Order that only the Administrator would be there. We wanted a politically accountable officer there, so there wasn't any back channeling through the staff, which had been an allegation during the Reagan years. [Critics of OIRA said] that the industry ... was sending things in through the transom, to the staff of OIRA, who were taking these documents and then throwing them back at the agency and it was a...

Balleisen: Separate from just using the notice and comment mechanism...?

Katzen: Right.

Balleisen: ...with the agency directly?

Katzen: Exactly. This was the back door. There were fewer fingerprints and this was not healthy. I think I mentioned that I had engaged in something dissimilar, but behind a curtain. We wanted to make sure that any meetings were with me. If I couldn't come, I would designate

somebody, it would usually be my deputy, who would run the meeting. I made it a practice of going to those meetings.

Because I was there, the agency sent a fairly high-ranking official. They didn't send just the person who had drafted the rule. They didn't send even the bureau chief. They would send somebody who was a political officer.

This might have been the very first time that this political officer heard the arguments. Often what happens within the agency is, they have a proposal and they pitch it to the next level, and they pitch it to the next level. The arguments against fall by the wayside as the preferred option moves up the ranks. I would have people there -- a Deputy General Counsel, or a General Counsel, or an Administrator.

When the [outside] people left, [the agency official] would stay behind and I would say, "Well I thought that was a colossal waste of time. There was one argument that they made which I found interesting, or curious. What did you think of this particular thing?" Or, "Hey, I was really blown away by this argument. What do you think about it?" Nine out of ten times, the person would say, "I hadn't heard that before," "I didn't know about that," and "I'm going to go talk to my staff, find out what's going on, on this particular issue."

I always made sure that my staff double checked [that] whatever [arguments] they were raising were in their comments -- no new stuff. I was not interested in back doors. I knew it was in the comments, but somehow it had never reached the decision making level at the agency.

Balleisen: Because there's a winnowing process there as well -- has to be.

Katzen: Right. I thought having these meetings and having these people there was really quite useful. I was particularly interested not in having lobbyists or even lawyers, forgive me. I was interested in having the business men, if it was a company, the people on the production line. Why doesn't this work? I would often say, "Humor me, let's pretend there's a problem. How would you solve it? If you don't like what they're doing, what would you do? Your company's not doing this but let's say other companies are."

I actually got a fair amount of useful information, again, in the presence of an agency representative who was able to then better understand the implications of what was going on. Those meeting I thought worked well.

Very little was put on the record other than there was a meeting, who was there, what subject was discussed. We didn't keep notes, we didn't do transcripts. Those who believe in complete transparency found that inadequate.

Those who believed in fishbowls would say well, yeah, how do we know what was said? This is where you have to find a balance between getting candid advice and then spending full time writing notes and keeping ledgers. I thought that it was generally very useful.

There was another piece of openness that didn't work well. There's a provision...and I'll find it at the next break for you so you can document this...but there's a provision in there that says after the rule is published the agency is supposed to state what changes were made.

And I'm quoting I think, "at the suggestion of OIRA," or "what changes were made because of OIRA." That's the essence of it and I'll get the exact language when we get a little bit of a break.

Balleisen: It's like having the OIRA font on the draft.

Katzen: Exactly. Now, this gets a little tricky, because let's say we talk to an agency and we say, "You've got three options here, A, B, C. A takes you in this direction. B takes you in the same direction. C takes you in a different direction." And they go, "Oh, oh no, there's a missing "not" in there. We wanted them to go in the same direction...They were all supposed to go...Oh no no no there's a typo there. No no no there's a typo. We're going to change that." Is that change at the suggestion of OIRA? I don't think so, because OIRA hasn't said anything other than to point out a fallacy or a problem that the agency has chosen to correct.

Scenario two. The agency proposes to do A. We say, "Hmm You know, if you do A, you're going to have these adverse consequences. If you do B, you get almost the same result and none of the adverse consequences."

The agency says, "Huh." The agency says, "OK. But, If I do C, I also get what I wanted and none of the adverse consequences and I like C better than B. I'm doing C." Is that at the suggestion of OIRA? I would say no. Hmm, not sure.

Then there's the not infrequent "This does not make sense." What are you trying to achieve? "We're trying to achieve this." Well then, why don't you write it this way? "Oh yeah, that's what we meant." Is that at the suggestion of OIRA? We're getting closer.

Now, if the agency has to say, "I'm doing this at the suggestion of OIRA," sometimes that might be beneficial if, for example, the agency wants to pretend that it's stalwart in its defense of its constituents.

[end of audio track 9]

[start of audio track 10]

Balleisen: Sally, you've been talking recently about a number of different elements of what you might think of as a management style while you were at OIRA. I'm wondering whether you think there was any significance to the fact that you were a woman in how you developed that management style and whether that was distinctive precisely because of your gender.

Katzen: I think there was an element that is gender-based. Studies have shown that women leaders tend to be more inclusive, more interested in talking to a number of people before reaching a decision. Maybe it comes from something in our DNA that makes us a little less secure and we want to touch a lot of bases before we move forward. Less confidence in our own judgment and so we want to run it up the flagpole a couple of places, to mangle all of my metaphors. I think there is a gender component to it.

But if we're talking about management, I want to make sure we don't lose what I think is one of the key components of whatever success I had at OIRA. That was earning the respect, if not affection, of the people who work for me. That I got, to a large extent, by hard work.

They knew if they gave me something, I would read it. I would read it carefully, that I would ask questions, that I rolled up my sleeves. I was not there for the perks, not that there were very many perks anyway, or for burnishing my resume, but that I really cared about what I was doing. I think they saw that, and I think they respected that.

Some of this, perhaps, has roots very, very deep to when I was the Editor-in-chief of the Law Review, and was faced with a management question of how to run the Law Review Board as the only woman, with all of those men. I knew that I had to prove myself. I had to work hard, and work smart and work strong.

That was part of my management style at OIRA. It was extraordinarily gratifying that it was reciprocated. It seemed that the harder I worked, the longer I stayed there, the more they worked, and the longer hours they put in. I think that is not gender-based, necessarily. I think that's a neutral principle that managers should understand. It doesn't mean you're doing their job, but you're doing your job as well as you can.

Balleisen: One power that you had at OIRA, would be to send a formal return letter to an agency, if you had questions about the rules that were coming your way the proposals that were coming your way. My sense is that you did not use that particular tool that often.

Katzen: That's correct. My recollection is we used it once, fairly early and it was on a budget-issue based regulation. A regulation that was going to have a material effect on the budget, and was therefore of even greater concern to the budget side of OMB than the OIRA side. The agency was not receptive to our suggestions the suggestions, again, probably coming from the budget side, rather than the OIRA side and declined to accept our good advice. This was raised with the director, and the people from the budget side were strongly recommending that we send a return letter saying this was not acceptable. I believe I wrote the letter, and I believe I signed the letter, not personally wrote it, but I was responsible for it, I went along with it.

We didn't use it in other instances, because a return letter is public. It's part of my sense that you do more with persuasion than with power. Sending a return letter, which is a public put down, is kind of the other side of a gotcha. I don't think it gets you anywhere or not where you want to get.

If I had a situation where it would be a return letter response, I picked up the phone and called the agency and said, "This isn't working, we're not able to clear this. We have a serious problem, here. We're not getting a meeting of the minds. You and I have got to sit down and work this through now."

