Milestones in the Evolution of the Administrative State

Susan E. Dudley

The modern administrative state, as measured by the number of agencies, their budgets and staffing, and the number of regulations they issue, has grown significantly over the last hundred years. This essay reviews the origins of the administrative state and identifies four milestone efforts to hold it accountable to the American people: passage of the Administrative Procedure Act in 1946, the economic deregulation of the 1970s and 1980s, requirements for ex ante regulatory impact analysis, and the establishment of White House review. These milestones reflect bipartisan consensus on appropriate constraints on executive rulemaking, but they have not succeeded in stemming the debate over the proper role for administrative agencies and the regulations they issue. New milestones may include judicial interpretations, legislative actions, and extensions to executive oversight.

Chances are, ten years ago, most readers of this essay would not have been familiar with the term *administrative state*. Now it is common in political discourse. Use of the term on Twitter increased dramatically in early 2017 after President Donald Trump's former strategist, Stephen Bannon, promised the "deconstruction of the administrative state," but its origins go much further back.

According to *The Washington Post*, Bannon was referring to "the system of taxes, regulations and trade pacts that the president says have stymied economic growth and infringed upon U.S. sovereignty." In this essay, I use *administrative state* to mean the federal agencies that make up the executive branch – such as the Department of Transportation, the Securities Exchange Commission, the Environmental Protection Agency, and the Food and Drug Administration – which, pursuant to authority granted from Congress, issue regulations that carry the force of law. It also includes several "independent" agencies that operate without direct oversight from the president, although recent Supreme Court cases have raised questions about how far that independence extends.

There is no question that the size and scope of the administrative state have grown over the last century. Today, scores of federal agencies issue thousands of regulations every year. The Code of Federal Regulations contains 242 volumes and

https://doi.org/10.1162/DAED_a_01858

more than 185,000 pages. That is four times as big as the U.S. Code of Laws passed by Congress, which contains fewer than 44,000 pages.

Debate over the proper role for these agencies and the regulations they issue emerged early in the twentieth century and led to different measures aimed at ensuring they are consistent with the U.S. Constitution and accountable to elected branches of government and the people. This essay traces the origins of the administrative state, identifies several milestone efforts to hold it accountable to the American people, and suggests what the future may hold.

Law and public administration scholars often attribute the term *administrative state* to Dwight Waldo's book of that title in 1948, although others point to earlier use in both the United States and elsewhere.[1] By the time Waldo was writing, debate over the proper role for administrative agencies had been raging for several decades. While executive agencies and departments are as old as the republic itself, the scope and reach of the administrative state have expanded over time, and with them, discussion of its proper role in the U.S. system of government.

Congress created the first modern regulatory agency, the Interstate Commerce Commission (ICC), in 1887. As a 1977 Senate report put it, "for close to 100 years Congress chose to exercise the commerce power directly, without the aid of regulatory agencies. . . . By 1887, Congress saw a need for delegating part of the task of regulating commerce."[2] The bipartisan, seven-member ICC adjudicated between railroads and shippers to regulate rates railroads could charge. In the decades that followed, Congress established a variety of agencies to regulate interstate trade, water and power, communications, commodity exchanges, and other areas of activity. These agencies were often outside of executive departments and structured to be somewhat independent of presidential control. Their members could only be dismissed "for cause" ("inefficiency, neglect of duty, or malfeasance in office") in contrast to political appointees in executive departments who served "at the pleasure of the president."

Federal courts played an important role in drawing boundaries for these agencies' activities. Recall that the U.S. Constitution grants the legislative branch the power to pass laws (Article I), it tasks the executive branch with administering and enforcing those laws (Article II), and it makes the judicial branch responsible for interpreting the Constitution and statutes (Article III).

Until the early twentieth century, the courts interpreted the separation of powers implicit in Articles I through III of the Constitution as prohibiting Congress from delegating its legislative powers to administrative agencies. In 1892, the Supreme Court declared: "that Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[3] This is known as the *nondelegation doctrine*.

By 1928, the Supreme Court had softened this interpretation of the separation of powers. It took a different view of the nondelegation doctrine in *J. W. Hampton v. United States*, when it found that Congress could delegate legislative power as long as the statute included an "intelligible principle" to guide executive action.[4] That is, the Supreme Court said that delegation is constitutional as long as Congress provides executive agencies with an unambiguous standard to guide rulemaking.

