

Harvard Law School
Briefing Papers on Federal Budget Policy

Briefing Paper No. 73

**Regulatory Budgeting:
Recent Efforts and Recurring Issues**

April 2018

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(Last Updated: September 2019)

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*As you know, excessive regulation and red tape have imposed an enormous burden on our economy—a hidden tax on the average American household in the form of higher prices for goods and services.*¹

INTRODUCTION

It seems axiomatic that “[m]odern government is administrative government.”² By any available measures, the scale of the burden imposed by regulatory agencies continues to grow dramatically.³ In 2016 alone, new regulations outpaced new public laws by a ratio of ten-to-one.⁴ While simple numerical comparisons (such as using pages in the Federal Register as a proxy for burden) may not be an ideal basis for analysis,⁵ no one seems to contest the general growth of the regulatory burden imposed by federal agencies. For example:

In 2014 Congress enacted 223 laws (including more than 50 namings of federal buildings and properties, five medal awards, several Smithsonian regent appointments, and the like). . . . If one looks at all new rules issued by federal agencies, during 2014 alone federal agencies issued 3,554 final new rules in the Federal Register.⁶

¹ George Bush, *Memorandum on Reducing the Burden of Government Regulation*, The American Presidency Project (Jan. 28, 1992), <http://www.presidency.ucsb.edu/ws/index.php?pid=20548>.

² STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN, ADRIAN VERMEULE & MICHAEL HERZ, *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS TEXT, AND CASES 1* (2017). *See also* INTRODUCTION TO REGULATORY BUDGETING: A HOUSE BUDGET COMMITTEE MAJORITY STAFF WORKING PAPER 1 (Sept. 8, 2016), <https://budget.house.gov/uploadedfiles/06-bpr-regulatorybudgeting-090816.pdf> (“The exercise of government in America has become much more a matter of regulation than of legislation”); Susan E. Dudley, *Can Fiscal Budget Concepts Improve Regulation?*, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 259, 259 (2016) (“Regulations are the primary vehicles by which the United States government implements statutory laws and agency objectives”); Jonathan Turley, *The Rise of the Fourth Branch of Government*, WASHINGTON POST (May 24, 2013).

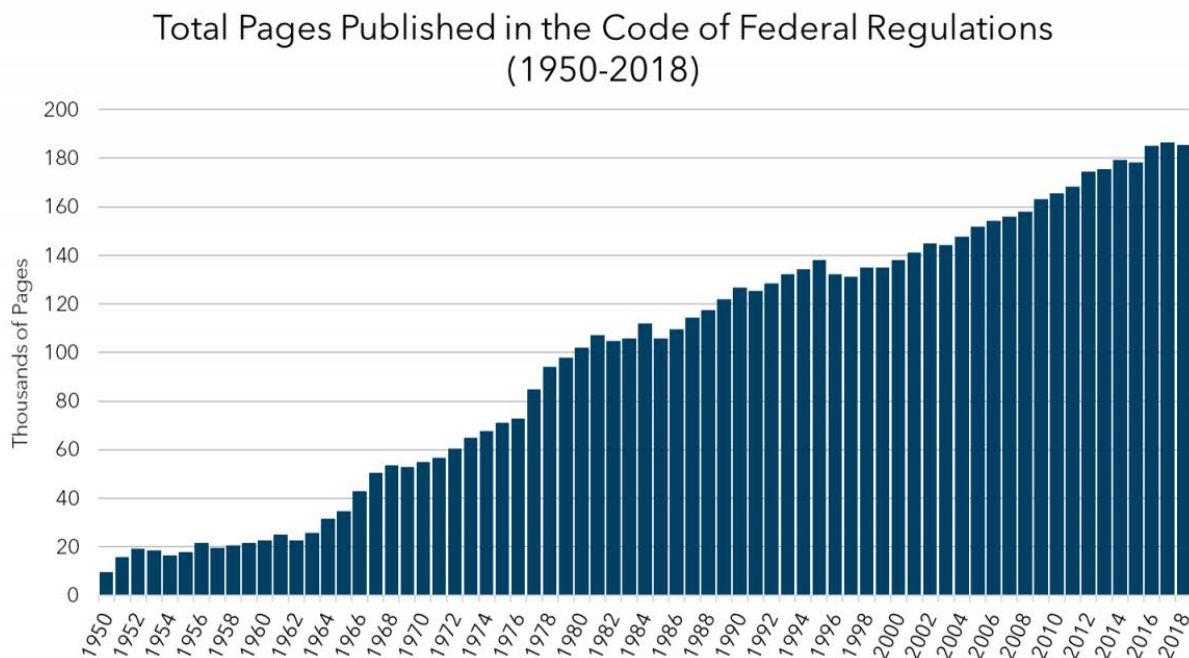
³ *See* Reg Stats, Regulatory Studies Center, George Washington University Columbian College of Arts and Sciences (accessed Mar. 14, 2017), <https://regulatorystudies.columbian.gwu.edu/reg-stats>.

⁴ Clyde Wayne Crews Jr., *How Many Rules And Regulations Do Federal Agencies Issue?*, FORBES (Aug. 15, 2017), <https://www.forbes.com/sites/waynecrews/2017/08/15/how-many-rules-and-regulations-do-federal-agencies-issue/#fa6b0831e647>.

⁵ *See, e.g.*, JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 84 (1938) (“The most superficial criticism which can be directed toward the development of the administrative process is that which bases its objections merely upon numerical growth.”).

⁶ *See* Jeff Rosen, *Putting Regulators on a Budget*, NATIONAL AFFAIRS (Spr. 2016), <https://nationalaffairs.com/publications/detail/putting-regulators-on-a-budget>.

As one former head of the Office of Information and Regulatory Affairs recently observed, this growth cannot be attributed to any particular political party.⁷



Source: Reg Stats, Regulatory Studies Center, George Washington University Columbian College of Arts and Sciences (accessed Sept. 4, 2019), <https://regulatorystudies.columbian.gwu.edu/reg-stats>.

It is perhaps surprising, however, that for the past 40 years many of the same presidents that have overseen the growth of the regulatory state have also called for its reformation.⁸ In particular, common and bipartisan cause has been found under the umbrella of cost-benefit analysis

⁷ See Christopher DeMuth, *The Regulatory State*, NATIONAL AFFAIRS (Summer 2012), <https://www.nationalaffairs.com/publications/detail/the-regulatory-state> (noting that “[t]he modern regulatory state is a bipartisan enterprise: During the half-century before President Obama’s election, the greatest growth in regulation came under Presidents Richard Nixon and George W. Bush”). See also Rosen, *Putting Regulators on a Budget* (observing that “the last three presidents before President Barack Obama each set a record for the number of costly, ‘economically significant’ (involving more than \$100 million per year) final rules published in his last year in office, and that was true regardless of his political party”).

⁸ Ted Gayer, Robert Litan & Philip Wallach, *Evaluating the Trump Administration’s Regulatory Reform Program*, BROOKINGS INSTITUTION (Oct. 2017), https://www.brookings.edu/wp-content/uploads/2017/10/evaluatingtrumpregreform_gayerlitanwallach_102017.pdf, at 3 (noting that “the regulatory process has been the rare policy area in which presidents from the two major parties have broadly agreed, building on each other’s efforts over the course of decades”).

(“CBA”): the idea “that regulatory policymaking should be guided, to the extent permitted by law, by balancing benefits against costs.”⁹

But CBA is not the only cost-conscious reform mechanism that has been proposed. Proposals for a regulatory budget—an administrative analog to the federal fiscal budget, which would limit the costs agencies can impose on private parties—have been part of the debate since at least 1978.¹⁰ Like CBA, regulatory budget proposals have found advocates on both sides of the political aisle. Indeed, regulatory budgets have been proposed in academic articles,¹¹ Congressional reports,¹² executive branch-authored reports,¹³ and legislative proposals drafted by Republican¹⁴ and Democratic¹⁵ members of Congress as well as the White House.¹⁶ However, unlike CBA, regulatory budget measures have not—aside from several ad hoc nods¹⁷—historically been implemented in any systematic way in the U.S.

But this may be changing. As will be discussed in greater detail below, the Trump Administration seems to have breathed new life into the regulatory budget idea, prompting several commentators to observe that it “has launched the most ambitious regulatory budgeting program in human history—just a tremendous undertaking.”¹⁸ And—also discussed in greater

⁹ *Id.* at 3-4 (noting that “[a]t least since the Ford administration, there have been numerous efforts to require agencies to pay greater heed to analyzing the costs and benefits of major new regulations”).