When John Graham, who was one of my successors during the George W Bush administration, reinvigorated the return letter and sent out something like 10 or 11 in the first five or six months after he was confirmed, and made a very big deal out of the fact that he had returned more in two months than we had returned in two years or maybe it was he had returned more in five months than we had returned in two years.

I smiled to myself and thought OK, that's his style, that's how he wants to do it to serve his interests. I didn't need to do that. I simply did not need to do that. I could communicate effectively without making a public statement.

The receipt of a return letter has got to have some consequences at the receiving agency. The people don't like it and with good reason. They've worked hard. It's not because they are incompetent or lazy. They've approached it in a certain way. They've done their best. To publicly criticize them, to say "You missed this," or "You should have done that," or "Why did you do this?" I don't think is the most productive way of proceeding.

Balleisen: We've talked a good bit of the nature of your interactions with the agencies, and also a little bit about interactions with other people in the White House. I wanted to ask you as well, just about how frequently you had interaction with either the Director of OMB, which I assume was quite frequent, or the White House Chief of Staff, or the Vice President or the President.

Katzen: It would differ. Starting with the Director of OMB, I did attend the [OMB] Senior Staff Meetings, and when something was happening or about to happen I always gave them a heads up. There were one or two occasions that I remember seeking advice. "Should I continue to press this, or not?..." When Leon Panetta became the Chief of Staff, and Alice became the Director of OMB, she had a strong economic background. She underst[ood] regulations. It turns out that she lived two and a half; three blocks away, and very frequently, we drove home together. I gave her a lift home.

I don't remember, it certainly was not all business talk, but I was able to make sure that she knew what I was doing, and was comfortable with where I was. I had a very easy relationship. I could walk into her office at any time and say "Here's a not so hypothetical/hypothetical. What do you think about this situation?" She always had good instincts.

Frank Raines had given me a lot of support, and had a lot of confidence in me. I was very fortunate, in that all of my directors appreciated my strengths, and allowed me latitude that many people might not have had under the circumstances....

Outside of OMB..., [I had] some [interactions], but not all that often. Leon Panetta, when he was Chief of Staff, would sometimes call me because it was a regulatory issue, seeking my advice, saying "You're not in on this discussion, but you may have something to contribute." [He would] pose an issue, and ask me to talk to somebody else in the West Wing about a policy that was being discussed or a process that was being developed.

Erskine Bowles ... was [the next] Chief of Staff. Erskine had been the head of SBA, the Small Business Administration. He and I had some work together on some regulations. I have enormous respect for Erskine. He taught me another management tool, if you will, or trick, I'm not sure which it was. There was one occasion where a Cabinet Officer had complained to him about a regulation that we were not seeing eye to eye on and that I was holding up, according to the cabinet officer. There was a meeting in Erskine's office and the meeting was relatively brief. The cabinet officer spoke and explained what was important to him and to his department. I responded and Erskine paused, smiled and said, "It is clear that the two of you know a great deal more about this subject matter than I could ever hope to learn in the time available.

If you're asking me to make a decision, I think both of you will be very unhappy. I suggest you go into my closet." It was always a joke because it was a closet that was large enough to have one or two people sit. "I'll give you a half an hour and you figure it out."

Nothing focuses the mind as much as a deadline. Nothing focuses the mind as much as the threat that if you can't figure it out, you will be unhappy. The two of us came out in about 15 minutes with a solution which probably neither one of us felt was the right decision, but it was close enough to keep both of us on board.

That approach of not trying to make decisions when you don't know something and pushing those who do know to try a little harder, was a technique I used later in the administration when I was Deputy Director of Management.

We had one meeting and it was involving HIPAA, the Health Information Privacy Protection Act. We were trying to issue regulations. I had agency representatives around the table in my conference room and they were, literally, yelling at each other. They all wanted different things and they were all right from their perspective.

They appealed to me to resolve the dispute. I pulled a small Erskine and said, "I don't think I'm going to do that. What I'm going to do is lock you in my office." It was then about 12:30, 1:00, and I could hear the beginnings of stomachs grumbling. "I'm going to lock you in my office for an hour, and I'll come back and see how you do." I came back and they had resolved the issue. That was very significant.

The other point of the Erskine Bowles story was that it was rare that I would go to Erskine, or Leon or, later, John Podesta. It was more frequent that the cabinet [officer] would go to him and say they didn't like that was happening, or they would go to the director of OMB.

There was one occasion where some cabinet secretary went to the director of OMB and complained about me. Whoever the director was called [me] and said, "OK. Tell me what's going on here," and was, ultimately, supportive of my position on this.

The Vice President, I talked to with some regularity, normally with Katie McGinty, who was the head of CEQ, the Council of Environmental Quality, who had been Senator Al Gore's legislative director and was very close to him. Katie was right down the hall from me, and I had been quite careful to make sure that Katie and I were seeing things alike. We talked frequently. When an issue was going to be a serious disagreement and would involve the Vice President, I wanted to know where Katy was. I didn't necessarily always agree with her, and she didn't necessarily always agree with me. We would have some disagreements, but I wanted to know where she was. When we would go in there, go talk to the Vice President, it was always a very respectful, substantive discussion that we had.

The President, I saw on one occasion on the reg itself. I mean, there were a number of occasions where I would meet with the President, [like] the signing of the Executive Order -- briefing him and the signing of the Executive Order. He had a number of Saturday morning radio addresses which were on regulatory issues, on which I had worked with speech writers, and then we would prep the President. He would do the radio address and I would be in attendance. We would discuss it before and after.

There were a couple of other issues where, out of the blue, I would be asked about certain things or the President would send me a note, want to talk to me about something. There was only one rule that was, actually, presented to him pursuant to the dispute resolution [clause in the

Executive Order]. There were, actually, a significant number of conversations on the legislation that we had discussed earlier and wanted to have clear understanding of his priorities, his preferences and be able to operate on that basis.

Balleisen: We talked before about how profoundly the election of 1994 transformed the political context for regulatory policy, in general, [and] OIRA's role, in particular. Did 1996 make much of an impact? Did that change things very much or not so much?

Katzen: It didn't change things because the Congress remained Republican. In that context, it was a re-election, which was an affirmation of the approach that President Clinton was using. I think, it made us somewhat more confident that we were proceeding in a sensible way and that we should continue that. In '94, shortly after the election, there was a moment where the President said something about [how] he remained relevant, which was probably the nadir. The President of the United States is relevant and to even have to say, "I'm relevant," suggested a lack of power or position. At that point, I don't think any of us would have bet a substantial amount of money on his re-election.

Then came the shutting down of the government. That was something remarkable in terms of the President standing for his principles, standing up to the Congress. The Government was shut down, and he succeeded. It was a testament to his smarts and his political skills strong emphasis on political skills that turned the corner. At that point, I think we thought, "Ah, he probably could be reelected." As the election came closer, it was not a surprise when he was re-elected. The election in '96 didn't change much. It had been the roller coaster of '94, '95.

Balleisen: That Government shut down -- what did do to the morale of the agencies, or even that of OIRA, while it was happening?

Katzen: Well there were a couple of different things that were happening. One is, there is a provision..., "essential personnel" would show up, but non-essential would not. Well, no one wants to be non-essential. One of the things that, as a manager, I felt it important to do was to meet with the staff. I was considered "essential," and there was one other person, but I needed to talk through with the entire office, what this designation didn't mean. It didn't mean they weren't essential. It didn't mean they weren't important. They needed to understand the respect that I felt for all of them.