This interpretation was tested in the 1930s when the New Deal created numerous new regulatory agencies, including the National Labor Relations Board (NLRB) and the Securities and Exchange Commission (SEC) and increased the jurisdiction of existing agencies, such as by giving the Department of Labor jurisdiction over wages and work hours. Opponents of the New Deal (those concerned with the expansion of the administrative state) turned to the judicial branch to constrain agency actions.[5] In 1935, in *Panama Refining Co. v. Ryan* and *A. L. A. Schechter Poultry Corp. v. United States*, the Supreme Court invoked the nondelegation doctrine to invalidate two provisions of the National Industrial Recovery Act.[6] The Court found the Act unconstitutional because it provided the president (and private industry associations) "virtually unfettered" decision-making power.[7]

However, two years later, the landscape changed, and the focus of administrative reform efforts shifted to Congress. After Roosevelt's threat to "pack the court," the Supreme Court began to approve New Deal programs and agencies, signaling that New Deal opponents' "only remaining recourse was in Congress."[8]

New Deal opponents were not alone in advocating for reforms. President Roosevelt established the Committee on Administrative Management (known as the Brownlow Commission) to recommend measures to reorganize the executive branch. His message to Congress accompanying the Brownlow report raised concerns over the "chaos of establishments" with "overlapping, duplication, and contradictory policies," and concluded:

> The plain fact is that the present organization and equipment of the executive branch of the Government defeats the constitutional intent that there be a single responsible Chief Executive to coordinate and manage the departments and activities in accordance with the laws enacted by the Congress. Under these conditions the Government cannot be thoroughly effective in working, under popular control, for the common good.[9]

The president did succeed in reorganizing the executive, including establishing the Executive Office of the President, but debate on the proper role of administrative agencies continued. This debate paved the way for the first milestone in constraining the administrative state, almost a decade later: passage of the Administrative Procedure Act.

The Administrative Procedure Act (APA) of 1946 followed more than a decade of debate on the question of unconstitutional delegation and reflected a "fierce compromise" balancing the competing goals of bureaucratic expertise and legislative accountability.[10] Its requirements – that regulations be grounded in statutory law and an administrative record that includes public notice-and-comment – continue to guide rulemaking today.

Legal scholar George Shepherd has provided a fascinating account of the shifting coalitions and aborted efforts at administrative reform between 1937 and 1946.[11] Early in that period, the American Bar Association (ABA) supported legislation that would have created an administrative court to oversee administrative agencies, especially disfavored New Deal agencies, such as the NLRB, the Department of Labor's Wage and Hour Division, and the SEC. Progressive members of Congress and the agencies themselves objected to these proposals and, in response, President Roosevelt established the United States Attorney General's Committee on Administrative Procedure in 1939 to study administrative reform and propose alternative legislation.

In 1940, Congress passed the Walter-Logan bill, with support from the ABA and conservatives in Congress. President Roosevelt vetoed the bill, which would have required agencies to present a record of findings supporting decisions and issue interpretive rules after notice and opportunity for hearings. Perhaps most important, it would have subjected agency actions to judicial review of jurisdictional questions as well as whether they were supported by substantial evidence.[12]

The Attorney General's Committee, composed of distinguished nongovernmental lawyers and a small staff, subsequently offered two bills, one drafted by its majority and another by its minority. The majority's bill offered small reforms, codified some existing practices, and would have established an Office of Administrative Procedure to recommend further changes, as appropriate. The minority's bill contained judicial review provisions similar to the Walter-Logan bill and recommended that agencies first propose rules and receive public comment before issuing regulation. Congress debated these bills extensively in 1941 but set them aside after the declaration of war on Japan and Germany that December.

The emergency powers used during the war constrained individual freedom and, according to the ABA, "illustrated and emphasized the admitted defects of administrative justice."[13] However, the war also forced compromise and cooperation. Shepherd notes that proponents of reform and the administration "sought to avoid a pitched political battle during war; each side sought to avoid creation of a public perception that it was willing to impede the war effort for partisan advantage in other areas."[14] Bills introduced in 1944 attempted to find middle ground between the administration, agencies, New Deal opponents in Congress, and the ABA.

