

An OIRA Rule on Rules

By: Bridget C. E. Dooling | September 16, 2019

In this commentary, I summarize a working paper I wrote with fellow GW Regulatory Studies Center Research Professor Brian F. Mannix entitled “[Codifying the Cost-Benefit State](#).” In it, we consider how a government-wide rule on regulatory analysis could help the courts review agency regulatory analysis. We prepared this paper with financial support from the [C. Boyden Gray Center for the Study of the Administrative State](#) as part of its research roundtable and public policy conference on “[The Future of White House Regulatory Oversight and Cost-Benefit Analysis](#).”

Rise of the Cost-Benefit State...and its Judicial Review

To begin, Professor Mannix and I review the rise of the cost-benefit state as a result of its development in the executive branch and its treatment by the courts. Almost fifty years of presidential direction and agency practice, combined with ten years of increasing encouragement from the Supreme Court, suggest that the “[cost-benefit state](#),” as Professor Cass R. Sunstein described it in 1996, has not only arrived, but is well past its introductory season.

After a review of specific cases and scholarly work documenting the use of benefit-cost principles by the courts, we conclude that benefit-cost balancing is now a dominant paradigm in administrative law for evaluating federal agencies’ exercise of delegated regulatory discretion. It was not always this way, and this shift is an opportunity to rethink whether courts have all the tools they need for judicial review.

A Need for Standards to Guide Judicial Review

At present, the courts work within broad standards, such as “arbitrary and capricious” from the Administrative Procedure Act. But how should a court determine whether a rule is arbitrary and capricious as a result of inadequate or otherwise problematic analysis? In other words, what makes an analysis good enough to meet this standard?

Guidance from the Supreme Court has been limited. For example, while [Michigan v. EPA](#) stands for the proposition that it is unreasonable for an agency to ignore costs, it declines to give agencies a roadmap for *how* to consider them sufficiently. And at perhaps the other end of the spectrum we have seen some provocative decisions from the U.S. Court of Appeals from the D.C. Circuit, especially its decision in [Business Roundtable v. SEC](#), which called for [quantified cost estimates](#) in the Securities and Exchange Commission’s (SEC) regulatory analysis. No matter what you think about that decision, you might agree

In brief...

Judicial review of agency benefit-cost analysis is on the rise. Although courts are paying more attention to these analyses, they lack a robust toolkit to assess them. A cross-government rule, written by OIRA, could help by giving courts a set of standards against which they can assess agency rules.

that the D.C. Circuit, a specialist on administrative law matters, likely has the most expertise in reviewing agency regulations. But as Professors Caroline Cecot and W. Kip Viscusi have [shown](#), judicial review of agency benefit-cost analysis arises in almost all of the U.S. Courts of Appeals. These reviewing courts might benefit from some consistent guidance.

In response to increased scrutiny upon judicial review, agencies have taken steps to firm up their benefit-cost analyses. Still, despite multiple executive orders and supplementary guidance, neither executive nor legislative action has produced a clear set of justiciable standards against which courts can evaluate agency analyses for adequacy.

A Cross-Government Rule Could Help

Who is in a position to provide this guidance? Congress could set regulatory analysis standards, but it has not yet acted to do so across the government. With almost 50 years of experience in crafting these analyses, the executive branch has the expertise needed. Right now, its [standards](#) are written in a technical manner aimed at the inner workings of agencies to help guide how they prepare these analyses. They are not written to facilitate judicial review.

Some agencies have recently [initiated rulemakings](#) to codify their own analytical procedures under particular laws. While this statute-by-statute interpretive approach may have some appeal, it is unlikely to provide consistency across government or broadly-applicable tools for courts to use in varying regulatory domains. Because we are thinking broadly about tools for courts to use upon judicial review, we propose a set of judicially enforceable, government-wide standards for the conduct of regulatory analysis in rulemaking. An executive order could direct Office of Information and Regulatory Affairs (OIRA) to write such a rule. As just one example of what the rule could contain, it could require agencies to consider alternatives in addition to the status quo. This is consistent with existing policy on regulatory analysis, but the rule would specify that, in the executive's view, an analysis that fails to do so would be arbitrary and courts should set it aside.

Sources of Authorities for Such a Rule

Savvy readers will note that there is no statute that directs the executive branch to write such a rule. Much of the [literature to date](#) has focused on theories of judicial authority to require and to review agency benefit-cost balancing in rulemaking. In our paper we focus instead on the executive's authority to write such a cross-cutting rule and the courts' authority to enforce it. We find that even if there is no direct, statutory authorization for this rule under current law, the executive could find regulatory authority in the president's Article II powers.

As an analogy, we offer the example of the Council on Environmental Quality's [regulations](#) under the National Environmental Policy Act (NEPA), which govern agencies' use of Environmental Impact Statements, to illustrate how the absence of express statutory authority is not necessarily fatal to a regulation, particularly when it regulates internal agency action rather than private action and offers tools to help judges overcome an emerging challenge. In *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979), the Supreme Court took favorable notice of these regulations, removing any doubt about the CEQ's rulemaking authority.

Turning to judicial authority to enforce such a rule, we offer two theories. The first is that the courts might choose to adopt the views of the executive on matters of agency administration and economic

analysis, and that the usefulness of such a rule may lead courts to embrace it in the way they did in the NEPA context. The second theory is a response to concerns about the fallout from a potentially [re-invigorated nondelegation doctrine](#). Justice Elena Kagan described one of these concerns in her plurality opinion in *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019): “if [this statute’s] delegation is unconstitutional, then most of Government is unconstitutional.” The rule we describe offers a way to ensure that more agency action comports with what Professor Sunstein has [called](#) the “cost-consideration canon” of modern nondelegation doctrine, which, he argues, serves as an effective check on agency action. This would advance some of the objectives of those advocating a reinvigorated nondelegation doctrine, but it would not likely lead to widespread vacation of existing statutes. It therefore offers an intermediate pathway to place limits on the administrative state without pushing it off a nondelegation cliff.

In sum, when courts probe an agency’s benefit-cost analysis they should be able to draw upon the toolkit that the executive branch has assembled over many decades. At present, they lack a set of standards designed for their use. In the absence of legislation, the courts might welcome an assist from the executive. While benefit-cost analysis does not answer all of the important questions we should ask about an agency action, it is increasingly part of judicial review. There are steps the executive can take, now, to help courts navigate this terrain.