John Koskinen was then Deputy Director for Management, and I believe that he sent either a memo out, or something to all the agency heads to say "Think about your people. Talk to them about it. Let them voice their concerns and make it clear to them why this is happening and that it's not personal." What I sensed was that when the Government reopened, people just came back and kicked in and caught up on the work that hadn't been done.

Many, many of my staff intended to pack up their desk and go home and work at home. I said, "No, you don't understand. You're not allowed to work. That's the way it is. You've got to leave your papers here. You can't be writing memos. You can't be working from home. That's not what this is all about. The Government is shutting down." There was some snide comments about "Well, are you going to search my briefcase on the way out the door?" I said "No. I'm just going to tell you what the rules are, and hope that you'll abide by them."

It wasn't easy. It was not a vacation. It wasn't like "Oh! Free time! Let's go play!" A snow day when you're in grade school. It was something that was serious that they needed to understand, and did understand the broader context – why the government was being shut down. The multiple riders that were on the appropriation bill. The things that the Republicans were demanding which the President was not about to agree to.

Balleisen: When you had a major rule that had clear [relevance] to OIRA and was now going to promulgated in the *Federal Register* -- to what extent were you involved in the administration approach to rolling that out? We've been talking an awful lot about the communications with OIRA, between OIRA and agencies, between OIRA and the rest of the White House apparatus. What role did you have, if any, in thinking about communications strategy about regulation to the broader public?

Katzen: In the beginning very little, if any. Ordinarily, rules were announced by the departments or agencies without any interference or influence from the White House, certainly in '93, '94. Rarely would I be asked any questions about this. As I said I had told the Director "This is a biggie and it's coming down." Whether he carried it on to the West Wing and told them, I don't know. After '94 there was a heightened sensitivity to reactions to everything, including breathing! As a result my sensitivity to how these rules were going to be rolled out began to increase. Over the course of the next year or several years, I became more interested in, and more involved in that process. It started with my talking with the agency.

It was normally in the form of questions. "How are you expecting to roll this out?" "How are you portraying this?" If it was a very controversial rule, I might actually ask to see the press release that would be accompanying the rule, because I wanted to make sure that the issue on which there had been such controversy was being presented in a way that I thought was the most productive.

There were occasions where I would be asked by the agency "Can we get a White House presence at the roll out?" Another way you might understand it is "Gee this is really important, wouldn't the President like to announce this in the Rose Garden, and I can stand next to him?" This was so they could get face time with the President.

On those requests, I would think about whether this merited the time and attention of the President. There were a couple that I then would take to either the Chief of Staff, or someone in the West Wing to run up the flagpole. I might check at that point with someone at DPC, the Domestic Policy Council, or the NEC, the National Economic Council, "Do you think this is something that the President should be involved in? Would this be useful?..."

[President] Clinton made a fine art of appropriating agency work, and there was a reason for that. Once the Republicans had taken control of the Congress, it was very hard to get legislation through. It was relatively easier to issue regulations or executive orders. To have the President associated with something good that was happening was a way of giving him something to tout, a small part of his legacy.

There were sometimes when I would say "Say, do you want me to see if the West Wing is interested in this?" There were times when an agency would say "Can you find out if the West Wing is interested in this?" That began to happen and then we came up to '95,'96, right before the

election, and there was the exquisite refinement of this sensitivity, of not putting out rules right before the election that would be highly controversial.

This happens in every administration. So there is somewhat of a slow-down as you really think about the implications of these. In those instances, I might say "This looks good to me at this point, but I'm not sure we want to roll it out now." This was a timing question, or "Let me check with the West Wing and see whether this really should fly at this point or not."

Then we went into the second term, and in the second term again we had a Republican Congress. We also had at some point in the next year-and-a-half or so, the beginning of the impeachment process. That in one sense made it more important that good things could come from the President. Again, a further heightening of this sensitivity of how to roll it out.

This was also a time at which I had an increasing understanding of the dynamics of the roll out. Who do you want to be saying good things about it, the day it comes out? Well indeed who do you want standing on the stage when you announce it? If you want a Rose Garden ceremony, it's not just the President and the Secretary of whatever. You want some of the regulated entities there applauding this.

We've seen this more recently with the CAFE²² standards that are announced in Rose Garden ceremonies with the car manufacturers standing behind the President [and] environmentalists standing behind the President. We all come together. Kumbaya. Everyone's happy with where we are. That sends a very strong message, that this is a sensible regulatory activity that is applauded by all involved. That tends to inoculate it from criticism that might otherwise come if it was just shipped out in the dark of night and no preparation was made. During this period there was more and more elaborate thought given to the roll out itself, not only within the administration, but among those who might be affected by it.

Who to let know what was coming? You didn't want to reveal state secrets and tell them what it was, but you wanted to give them enough so that they felt comfortable standing on that stage with you. This was something that was evolving, and I think I became increasingly adept at anticipating. I didn't have all the answers, but I could ask the agency the questions, or make sure that the West Wing knew.

Then when I came back to OMB as the DDM,²³ the OIRA Administrator had stepped down, so Jack Lew, who then the Director of OMB, had asked me to take over responsibility for OIRA again. At that point, the Vice President was running for President and while it was not the President, it was a member of our administration so there was going to be increased sensitivity in advance of an election.

At some point, and it may have been as early as '97, or early '98, we started something called the "Heads-up Memo." I would write a memo to the Communications Office, the Chief of Staff's office, DPC,²⁴ NEC and some of the other policy offices in the West Wing saying, "This is to let you know that we have been reviewing and are very close to concluding our review...."

²² Corporate Average Fuel Economy Standards.

²³ Deputy Director of Management.

²⁴ Domestic Policy Council

That was a way of saying it was about to happen. "Concluding our review of a regulation from," name the agency, "that," describe in words of one syllable, "would do x." I would try in that memo to say, "We believe that this constituency will love it, this constituency may be opposed." Give them some sense of how it would play. "We do not expect a lot of press on this," or "We expect this to be front page. Any questions you might have on the substance, or thoughts you may have on how this will be received, please let me know." We'd send these heads-up memos on most of the major regs.

Balleisen: In this context of becoming more aware of the importance of communications with the public and becoming more adept at it, did that also involve developing deeper relations with journalists?

Katzen: I had been very fortunate to have good relations with journalists from the very beginning. I knew what I could talk about and what I couldn't. They respected where I had to draw the line. I respected them fishing beyond where I had drawn the line. For the most part, I don't think there was a qualitative change in my relationship with reporters. Because all of this roll-out was to come, either from the West Wing, or the agency, or both. I might be asking the right questions, and I might be providing some useful suggestions, but I wasn't part of the roll-out.

Balleisen: Did you have a sense that there was a corps of regulatory beat reporters?

Katzen: Yes.

Balleisen: So who would you say the most important ones were?

Katzen: This is embarrassing. I'm not sure I could remember any of their names. Cindy Skrzyicki, an unpronounceable name, was at the *Washington Post*. She wrote a column in the *Washington Post*, at least once a week; she was very good. She later moved to Pittsburgh, Pennsylvania but continued to work for the *Post* and also wrote a column. Her column was syndicated in a number of different places. She wrote a book which was a collection of her columns that I used to use in my undergraduate course, because it really put it in lay terms. She was able to translate complicated and complex technical questions into relatively simple language.

