REGULATORY REFORM

40th ANNIVERSARY

RESTRAINING THE REGULATORY STATE

A Regulatory Review Office could help Congress determine if new rules are benefiting the public.

BY ROBERT W. CRANDALL

Forty years ago, Congress launched a significant rollback of the regulatory state that had been in place since the Great Depression. Economic analyses of decades of economic regulation by the Interstate Commerce Commission, Civil Aeronautics Board, and Federal Power Commission had shown that those regulatory programs had reduced consumer welfare substantially by reducing entry, increasing prices, and restraining technological progress. By the mid-1980s, Congress had abolished the Interstate Commerce Commission and Civil Aeronautics Board and rolled back the regulatory authority of several other agencies.

At the same time, however, Congress established or expanded dramatically the scope of federal health, safety, and environmental regulation. The Environmental Protection Agency (EPA), Occupational Safety and Health Administration (OSHA), National Highway Traffic Safety Administration (NHTSA), Consumer Product Safety Commission, and other agencies began to issue far-reaching regulations in response to continuing expansions of regulatory authority granted by Congress. Thus, while the Gerald Ford and Jimmy Carter administrations had succeeded in reining in traditional economic regulation, they offset this success by launching a wave of new regulations that has not crested to this day.

RESTRAINING THE NEW REGULATORS

Almost immediately, the Ford and Carter administrations recognized the dangers of the unbridled regulatory authority that Congress had granted to the new or expanded agencies. Though both administrations accepted the agencies' public missions, they worried that regulators would pursue those missions to such a degree that public costs would eclipse benefits. Both administrations began to search for a mechanism that would assure the agencies would not be excessively burdensome on private businesses and thereby saddle consumers with unnecessarily high prices and reductions in product choices. As a result, the Council on Wage and Price Stability (CWPS) was established in the White House in 1974 to monitor regulation and suggest regulatory

ROBERT W. CRANDALL is a non-resident senior fellow with the Brookings Institution and a non-resident senior fellow with the Technology Policy Institute.

alternatives that were less burdensome to the economy. In 1981, Ronald Reagan's administration renamed this agency the Office of Information and Regulatory Affairs (OIRA) and moved it to the Office of Management and Budget (OMB), where it remains to this day.

The formal purpose of OIRA is to enforce a requirement that regulatory agencies in the executive branch use cost–benefit analysis to justify new regulations and make sure they reflect the most efficient approach to achieving their purposes. From the outset, this requirement was controversial and strongly resisted by many regulatory agencies. Some regulators viewed cost–benefit analysis as burdensome, difficult to execute, and the source of unnecessary delay in the rulemaking process. Often, analyses bogged down in disputes over how to value improvements in human health or reductions in mortality. In most proceedings, regulators had no independent data on the likely cost of proposed rules and therefore relied on estimates submitted by the regulated firms themselves, an obvious source of potential bias. And in each case, a cost–benefit analysis would require assumptions about the evolution over time of demand, costs, and technical change in the affected industry or product market. Finally, some regulatory statutes do not require that the prospective costs of regulations be considered when promulgating rules.

It is hardly surprising that even after 35 years there is very little evidence of the effects of requiring regulators to use cost–benefit analysis. Even if such analyses are done well, it is difficult to know how the regulations would have evolved without such analyses. Retrospective studies of any individual regulation may eventually reveal that the regulation was too strict, too lenient, or perhaps irrelevant, but it would be difficult to conclude that the availability of better cost–benefit analysis during the regulation's development would have led to a better result. Several government reports and private studies of the effects of CWPS and OIRA regulatory oversight have been published (see Readings), but none provides dispositive evidence of the success or failure of such oversight.

This is not to say that such oversight and the cost–benefit analysis requirement are not useful and likely very valuable, particularly for major regulations. Surely, no regulator should proceed without carefully analyzing the prospective benefits and costs of what he is about to do. Even if his final decision is considerably removed from the best course of action because of political pressures, it should be useful to know how much this departure from rational regulation is costing society in forgone benefits or excessive costs.

THE POLITICAL DIMENSION

For their entire history, regulatory review and its cost–benefit requirements have been lodged in the Executive Office of the President. The logic of placing them there is that the president needs independent assessments of whether his cabinet regulatory agencies are carrying out his desired policies, which is the role of the OMB in other policy arenas. Much of the impetus for regulatory review came from the perception that regulatory agencies can engage in excessive regulation without the knowledge of the White House because rules are often complicated, difficult to understand, and leave no direct footprints on the federal budget. Who in the White House can know, for example, whether proposed New Source Performance Standards for facilities that emit nitrogen oxides are sensible and efficient? The only evidence, absent a formal regulatory review, would come from lobbyists offering their clients' biased views on such a matter, and even then who would pore over the lengthy, complicated reports submitted by the lobbyists?

The notion that a regulatory review process at OMB would reduce the burdens of rules and perhaps make them more efficient rests heavily on the assumption that the president or his designees will necessarily respond to harsh reviews by reining in the regulators, preventing them from piling one burdensome rule on another. But the heads of the OMB and OIRA are appointed by the same White House that appoints the administrators of the EPA, OSHA, and NHTSA. If the stimulus for excessive regulation—or even for regulation that is too lax—emanates from the president himself, OIRA will simply be tilting at windmills if it attempts to do its job.