¹⁰ *Id.* at 6 (“A 1978 paper by Robert Crandall argues, ‘The most practical possibility for confronting regulators with the costs of their actions would be to construct a shadow budget to cover the resources that the agency requires private agents to consume in the pursuit of the regulatory goal.’”).

¹¹ *See, e.g.*, Christopher C. DeMuth, *The Regulatory Budget*, REG. MAG., Mar.-Apr. 1980.

¹² *See, e.g.*, JOINT ECON. COMM., U.S. CONG., REPORT ON THE 1979 ECONOMIC REPORT OF THE PRESIDENT, S. REP. NO. 96-44 (1979), at 52-54.

¹³ *See, e.g.*, COUNCIL OF ECON. ADVISORS, ECONOMIC REPORT OF THE PRESIDENT 125 (1980).

¹⁴ *See, e.g.*, National Regulatory Budget Act of 2014, S. 2153, 113th Cong. (2014), <https://www.Congress.gov/113/bills/s2153/BILLS-113s2153is.pdf>.

¹⁵ *See, e.g.*, Federal Regulatory Budget Act, S. 3550, 95th Cong. (1978), <https://www.Congress.gov/bill/95th-Congress/senate-bill/3550>.

¹⁶ *See, e.g.*, OFFICE OF MGMT & BUDGET, REGULATORY COST ACCOUNTING ACT OF 1979 (1979), (draft legislation), available at http://www.thecre.com/pdf/Carter_ProposedBill.PDF. *See also* Jeffrey A. Rosen and Brian Callanan, *The Regulatory Budget Revisited*, 66 ADMIN. L. REV. 835, 850-51 (2014).

¹⁷ *See, e.g.*, Exec. Order No. 13,422 (2007). However, this was repealed on January 20, 2009, *see* Exec. Order No. 13,497 (2009).

¹⁸ Gayer et al., *Evaluating the Trump Administration’s Regulatory Reform Program*, at 16.

detail below—several recently-proposed legislative measures, if passed into law, would create a regulatory budget that could run alongside the annual fiscal budget.

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This paper will proceed in four parts. Part I will provide background on how regulatory budgeting differs from traditional CBA. Part II will discuss several major design features that can characterize a regulatory budget. Part III will consider recent regulatory budget efforts, including the Trump Administration’s OIRA-led initiatives as well as several legislative proposals. Finally, Part IV will raise several of the perennial challenges that any regulatory budget effort will likely have to confront.

I. BACKGROUND

Regulatory Budgeting vs. CBA

Regulatory budgeting could be described as a cousin to CBA. At a general level, CBA is largely (if not exclusively) focused on competing ways to address a single problem. CBA’s central objective is to ensure that agencies pick the best of several possible responses to address an identified market failure.¹⁹ The most efficient response (according to three successive White Houses) is that which achieves the greatest net social benefits at the lowest cost.²⁰ As OMB explained in a 2015 report to Congress:

Careful consideration of costs and benefits is best understood as a pragmatic way of helping to ensure that regulations will improve social welfare, above all by informing the design and consideration of various options so as (1) to determine whether additional regulation is appropriate and (2) to identify the opportunities

¹⁹ See, e.g., ANTHONY BOARDMAN, DAVID GREENBERG, AIDAN VINING & DAVID WEIMER, *COST-BENEFIT ANALYSIS* (2010).

²⁰ See Exec. Order No. 12,866 (1993); OFFICE OF MGMT. & BUDGET, *CIRCULAR A-4: REGULATORY IMPACT ANALYSIS* (2003) (“Where all benefits and costs can be quantified and expressed in monetary units, benefit-cost analysis provides decision makers with a clear indication of the most efficient alternative, that is, the alternative that generates the largest net benefits to society (ignoring distributional effects).”); Exec. Order No. 13,563 (2012).

for minimizing the costs of achieving a social goal (cost-effectiveness) and maximizing net social benefits (efficiency).²¹

For example, CBA would instruct an agency confronted with an identified market failure to act only if the benefits of action outweigh the costs; and if action is warranted, to pick the action that will produce the greatest benefits for the least cost.²² All of this is irrespective of distributional considerations.²³

That is where the CBA endeavor stops. EO 12866 and its successor orders focus on discrete proposed rules, not all rules in the aggregate.²⁴ A regulatory budget picks up where CBA stops. Rather than focusing on a single solution to a single problem, a regulatory budget is concerned with all proposed solutions to all problems an agency is considering.²⁵ As one of the earliest advocates of a regulatory budget explained, “[t]here is an implicit economic logic to this procedure. Comparing partial costs with concurrent total costs is a casual exercise in marginal analysis, of a sort that never occurs in most practical applications of [CBA] where considerations of costs outside the project being analyzed are deliberately excluded.”²⁶ This remains one of the most universally-advanced justifications for a regulatory budget amongst economists and

²¹ OFFICE OF INFO. & REGULATORY AFFAIRS, 2015 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 3 (2016). The report was required by the Unfunded Mandates Reform Act (UMRA) (Pub. L. No. 104-4, 2 U.S.C. § 1538).

²² *See id.*

²³ *See id.*

²⁴ *See* Exec. Order No. 12,866 (1993) (applying to a subset of all rules identified as “[s]ignificant regulatory action,” which includes rules which “[h]ave an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities”); OFFICE OF MGMT. & BUDGET, CIRCULAR A-4: REGULATORY IMPACT ANALYSIS (2003).

²⁵ *See* ROBERT E. LITAN & WILLIAM D. NORDHAUS, REFORMING FEDERAL REGULATION 66 (1983) (observing that “[a] [regulatory] budget would require legislators and administrators to make explicit decisions regarding the allocation of social resources both to regulatory goals generally and among specific regulatory programs in particular. Of central importance, a budgetary framework would change the way in which the regulatory effort is viewed. Individual regulatory programs would no longer be viewed in isolation”).

²⁶ Christopher C. DeMuth, *The Regulatory Budget*, at 37.

regulatory scholars alike.²⁷ For example, as Susan Dudley, a former Administrator of OIRA, recently explained, CBA—while important—“may not provide sufficient discipline for ensuring that tradeoffs are realistically considered. The application of fiscal budgeting concepts to regulation holds the potential to bring more accountability and transparency to the regulatory process.”²⁸ Cass Sunstein, another former Administrator of OIRA, has suggested (albeit long before his tenure at OIRA) that the analysis a regulatory budget would allow could help prevent agencies from taking action which cater to the preferences of a minority.²⁹ As will be discussed in greater detail below, the regulatory budget concept is flexible and, through specific design features, could be used to accomplish numerous political or economic ends.

The defining feature of a regulatory budget is some kind of ceiling on how much cost regulators can impose on regulated entities. This indispensable feature is the result from two observations and an inference. The first observation calls attention to the similarities between direct costs imposed by the government and indirect costs imposed by regulation. As Rosen and Callanan observed:

The principal insight behind a regulatory budget—the notion that private-sector costs arising from taxation and regulation are largely fungible—emerged in the 1970s. The regulatory budget is premised on the view that the transfer of private resources by regulation is no less a cost imposed by government than the

²⁷ See, e.g., ROBERT E. LITAN & WILLIAM D. NORDHAUS, REFORMING FEDERAL REGULATION 134 (1983) (“Individual regulatory programs would no longer be viewed in isolation, but rather would be compared . . . against each other and against similar direct-expenditure programs.”).

²⁸ Dudley, *Can Fiscal Budget Concepts Improve Regulation?*, at 265. See also Susan Dudley, *Putting A Cap on Regulation*, ADMIN. & REG. L. NEWS (2017), at 4, 6 (citing Michael Mandel & Diana G. Carew, *Regulatory Improvement Commission: A Politically-Viable Approach to U.S. Regulatory Reform*, PROGRESSIVE POLICY INSTITUTE (May 2013)) (“Presidents for the last 40 years have called upon agencies to analyze the benefits and costs of new regulations before they are issued. While this is still an important requirement, it hasn’t constrained the scope and reach of regulation. As Michael Mandel and Diana Carew of the Progressive Policy Institute note, like pebbles tossed in a stream, each individual regulation may do little economic harm, but eventually the pebbles accumulate and like a dam, block economic growth and innovation.”).