There were two or three other people at the *Post* who wrote on The Federal Page. For some reason in the early years I'm thinking Steve Barr was still there. But I may be remembering him from the Carter administration, but I think there's a Raj, and his last name, again, is unpronounceable. It starts C-H-.²⁵ He now writes for the *Post* in foreign affairs, but he was writing in the field of technology and information policy, and he was quite good.

There were two people on the beat from the *New York Times*, and then we had the trade press.... There were a couple of magazines that did long pieces, thought pieces that I would respond to. I had fairly minimal contact with the Hill papers, *The Hill*.... There were a couple of Capitol Hill

²⁵ Rajiv Chandrasekaran.

papers. That was much more politics than policy, and I tried to stay away from those, and I'm not sure that I ever got to know the guys very well, or gals, as the case may be.

When a call came in, I would ask what it was that they wanted to talk about, what subject they wanted to talk about. Certain subjects I was not willing to talk about at all, and that was the negotiations with the agency, the relationship with the agency. On some of the legislative issues that we had discussed earlier, I thought it would be useful to make sure there was a good-government description of what we were seeking to accomplish.

Our press officers at OMB, and there were two or three over this period that I worked closely with, could not have been better or nicer. They had a lot of confidence in me, and they usually sat in the room and I would have it on speakerphone. But they basically would let me do my thing with the press, and for the most part, I found that these people were working under very quick deadlines, did not have the background, and were just flying as best they could, and they did the best job they could, which was not always a really good job, but who could have expected otherwise?

Balleisen: So if you could put yourself at the point where you were moving toward the end of your tenure at OIRA, from that vantage point, how had you seen the basic approach of benefit cost analysis evolving from, say, the late seventies when you first encountered it at COWPS, up through your tenure at OIRA? Was the approach getting better? Was it becoming a more common tool, not just within the oversight part of the White House but also within the agencies? What were the key ways in which this approach to policy analysis had shifted over the course of ... almost two decades?

Katzen: I think you have to distinguish the theory or the science from the practice. Clearly, the science of cost benefit analysis, if I could call it that, what the economists were saying about cost benefit analysis was evolving, slowly but surely. The members of my staff were able to call on a lot more supportive literature, had more creative ways of explaining some of these things. We had made substantial progress in quantifying and monetizing the benefit side of the equation. The actual methodology of cost benefit analysis was, I think, evolving in a constructive fashion. The practice of it was quite varied. There were some agencies that had the capacity and did remarkably good jobs. There were other agencies that did not seem to have any capacity.

Balleisen: Could you give me an example of one from either side?

Katzen: This might surprise some. One of the best agencies was EPA. Another, which was superb, was DOT. DOT did not have the same types of issues, because ... lives saved on the highway ... was easier to calculate than the value of looking across the Grand Canyon and seeing the other side. But those two stood out as agencies that I thought were really proficient and professional in their application of cost benefit analysis. They might make some mistakes. They might use some assumptions we would question, and they might have some other fallacies that our staff would find, but we're talking about generally competent and commendable work.

There were some other agencies that did not have staff economists, did not think in these terms. I might get a cost benefit analysis from an agency that was three pages long, double spaced, where obviously not a lot of thought had gone into it. And this raised a very important issue for me because OIRA can't do the cost benefit analysis [in the first instance;] it can simply review it. It

was important to inculcate in the agencies the capacity, and the culture, to do this analysis themselves.

One way to do it was to try to provide money through the budget process, so that they would hire a few more economists. Another way was to speak to the management people including the Secretary of the Department, or the head of the agency saying, "You need to build up your staff, so that you have the capacity."

It was very uneven, but I think the most negative thing I would say about the entire process was that too frequently, much too frequently, the cost benefit analysis was done after the programmatic decisions were made. It was a paper exercise to justify the policy decision that had already been determined, rather than what I always think of as the utility of cost benefit analysis -- ... an iterative process.

To come in really very early, so that you are doing the benefits and the costs of a variety of approaches, and different alternatives, and let the cost and benefit analysis help guide the decision. It should be an input that is used in making the decision, rather than an exercise which is done afterwards to justify the decision. This would require not for just the agencies to have a capacity, but to have the culture of having that expertise, that interdisciplinary approach, brought in to the process early on. And this did not frequently happen....

We hear that agencies are stove pipes, which they are. Within agencies, there [are] stove pipes -- how to break those stove pipes down? How to make sure that, you've got all the different capacities at work early on. It should be done, cost benefit analysis should inform, not be used to justify the decision. If it's a paper exercise, it's not worth the paper it's printed on. And that had been sort of my preaching if you will, to the agencies, my plea to the agencies. You have to do it! Make it meaningful! And, it wasn't always easy.

Balleisen: To what extent did they eventually as a whole, collectively become part of the chorus? In response to that preaching?

Katzen: There was a growing, I think there was an evolving pattern, and I think that where we are today is a lot better than where we were in the 90's, which [was] certainly a lot better than where we were in the 70's, and I would actually use the regulatory working group we've discussed as a forum to talk about poster cases, where had we known this at the beginning we would not have structured the rule this way. Think about that when you next are developing the rule.... HACCP, which we have earlier talked about, was an example because [we] did a very rudimentary cost benefit analysis on using HACCP instead of Command and Control for seafood safety and it said that this was a winner! We were able to use that as an example of sensible regulation.

[end of audio track 10]

[start of audio track 11]

Balleisen: You left OIRA in 1997.... I get the strong sense that you were deeply committed to OIRA during your tenure there. You had been eager to propose that you take on the role of

OIRA Administrator during the Clinton transition period. You had a very intense five and a half year period working at OIRA. What led you to leave the agency?

Katzen: Being Administrator of OIRA was the very best job I ever had. I can say that now, 20 years later. It was the very best job I have ever had. I got a great deal out of it. It was extremely gratifying and rewarding. I had been asked several times while I was Administrator if I would become the Deputy Director of Management for OMB and possibly other positions and I said, "No. I really like being at OIRA. I like doing what I'm doing. I like the people I'm doing it with. I think this is the best use of my skills," and was really quite content.

And then, one morning, I got a telephone call. I was at home, so it must have been a weekend. It was from the Chief of Staff, ... then Erskine Bowles, who said that there was a management problem at the National Economic Council -- the staff was large, which I had known, and was not functioning at the level that they had hoped.

He had had a number of conversations and wanted me to go over to the NEC, the National Economic Council, and serve as the Deputy Director of the NEC. He said very nice things about my management skills.... The thought that I had been a very effective manager and that my substantive skills were...Again, he said very nice things about my analytical ability, et cetera, and that this was of critical importance to the administration and that they really wanted me to serve as the Deputy Director of the NEC.

I asked a few questions, but I told him that I wasn't particularly interested in leaving OIRA. I really liked OIRA. He said, "I know that. I know that it means a lot to you, but this is really very important. We've given this a lot of thought. We want you to do it."

I, at one point, said, "Who's this 'we' that you keep referring to?"

He said, "The President."

I said, "Yes." I don't think you say, "No," to the President of the United States, and I certainly didn't want to be in a position where I would have to say no... So I think Frank Raines was then the director of OMB, and I went in and I said, "I'm going to be going over to the NEC as the Deputy Director." He said, "Is that what you really want to do?" And I said, "That's not the issue, Frank. I was asked to do it and I'm going to do it."

He was incredibly gracious, hugged me, and asked me if I could help him find a replacement for OIRA, which I agreed to do. It was about, I don't know, within a week, 10 days, and I went over to the West Wing and became Deputy Director of the NEC.