These efforts reached fruition on June 11, 1946, when President Truman signed the Administrative Procedure Act into law. It established procedures an agency must follow to promulgate binding rules and regulations within the area delegated to it by statute. Agencies must provide public notice of all rules and provide an opportunity for public comment. Final rules are subject to judicial review to determine whether they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," among other things. For administrative adjudications, in which the enabling statute calls for public hearings on the record, decisions must be based on substantial evidence. As long as executive branch agencies act within the rulemaking authority delegated to them by Congress, and follow the procedures in the APA, recent courts have not found it unconstitutional for them to write and enforce regulations. According to Shepherd:

> The landmark Administrative Procedure Act of 1946 and its history are central to the United States' economic and political development. The APA was the bill of rights for the new regulatory state. In a new era of expanded government, it defined the relationship between government and governed. The APA's impact has been profound and durable and represents the country's decision to permit extensive government, but to avoid dictatorship and central planning. The APA permitted the continued growth of the regulatory state that exists today.[15]

Though there are indications that the tide may be turning, as discussed below, the Supreme Court has not overturned legislation or regulation on nondelegation grounds since the 1930s. Indeed, in 1989, the Supreme Court found that "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[16]

Congress has supplemented the APA through legislation tailored to specific programs and passed government-wide procedural laws (such as the Freedom of Information Act of 1966 and the Government in the Sunshine Act of 1976). However, the APA, one of the most important pieces of legislation ever enacted in the United States, has guided executive branch rulemaking without significant amendment for seventy-five years.

Economic deregulation offered the second milestone. The administrative agencies formed during the New Deal and earlier generally issued "economic regulations" governing economic activities of particular industries using controls such as price ceilings or floors, quantity restrictions, and service conditions. These regulations were justified as necessary to protect consumers from the exercise of producers' market power, or to protect the industry from "destructive competition."

Most of these agencies were established as independent commissions to avoid political influence, but were they serving the public interest? Scholars in the fields of economics, antitrust, and law found that regulatory agencies such as the ICC, the Civil Aeronautics Board (CAB), and the Federal Communications Commission (FCC) seemed to get "captured" by the industries they regulated.[17] They argued that regulation of private sector prices, entry, and exit tended to keep prices higher than necessary, to the benefit of regulated industries, and at the expense of consumers.[18]

Policy entrepreneurs at think tanks (especially the Brookings Institution and American Enterprise Institute), officials in the Ford, Carter, and Reagan administrations, and legislators in Congress brought these observations and academic insights to the policy realm. They linked regulatory impacts to the problem of inflation by showing that eliminating economic regulations and fostering competition would lead to reduced prices.[19]

The CAB, established in 1938, illustrates both the structure and authorities of these administrative commissions and the evolution of public opinion and policy with respect to them. The CAB board comprised five members; the president designated one to be chairman, and not more than three could be of the same political party. Congress tasked the CAB with reviewing and approving routes and rates for air travel that are "in the public interest and in accord with public convenience and necessity." Administrative law judges would hold public hearings on rates, with disputes being resolved by the board. According to a contemporary case study:

> Under its rate-setting philosophy, the CAB totally prevented price competition. All airlines charged the same fares for the same flights. When one raised prices, all followed suit. The market was further limited by the Board's consistent refusal to allow new competition into the arena. In the name of protectionism, the last thing the Board felt "in the public interest" was more competition, so all certificates for entry were denied.[20]

In response to concerns about regulatory impacts, President Gerald Ford called for "a joint effort by the Congress, the executive branch, and the private sector to identify and eliminate existing Federal rules and regulations that increase costs to the consumer without any good reason in today's economic climate."[21]

At about the same time, Senator Ted Kennedy, chair of the Senate Judiciary Subcommittee on Administrative Practice and Procedure, engaged then Harvard Law Professor Stephen Breyer to help guide the subcommittee's activities. Breyer's background was in economic regulation and administrative law, so he steered the subcommittee toward a "long-range systematic study of economic regulation" through a series of hearings beginning with the CAB. Breyer argued it would be possible to "line up a group of political forces all in favor [of deregulation] ranging from Senator Thurmond and the administration, and all the traditional laissez-faire Republicans, on the one hand, and over to Ralph Nader and the consumer Democrats on the other."[22] He was right.

Bipartisan efforts across all three branches of government eventually led to the abolition of whole agencies such as the CAB and the ICC, and removal of unnecessary regulation in several previously regulated industries, with resulting improvements in innovation and consumer welfare.[23]

The transportation and telecommunications deregulation that took place in the 1970s and 1980s lowered consumer prices and increased choices. By 1993, the deregulated industries (trucking, rail, air, and telecommunications) produced efficiency improvements equivalent to a 7–9 percent increase in GDP.[24] Competitive markets have not just reallocated resources but generated tens of billions of dollars per year in benefits for consumers and society as a whole, in addition to beneficial changes to markets that were not anticipated prior to deregulation.[25]

Presidential requirements for regulatory impact analysis before issuing regulation became the third milestone. At the same time that economic forms of regulation were declining in the 1970s, a new type of "social regulation" was emerging, aimed at protecting health, safety, and the environment. Concerns over the reporting and compliance burdens of these new rules led to the next wave of regulatory reform, focused not on deregulation, but on ensuring that regulatory benefits outweighed costs.

