J. Benefit Cost Anal. 2020; 11(1):62–70
doi:10.1017/bca.2019.34

Susan E. Dudley

Regulatory Oversight and Benefit-Cost Analysis: A Historical Perspective

The Office of Information and Regulatory Affairs (OIRA) in the Executive Office of the President coordinates the federal government's regulatory agenda, reviews executive branch agencies' draft regulations, and oversees government-wide information quality, peer review, privacy, and statistical policies. Remarkably, its regulatory oversight functions, and the benefit-cost framework underlying them, have not changed significantly through six very different presidential administrations. This article examines the evolution of executive regulatory oversight and analysis from the 1970s to today, exploring the reasons for its durability and whether the current imposition of a regulatory budget challenges the bipartisan nature of regulatory practice.

Regulatory oversight before OIRA

The number and reach of regulatory agencies increased dramatically in the early decades of the 20th century. But, the extensive scope of their authorities raised concerns about the constitutionality of Congress's apparent delegation of its Article I powers to a "fourth branch." In response to these concerns, Congress passed the Administrative Procedure Act in 1946 to balance the competing goals of bureaucratic expertise and legislative accountability (Shepherd, 1996). It required that regulations be grounded in statutory authority, that agencies seek public comment before issuing rules, and that final rules be based on an administrative record.

Most of the early regulatory agencies were established as independent commissions to avoid political influence (Humphrey's Executer v. United States 1935); they generally issued "economic regulations," which imposed maximum or minimum prices, quantity restrictions, and service parameters (Weidenbaum, 2004). Evidence that these agencies appeared to be "captured" by the industries they regulated (Stigler, 1971) led to bipartisan deregulatory efforts from all three branches of government (Derthick & Quirk, 1985).

While economic forms of regulation were declining in the 1970s and 1980s, a new type of "social" regulation – aimed at environmental, safety, and health concerns – began to emerge (Weidenbaum, 2004). Concerns that these new regulations and

Susan E. Dudley: The George Washington University Regulatory Studies Center, USA
E-mail: sdudley@gwu.edu

reporting requirements were overly burdensome led presidents, beginning with Richard Nixon, to take steps to exert some control over them.

President Richard Nixon initiated a "Quality of Life Review" (QLR) in 1971. It required agencies to submit for Office of Management and Budget (OMB) review agendas of upcoming regulatory actions and certain proposed and final rules before publication in the *Federal Register* (Schultz, 1971; Tozzi, 2011).

President Gerald Ford built on the QLR and issued E.O. 11821 (1974), which required agencies to develop an "inflation impact statement" for each major legislative or regulatory proposal. Pursuant to E.O. 11949, these later became "economic impact statements" (1977). He signed a bill establishing the Council on Wage and Price Stability (CWPS) to, among other things, "intervene and otherwise participate on its own behalf in rulemaking, ratemaking, licensing and other proceedings before any of the departments and agencies of the USA, in order to present its views as to the inflationary impact that might result from the possible outcomes of such proceedings" (Council on Wage and Price Stability Act Amendments of 1975 Pub. L. 94-78). The CWPS "regulatory review staff … operated as a relatively freewheeling analytical group that selectively and publicly critiqued regulatory proposals from a wide array of federal agencies" (Hopkins, 2011, p. 71).

President Jimmy Carter discontinued the QLR but retained the CWPS economists' role in filing comments on the public record of agency rulemakings. Carter's "program had three principal objectives: improved regulatory management, economic deregulation, and the adoption of less-intrusive regulatory techniques" (Eads & Fix, 1982, p. 135). His cabinet-level Regulatory Analysis Review Group served as an "expert regulatory 'watchdog'" (Fix & Eads, 1985, fn. 19) that reviewed the most important regulatory proposals with analytical support from the CWPS economists (Weidenbaum, 1997).

Carter's E.O. 12044 required agency heads to determine the need for a regulation, evaluate the direct and indirect effects of alternatives, and choose the least burdensome approach (1978). He signed the Regulatory Flexibility Act, focused on minimizing regulatory impacts on small entities (Regulatory Flexibility Act of 1980 Pub. L. 96-354), and the Paperwork Reduction Act (PRA), which established Office of Information and Regulatory Affairs (OIRA) in OMB to review and approve all new reporting requirements to minimize the burdens associated with the government's collection of information (Paperwork Reduction Act of 1980 Pub. L. 96-511).

OIRA 1981–2019

Soon after he took office in 1981, *President Ronald Reagan* issued E.O. 12291, giving OIRA a role in reviewing draft regulations to ensure their benefits exceeded their costs (1981). He abolished the wage and price program and moved the group of CWPS economists responsible for filing comments on regulation to the newly created OIRA along with the OMB analysts who had reviewed regulations under Ford and Carter. The directors of the OMB and CWPS units became deputies to the OIRA administrator (Hopkins, 2011; Tozzi, 2011). The former budget staff were assigned to specific agencies and responsible for transactional reviews and the PRA, while the CWPS economists focused on economic efficiency and the quality of agencies' benefit-cost analysis (BCA).