²⁹ See Cass R. Sunstein, *Public Choice, Endogenous Preference*, 12 INT’L REV. L. & ECON. 289, 290-91 (1992) (“Congress should create a regulatory budget to allow consideration of the effects of regulatory programs and to permit informed comparisons across programs. The device of omnibus bills, allowing coordination of the costs and benefits of various initiatives, has considerable promise here. This device has the effect of overcoming the power of well-organized groups to ensure passage of programs that benefit them at the expense of the public as a whole.”).

collection and expenditure of private resources through the tax and spending powers.³⁰

Regulation, then, can be understood as a substitute for the government’s power to collect and spend money collected through taxation.³¹ By way of example, “the government could provide insurance coverage to workers by paying for it directly—spending its tax revenues or proceeds from public debt—or it could require by regulation that employers provide that same insurance coverage, using the employers’ own private funds.”³² Indeed, as a practical matter, “[f]or the people who bear the cost of regulation, it makes little difference whether the pain comes from taxes or from regulations: Their economic burdens are increased either way.”³³ However, this equivalence may lose its force to where a regulation specifically forces an actor to internalize the costs of a negative externality it has itself created—analogue to a Pigouvian tax.³⁴

³⁰ Rosen & Callanan, at 838-39. *See also* Clyde Wayne Crews Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, COMPETITIVE ENTERPRISE INSTITUTE, <https://cei.org/sites/default/files/10KC2019.pdf> at 17.

³¹ *See* Susan E. Dudley, *Can Fiscal Budget Concepts Improve Regulation?*, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 259, 260 (2016) (“Taxes, and subsequent spending, are one way the federal government directs resources from the private sector to accomplish public goals. Regulation of private entities—businesses, workers, and consumers—is another.”).

³² Rosen, *Putting Regulators on a Budget*. *See also* JOINT ECON. COMM., U.S. CONG., REPORT ON THE 1979 ECONOMIC REPORT OF THE PRESIDENT, S. REP. NO. 96-44 (1979), at 54 (“The ‘off-off-budget’ spending, the costs of compliance with Federal regulations . . . have a financial impact on businesses just as a tax would, and an impact on the economy just as Federal spending would.”).

³³ Rosen, *Putting Regulators on a Budget*.

³⁴ *Cf.* Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 232 (2012) (“Unsafe behavior causes an externality—harm to others. A basic regulatory tool for dealing with the failure of markets to solve this problem is the Pigouvian tax. This tax imposes on the externalizing party the external cost of its activity, thus reducing activity levels closer to the social optimum. The Pigouvian tax is often regarded in theory as an effective form of regulation, because, unlike the command-and-control alternative, the Pigouvian tax allows the regulated party to choose whether, how much, and how to engage in the regulated activity”); Jonathan S. Masur & Eric A. Posner, *Toward A Pigouvian State*, 164 U. PA. L. REV. 93, 95 (2015) (“Other forms of regulation are inferior to the Pigouvian tax. Consider command-and-control regulation, in which a regulator forces a firm to take a particular action, such as installing a pollution-reducing scrubber.”); Victor Fleischer, *Curb Your Enthusiasm for Pigouvian Taxes*, 68 VAND. L. REV. 1673, 1686 (2015) (noting that “Louis Kaplow and Steven Shavell have argued that not only are taxes generally more efficient, but can also replicate most of the features of regulatory mandates—like nonlinear schedules—through careful design of tax instruments”).

Although it can be difficult to quantify the exact costs that result from governmental regulation,³⁵ precise numbers are not needed to appreciate their significance. A number of estimates have found that they rival—or exceed—the annual discretionary budget outlays.³⁶ Indeed, “while appropriated federal spending generally did not increase during the four years after Republicans took control of the House of Representatives in 2010, the cost of regulation increased substantially.”³⁷ This supports the core observation that, in the budgetary context, regulation and taxation can best be understood as politico-economic substitutes.³⁸

This brings us to the second observation: While the government’s power to tax and regulate may have similar effects, they are subject to vastly different political controls. The taxing and spending powers remain firmly in Congress’s hands. As a structural matter, the appropriations principle—the idea that Congress possesses ultimate and exclusive power over federal government spending—emanates from Article I of the U.S. Constitution.³⁹ Article I instructs that bills appropriating money must originate in Congress,⁴⁰ and bills levying taxes must also originate not only in Congress, but specifically in the House of Representatives, the chamber most directly accountable to the people.⁴¹ Even a brief review of an appropriations bill⁴² and the Internal Revenue Code⁴³ illustrates the extensive nature of this control.

³⁵ See MAEVE P. CAREY, CONG. RESEARCH SERV., REP. NO. R44348, METHODS OF ESTIMATING THE TOTAL COST OF FEDERAL REGULATIONS 2 (2016) (“Estimating the total cost of regulations is inherently difficult. Current estimates of the cost of regulation should be viewed with a great deal of caution.”).

³⁶ Rosen, *Putting Regulators on a Budget* (summarizing studies and noting that “apart from automatic entitlement spending, Congress appropriated approximately \$1.1 trillion in 2014 for spending by the entire government (that includes the Departments of Defense and Homeland Security, as well as all other domestic agencies). The available studies say that the annual cost of regulation likely exceeded that”).

³⁷ *Id.*

³⁸ *See id.* (arguing that “while appropriated federal spending generally did not increase during the four years after Republicans took control of the House of Representatives in 2010, the cost of regulation increased substantially”).

³⁹ U.S. CONST. art. I, § 9, cl. 1, 7.

⁴⁰ U.S. CONST. art. I, § 9, cl. 7.

⁴¹ U.S. CONST. art. I, § 7, cl. 1. (“All bills for raising revenue shall originate in the House of Representatives.”).

⁴² *See, e.g.*, Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5 (Jan. 17, 2014).

⁴³ *See, e.g.*, 26 U.S.C. § 1 et seq.

However, no analogous controls apply in the regulatory sphere.⁴⁴ In terms of judicial restrictions, many commentators have noted that little if anything remains of the nondelegation doctrine's historic restriction on Congress's power to delegate to agencies.⁴⁵ And while Congress can, and often does, restrict the authority agencies may exercise, it does so on its own terms and in ways that allow it to skirt responsibility.⁴⁶ Although less cynical explanations for delegation can be advanced,⁴⁷ "it is remarkable how much authority Congress has delegated to federal agencies (and the president) over the last century Congress has delegated extremely broad lawmaking power to agencies, with virtually no limitations as to the costs agencies can impose on regulated parties."⁴⁸ Indeed, the Tax Code is perhaps the exception that proves the rule of disparate treatment between taxation and regulation:

Congress has obviously delegated a great deal of tax lawmaking authority to the Treasury Department and the Internal Revenue Service . . . This is evidenced by, if nothing else, the thousands of pages of Treasury regulations, the numerous revenue rulings and other forms of written guidance issued by the IRS, and the countless discretionary enforcement decisions made by the IRS every year--settling some tax cases, litigating others. . . . These examples of agency-based tax lawmaking, however, differ from the sort of broad policymaking discretion that Congress regularly delegates to agencies in other areas of law. For example, Congress rarely enacts tax statutes that set out broad tax policy principles and authorize the Treasury Department or some other regulatory agency to fill in the details. There is no tax equivalent, for example, to the language in the Clean Air Act empowering (and requiring) the EPA administrator to set emissions standards

⁴⁴ See LITAN & NORDHAUS, at 86 ("Compared to the institutionalized control of the federal expenditure process . . . the regulatory process is 'immature'").

⁴⁵ Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1630 (2009) (noting that "the nondelegation doctrine is largely moribund at the level of constitutional law").

⁴⁶ See, e.g., David Schoenbrod, *How to Salvage Article I: The Crumbling Foundation of Our Republic*, 40 HARV. J.L. & PUB. POL'Y 663, 671-72 (2017) (noting that, through broad delegations of power, "Congress found a way to get credit for the benefits, but shift blame for the burdens and the failures to deliver the benefits").

⁴⁷ See, e.g., John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 681 (1996) (noting that "Congress's decision to commit lawmaking power to agencies vests substantial regulatory authority in specialized bodies with knowledge, expertise, and experience that generalist courts lack"). See also Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165 (1984) ("What has appeared to scholars to be neglect of oversight, we argue, really is a preference for one form of oversight over another, less-effective form.").