In 1978, President Jimmy Carter issued Executive Order (E.O.) 12044, which required agency heads to determine the need for a regulation, evaluate the direct and indirect effects of alternatives, and, when regulation was necessary, choose the least burdensome approach. Carter also required agencies to make their regulatory analyses available to the public when proposing new rulemaking.

In 1981, President Ronald Reagan replaced Carter's order with E.O. 12291, which formalized regulatory analysis requirements and directed that "regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society." As discussed in the next section, it also established review procedures that increased incentives for conducting analysis.

In 1993, President Clinton rescinded Reagan's executive order and replaced it with E.O. 12866, though the new order reinforced the philosophy that regulations should only be issued if required by law or a "compelling public need." It directed agencies to base rules on an analysis of the costs and benefits of all available alternatives and to select "regulatory approaches that maximize net benefits" to society unless otherwise constrained by law.

More than twenty-five years and several presidential administrations later, E.O. 12866 still remains in effect. Subsequent presidents have maintained and supplemented its requirements, including, for example, President Obama's E.O. 13563 and President Trump's E.O. 13771. Regulatory impact analysis and benefit-cost balancing have become standard practice in most regulatory agencies, and it is increasingly expected by reviewing courts. Further, developed countries around the world have adopted regulatory analysis as a way "to improve policy coherence and promote economic welfare through better quality regulation."[26]

According to a 2011 Office of Management and Budget (OMB) circular:

> Regulatory analysis is a tool regulatory agencies use to anticipate and evaluate the likely consequences of rules. It provides a formal way of organizing the evidence on the key effects – good and bad – of the various alternatives that should be considered in developing regulations. The motivation is to (1) learn if the benefits of an action are likely to justify the costs or (2) discover which of various possible alternatives would be the most cost-effective.

The OMB continues, "regulatory analysis also has an important democratic function; it promotes accountability and transparency and is a central part of open government."[27]

The fourth milestone on the road to the modern regulatory state is the centralized review of regulations before they are issued. While Presidents Reagan and Clinton established the White House review procedures that largely remain today, the roots of that oversight go further back.[28] In 1971, President Richard Nixon instituted a "Quality of Life Review" program that required agencies to submit for OMB review agendas of regulatory actions and certain proposed and final rules along with their supporting analysis before publication in the *Federal Register*.

President Ford gave the OMB responsibility for coordinating oversight of agencies' "inflation impact statements" (later "economic impact statements") and directed agencies to submit to the Council on Wage and Price Stability (CWPS) "a copy of the proposed rule or regulation, the accompanying certification, and a brief summary of the agency's evaluation" of costs, benefits, and alternatives considered.[29] According to Murray Weidenbaum, who later chaired President Reagan's Council of Economic Advisors, "the driving force behind Ford's review process was the Review Group on Regulatory Reform . . . a policy-coordinating mechanism used in the Ford White House."

When he took office, President Carter abandoned some of the Nixon and Ford procedures but established his own cabinet-level Regulatory Analysis Review Group to serve as an "expert regulatory 'watchdog'" to review agencies' most important regulatory proposals. It was supported by CWPS economists and backed up by senior officials in the White House, OMB, and Council of Economic Advisors. Carter further centralized the coordination of executive oversight in 1978 with his Regulatory Council, which included representatives from independent as well as executive agencies. It was responsible for a semiannual agenda of regulatory actions and an:

> agenda of regulatory reform proposals which stressed: (1) enhancement of presidential oversight; (2) institutionalization of cost-benefit regulatory assessment procedures; (3) adoption of flexible regulatory alternatives and market mechanisms in lieu of traditional command and control regulation; and (4) further examination of non-governmental solutions (such as greater insurance availability) to problems previously viewed as primarily regulatory in character.[30]

A month before he left office, President Carter signed the Paperwork Reduction Act of 1980, which established the Office of Information and Regulatory Affairs (OIRA) in the OMB to review and approve all new reporting requirements to minimize the burdens associated with the government's collection of information. When President Reagan took office in 1981, he further centralized and formalized regulatory oversight by giving the newly created OIRA a gatekeeper role in reviewing draft regulations – as well as paperwork – to ensure they were consistent with his E.O. 12291. Unlike previous review practices, Reagan required executive agencies to submit all regulations to OIRA and not to publish them until OIRA had completed its review. He also issued E.O. 12498, which required publication of the annual *Regulatory Program*, coordinated by OIRA, which listed the most significant upcoming regulations to "improve the management of regulatory activity within the Executive branch" and "provide the public and the congress with a greater opportunity to learn about and evaluate . . . regulatory priorities and procedures."