Balleisen: Did you deal with many regulatory issues there? Or did you really move off in different directions?

Katzen: Off in different directions. There were a variety of very hot issues, from saving Social Security, what to do with the... surpluses... -- how to deploy those assets. There were some serious ... job training issues. Some education issues, and a variety of smaller things that I hadn't even been aware that the NEC would worry about. There was a potential strike, and would we invoke Taft-Hartley? There were issues involving the housing market. A whole variety of things about which I didn't know very much at all. I felt a little bit like I had returned to COWPS my

first day. Here I was being introduced to an entire plate, a full plate, of very challenging, difficult questions.

We had a superb staff, an absolutely superb staff of younger policy people, economic people. From time to time, a regulatory issue might come up, but I was able to say "Well that belongs in OIRA." And this was challenging, and it was interesting. Again, I learned so very much from the job.

Balleisen: What were the circumstances that then led you to go back to the Office of Management and Budget as Deputy Director?

Katzen: One of the things that happened shortly after I arrived at the NEC was that I was diagnosed with large and aggressive breast cancer, which kind of shook me. I ended up within a matter of a week or two entering a protocol experimental program at Georgetown, which was trying something which was relatively new at that time, and that was pre-surgery chemo. The normal approach at that point was, take off the breast, then give them chemo and maybe radiation. And this was, what happens if we give them chemo first, shrink the tumor. That was particularly important to me in my case, because I had a number of tumors spread around. I could not have had a mastectomy and gotten clean margins, because of the state of my cancer, which was also 3B, which was pretty serious.

So I was a candidate for a protocol that was just opening at Georgetown. There were 12 or 13 of us, all of whom had very serious cancer, and some got Taxol first and then Adriamycin, and others -- that was my group -- got Adriamycin first and then Taxol, to see if that made any difference in the staging of those. That was 12 weeks of very intensive [chemo]; I'm thinking it's double dosage, double frequency, but that seems like too much, I can't believe I did that.

I went through the chemo, and I continued working through the entire process to the extent that I could. [At] the conclusion of the chemo I did have a mastectomy, and then I had some regular chemo, I'm not sure what that was, and then I had radiation. And I was working through the entire period, into the next year. This would have been the spring of '99. And I decided that I wanted to have reconstruction, because if I was going to be healed, I needed to be whole.

So I wanted to have reconstructive surgery, and I was told I would have to be out for four weeks. I talked with Gene Sperling, who was the Director of the NEC, and he said he really thought he needed somebody else to work with me and I would work from home. He was very gracious, he was very kind, sent me a box of chocolates the night before the surgery and other things. But I said no, I don't think that's fair. And he insisted.

Then I got a call from Jack Lew, who was then Director of OMB. He said, "I heard on the grapevine that you want to take four weeks off. When you come back, would you come back to OMB? This is your home, we love you, I want you to be my Deputy Director for Management. You turned us down twice, please take it this time." And I said "yes."

I had my surgery and then I came back as DDM. Of course, I didn't get confirmed this time. There was a slight uproar, so I was not able to be confirmed. Then President Clinton gave me a recess appointment as the Deputy Director of Management, and I served out his second term as the DDM.

Balleisen: The nature of your work there, was it connecting at all to regulatory policy-making?

Katzen: Yes and no.... The DDM is ... supposed to concern itself with the management functions, not the budget functions, of the federal government. Or as I jokingly would say, I was supposed to run the federal government. It has certain defined areas, such as federal financial management systems, how [the] government keeps its books and which agencies are keeping its books in good order and which are not; office of federal procurement policy, competitive bidding, when there should be exceptions to that. This is procurement policy that also is within the purview of the DDM. The information technology and policy part of the OIRA function was always a part of the DDM and that's how I got involved in Y2K and other different information policy pieces.... And the Congress had passed GPRA, the Government Results Performance Act, in which government agencies were supposed to specify their objectives, have a performance plan to meet those objectives, and then keep milestones each year.

There was the "high risk" list. These were problem areas that GAO, which I think it changed its name then from ... General Accounting Office...to Government Accountability Office...-- it changed its name sometime in that decade -- [it] would come up with [a list of] high risk things.

These were programs in the government that were either over budget or had other serious problems, and there were some that were perpetually on the high risk list. Who is going to sort of sit on top of those and find out what's going on? What's wrong? How do we straighten this out? There invariably were HR problems, human resource problems....

Also, the DDM presides over the President's Management Council, which [includes] the COO..., normally, the deputy secretary, but the chief operating officer of every department or agency. We would have monthly meetings and I would preside over those and we would try to determine best practices, solve problems. Not dissimilar, actually, from the model that we had for the Regulatory Working Group.

I would chair ... the Chief Information Officer's council, which would be the CIO's of all the different agencies. And we would meet once a month and I would have a monthly CIO meeting. And then there were the CFO's, the Chief Financial Officers. And we would meet once a month and I would preside over the Chief Financial Officer's monthly meeting.

There was the PCIE²⁶ ... -- the Inspectors General of all the different agencies; and we would have a monthly meeting. I had a lot of meetings. And this was the purview of the DDM. And I'm sure I've forgotten some of my monthly meetings, but these were the kinds of things that the DDM was concerned about. As well as working with the Director and the Deputy Director of OMB to see where budget issues might impact management issues because funding is obviously important.

At some point in that ... eighteen month period that I served in that capacity, the then Administrator of OIRA left. Jack said, "So, can they report to you?" And, I'm not about to say I don't want OIRA back, so I got OIRA back again with all of my other responsibilities. And the other aspect, and I'm smiling just because it was a little crazy, the Chief of Staff was then John

²⁶ President's Council on Integrity and Efficiency.

Podesta, and he said some flattering things about my ability to herd cats, my ability to bring people together and resolve disputes.

So, virtually every time there was an issue that involved more than two or three, eight different agencies who were vying for priority or policy dominance, John would call and say, "I need you to do some troubleshooting for me. Can you run this process? Can you bring this home?"

I mentioned earlier that HIPAA process because there, HHS²⁷ was coming up with [rules governing] privacy of medical information, [about] which we all feel strongly. But there's the State Department saying, "Excuse me? We put a family, an ambassador's family or Foreign Service family in a foreign country and you don't want us to know about the health conditions of the people that we're responsible for?"

I mean, there's got to be some understanding that we need that information. And the Defense Department says, "Well, we need to know about the medical history and the medical welfare of our troops." And the VA says, "Well, we need to know about those same things because they're going to come over and be part of the Veteran's Administration."

There must have been five or six other departments that made compelling cases why they should [have access to this information...], and that's how I had all these people in the room, trying to accommodate legitimate, not exaggerated, but legitimate reasons. So I was doing troubleshooting, and I was doing the DDM job, and I got a chance to dabble with OIRA again at the end, which I found very gratifying.

Balleisen: What was your role in the response to the Y2K threat? This possibility that the computer systems across the world would collapse?

Katzen: ...Bruce McConnell was my Branch Chief for information technology and Bruce started talking about Y2K back in '95 or '96. And I kept saying, "Well, what are you talking about?" And he said, "Well, we've got this problem because some computers are only programmed for ...two digits for month, two digits for day, two digits for year. So the year is 95 and someday it's going to be 96, 97, 98, 99, and then zero, zero. And is that going to be two, zero, zero, zero or is that going to be one, nine, zero, zero? All of our computers are going to go back a hundred years." And I said, "This is tricky." And I was not exactly the most sophisticated person when it came to computers, but even I could understand this problem. As we started thinking in terms of how do we get the government to prepare its computers? And Bruce came up with a game plan and I remember it...in the midst of some of this was that old thing from the campaign the Vice President said he had invented the Internet, so can you imagine if on his watch the Internet collapses or the government computers shut down? When if all goes according to script he's running for the Presidency, this is not a good thing. We need to worry about this.