⁴⁸ Rosen, *Putting Regulators on a Budget*.

for “any air pollutant . . . which in his judgment cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.”⁴⁹

As Dudley notes, under current law “the costs associated with regulatory programs are not subject to the same checks and balances that govern fiscal spending.”⁵⁰ Unlike the power to spend, which is “constrained by the power to tax and borrow, regulatory costs are subject to no built-in limitations.”⁵¹

These two observations give rise to the inference at the heart of the regulatory budget idea: If costs imposed by taxation and regulation are similar, then they should be subject to similar controls. Thus, a regulatory budget seeks to create more parity between these two cost-imposing powers. As several commentators recently noted, “[t]he logic of a regulatory budget is therefore political rather than economic. It is analogous to the fiscal budget for direct expenditures that limits the authority of agency spending.”⁵² It is asymmetric to subject a certain set of cost-imposing policy decisions (those implemented through spending) to the extraordinary controls imposed by the appropriations process while subjecting another set (those implemented through regulation) to virtually none. This becomes all the more compelling when more and more policy is enacted by regulation rather than fiscal expenditure.⁵³ As DeMuth noted in 1980, a regulatory budget “would acknowledge explicitly the political nature of regulatory benefits and permit the President and Congress to make political judgments in light of more thorough information about economic costs.”⁵⁴

⁴⁹ James R. Hines Jr. & Kyle D. Logue, *Delegating Tax*, 114 MICH. L. REV. 235, 237 (2015).

⁵⁰ Dudley, *Can Fiscal Budget Concepts Improve Regulation?*, at 260.

⁵¹ Rosen & Callanan, at 839.

⁵² Gayer et al., *Evaluating the Trump Administration’s Regulatory Reform Program*, at 7.

⁵³ See Rosen & Callanan, at 841. See also See, e.g., JOINT ECON. COMM., U.S. CONG., REPORT ON THE 1979 ECONOMIC REPORT OF THE PRESIDENT, S. REP. NO. 96-44 (1979), at 54 (noting that, given the growing number of regulatory agencies, “[t]he annual budget understates the proportion of the Nation’s resources that are used for public purposes”).

⁵⁴ DeMuth, *The Regulatory Budget*, at 37.

In this respect, a regulatory budget stands in stark contrast to CBA. In its purest and most abstract form, CBA's endeavor is expansive and apolitical.⁵⁵ It aims to capture all measurable costs and weigh them against all measurable benefits. The defining challenges are line-drawing (e.g., whether to include indirect benefits) and analytical limitations (e.g., how to account for unquantifiable costs). A regulatory budget, on the other hand, is inherently guided by political priorities and, as will be discussed more below, is usually conceived as a narrow endeavor that focuses only on costs. DeMuth's weather information example illustrates this point:

One could say that the activities of the Weather Bureau are undertaken because of "public goods" problems in the provision of information about the weather, and that the appropriate level of the bureau's activities should therefore be determined by calibrating the point at which its marginal costs equal its marginal benefits to the nation's economy, rather than by the crude imposition of a budget constraint that takes no formal account of benefits. But of course this is a superficial criticism. The economic benefits of government provision of weather information are impossible to measure with any precision. And they *are* taken into account in the budget process, as funds are allocated [to the relevant agencies]. . . . Similarly, the benefits of regulatory programs are difficult to measure precisely and inevitably involve a large measure of political judgment: it is appropriate that regulatory benefits too should be accounted for by allocating the costs of achieving various goals amongst the regulatory agencies according to the political judgments of the President and Congress.⁵⁶

DeMuth embraces the political nature of measuring benefits. Indeed, for him, the benefits of governmental action are difficult to measure precisely because they are political.⁵⁷ For others, however, the justification for a regulatory budget is a pragmatic way to accommodate what some identify as the inherent limitations of the CBA endeavor:

At least as far as economic theory is concerned, any new regulation that offers more benefits than costs should be undertaken, regardless of its contribution to the aggregate regulatory cost to society. The justification for a regulatory budget, however, is that the real-world political economy of the regulatory policymaking

⁵⁵ See, e.g., Jonathan S. Masur & Eric A. Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. CHI. L. REV. 936, 949 (2018) ("The apparent ideological valence of CBA is an illusion generated by the location of the status quo regulation in ideological space; CBA does not itself have an inherent ideological valence.")

⁵⁶ DeMuth, *The Regulatory Budget*, at 37.

⁵⁷ *Id.*

process deviates from the conceptual ideal of maximizing net social benefits, leading to an inefficiently high burden from regulations.⁵⁸

Nevertheless, whether because of the limitations of CBA or the inherently political nature of benefits, a regulatory budget is designed to treat all cost-imposing measures the same. The core idea is to impose some kind of political check on the costs that regulators can impose on private parties. And this check would function alongside CBA practices, not in their place.⁵⁹

II. DESIGN FEATURES

There are numerous ways to implement a regulatory budget. Aside from imposing some kind of limitation on how much cost agencies can impose on private parties without additional authorization from a political actor, the concept is quite flexible. And even that core restriction can be implemented in a number of ways. This section will explore several of the fundamental design features that could be employed in a regulatory budget framework.

Congress or the President

One fundamental design question focuses on which political actor should be responsible for imposing and/or overseeing the imposition of regulatory cost caps: the president or Congress. If the primary objective is to create a political check on agency action, Congress would seem to be the more appropriate actor. In such a case, a regulatory budget could simply mirror the fiscal budget process. As Rosen and Callanan explain:

A regulatory budget in its purest form would be structured by analogy to the fiscal budget. [OMB] would collect and review each agency's regulatory agenda for the

⁵⁸ Gayer et al., *Evaluating the Trump Administration's Regulatory Reform Program*, at 5.

⁵⁹ DeMuth, *The Regulatory Budget*, at 37 ("Some amount of cost/benefit analysis would continue in one part or another of the Executive Office of the President, but as an adjunct to the budgeting process rather than its driving force, just as in expenditure budgeting. (OMB examiners evaluate the costs and benefits of various weapons systems, but the defense budget is not simply the sum of their conclusions.)").

year ahead, much as it evaluates agency fiscal budget requests. OMB would then develop the President's regulatory budget proposal, allocating regulatory costs across each agency, program, or specific initiatives. The budget would be submitted to Congress for revision and approval. The legislative process could be designed to track the Congressional Budget Act of 1974, resulting in a non-binding concurrent resolution. Alternatively, it could be designed to produce a joint resolution, signed by the President, with binding limitations on each agency's regulatory costs.⁶⁰

Such a process would have the effect of regularly reintroducing Congress into the regulatory policymaking process. The current process generally permits Congress to adopt a set-it-and-forget-it approach: In a post-*INS v. Chadha*⁶¹ world, after an initial delegation, Congress's levers of power over an agency are largely limited to the blunt fiscal budgeting tool,⁶² traditional oversight activities,⁶³ and the historically weak Congressional Review Act procedures.⁶⁴ But a regulatory budget with a limited timeline (perhaps two to four years) could provide a more direct political check. For example, regulatory caps could apply at the agency level, the budget function level, or even the subfunction level.⁶⁵ Alternatively, Congress could create restrictions that focus on the type of actor on whom regulatory cost is being imposed; this could be implemented at the level of an individual agency or the entire government.⁶⁶ For example, if Congress remains

⁶⁰ Rosen & Callanan, at 843.

⁶¹ See *INS v. Chadha*, 462 U.S. 919 (1983). See also Nick Smith, *Restoration of Congressional Authority and Responsibility over the Regulatory Process*, 33 HARV. J. ON LEGIS. 323, 329–30 (1996) (“The legislative veto was an efficient way for Congress to control the agencies, so the loss of this tool has hampered legislative supervision of the Executive Branch's rulemaking. Given demands on Congressional time, other oversight methods such as the budget process and enacting new statutes to repeal bad rules are too involved to alter any but a small number of flagrantly objectionable regulations.”).

⁶² See LITAN & NORDHAUS, at 65 (“[T]he appropriations process is likely to be an ineffective means of monitoring and controlling the social cost of regulation because the lion's share of costs imposed by regulation is off-budget and borne by the private sector. The goal of the appropriations committees is to protect the Treasury; reducing mandated private outlays will not show up in a reduced budget deficit. Similarly, although reductions in agency operating budgets may translate into reductions in costs incurred by the private sector, they do so in a highly haphazard and indiscriminating fashion.”).

⁶³ See, e.g., Anthony M. Bottenfield, *Congressional Creativity: The Post-Chadha Struggle for Agency Control in the Era of Presidential Signing Statements*, 112 PENN ST. L. REV. 1125, 1144 (2008).

⁶⁴ See Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J.L. & PUB. POL'Y 187, 191 (2018).