Although Reagan's centralized regulatory review was initially controversial, each subsequent president has continued and expanded OIRA's central regulatory oversight role. As noted, President Clinton retained the key features of OIRA regulatory review. Clinton narrowed OIRA's purview to rules deemed "significant," and his order softened Reagan's rhetoric, with the preamble emphasizing "planning and coordination," reaffirming "the primacy of Federal agencies in the regulatory decision-making process" and promising to "restore the integrity and legitimacy of regulatory review and oversight" and "make the process more accessible and open to the public." It replaced the *Regulatory Program* with the semiannual *Unified Regulatory Agenda*, listing "all regulations under development or review," and the annual *Regulatory Plan*, providing more detail on "the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter." Unlike Reagan, Clinton included independent regulatory agencies in this planning process, though not in the requirement to submit individual regulations to OIRA for review.

Presidents George W. Bush, Barack Obama, Donald Trump, and Joseph Biden all retained the Clinton procedures for White House oversight of regulations and continued to assign OIRA responsibility for crosscutting administration-wide activities. President Obama's E.O. 13563 raised concerns over "redundant, inconsistent, or overlapping" regulations and encouraged greater "coordination, simplification, and harmonization." President Trump's E.O. 13771 (rescinded by President Biden) made OIRA responsible for carrying out its requirements for agencies to offset the costs of new regulations by removing or modifying existing rules.

OIRA's regulatory oversight role has several functions, including coordinating interagency disputes on regulation, liaising with White House officials to ensure regulations are consistent with presidential policies, and reviewing agency regulatory impact analyses to offer what President Obama called a "dispassionate and analytical second opinion" on agencies' actions.

As Justice Elena Kagan, then a professor at Harvard Law School, observed in her landmark article on presidential administration, presidents confront a principal-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."[31] OIRA serves as monitor and as representative of the president's priorities on regulatory matters, but those are not its only roles. As an aggregator of information and perspectives across the executive branch, it serves an essential coordinating function in an expansive bureaucracy made up of myriad narrow-mission entities.[32] Its staff of career regulatory experts is a source of institutional knowledge that endures across administrations. White House staff bring their political perspectives to regulatory policy, to be sure, but OIRA's cadre of career professionals with their expertise, knowledge, and cross-cutting perspective bring useful insights and experiences to presidential decisions.

These four milestones – passage of the Administrative Procedure Act, economic deregulation, regulatory impact analysis, and White House review – have shaped regulatory practice in the United States. The constraints they have imposed have done little to reduce either the stock or flow of new regulations, however, and concerns that executive-made laws are not appropriately accountable to American voters remain. Changes related to judicial oversight, legislative action, application of regulatory analysis retrospectively to existing rules, extension of OIRA oversight to independent regulatory agencies, and more concerted efforts at regulatory budgeting may yet mark new milestones.

Greater judicial oversight. As noted earlier, since the mid-1930s, the courts have generally been deferential to Congress and agencies when it comes to regulation, leading many to conclude that the nondelegation standard is dead.[33] The landmark 1984 Supreme Court case *Chevron U.S.A. v. Natural Resources Defense Council* established the *Chevron* deference principle, which holds that, in the face of ambiguous statutory language, courts should defer to an agency's interpretation of its statutory authority as long as it is reasonable, even if it is not the best interpretation. In legal scholar Peter Wallison's words, *Chevron* is "the most important single reason that the administrative state has continued to grow out of control."[34]

Yet this deference may be changing. There is growing interest in challenging the "intelligible principle" standard and reviving the nondelegation doctrine. Recent opinions suggest that some in the judiciary, including perhaps a majority of Supreme Court justices, are open to revisiting both *Chevron* and nondelegation doctrines.

Additionally, the Supreme Court appears to be paying more attention to whether agencies justify their decisions with sound regulatory impact analysis.[35] In 2015, it rejected an Environmental Protection Agency (EPA) regulation as arbitrary because the EPA had not weighed both the costs and the benefits, concluding that "against the backdrop of this established administrative practice, it is unreasonable to read an instruction to an administrative agency to determine whether 'regulation is appropriate and necessary' as an invitation to ignore cost."