I talked with Vice President and I talked with the Director of OMB and he said, "You know you have got to take this on." While I was at OIRA and while I was doing the regs.

Balleisen: Did the "information" part level out?

²⁷ Department of Health and Human Services.

Katzen: This was the information part, the Office of "Information" and Regulatory Affairs. So I was taking on the Y2K responsibility and it quickly became apparent to me that even if we fixed all the government computers, that was just a small piece of the problem, because the electricity grid, the telephones, banking, all this stuff is hooked up to computers and it's all in the private sector. This is not just a government operation. It's a societal operation. I remember talking with the director of OMB saying, "This is bigger than me. This is well beyond my capabilities and my time. We need a Y2K czar. We need to come in here and work with the private sector and work with the government agencies. My people can help the government agencies a bit, make sure they had enough money. Make sure they knew what they were doing. I'll stay involved but we need a Y2K expert."

So we put our heads together and we came up with the perfect candidate and the perfect candidate was guy named John Koskinen, who had been DDM, and had just stepped down. He had this easy going, relaxed kind of personality. His people skills were superb. He was very computer savvy. He could do this. Of course, he had just stepped down from DDM because he didn't want to work in the government anymore. We tracked him down and found out that he was on a plane arriving from Egypt, having spent the last three or four weeks with his wife on vacation. I called him on his cell phone after he had cleared customs and asked if I could come see him the next day, that I had a problem that I really needed to discuss with him.

I stopped at this little shop on Connecticut Avenue and I got a four pound box of Godiva Chocolates, because he loved chocolate, and I arrived at his house and said, "You need to do this," and I laid out what we had in mind. We could negotiate anything he wanted in terms of title, office space, whatever. He'd be part of the Executive Office of the President, whomever he wanted to report to, he could report to, or he didn't have to report to anybody, but this was critical and this was something we wanted him to take.

He said, "No," and I said, "No?" He said, "No." He said, "No, I spent my time in government there are so many things I've been wanting to do that I want to do now," and I said, "John I brought you this box of candy," and he laughed, and he said, "I know and you're very persuasive, but no."

I said, "John do you know what happens when you say no?" He said, "No," I said, "I call the Director of OMB and I tell him you said no, the director of OMB is going to call you and ask you to do this, so you're going to have to say no to ... Frank Raines," and he said, "And I'll tell him no."

"And do you know what happens when you say no to Frank Raines? He's going to call the Vice President, and the Vice President's going to call you, and the Vice President is going to ask you to do this," and he looked at me and he said, "What are you saying?" I said, "Let me just finish, if you say no to the Vice President, then the President's going to call you, and do you really want to say no to the President of the United States?" He said, "It's not going to happen, it's just not going to happen."

So I picked up my cell phone, these were very cumbersome things at the time, not like these cute little devices we have. He said, "What are you doing?" I said, "I thought I'd call the Vice President..., I'll just skip the Director of OMB and start up the ladder." He said, "Put that down."

I said, "No, I'm not going to put it down." He said, "Put it down..." So I said, "Well I've done the best I can do," and I left, and I went out to my car, and I called the Vice President.

I could see in through his window and I saw him answer the phone..., and then I saw him look out the window, and I waved at him, and John agreed to do it and he did a masterful job. Just a masterful job, and I stayed onboard, and I provided what little help I could, and I was there midnight, December 31.

We were at command headquarters in my long gown because we were going over to the White House for the Millennium Ball, and I was in there in my brand new long gown, and looking swift and, standing up there, and we were on the ... [rooftop of the building] watching to make sure the lights stayed on at midnight.

We had been in the command center and we had our reports coming across starting from Asia, and Europe, and then Maine, Greenland, and then the Eastern coast, and we had a screen showing us New York City, and we said, "Oh, hell, let's just go see what's happening here." We ran off to the roof top and the lights stayed on, and one of the staff had brought several bottles of champagne, and it just went all over everything, and we were very glad.

It turned out that we were able to prepare for Y2K. There were, and I think this is public information, there were one or two things that didn't [go smoothly], including one in the military, but it did not have any adverse consequence and it was fixed very quickly thereafter, but some people said that we over hyped it, that it was never that big of a problem. We made a big deal about it, look it was so smooth, and other people say it was so smooth because we had worked so hard to make sure that it was smooth.

Balleisen: Did you encounter any difficulties in getting the key players in the private sector to engage with this process?

Katzen: ... John was the primary point person and again, he was so good at this.... There were some who were dubious, but you get this ground swell, you get a group. I don't remember whether it was the electricity grid or the banking [people], but you get a group [to sign up] who then bring along other groups, and who then bring along other groups, and then you turn to the ones who haven't joined in and say, "Do they know something you don't know or do you know something they don't know? Do you want to join in?" We had all sorts of little teams, and some of them got to be at command central that night, some of the team leaders from the team groups. You work with incentives to make people feel like they're part of the solution. So far as I know, no one stiffed him, and he was able to secure their cooperation.

Balleisen: The 2000 elections come along and Al Gore [won] the popular vote, but not in the end the Presidency. Had you been expecting to stay in the administration if Gore had won? Stayed in Washington working for the federal government?

Katzen: I would stay in Washington: my husband is a federal judge and he has to live within 50 miles of the court, which is in the District of Columbia, and in addition we had always lived in Washington and I had no thoughts of leaving Washington. The Vice President had always been very kind to me, and very complimentary of my minimal talents, and I had reason to believe that he would want me to stay on in some capacity.

Balleisen: Then you were confronted with the political reality of a different party controlling the White House and as a result a question about where to go next. Did you think about returning to private legal practice at Wilmer Cutler and Pickering?

Katzen: Yes, I assumed I would, and I may have taken a couple of weeks, and I called the managing partner, and said, "Hi. How are you?" He said, "It's great to hear from you, I was thinking of reaching out to you but, you want to come on in? Let's talk about what the future holds." I did and we had a very nice discussion and he was interested in my returning to the firm and in the middle of this conversation my eyes fell on the document in front of him, which was a Day Timer. A Day Timer is where you keep time, and I went, "Oh my god I don't know that I can...I can't live my life in quarter hour increments anymore. I don't know that I could do this." He said, "It's not quarter hours. It's tenth of hours, its every six minutes," and I went, "I can't, I don't, I won't, I can't. No." And I got up and I thought, "No, this is not what I want to do with my life." I have been living a dream in a way.

I had all the work I could ask for of the most challenging, interesting, fulfilling type. I didn't keep time. No one ever asked me how many hours I was working. I did my job and when I was tired I went home, and this was an entirely different world and it struck me, because I had heard a lot about ... the evolution ...of the economics of law firms and how billable hours was the thing.

I remember going home, and calling my husband, and saying, "I don't think I can do this. I don't want to do this. I don't want to go back," and he was, as he has always been, extraordinarily supportive, and he said take your time, which I did, and I cleaned out the medicine chests and I rearranged the furniture. I did other things around the house, and it may have been a couple weeks later that I called him in his chambers and said, "Honey I've just alphabetized the spices," and he said, "OK, I want you to hang up the phone. I want you to walk out of the house. I want you to get a job, and get a life, or you are going to drive us both crazy," and I said, "Gotcha, what am I going to do?"