⁶⁵ See LITAN & NORDHAUS, at 145. See also D. ANDREW AUSTIN, CONG. RESEARCH SERV., REP. NO. R41726, DISCRETIONARY BUDGET AUTHORITY BY SUBFUNCTION: AN OVERVIEW (2016).

⁶⁶ Rosen & Callanan, at 840 (“A regulatory budget would also allow regulators to consider ‘similar costs imposed on the same groups of regulated industries by other federal agencies.’”).

concerned about the regulatory burden on small businesses⁶⁷ or community banks,⁶⁸ it could set a supra-agency restriction and require OMB to ensure that the various agencies that regulate these entities do not exceed it.⁶⁹ And a government-wide regulatory budget would also force Congress to consider the full scope of regulatory costs imposed on private parties, counteracting the set-it-and-forget-it model of governance.⁷⁰

More particularity would create more political accountability insofar as direct representatives would be more involved in regulatory decisionmaking.⁷¹ As Rosen and Callanan point out, a regulatory budget which puts Congress in the driver's seat "would hold members of Congress accountable for regulations they have authorized. By requiring Congress to approve the consequences of its open-ended delegations of rulemaking power, a regulatory budget might counteract the Congressional practice of passing broad regulatory statutes with popular but ill-defined goals and blaming regulators for implementation problems."⁷² Of course, to the degree to which Congress benefits from broad delegations, it may oppose a regulatory budget which forces it, rather than agencies, to make hard decisions.⁷³

⁶⁷ See, e.g., Doris S. Freedman et al., *The Regulatory Flexibility Act: Orienting Federal Regulation to Small Business*, 93 DICK. L. REV. 439 (1989).

⁶⁸ See, e.g., Sen. John Kennedy, *A Plan to Give Community Banks Relief From Dodd-Frank*, WALL ST. J. (Apr. 23, 2017).

⁶⁹ Lance D. Wood, Elliott P. Laws & Barry Breen, *Restraining the Regulators: Legal Perspectives on a Regulatory Budget for Federal Agencies*, 18 HARV. J. ON LEGIS. 1, 7 (1981) ("A third form would establish an overall ceiling, a ceiling for each covered department and agency, and a ceiling on particular programs, with special attention to overlaps among the different departments and agencies.").

⁷⁰ See Rosen & Callanan, at 844. ("[I]nvolving Congress through House and Senate regulatory committees would, for the first time, create a body within Congress that takes a broader view of the overall consequences of government regulation.").

⁷¹ See LITAN & NORDHAUS, at 145 ("Clearly, the less detailed the constraints, the greater the discretion that will be accorded to the agencies in trading off the private sector efforts of various rules or portions of rules. On the other hand, fewer details mean reduced control by Congress.").

⁷² Rosen & Callanan, at 844. *But see* Smith, *Restoration of Congressional Authority* at 333 (noting that unfunded mandates reform and a regulatory budget "would force the federal government to itemize or even to pay for the full cost of big government regulations but fail to address the problem of delegation directly").

⁷³ See, e.g., Rosen & Callanan, at 844 ("Congress may also have strong institutional reasons to oppose the greater accountability and increased workload of a regulatory budget.").

While there are certainly advantages to having Congress in the lead, there are disadvantages as well. Given the scope and complexity of establishing a regulatory budget, some have suggested that the president take the lead at least initially.⁷⁴ According to this view, the regulatory budget would begin as a White House-administered limitation giving “the Executive Branch the leeway to develop a workable regulatory budgeting process that could, if successful, be expanded into a joint legislative-executive process.”⁷⁵ However, there are numerous permutations which could be pursued⁷⁶ and, just as with the fiscal budget, there is no reason to think that the model could not be updated over time.

More fundamentally, preferences regarding which political branch should impose and/or oversee regulatory cost caps are likely to be informed by broader views of institutional capacity. For example, empowering Congress will likely appeal to those who believe that agencies are an unaccountable fourth branch, running amok and subject to few political checks.⁷⁷ By contrast, empowering the president will likely appeal to those who believe Congress is either captured by special/local interests⁷⁸ or is just generally incapable of governing at a level of precision

⁷⁴ See, e.g., Rosen & Callanan, at 844-54 (“Given the breadth and potential complexity of this reform, the flexibility afforded by executive action may be advantageous, at least at the pilot stage. . . . Even reform-minded legislators might consider a full regulatory budget process procedurally challenging, given that the U.S. Senate has lately proven incapable of complying with its basic responsibilities under the Congressional Budget Act.”).

⁷⁵ See Rosen & Callanan, at 845.

⁷⁶ See Wood et al., *Restraining the Regulators*, at 8 (suggesting that “federal policymakers may decide to exempt certain agencies because of practical considerations involving the nature of their mandate. For example, the Internal Revenue Service and the federal law enforcement agencies may be excluded from general regulatory budget constraints because the costs they impose are fundamental to the structure of the national economy and because they do not regulate purely economic activities.”).

⁷⁷ See, e.g., John Tierney, *The Tyranny of the Administrative State*, WALL ST. J. (Jun. 9, 2017).

⁷⁸ See, e.g., Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 59 (1994) (arguing that “senators and representatives are first and foremost creatures of state politics, just as the President is first and foremost a creature of anything that could remotely be made part of his national electoral base”). See also Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1, 34 (1994) (“[T]he regulatory budget could make elected officials less, not more, accountable. The fact that joint oversight would revolve around empirical data would obscure it from the public and invite manipulation at the behest of special interests.”).

necessary for an effective regulatory budget.⁷⁹ And those who believe that agencies themselves are subject to their own types of institutional pathologies⁸⁰ may desire the political check that Congressional involvement could provide. Miles' Law is likely to be informative here.⁸¹

Cost-only or Benefits Too

Another fundamental design question focuses on whether the budget should account for costs and benefits, or only costs. DeMuth's view in 1980 was that a regulatory budget should encompass only direct costs ("something less than the economic concept of social opportunity cost").⁸² Benefits were to be "excluded altogether, which means that expenditures in the form of transfers from one group to another *would* be counted as regulatory costs, although they are not economic costs at all."⁸³ According to DeMuth and others, benefits are more appropriately considered during the CBA review process and, at least in a general way, when setting regulatory budget cost caps.⁸⁴ Rosen and Callanan seem to suggest that even if the relevant benefits were

⁷⁹ See Shapiro, *Political Oversight*, at 34 (predicting that "budget estimates, which are inherently imprecise, would invite partisan wrangling because opponents and supporters of regulation would advocate budget levels based on ulterior motives concerning the scope of federal regulation. With such controversy, the regulatory budget could easily bog down, as does the traditional budget process.").

⁸⁰ See Susan Bartlett Foote, *Independent Agencies Under Attack: A Skeptical View of the Importance of the Debate*, 1988 DUKE L.J. 223, 223 n.5 (1988) (noting that "[t]here is a large amount of literature on agency capture, including the concern that independent agencies, with less clear lines of accountability, were more susceptible than other institutions in government"); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 771 (2013) (suggesting that "by the 1960s, it became clear that [independent] agencies faced the same pathologies, such as capture and poor decision making, as executive agencies").

⁸¹ Rufus E. Miles, Jr., *Origin and Meaning of Miles' Law*, 38 PUB. ADMIN. REV. 399, 399 (1978) ("Miles' Law says: 'Where you stand depends on where you sit.' The concept is probably as old as Plato, but this particular phraseology arose in the Bureau of the Budget as a result of events that occurred in late 1948 and early 1949.").

⁸² DeMuth, *The Regulatory Budget*, at 31, 38 ("Arguments over elasticities of demand and supply, adjustments to account for risk aversion, exogenous variables insufficiently accounted for, and the reality of the economist's fundamental assumptions could swamp the budgeting process in controversy and destroy its programmatic neutrality."). See also Wood et al., *Restraining the Regulators*, at 9.

⁸³ DeMuth, *The Regulatory Budget*, at 31 (emphasis in original).