Legislative support for regulatory procedures and analysis. Two of the milestones described here – passage of the APA and economic deregulation – benefited from bipartisan support across all three branches of government. In contrast, requirements for regulatory impact analysis and executive oversight have been largely the purview of the executive branch, with only sporadic support from Congress. While some crosscutting procedural laws, such as the Unfunded Mandates Reform Act (1995) and Regulatory Flexibility Act (1980), include requirements for agencies to develop estimates of the costs and benefits of certain regulations, their coverage is more limited than the presidential orders.

To ensure the continuity of regulatory impact analysis, Congress could reinforce the bipartisan principles embodied in presidential executive orders, especially Clinton's E.O. 12866 and Obama's E.O. 13563. Such codification would lend congressional support to the orders' nonpartisan principles and the philosophy that before issuing regulations, agencies should identify a compelling public need, evaluate the likely effects of alternative regulatory approaches, and select regulatory options based on an understanding of social benefits and costs. Ideally, such a requirement would override authorizing statutes that ignore or explicitly prohibit analysis of trade-offs.

While executive orders include language explicitly precluding judicial review, Congress could make compliance with analytical requirements judicially reviewable. Regulatory scholars Reeve Bull and Jerry Ellig found that explicit mandates for regulatory analysis appear to produce not only relatively sophisticated agency economic analyses, but more rigorous judicial review as well.[36] Congressional action on regulatory practice could also support other potential milestones, including extending regulatory analysis requirements to independent regulatory agencies, better retrospective evaluation of existing regulations, and regulatory budgeting.

Retrospective evaluation. Since Carter's E.O. 12044, presidents have directed agencies to apply regulatory impact analysis retrospectively to be sure existing rules are having their intended effects. Reagan's E.O. 12291 applied to existing as well as new rules, and Clinton's E.O. 12866 directed each agency to "periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated so as to make the agency's regulatory program more effective in achieving the regulatory objectives, less burdensome, or in greater alignment with the President's priorities and the principles set forth in this Executive order." Obama's E.O. 13563 directed agencies to "consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned."

These directives have met with limited success, however, and agencies devote much less analysis to evaluating the impacts of their regulations once they are in effect than they do to estimating hypothetical impacts before they are issued. This may be largely because executive directives have not changed underlying incentives. Unlike other government programs that are reassessed each time their funds are appropriated, regulations, once created, tend to exist in perpetuity.

In theory, Trump's regulatory budget initiative that made the issuance of new regulations contingent on finding a regulatory cost offset could have provided incentives for agencies to evaluate both the costs and effectiveness of existing programs. However, as implemented, Trump's regulatory budgeting process did more to slow the pace of new rulemaking than to evaluate the merits of regulations on the books. Agencies chose not to pursue new initiatives that would have required cost offsets from revisions to existing regulations.

The key to better retrospective regulatory evaluation may lie in developing an evaluation plan when a rule is first issued and committing to gathering the data needed for evaluation. Further, designing regulations from the outset in ways that allow variation in compliance would provide natural experiments from which to learn from experience. The successful economic deregulation of the 1970s and 1980s benefited from such natural experiments. Intrastate airline fares not subject to the CAB's rate-setting authority were markedly lower than interstate fares, providing a powerful counterfactual for what interstate prices could be with more competition.

Independent regulatory agencies. As noted above, because presidents' ability to remove independent agency commissioners is more constrained than for executive agency appointees, they have been hesitant to require centralized review. The executive orders governing OIRA review issued by Presidents Reagan (E.O. 12291), Clinton (E.O. 12866), Obama (E.O. 13563), and Trump (E.O. 13771) all excluded independent regulatory agencies. As a result, independent agencies have traditionally performed lower-quality analysis than executive branch agencies.[37]

Presidents have become less reluctant to exert oversight over independent agencies, however. Obama's E.O. 13579, "Regulation and Independent Regulatory Agencies," *encouraged* independent regulatory agencies to comply with E.O. 13563's provisions for "public participation, integration and innovation, flexible approaches, and science . . . to the extent permitted by law" and *directed* them to release public plans regarding how they would periodically review their existing significant regulations. Legal experts have found that, while the exact approach to oversight may differ depending on independent agencies' authorities, presidents could require more analysis and review.[38] Congress has introduced bills that would explicitly allow the president, by executive order, to subject independent regulatory agencies to the executive analytical requirements applicable to other agencies. Several bills have also attempted to impose analytical requirements on specific independent agencies, such as the FCC and the SEC.[39]

Regulatory budget. In theory, President Trump's regulatory budgeting requirements could have provided stronger incentives for retrospective evaluation. Executive Order 13771 required agencies to 1) offset the costs of new regulations by removing existing burdens and 2) eliminate two regulations for every new one they issue. Trump also set up a Regulatory Reform Task Force within each agency to make recommendations for regulatory reforms (E.O. 13777). President Biden revoked both of these orders on his first afternoon in office.