At some point he said, "Look you've always wanted to inspire young people to public service. You've always talked about going back to Smith and teaching con law, that course you loved so much. "Smith," I said, "is in Northampton. We live in Washington." This was before 9/11, he said, "There's planes, they go back and forth. Call them," so I called Smith College, called the head of the Government department, who actually I knew because I had been invited up there to give some speech....

I said, "How would it be if I came up and taught Con Law," and she said, "We have someone who teaches Con Law." I went, "Oops." She said, "But we'd be interested if you wanted to teach something else, and I thought about what I could teach and I came up with a cute title, "How Washington Really Works," and I was going to use rule-making as a window into how decisions are made in Washington.

I flew up there, actually my very first day of teaching was 9/11/2001, but I taught ... a seminar on how Washington really works and another seminar, "Technology Information Policy" and leaping somewhat far ahead I found it gratifying to teach, and I started teaching at law schools, and spent the next eight years teaching at a variety of undergraduate and law schools.

From Michigan, to Penn, to George Mason, George Washington, Johns Hopkins, Michigan undergraduate, and I found it quite fulfilling, of a different kind, because I was determined to have a not-so-hidden agenda and inspire young people to public service. That meant a lot to me, and when they responded, and so many of them did, I felt that I was doing something important and worthwhile.

Balleisen: When did you begin to work also for the Podesta group?

Katzen: That came after the transition. In July 2008, this is before the convention. I got a call from someone saying that I "knew the federal government inside out and backwards -- would I be willing to serve in a transition effort for Obama?" and I said, "Sure," and what it was, was that there were five of us who were on the agency review working group, and we were going to divide up the entire executive branch. One person was going to take State, Defense and the intelligence agencies. One was going to take Health, HHS, and Labor, and Education. One was going to take Agriculture, Interior, EPA, Natural Resources, and they wanted me to take the Executive Office of the President, which would include the White House and OMB and all the government wide agencies such as General Services Administration, Office of Personnel Management, GPO, NARA, the whole number.

What we were supposed to do was to [create] teams under the radar. No one was to know we were doing this. This was absolutely confidential. We were supposed to assemble people who were discreet to write a two-pager on what's going on in that agency that, assuming he won the election, that he could read and get a snapshot of what that agency was all about, or that department was all about.

The President-elect, the Vice President-elect, and the chief of staff could read that and then, when they nominated cabinet members, they could have just a two-pager that would set it forth, and the skeletal outline of what would be about a twenty pager. What are the ticking time bombs? What are the real challenges facing the agency in the next one-hundred days? What's the budget situation? How large is this? What's their jurisdiction?

A road map of what needs to be done, and we were supposed to do this all by November 5th or 6th or whatever was election day, so these packages were ready, and no one could know about it. At one point I think Senator McCain had said, "They're in there measuring the drapes." No we weren't. We were looking through file cabinets. We were trying to dig up all of the information we could.

We did this and then [after the election] we became public, moved into transition headquarters, and I had seventeen teams. I had seventeen agencies all told, and I had seventeen teams. They took what we had in skeletal form and they were now allowed into the agencies, and found out whether all that we thought was true. Corrected it, and worked through all of those to come up with final two-pagers within a week, ten days.

Then twenty-pagers preferably by ... early December, and then meanwhile there were all these cross, government-wide, responsibilities. One of which was to look at all of the Bush Executive Orders, and see which of them had lapsed of their own accord, which should continue, and ... which should be modified.... That was eight years of Executive Orders to review.

Then there was, "What about the regulations?" I had these spreadsheets going out the gazoo with Executive Orders and regulations, and then I took on government-wide contracting, government-wide procurement, other things that I had had experience with from the Clinton Administration, so I was relatively busy for the period November until January 20th. . . . I think I stayed on for about two or three weeks to close up and put the files in order for archives, and then I got a call from Tony Podesta. He said, "If you can't run the federal government, can you come run my shop?" That was a very sweet introduction and I went over to meet with Tony, and his chief operating officer, or he's the chairman of the board and she's the president, Kimberly Fritts.

We talked about what role I could have, what I could contribute, and I went there for a year as managing director, and then decided I was more interested in some of the substance, and moved to senior advisor where I've been for the last couple of years, and I help our clients navigate the executive branch.

Balleisen: Clients, perhaps a corporation has some issue and wants some sense [about] the right places to go or how to frame the argument.

Katzen: Both of those, all of those, and more. How to get support from the Hill. What data they should be assembling so that when they make their arguments they're able to provide a solid basis for their arguments. What allies they might want. Do they want to reach out to think tanks? Do they want to reach out to public interest groups or other trade associations? It's the whole -- "How do you structure your approach," and, "What levers do you want to try to pull?"

Balleisen: You had the opportunity to watch the regulatory state from the perch of all of these academic positions during the George W. Bush administration. What struck you as distinctive? Obviously there are many different agencies, but did it seem to you that there was a palpable shift in regulatory style aside from the substantive policy differences between the Republican Party and the Democrats, or George W. Bush and Bill Clinton?

Katzen: To some degree, yes. I think the office of OIRA takes on the character and the attitude of the Administrator, and I saw myself as a facilitator, and a collegial collaborator. John Graham²⁸ described himself as a gatekeeper. It's more than a different tone. Under George W. Bush, the institution does the same thing, but it's the attitude and it's the approach. In a Republican administration, I think OIRA is more powerful than in a Democratic administration, and so he was able, in some respects, to exert that power, and felt that the agencies would have to, or should listen to him. We discussed earlier the return letters that he used. There were other devices that he employed. But I think that the differences are relatively small in this scale. There are differences, that was your question, but I wouldn't make a whole lot out of them. Different Administrators take on different favorite subjects, and push different items on what they believed to be the President's agenda, but Administrators are reflecting the president who appointed them.

Balleisen: At the end of this discussion that we've been having I wanted to give you an opportunity to reflect maybe more broadly on some big picture questions about the evolving nature of American approach to regulatory governance as you've experienced that. One of those questions would involve what you see as the abiding strengths and perhaps weaknesses of the

²⁸ Administrator of OIRA from 2001-2006.

American approach to regulatory review, that's emerged over the course of the last thirty plus years, from the creation of OIRA to even before with its antecedents like COWPS.

Katzen: I think I said before that if it hadn't existed we'd have had to invent it because I think there's a very important legitimate role for centralized review. The president is accountable for what his agencies are doing. He should be aware of and be able to influence it, and he presides over the entire executive branch not just one agency. Therefore whatever one agency says may have implications for another agency, so I think the centralized review is a necessary but not sufficient component of a sound regulatory state. I think the agencies are the repositories of expertise, experience, and the closest contact with stake holders. I think they have still a long way to go in terms of their approach to rulemaking. I don't think they have harnessed the capacity that they have for analysis, and we discussed earlier that I think they should be doing it at an earlier stage, to inform decisions.

I think some of the agencies are reactive. A problem comes up, they're going to react, and that leads us in a less solid, well-grounded position, than if there was also some time to contemplate and time to work more thoughtfully. With respect to OIRA I think that I mentioned that it's a transaction-based organization. It looks at one regulation at a time.

Occasionally if two come in the door at the same time it might look at both of them at the same time. I think that's important because you have to look at each one. But I've testified on a number of occasions in the last eight years, or ten years, or twelve years, that OIRA ought to do more analysis of the cumulative impact on a particular sector, particular industry.