⁸⁴ See DeMuth, *The Regulatory Budget*, at 35-37; Rosen and Callanan, at 846-48. See also John D. Graham, Paul R. Noe & Elizabeth L. Branch, *Managing the Regulatory State: The Experience of the Bush Administration*, 33 FORDHAM URB. L.J. 953, 985 (2006) (noting that "[w]ithout information on benefits, however uncertain, there is no analytic basis for determining how large a regulatory 'budget' or appropriation should be").

readily calculable, the disciplining effect of a regulatory budget means that they should still be excluded.⁸⁵ Similarly, as Dudley suggests, focusing on costs “[allows] agencies to set priorities and make tradeoffs among regulatory programs.”⁸⁶ She also justifies a cost-only budget as a practical accommodation:

If regulators had perfect information and incentives, benefit-cost analyses alone should be adequate to direct resources to their best use, and agencies would only issue regulations that make the public better off. In this ideal world, a budget constraint, such as that imposed by Executive Order 13,771, would either be nonbinding or harmful because it would disallow some regulations that would have offered net societal benefits. In practice, however, agencies do not conduct benefit-cost analyses on the basis of perfect information, and they face incentives to demonstrate that the benefits of their regulatory actions exceed the costs. As a result, these analyses often look more like advocacy pieces for a preferred alternative than a transparent accounting of possible options and outcomes.⁸⁷

However, others argue that a regulatory budget *should* include benefits. For example, Eric Posner has proposed the creation of quasi-regulatory budget that would function as an aggregate CBA:

[T]he benefit of every regulation would take the form of an addition to the agency’s [Net Benefit Account (“NBA”)], and the cost would take the form of a subtraction. Agencies would be required to keep positive balances in their NBAs. Agencies with large surpluses in their NBAs would be permitted to draw down a portion of the surplus for the purpose of issuing cost-unjustified regulations for which the agency has a strong preference.⁸⁸

⁸⁵ See Rosen & Callanan, at 848 (“But the purpose of a regulatory budget, much like the fiscal budget, would be to limit the government’s cumulative use and allocation of finite resources. That discipline requires a focus on the cost side of the equation—the expenditure of private resources required to comply with regulations.”).

⁸⁶ Dudley, *Can Fiscal Budget Concepts Improve Regulation?*, at 267. See also Gayer et al., *Evaluating the Trump Administration’s Regulatory Reform Program*, at 7 (“Whether or not a regulatory budget (in either dollar or list form) enhances social welfare depends on whether it is more likely to lead agencies to carefully prioritize their regulatory efforts, eliminating or revising their less effective regulations, or whether an exclusive focus on the cost constraint—absent consideration of the benefits of regulatory options—will lead agencies to forgo regulations that have high costs but positive net benefits.”).

⁸⁷ Susan Dudley, *Regulating Within a Budget*, THE REGULATORY REVIEW (Apr. 23, 2018), <https://www.thereview.org/2018/04/23/dudley-regulating-within-a-budget>.

⁸⁸ Eric A. Posner, *Using Net Benefit Accounts to Discipline Agencies: A Thought Experiment*, 150 U. PA. L. REV. 1473, 1474 (2002).

This is different from traditional regulatory budget proposals which “do[] not reflect the benefits generated by any particular regulation.”⁸⁹ Posner levies two criticisms against a cost-only regulatory budget in comparison to his proposal. First, a regulatory budget which excludes benefits “prevents an agency from issuing a regulation whenever the regulation’s costs would deplete the budget, regardless of whether the regulation’s benefits exceed its costs.”⁹⁰ And second, cost-only budgets “reward agencies only for minimizing regulatory costs when we want to reward agencies for maximizing net benefits.”⁹¹ Nick Malyshev, a regulatory expert at the OECD, levies similar criticisms.⁹² Connor Raso recently observed that “[b]enefits foregone from repealing a rule . . . could just as easily be labeled as a ‘cost’ to society imposed by deregulation.”⁹³ In some sense, however, these criticisms apply to any regulatory control mechanism that disincentivizes governmental action which would enhance net social benefit.

III. RECENT EFFORTS

As discussed above, regulatory budgeting is not a new idea. Scholars and legislators have been considering it since at least 1978.⁹⁴ And yet no true regulatory budget has yet been adopted. To be sure, there have been measures that have the flavor of regulatory budgeting, such as the Paperwork Reduction Act (“PRA”).⁹⁵ Under the PRA, “OMB produces an annual *Information*

⁸⁹ *Id.* at 1475.

⁹⁰ *Id.* at 1486-87.

⁹¹ *Id.* at 1487.

⁹² Nick Malyshev, *A Primer on Regulatory Budgets*, OECD JOURNAL ON BUDGETING, Vol. 2010/3, at 5 (noting that a cost-only regulatory budget “may lead to the non-pursuit of measures that would have delivered benefits in order to keep the costs of complying with regulation within budget” and “creates a bias towards low-cost regulatory options at the expense of solutions that may be more costly but that deliver greater economic benefits”).

⁹³ Connor Raso, *What does \$33 billion in regulatory cost savings really mean?*, BROOKINGS INSTITUTION (Jan. 10, 2019), <https://www.brookings.edu/research/what-does-33-billion-in-regulatory-cost-savings-really-mean>.

⁹⁴ See Gayer et al., *Evaluating the Trump Administration’s Regulatory Reform Program*, at 6; Federal Regulatory Budget Act, S. 3550, 95th Cong. (1978), <https://www.Congress.gov/bill/95th-Congress/senate-bill/3550>.

⁹⁵ Pub. L. No. 96-511, 94 Stat. 2812 (codified as amended at 44 U.S.C. §§ 3501-3521).

Collection Budget report (“ICB”) to Congress” in which OMB estimates how many hours the public spends providing the government with information.⁹⁶ But, as Dudley points out, “the ICB is reported in hours, rather than dollars, and there are no consequences for increasing regulatory burdens, nor are there incentives to offset new requirements by removing existing burdens.”⁹⁷ Another measure passed into law is the Regulatory Flexibility Act (“RFA”),⁹⁸ which “requires that all agencies publish semiannual regulatory agendas in the *Federal Register* describing regulatory actions that they are developing that may have a significant economic impact on a substantial number of small entities.”⁹⁹

There have also been a few presidentially-imposed measures. For example, Jim Tozzi, a former OIRA official, described President Reagan’s publication of the first *Regulatory Program of the United States Government*¹⁰⁰ as a “regulatory budget without the numbers.”¹⁰¹ And President George W. Bush issued EO 13422 mandating that “each agency include in its annual regulatory plan a ‘best estimate of the combined aggregate costs and benefits of all its regulations planned for that calendar year to assist with the identification of priorities.’”¹⁰² Yet despite these efforts and the numerous proposed measures, regulatory budgeting has never quite seemed to fully take off.

⁹⁶ Dudley, *Can Fiscal Budget Concepts Improve Regulation?*, at 263. See also 44 U.S.C. § 3514.

⁹⁷ Dudley, *Can Fiscal Budget Concepts Improve Regulation?*, at 263.

⁹⁸ Pub. L. No. 96-354, 94 Stat. 1164-65 (codified as amended at 5 U.S.C. § 601).

⁹⁹ MAEVE P. CAREY & KATHRYN A. FRANCIS, CONG. RESEARCH SERV., REP. NO. R45032, THE TRUMP ADMINISTRATION AND THE UNIFIED AGENDA OF FEDERAL REGULATORY AND DEREGULATORY ACTIONS 2 (2017).

¹⁰⁰ Ronald W. Reagan, President of the United States, Message to the Congress on the Publication of the Regulatory Program of the United States Government (Aug. 8, 1985),

<https://www.reaganlibrary.gov/sites/default/files/archives/speeches/1985/80885a.htm>.

¹⁰¹ Jim Tozzi, *Congressional Reaction to the Regulatory Budget* (Aug. 10, 1985),

<http://www.thecre.com/pdf/RegBudget.PDF>.

¹⁰² Rosen & Callanan, at 853; See also Exec. Order No. 13,422 (2007); Exec. Order No. 13,497 (2009) (repealing Exec. Order No. 13,422).

But this may be about to change. As will be discussed below (and summarized in the following table), a number of efforts have either been proposed or are already under way.