The idea of a "regulatory budget" had been discussed in academic and policy circles prior to 2017.[40] In 1980, President Carter's *Economic Report of the President* discussed proposals "to develop a 'regulatory budget,' similar to the expenditure budget, as a framework for looking at the total financial burden imposed by regulations, for setting some limits to this burden, and for making tradeoffs within those limits." The *Report* noted analytical problems with developing a regulatory budget, but concluded, "tools like the regulatory budget may have to be developed" if governments are to "recognize that regulation to meet social goals competes for scarce resources with other national objectives" and set priorities to achieve the "greatest social benefits."

A meaningful regulatory budget would benefit from legislative as well as executive action. When passing new statutes authorizing regulatory activity, Congress is often clear on what benefits it expects those regulations to generate. It could also set limits on the costs, so agencies are not unconstrained in issuing regulations, but are mindful of Congress's intent with respect to the burdens those regulations pose on the American people.

The modern administrative state, as measured by the number of agencies, their budgets and staffing, and the number of regulations they issue, has grown significantly over the last hundred years. The four milestones reviewed in this essay reflect bipartisan consensus on appropriate constraints on executive rulemaking, but they have not succeeded in stemming the debate over the proper role for administrative agencies and the regulations they issue. New judicial interpretations, legislative actions, and extensions to executive oversight could emerge as the next milestones of constraint on the administrative state.

About the Author

Susan E. Dudley is the Director and Founder of the Regulatory Studies Center and Distinguished Professor of Practice in the Trachtenberg School of Public Policy and Public Administration at George Washington University. From 2007 to 2009, she served as Administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget. She has recently published in such journals as *Regulation and Governance*, *Journal of Benefit-Cost Analysis*, *Administrative Law Review*, and *Journal of Law and Politics*.

Endnotes

1 Dwight Waldo, *The Administrative State: A Study of the Political Theory of American Public Administration* (New York: Ronald Press Company, 1948), viii, 227. For recent scholarly attribution to Waldo, see, for example, Kathy Wagner Hill, "The State of the Administrative State: The Regulatory Impact of the Trump Administration," *Emory Corporate Governance and Accountability Review* 6 (1) (2019). For earlier use here and abroad, see, for example, Alasdair Roberts, "Should We Defend the Administrative State?" *Public Administration Review* 80 (3) (2020), https://ssrn.com/abstract=3441123.

2 Angel Manuel Moreno, "Presidential Coordination of the Independent Regulatory Process," *Administrative Law Journal of American University* 8 (1994): 461.

3 *Field v. Clark*, 143 U.S. 649 (1892).

4 *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928).

5 George B. Shepherd, "Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics," *Northwest University Law Review* 90 (4) (1995–1996): 1557.

6 Kristin E. Hickman, "Gundy, Nondelegation, and Never-Ending Hope," *The Regulatory Review*, July 8, 2019, https://www.theregreview.org/2019/07/08/hickman-nondelegation/.

7 *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

8 Shepherd, "Fierce Compromise," 1557.

9 Franklin D. Roosevelt, "Logan-Walter Bill Fails," *American Bar Association Journal* 27 (1) (1941): 52.

10 Shepherd, "Fierce Compromise."

11 Ibid.

12 Foster H. Sherwood, "The Federal Administrative Procedure Act," *American Political Science Review* 41 (2) (1947): 271.

13 Shepherd, "Fierce Compromise," citing "Report of the Special Committee on Administrative Law," *American Bar Association Annual Report* (1943): 249.

14 Shepherd, "Fierce Compromise," 1648.

15 Ibid., 1678.

16 *Mistretta v. United States*, 488 U.S. 361, 372 (1989); and 18 U.S.C. § 3551 (1982). See also *Whitman v. American Trucking Associations*, 531 U.S. 457, 472 (2001).

[17] Mark Green and Ralph Nader, "Economic Regulation vs. Competition: Uncle Sam the Monopoly Man," *Yale Law Journal* 82 (5) (1973): 871–889, https://doi.org/10.2307/795533.

[18] George Stigler, "The Economic Theory of Regulation," *The Bell Journal of Economics and Management Science* 2 (1) (1971): 3.