For example, if in 2015–2016 OIRA had used cost–benefit analysis to show that the control of carbon emissions through the EPA's Clean Power Plan is so costly that it should be scaled back substantially, would anyone have expected President Barack Obama to recommend that the EPA administrator weaken the proposed rule? Alternatively, if the current OIRA's cost–benefit analysis were to demonstrate that the Clean Power Plan is justified because its benefits far exceed its costs, would anyone expect President Trump to order the EPA to clamp down further on emissions from, say, West Virginia and Kentucky? The politics that drive the executive branch are likely to permeate all departments and agencies within that branch of government.

A BETTER "SOLUTION"

No one should expect government intervention in private markets to be efficient, whether it is in the form of regulating prices or setting standards for health and safety. Forty years ago, the recognition of this fact led to substantial deregulation and even the elimination of regulatory agencies. But no one supports the elimination of the EPA, OSHA, or NHTSA. The only issue on the table is how to require those agencies to make sure that the social benefits of their rules exceed their costs. If some form of regulatory review based on cost–benefit analysis is to serve as a check on unwise and inefficient regulation, the review process and the authority should reside outside the executive branch.

Comprehensive regulatory review cannot be left to the judiciary because of the costs and time required to litigate thousands of agency rules with all of the due process requirements as each challenged rule winds its way through the federal courts—a phenomenon all too familiar. Thus, the best solution to the problem of excesses in the agencies' exercise of delegated regulatory authority is to allow Congress to undertake regulatory reviews and, where appropriate, undo some of this delegation.

The statutory authority for Congress to review individual regulations has been in place for more than 20 years. In 1996, Congress passed the Congressional Review Act, which requires that regulatory agencies submit new rules, with supporting materials, to each chamber of Congress and the comptroller general. If a majority of lawmakers in both houses disapprove of a new rule, the Senate and House of Representatives have 60 days to pass a resolution of disapproval and forward it to the president for his signature. Through 2016 only three such resolutions had been passed by Congress, one in 2001 and two in 2015, but the latter two were vetoed by President Obama, whose vetoes were not overridden. Thus, congressional review, while possible, has not been an effective constraint on agency action—at least, not till now.

The effectiveness of congressional review depends on the saliency of the regulatory issues. As long as potential congressional debates over resolutions of disapproval of individual regulations are not well understood by the press and the public, there will be little public pressure on Congress and the president, whose concurrence is necessary, to reverse an agency rule. Congress needs an institution to provide reviews of major regulations as they are being developed and to issue reports on particularly ill-advised rules in a timely fashion, providing the impetus and political cover for lawmakers to act—and for the president to concur when the politics allow. No such institution exists today.

Forty years ago, Congress established the Congressional Budget Office (CBO) to serve as its source of analysis of government spending and taxation that is independent of the executive branch—i.e., separate from the OMB. The CBO has performed admirably over this period, avoiding most of the ideological polarization that has gripped Congress in recent years. Apparently, legislators from both sides of the aisle value the independent judgment of CBO analysts. This suggests that a Congressional Regulatory Review Office, providing timely analysis and public reports on major regulatory rules, could provide similar value to Congress, helping lawmakers to exercise their power to review and potentially repeal burdensome new regulations.

A Congressional Regulatory Review Office could fill another major void in the current regulatory environment. Most of the debate over regulation is usually focused on prospective regulations to control the latest threat to human well-being. In the last few years, the public's attention has been focused on such issues as the environmental effects of new energy pipelines, fracking, and fossil fuel combustion; the effect of new Dodd-Frank rules on bank lending; and the appropriate regulation of overtime hours or contract workers (for Uber, Lyft, etc.). There is very little discussion of how decades of regulatory rules have actually worked in practice.

A new Regulatory Review Office could (and should) be instructed to undertake such retrospective reviews, particularly of very costly regulatory programs. How efficient and effective has the EPA's regulation of abandoned ("brownfield") industrial sites been? Do NHTSA's fuel-economy rules contribute positively to consumer welfare or would a gasoline tax or carbon tax be more efficient and effective? Obviously, such reviews would be costly and time-consuming, but their value could be substantial in directing future legislation and guiding regulators as they continue to struggle with implementing current laws.

SEIZE THE MOMENT

As this issue goes to press, Congress is finally beginning to use the Congressional Review Act to unwind some of the "midnight" regulations promulgated in the waning months of the Obama administration. This is happening because the Republicans now control both houses of Congress and the White House, and cannot be blocked by Democratic opposition. But the Republicans are doing this without the benefit of regulatory analysis that could have been prepared over the last few years by a Congressional Regulatory Review Office. Had such an organization been in place and issued a variety of reports documenting the inefficiency or ineffectiveness of the target rules, a stronger political case would exist for Congress's current actions, even in an environment of divided political control in Washington.

Surely, such divided control will arise again, perhaps even in the near future. In that environment, expert analysis from a Regulatory Review Office could gain bipartisan support. As the CBO has shown, the presence of a strong, independent analytical institution that supports rational public policy could be a major component in constraining excessive partisan zeal.

READINGS

■ "Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews," published by the Government Accountability Office, April 2009.

■ "Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs," by Curtis W. Copeland. Congressional Research Service, June 9, 2009.

■ "The Case for a Congressional Regulation Office," by Philip Wallach and Kevin R. Kosar. *National Affairs* 29 (Fall 2016), 56–68.

■ "The Legacy of the Council on Wage and Price Stability," by Thomas D. Hopkins, Benjamin Miller, and Laura Stanley. Mercatus Center at George Mason University, 2014.