	Branches	Process	Stock & Flow	Enforcement
EO 13771	Executive only	Centered entirely in OMB: <ul style="list-style-type: none"> OMB Director sets an incremental cost cap which agencies are generally required to comply with. Agencies are not prohibited from enacting rules required by statute. Agencies may seek adjustment from OMB. 	Applies to new regulations only.	OMB can: <ul style="list-style-type: none"> Require an agency to propose a plan to come into compliance, or Recommend specific steps an agency should take to come into compliance “such as publishing a notice in the Federal Register requesting ideas from the public on EO 13771 deregulatory actions to pursue.”
H.R. 2623	Congress initially; Executive thereafter	Because the bill simply codifies EO 13771, it does not contemplate further congressional action.	Same as EO 13771.	Same as EO 13771.
S.R. 2982 / H.R. 5319	Congress and Executive	Bill would create a process which runs alongside the fiscal appropriations process: <ul style="list-style-type: none"> Regulatory cost level for at least four years is set by concurrent resolution. Specific levels are then set by the appropriate committees and subcommittees. Includes default rules in case no new levels are set. 	Bill adopts a phased-in approach: <ul style="list-style-type: none"> For the first four years, the president submits a regulatory cost baseline. Beginning with the fifth year, “and for every second fiscal year thereafter, CBO, in consultation with OMB, shall submit to the President, the Senate, and the House of Representatives a regulatory baseline, consisting of a projection of the Federal regulatory cost for the fiscal year and at least each of the 4 ensuing fiscal years.” 	Congressional, Executive, and private: <ul style="list-style-type: none"> Congress cannot consider any measure “that does not include a provision prohibiting amounts made available under the measure from being obligated or expended to enforce a Federal regulation, rule, or statement that would cause a breach of any level or allocation of the Federal regulatory cost in effect for a fiscal year.” This requirement is waivable. OMB is required to police compliance. Private right of action for individuals subject to rules which OMB has determined exceed cost caps.

Trump Administration

Within a month of his inauguration, President Trump signed Executive Order 13771, entitled “Reducing Regulation and Controlling Regulatory Costs.”¹⁰³ Although EO 13771’s two-

¹⁰³ Exec. Order No. 13,771 (2017).

for-one provision has received a great deal of attention,¹⁰⁴ the order aims to do much more. Specifically, section 3(d) is arguably the first major regulatory budgeting effort in the U.S.:

During the Presidential budget process, the Director shall identify to agencies a total amount of incremental costs that will be allowed for each agency in issuing new regulations and repealing regulations for the next fiscal year. No regulations exceeding the agency's total incremental cost allowance will be permitted in that fiscal year, unless required by law or approved in writing by the Director. The total incremental cost allowance may allow an increase or require a reduction in total regulatory cost.¹⁰⁵

OMB has noted that it “expects to publish each agency’s final total incremental cost allowances.”¹⁰⁶ EO 13771 thus represents the first fulsome regulatory budget effort in U.S. history. Although it does not specifically address costs posed by extant regulations (discussed below), it establishes politically-created cost caps for new regulations. And while it follows the cost-only model,¹⁰⁷ OMB has clarified that the regulatory budget supplements, rather than supplants, the traditional CBA requirements imposed by EO 12866.¹⁰⁸ In discussing a related provision of EO 13771, OMB analogized regulatory cost caps to “fiscal spending caps” and noted that “the goal of the regulatory cost caps is to provide a mechanism for the prudent

¹⁰⁴ See, e.g., Josh Gerstein, *Trump Faces Suit Over 2-for-1 Executive Order on Regulations*, POLITICO (Feb. 8, 2017).

¹⁰⁵ Exec. Order No. 13,771 (2017).

¹⁰⁶ Office of Mgmt. & Budget, Exec. Office of the President, Memorandum, Titled “FY 2018 Regulatory Cost Allowances” (Sept. 7, 2017).

¹⁰⁷ Benjamin M. Miller, Frank Camm, Marjory Blumenthal, Jesse Lastunen, & Kenneth W. Miller, *Inching Toward Reform: Trump’s Deregulation and Its Implementation*, RAND CORPORATION (2017), https://www.rand.org/content/dam/rand/pubs/perspectives/PE200/PE241/RAND_PE241.pdf at 8 (“The framework in place before focused primarily on net benefits—the difference between benefits and costs. In contrast, EO 13771 states that it is ‘essential to manage the costs [emphasis added] associated with the governmental imposition of private expenditures required to comply with Federal regulations.’”).

¹⁰⁸ See Office of Mgmt. & Budget, Exec. Office of the President, Guidance Implementing Executive Order 13371, Titled “Reducing Regulation and Controlling Regulatory Costs” (Apr. 5, 2017) [hereinafter OMB Apr. 5]. <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf> at 13 (“EO 13771 does not change the requirements of EO 12866, which remains the primary governing EO regarding regulatory review and planning. In particular, EO 13771 has no effect on the consideration of benefits in informing any regulatory decisions.”). See also Office of Mgmt. & Budget, Exec. Office of the President, Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled “Reducing Regulation and Controlling Regulatory Costs” (Feb. 2, 2017) [hereinafter OMB Feb. 2].

management and control of regulatory costs imposed on society by agencies attempting to achieve regulatory benefits.”¹⁰⁹

A number of commentators—including regulatory budget advocates—have expressed skepticism of the Trump Administration’s effort.¹¹⁰ For example, Jim Tozzi, former deputy administrator of OIRA during the Reagan Administration, noted that OIRA may lack the infrastructure needed to make the budget actually work.¹¹¹ Tozzi also voiced concern regarding the lack of Congressional involvement.¹¹² Others, however, such as DeMuth, are hopeful, notwithstanding the challenges inherent in the endeavor.¹¹³ Still others question the entire endeavor.¹¹⁴ For example, two legal scholars recently reiterated “the enormously difficult

¹⁰⁹ See OMB Feb. 2.

¹¹⁰ See, e.g., C. Jarrett Dieterle, *Executive Orders Alone Can’t Create Sustainable Deregulatory Change*, THE HILL (Apr. 16, 2017), <http://thehill.com/blogs/pundits-blog/the-administration/328976-executive-orders-alone-cant-create-sustainable>. See also Susan Dudley, *Putting A Cap on Regulation*, ADMIN. & REG. L. NEWS (2017), at 4, 6 (“Despite the sweeping nature of these executive orders, do not expect to see changes in the first 100 days or even the first year. Removing or revising existing regulations takes at least as much time and effort as developing new regulations.”); Miller, et al., *Inching Toward Reform*, at 9 (“Unless the introduction of a regulatory budget is accompanied by efforts to shift the focus from what to regulate to how to regulate, the decision about which regulations to eliminate will likely be decided using the same processes that proponents of regulatory budgets believe is biased.”)

¹¹¹ See C. Jarrett Dieterle, *Lessons from the Godfather of Regulatory Budgeting*, THE HILL (Feb. 23, 2017), <http://thehill.com/blogs/pundits-blog/economy-budget/320800-lessons-from-the-godfather-of-regulatory-budgeting> (“As he points out, when Reagan issued Executive Order 12,291 to establish OIRA’s centralized regulatory-review powers, ‘we had a system in place.’ . . . By contrast, Trump’s order to establish a regulatory budget could be a ‘recipe for disaster.’ He noted that ‘we don’t have the staff and [OIRA] does not have the background on implementing a regulatory budget.’”).

¹¹² See *id.* (“Ultimately, Tozzi acknowledged that executive orders alone aren’t sufficient. . . . Congress’ buy-in is also important from a separation of powers and policy perspective, given that some entity must be tasked with setting the total costs that agencies can impose on society. ‘If this really starts going, people are going to say, ‘even if we agree with the costs and all that, who sets the totals?’,’ Tozzi predicted. Ultimately, the task must fall to Congress, which is the most democratically accountable branch of government and the one that oversees the fiscal budget.”).

¹¹³ Christopher DeMuth, *Trump vs. the Deep Regulatory State*, WALL ST. J. (Nov. 17, 2017), <https://www.wsj.com/articles/trump-vs-the-deep-regulatory-state-1510952431>.

¹¹⁴ Caroline Cecot & Michael A. Livermore, *The One-in, Two-Out Executive Order Is A Zero*, 166 U. PA. L. REV. ONLINE 1, 14 (2017) (“Regarding the regulatory budget, we believe that there are good reasons that President Reagan, after considering both a budget and cost-benefit analysis requirement, decided to go with cost-benefit analysis. Cost-benefit analysis, while not perfect, is consistent with rational decisionmaking, weighing both costs and benefits of regulation. President Reagan, we believe, made the right choice.”).

practical challenge of trying to decide ex ante what the overall efficient regulatory expenditure is” and argued that “any errors in setting the budget at the right level will be costly to society.”¹¹⁵

Two years in, few question the overall regulatory cost savings that have accrued since EO 13771 was signed.¹¹⁶ OIRA has estimated that EO 13771 reduced regulatory costs by over \$23.4 billion in FY 2018.¹¹⁷ At least one outside group believes this estimate to be low,¹¹⁸ and at least one agency came in well below its regulatory cost caps.¹¹⁹ Overall judgments regarding whether the deregulatory effect is good or bad often break along familiar lines.¹²⁰ Either way, the Trump

¹¹⁵ *Id.* at 7.