President George H. W. Bush ("Bush 41"), who had served as Reagan's Vice President and director of his Task Force on Regulatory Relief, continued the policies and practices of the previous eight years. However, one of his chief regulatory advisors observed that "the Bush administration lost the deregulatory momentum of the Reagan years" largely due to "the relaxed commitment to oversight in the Executive Office of the President" (Gray, 1993, p. 31).

President Bill Clinton's election in 1993 stirred hope among critics of OIRA oversight and the net-benefits approach to regulation that he might abolish regulatory review (Katzen, 2018*a*). But, he did not act immediately to rescind the Reagan order. Instead, after several iterations and repeat consultations with various agencies and outside groups, President Clinton signed E.O. 12866 (1993) on September 30, 1993 (Katzen, 2018*b*). While the new order's rhetoric was softer than the Reagan order it replaced, it retained the key features of OIRA regulatory review and reinforced the focus on net benefits and the philosophy that regulations should be issued only if required by law or a "compelling public need" (1993, Sec.1.a)

President George W. Bush ("Bush 43") retained E.O. 12866 but, at least in some respects, his OIRA administrator implemented it more aggressively than his predecessors, for the first time returning draft regulations to agencies for reconsideration pursuant to Sec. 6(b)(3) and sending "prompt letters" that suggested priority actions agencies could take to improve their regulations. During the Bush 43 administration, OMB also issued Circular A-4 on Regulatory Analysis (OMB, 2003), as well as bulletins articulating good practices for guidance documents (OMB, 2007*a*), data quality (OMB, 2002), peer review (OMB, 2004), and principles for risk analysis (OMB, 2007*b*).

Upon taking office in 2009, *President Barack Obama* directed his agencies to develop recommendations for a new executive order (Obama, 2009), noting that OIRA oversight can serve to "ensure consistency with Presidential priorities, to coordinate regulatory policy, and to offer a dispassionate and analytical 'second opinion' on agency actions" (Obama, 2009). Two years later, he issued E.O. 13563, which explicitly reaffirmed E.O. 12866 and supplemented it to address technological developments since 1993 as well as periodic review of existing regulations and other issues (2011). President Obama's E.O. 13579 was significant in that it encouraged independent regulatory agencies to comply with some of E.O. 13563's provisions, including retrospective review (2011).

President Donald J. Trump came to office in 2016 promising deregulation. His E.O. 13771 directed agencies to remove two regulations for every new one they issued, and to offset the costs of new regulations by removing or modifying existing rules (2017). While his emphasis on reducing regulatory costs departed from previous administrations' focus on net benefits, he retained the Clinton and Obama executive orders requiring decisions to be made on the basis regulatory benefits and costs. The relevance of a budget constraint overlaid on existing policies is discussed below.

The durability of OIRA's procedures and principles

Bruff argues that by the end of the Reagan administration, OIRA's review procedures had gone from having a "distinctly experimental flavor" to "tentative acceptance in the executive branch" (1989, p. 562). The fact that they have continued through the next five very different presidents (Bush 41, Clinton, Bush 43, Obama, and Trump) confers on them a rare bipartisan status (DeMuth, 2011; Kagan, 2001).

What accounts for the durability of OIRA's procedures and principles over the course of almost 40 years and six presidents? Procedurally, as Congress delegates lawmaking authority to an increasingly large and complex body of regulatory agencies, OIRA gives the democratically-elected president a vehicle to monitor, and exert some control over, agency actions. While presidents have increased the size of White House staffs over the years, OIRA – with its transparent procedures and staff of career regulatory experts – complements and supports those advisors.

OIRA coordinates interagency disputes on regulation, liaises with White House officials to ensure regulations are consistent with presidential policies, and reviews regulations through an analytical economic lens to provide a "dispassionate and analytical second opinion" (Obama, 2009) on agencies' actions.

Not only does OIRA review help ensure agency actions are accountable to the elected president, but OIRA itself is accountability to Congress and the public as well. Because the OIRA administrator is a Senate-confirmed position, Congress can compel him or her to testify – something it cannot demand of White House staff. OIRA's disclosure procedures also provide Congress and the public information on meetings with outside groups on regulations under development.

Equally important are the policies expressed in E.O. 12866, E.O. 13563, and E.O. 12291 before them, which have become well-established regulatory practice (see, for example, OECD, 2008). Although BCA is still not universally supported (Ackerman & Heinzerling, 2004), it is increasingly accepted across the ideological spectrum as a valuable tool for informing policymaking (Revesz & Livermore, 2008;

Sunstein, 2017). While Congress has not adopted BCA and many statutes are silent on whether it governs regulatory decisions, the Supreme Court is increasingly interpreting silent statutes in favor of analysis (Graham & Noe, 2016; Entergy Corp. v. Riverkeeper, Inc. 2009; Michigan v. EPA 2015).