The coal industry today, there might be five or six different regulations coming out of EPA, some of them are coming out of air, some of them are coming out of water, some of them might be coming out of other branches. What is the cumulative effect of all of these, and when you add in that the Department of Labor is working on mine safety, Interior is working on mountain top mining, there are any number of regulations where the effect of the sum might be greater than each individual regulation.

I think it would be appropriate for an institution like OIRA -- not with the staff it has now, it does not have sufficient capacity. There's only about thirty-five, forty professionals who are doing all the regulations. It's a mere shadow of its former self, and it needs I think to be greater -- but I would suggest with additional FTEs, that's full time equivalents slots, that they take on that assignment.

Similarly they do not review the regulations of the independent regulatory commissions. We talked about what an IRC was, an independent regulatory commission.... The IRCs have always been viewed as somewhat special. The word independent was read to be independent of the President.

The President was not supposed to, in anyway, interfere with an independent [agency]. It seems to me that there's a way of structuring, and I've testified to this effect, there's a way of structuring an OIRA review that wouldn't interfere with the independence of the agencies. Again OIRA would need more resources to look at that, but we have everything from the FCC, the Federal Communications Commission, the SEC, CFTC, and the New Consumer Financial Protection [Bureau].

There's a whole host of agencies that are issuing rules and regulations that are outside of anything we've been talking about in this entire discussion.

Balleisen: The Securities and Exchange Commission...

Katz: Securities and Exchange Commission...

Balleisen: ...Commodity Futures and Trading Commission

Katz: FTC, the Federal Trade Commission. There's a whole group of them and the rationale for their being different I don't think requires that they be exempt from this program. I would say in fact, to my mind they should be included, again I've testified to that effect. I think there's a way of structuring it. I think OIRA could take on that. But the problem... we've been talking about is institution-based. What does OIRA do? What do the agencies do? What does the government do? I think it's broader than that. I think the American people do not understand the role of regulation, do not understand the benefits that it confers. They've heard a lot in a series of political campaigns about the costs that are imposed, although it's never very specific.

It's fascinating that when you talk to people.... There's all sorts of polls that say that the majority of people think there's too many regulations. Everybody subscribes to the theory, "There's too many regulations." Do you want to get rid of the regulations that produce clean air? "Oh no, I like those." How about the ones that are clean water? "Oh no, I like those too." Safe food? "Oh, I'm in favor of that as well." Testing of drugs before they go on the market? "Oh no no, that's good too."

Any individual regulation or series of regulations will be supported when they consider the merits of it, and this disconnect between a general disavowal of regulations, and, when you're specific about what regulations are trying to accomplish in many instances do accomplish -- this disconnect should I think be [addressed].

I think we have a leadership failure. I can go into the causes of why there is this disconnect but I believe that we have ill served the American people in failing to provide in clear understandable ways what we're talking about when we talk about "regulation."

Balleisen: I'll invite you to offer a few observations about what those causes of this disconnect might be.

Katz: We live in very challenging times, where there is enormous amount of information that is being delivered, if you will. People are working longer hours, doing more things, juggling more stuff. It's kind of curious, if you go back and look at this post World War II. All the appliances that came into the home, to give us more free time. We don't have more free time. We don't have a lot of leisure time. We don't have time to think. The amount of, and diversity of, information sources just overwhelms people. It's enough for them to just go through their day, and I'm not saying this in a demeaning or disparaging way. They've got their hands full, particularly now in the economic times that we have. There hasn't been an attempt, even a feeble attempt, to try to communicate to the American people what this is all about. This is what I would call a leadership failure. The [public has] heard that regulations are bad, that regulations are precluding businesses from hiring people, that regulations are the cause of our being very not

competitive within the global market. These are all things that are 30-second sound bytes, or sometimes even 10-second sound bytes, that they hear at least every four years, probably every two years, even in the off-term elections. You hear it enough and it becomes the truth, and they don't get beneath it.

I think starting with civics in grade school, I would join Sandra Day O'Connor in civic engagement and education. I would start early, early and often, in what we're all about and why we are doing the things we're doing. I think the failure exists among a lot of our leaders.

Balleisen: You came into contact with regulatory process and regulatory decision-making through the law as a lawyer, with clients. Your interests throughout your career have reflected, to some extent, that grounding. A focus on the importance of process. A focus on the significance of proper notice. Considered decision-making on the basis of proper procedure. Yet, another theme that has emerged in our discussions has been the centrality of informal collaborative problem solving. I wanted to just ask, whether or not you see a tension between the aspects of American legal culture that stress the existence of bright lines that make clear what you can or can't do -- that send clear signals to people about their responsibilities as well as their rights, on the one hand -- and the less clear, sometimes fuzzy, role of collaborative engagement to find flexible solutions to collective problems.

Katzen: I think that's a very good question. I'm not sure I can answer it without a lot more thought. My initial reaction is -- we sort of need both. We need some process, and we need some flexibility in adaptive management, I think it's called. I think the two can co-exist. There may be times when they're in conflict. What I think the role of leaders is all about is recognizing what may be the most appropriate route for a particular circumstance, judgment that is called for. And to follow the rules and provide the procedures.

But with the left hand, stir up the collaboration. Provide the informal inclusiveness in the process. Try to accommodate. Bend one way sometimes, bend one way the other time. I'm not saying you violate the law, but I'm saying that a good decision-maker is going to use all the resources and all the processes at his or her disposal, and is probably going to behave differently in different situations. There isn't a single answer.

Balleisen: This is my final question for you, Sally. We're having this conversation just a few days after the last presidential election. We know now there will be another term for President Obama. Any thoughts about how the Obama administration has coped with these tensions in its first term? Or the challenges it may face in addressing them with likely far less resources at its disposal, given the likelihood of significant budget cuts coming down the pike as the result of the overall fiscal situation and the political environment with the Republican Party in control of the House of Representatives, advocating a very strong position on cutting the role of government?

Katzen: I would start with the observation, that having been "on the inside," if you will, I know that there's an enormous amount that those on the outside do not know. I can make observations from the outside, about the last three and a half years of the Obama administration, and what the next four might look like. But, I don't think that would be anything more than my own observations. It's like a marriage. I guess an analogy I used earlier, as well. People from the outside don't know what's going on, in a relationship between two people. Sometimes those two people don't know what's going on, all the time.

My observations are that the President has remained consistent with his predecessors, in valuing the contribution that OIRA makes. He put his imperator on centralized review in his Executive Order 13563.

His relationship with Cass Sunstein, which pre-dated his election as President. Enabled there to be a fairly close rapport, and I think probably, an appreciation of what OIRA does.

Balleisen: Sunstein being the Administrator, for most of the first term.

Katzen: Yes, and he had been a professor at the law school in Chicago, and had been friends with -- then adjunct professor -- Barack Obama when he was at Chicago. Their friendship has survived. I think that closeness provided the President with some perspective on the regulatory process that others may not have had. I think that is one, at least, of the factors that led him to reaffirm the Clinton executive order, which stressed the importance of OIRA. I don't think that will change in the next four years. I don't even know who will be President in 2016, but I don't think that will change even then.

Beyond that, as I say, it's very hard to know what's going on inside. I would leave it to historians -- perhaps years from now -- to enquire of those who were actually in the room what it was like.

Balleisen: Sally, thank you very much.

[end of audio 11]