[19] Susan E. Dudley, "Alfred Kahn 1917–2010," *Regulation* 34 (1) (2011), https://www.cato.org/sites/cato.org/files/serials/files/regulation/2011/4/regv34n1-2.pdf.

[20] Donald Simon, Stephen G. Breyer, and Philip B. Heyman, *Senator Kennedy and the Civil Aeronautics Board* (Cambridge, Mass.: Harvard Kennedy School Case Program, 1977).

[21] Gerald R. Ford, "Address to a Joint Session of Congress on the Economy," October 8, 1974, https://www.fordlibrarymuseum.gov/library/speeches/740121.asp.

[22] Simon et al., *Senator Kennedy and the Civil Aeronautics Board*.

[23] Martha Derthick and Paul J. Quirk, *The Politics of Deregulation* (Washington, D.C.: Brookings Institution Press, 1985).

[24] Clifford Winston, "Economic Deregulation, Day of Reckoning for Microeconomists," *Journal of Economic Literature* 31 (3) (1993).

[25] Robert W. Crandall, "Extending Deregulation: Make the U.S. Economy More Efficient" (Washington, D.C.: The Brookings Institution, 2007), https://www.brookings.edu/wp-content/uploads/2016/06/PB_Deregulation_Crandall.pdf.

[26] Organisation for Economic Co-operation and Development, *Regulatory Impact Analysis: A Tool for Policy Coherence* (Paris: Organisation for Economic Co-operation and Development, 2009), https://www.oecd.org/gov/regulatory-policy/ria-tool-for-policy-coherence.htm.

[27] Office of Management and Budget, "Regulatory Impact Analysis: A Primer," OMB Circular A-4 (Washington, D.C.: Office of Management and Budget, 2011), https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf.

[28] Susan Dudley, "The Office of Information and Regulatory Affairs and the Durability of Regulatory Oversight in the United States," *Regulation and Governance* (2020), https://doi.org/10.1111/rego.12337.

[29] Office of Management and Budget, OMB Circular A-107 (Washington, D.C.: Office of Management and Budget, 1975), https://www.fordlibrarymuseum.gov/library/document/0039/18514794.pdf.

[30] Michael Fix and George C. Eads, "The Prospects for Regulatory Reform: The Legacy of Reagan's First Term," *Yale Journal on Regulation* 2 (2) (1984): 293, n. 19.

[31] Elena Kagan, "Presidential Administration," *Harvard Law Review* 114 (2001): 2245.

[32] Cass R. Sunstein, "The Office of Information and Regulatory Affairs: Myths and Realities," *Harvard Law Review* 126 (2013): 1838.

[33] Eric A. Posner and Adrian Vermeule, "Interring the Nondelegation Doctrine," *University of Chicago Law Review* 69 (2002): 1721, https://chicagounbound.uchicago.edu/journal_articles/1732/.

[34] Peter J. Wallison, *Judicial Fortitude: The Last Chance to Rein in the Administrative State* (New York: Encounter Books, 2019), 134.

35 John D. Graham and Paul R. Noe, "A Paradigm Shift in the Cost-Benefit State," *The Regulatory Review*, April 26, 2016, https://www.theregreview.org/2016/04/26/graham-noe-shift-in-the-cost-benefit-state/; and Cass R. Sunstein, "Cost-Benefit Analysis and Arbitrariness Review," *Harvard Environmental Law Review* 41 (1) (2017): 1.

36 Reeve T. Bull and Jerry Ellig, "Statutory Rulemaking Considerations and Judicial Review of Regulatory Impact Analysis," *Administrative Law Review* 70 (2018): 873.

37 Arthur Fraas and Randall Lutter, "On the Economic Analysis of Regulations at Independent Regulatory Commissions," *Administrative Law Review* 63 (2011): 213.

38 Bridget Dooling, "Bespoke Regulatory Review," *Ohio State Law Journal* 81 (2020), https://ssrn.com/abstract=3550234. The Department of Justice's Office of Legal Counsel issued an opinion that presidents could apply E.O. 12866 to independent agencies. See "Extending Regulatory Review Under Executive Order 12866 to Independent Regulatory Agencies," Memorandum Opinion for the Counsel to the President, October 8, 2019, https://www.justice.gov/olc/file/1349716/download.

39 Susan E. Dudley, "Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future," *Case Western Reserve Law Review* 65 (4) (2015): 1027.

40 Christopher C. DeMuth, "Constraining Regulatory Costs–Part II: The Regulatory Budget," *Regulation* (1980).