Role for a regulatory budget

In a world with perfect information and incentives that align with public goals, BCA alone would lead agencies to issue regulations only when they can show they make the public better off. In this ideal world, a budget constraint, such as that imposed by Trump's E.O. 13771, would be nonbinding or harmful because it would prohibit regulations that could have offered net societal benefits (Pierce, 2016).

In practice, of course, agencies' analyses are based on neither complete information nor publicly-aligned incentives (Dudley & Mannix, 2018). Regulators may seek to maximize their authority rather than social welfare or respond to the preferences of concentrated interests at the expense of the more diffuse public interest. In conducting analysis, they face incentives to show that the benefits of their desired actions outweigh the costs. As a counterweight to these political and institutional incentives that can lead to overregulation, Gayer *et al.* (2017) point out that a regulatory budget constraint may not be as anathema as it appears on the surface. When considered as a supplement to BCA requirements, it may motivate agencies to maximize benefits within a budget constraint (Dudley, 2016). Equally important, it may provide agencies with incentives to focus more attention on identifying existing regulations that may be underperforming.

Ever since Carter's E.O. 12044, presidents have directed agencies to examine the benefits and costs of existing rules (Aldy, 2014). These directives have had limited success because agencies lacked incentives to follow through, and faced analytical difficulties in measuring *ex-post* impacts (Dudley & Mannix, 2018). Trump's requirement that agencies offset the costs of new regulations by reducing the costs of existing regulations (through modification or rescission) may provide needed incentives. If taken seriously, it could also spur the development of improved analytical tools for evaluating regulatory benefits and costs. Not only could this address the problem of regulatory accumulation, but also it could improve *ex ante* BCA by testing, and providing valuable feedback on, the assumptions used initially.

As President Carter's Economic Report of the President concluded in 1980:

> Priorities must be set to make certain that the first problems addressed are those in which regulations are likely to bring the greatest social benefits. Admittedly, this is an ideal that can never be perfectly realized, but tools like the regulatory budget may have to be developed if it is to be approached (Carter, 1980, p. 26).

Conclusions

Since the emergence of the first social regulatory agencies in the 1970s, presidents have worked to supervise their regulatory policies and required them to show that new regulations will offer net public benefits. However, as Justice Elena Kagan observed, presidents confront a principle-agent problem; "In a world of extraordinary administrative complexity and near-incalculable presidential responsibilities, no President can hope (even with the assistance of close aides) to monitor the agencies so closely as to substitute all his preferences for those of the bureaucracy" (Kagan, 2001). Since 1981, presidents have relied on OIRA to monitor regulatory agency actions, coordinate information, perspectives, and policies across the executive branch, and provide a "dispassionate and analytical 'second opinion'" on agencies' analysis (Obama, 2009).

The bipartisan support for OIRA across six very different presidents is remarkable. While executive orders can be rescinded with the stroke of a pen, E.O. 12866 remains in effect 26 years after it was issued. (See Forum Celebrating 25 Years of Executive Order 12866: https://regulatorystudies.columbian.gwu.edu/node/916.)

This longevity can be attributed to the principles and procedures that guide OIRA review. Like its CWPS predecessor in earlier administrations, OIRA review applies BCA to improve the economic efficiency of government policies. Most observers agree that its review has motivated agencies to consider the effects of regulations, perhaps leading to "smarter regulations" that yield more benefits than costs (Graham *et al.*, 2006; Sunstein, 2011). Nevertheless, OIRA review and *ex ante* BCA have been inadequate for stemming the accumulation of regulation (DeMuth, 2011; Mandel & Carew, 2013).

Trump's regulatory budget has introduced the biggest shift in regulatory oversight and analysis since OIRA was formed. Significantly, he has not abandoned his predecessors' executive orders nor their BCA approach to regulation but rather has overlaid an incremental regulatory cost cap on top of it. Like previous attempts at constraining regulatory agencies, his has been controversial (Dudley, 2019). Yet, it may provide a useful counterweight to regulators' institutional tendency toward over-regulation (Gayer *et al.*, 2017) and could improve regulatory BCA in the long run.

Acknowledgments. This article is based on a longer working paper available at www.RegulatoryStudies.gwu.edu. I am grateful for support from the C. Boyden Gray Center for the Study of the Administrative State and feedback on an early draft from participants in a workshop it hosted. I also appreciate constructive comments on the longer paper from my GW Regulatory Studies Center colleagues, Bridget Dooling, Jerry Ellig, Mark Febrizio, Brian Mannix, Daniel Pérez, and Zhoudan Xie. Any errors are my own.

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https://doi.org/10.1017/bca.2019.34 Published online by Cambridge University Press