¹¹⁶ Connor Raso, *How has Trump’s deregulatory order worked in practice?*, BROOKINGS INSTITUTION (Sept. 6, 2018), <https://www.brookings.edu/research/how-has-trumps-deregulatory-order-worked-in-practice> (observing that “the overall picture is clear: the Trump administration stayed true to its rhetoric and did not issue costly new rules.”). Causation, of course, remains open to interpretation, *see, e.g.*, Bridget C.E. Dooling, *My Talk at “Regulatory Change & the Trump Administrative State,”* 36 YALE J. ON REG.: NOTICE & COMMENT (Apr. 1, 2019), <https://yalejreg.com/nc/my-talk-at-regulatory-change-the-trump-administrative-state> (“I stop short of saying that the regulatory 2-for-1 initiative ‘caused’ this precipitous drop in new rules, because of confounding impact of the personnel choices that the President has made – many of his cabinet secretary selections are or were avowed deregulatory supporters.”); Bridget C.E. Dooling, *Trump Administration Picks up the Regulatory Pace in its Second Year*, REGULATORY STUDIES CENTER, GEORGE WASHINGTON UNIVERSITY (Aug. 1, 2018) https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs1866/f/downloads/Dooling_Trump%27sFirst18Months.pdf at n.1. At least one former Trump Administration official who served in OIRA during the rollout of EO 13771 recently highlighted its symbolic significance: “I think the clear, overarching message from 13771 is just to send an absolutely powerful signal to the private sector that this sort of never ending, one-way ratchet of increasing regulation is over,” *see* Telephone Interview by Adam White with Jeffrey M. Harris, Partner, Consovoy McCarthy, *Are “Regulatory Budgets” Paying Off? A Year Two Look-Back at Executive Order 13771* (Feb. 4, 2019), <https://fedsoc.org/events/are-regulatory-budgets-paying-off-a-year-two-look-back-at-executive-order-13771>.

¹¹⁷ OFFICE OF INFO. & REGULATORY AFFAIRS, REGULATORY REFORM UNDER EXECUTIVE ORDER 13771: FINAL ACCOUNTING FOR FISCAL YEAR 2018 (accessed Sept. 5, 2019), https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2018.pdf.

¹¹⁸ Dan Bosch, *The FY2019 Regulatory Budget & FY2018 Wrap-up*, AMERICAN ACTION FORUM (Oct. 17, 2018), <https://www.americanactionforum.org/insight/the-fy2019-regulatory-budget-fy2018-wrap-up>; Dan Bosch & Dan Goldbeck, *Trump Administration Regulatory Savings More Than Double Goal*, AMERICAN ACTION FORUM (Oct. 3, 2018), <https://www.americanactionforum.org/research/trump-administration-regulatory-savings-more-than-double-goal>.

¹¹⁹ U.S. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF INSPECTOR GENERAL, REPORT NO. 19-P-0267, COMPLIANCE WITH THE LAW: EPA EXCEEDED THE DEREGULATORY GOALS OF EXECUTIVE ORDER 13771 7 (Aug. 9, 2019), https://www.epa.gov/sites/production/files/2019-08/documents/_epaog_20190809-19-p-0267.pdf.

¹²⁰ Compare Sam Berger & Malkie Wall, *President Trump’s Regulatory Rollbacks Are an Attack on Americans’ Wallets*, CENTER FOR AMERICAN PROGRESS (Mar. 27, 2019), <https://www.americanprogress.org/issues/democracy/news/2019/03/27/467341/president-trumps-regulatory-rollbacks-attack-americans-wallets>, with Diane Katz, *Here’s How Much Red Tape Trump Has Cut*, THE HERITAGE FOUNDATION (Oct. 17, 2018), <https://www.heritage.org/government-regulation/commentary/heres-how-much-red-tape-trump-has-cut>.

Administration has made clear that it plans to build on its momentum; in FY 2019, most agencies will be required to affirmatively cut the costs imposed by regulation.¹²¹

EO 13771 also raises a number of separation of powers questions.¹²² The Trump administration's efforts mark a sharp departure from past regulatory proposals which, as discussed above, "advocated a strong role for Congress, similar to its role in the conventional fiscal expenditure budget process."¹²³ Although EO 13771 includes a caveat exempting regulations "required by law" that should alleviate any immediate concerns, implementing a purely executive regulatory budget without a specific statutory blessing could give rise to impoundment issues.¹²⁴ And recent caselaw suggests that extended delays in rulemaking can be susceptible to judicial review.¹²⁵ Challengers could also analogize a purely executive regulatory budget to the line-item veto which the Supreme Court held to violate Article I's Presentment Clause.¹²⁶ As several commentators observed in 1981, "[s]ince a regulatory budget would result in a systematic enforcement of some laws, partial enforcement of others, and non-enforcement of

¹²¹ OFFICE OF INFO. & REGULATORY AFFAIRS, REGULATORY REFORM: REGULATORY BUDGET FOR FISCAL YEAR 2019 (accessed Sept. 5, 2019),

https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Regulatory_Budget_for_Fiscal_Year_2019.pdf.

¹²² At least one legal challenge has been made and raises several of the issues discussed in this section, *see Public Citizen, Inc. et al v. Trump*, No. 1:17-cv-00253 RDM (D.D.C. Feb. 8, 2019).

¹²³ Gayer et al., *Evaluating the Trump Administration's Regulatory Reform Program*, at 6.

¹²⁴ *See* Lance D. Wood, Elliott P. Lums & Barry Breen, *Restraining the Regulators: Legal Perspectives on a Regulatory Budget for Federal Agencies*, 18 HARV. J. ON LEGIS. 1, 15 (1981) ("[T]he concept of a regulatory budget is analogous to a presidential impoundment of funds, since the regulatory budget might prevent the full implementation of programs mandated by Congress. . . . Federal courts consistently have held that for the Executive to impound funds, he or she must have the permission of Congress. . . . If the President were to attempt to implement the regulatory budget by unilateral executive action, i.e., without specific Congressional authorization, the federal courts may draw the analogy to fiscal impoundment and void the regulatory budget restrictions on agency action.").

¹²⁵ *See Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017) ("By staying the methane rule, EPA has not only concluded that section 307(d)(7)(B) requires reconsideration, but it has also suspended the rule's compliance deadlines. EPA's stay, in other words, is essentially an order delaying the rule's effective date, and this court has held that such orders are tantamount to amending or revoking a rule."). *See also* Connor Raso, *Trump's deregulatory efforts keep losing in court—and the losses could make it harder for future administrations to deregulate*, BROOKINGS INSTITUTION (Oct. 25, 2018), <https://www.brookings.edu/research/trumps-deregulatory-efforts-keep-losing-in-court-and-the-losses-could-make-it-harder-for-future-administrations-to-deregulate>.

¹²⁶ *See Clinton v. City of New York*, 524 U.S. 417 (1998).

still others, its operation would amount to [impermissible] executive lawmaking.”¹²⁷ Perhaps to avoid these issues, OMB has clarified several times that EO 13771 does not supersede statutory mandates.¹²⁸

Additionally, decisions regarding individual rules could raise a number of Administrative Procedure Act-related questions. The Administrative Procedure Act requires an agency to use the same procedures to remove a rule as it used to promulgate it.¹²⁹ Courts review such action under the familiar arbitrary and capricious standard.¹³⁰ As Gayer et al. point out, “[u]nder [*Motor Vehicle Mfrs. Ass’n v. State Farm*, 463 U.S. 29 (1983)], the administration will need to create an evidentiary record justifying any shift in policy rather than merely asserting that the relevant agency possesses the authority to reinterpret the statute at issue.”¹³¹ The absence of Congressional authority could create problems in this context:

No statute explicitly allows an agency to repeal a regulation to serve a larger goal of overall cost budgeting, and eliminating a regulation just to pass another unrelated one sounds awfully arbitrary. The agency would need to have some other basis for repealing that particular regulation that would have to be vetted in notice and comment, reducing the force of the Order as the impetus for reducing regulatory burdens.¹³²

Presumably the same caveat discussed above would allow agencies to use the requisite procedure when repealing a rule. Although there is an open question as to whether mere compliance with a

¹²⁷ See Wood et al., *Restraining the Regulators*, at 15.

¹²⁸ See OMB Apr. 5.

¹²⁹ See CONG. RESEARCH SERV., REP. NO. R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 9-10 (2017) (pointing out that in order to repeal an existing rule, “the agency must comply with the default requirements of the APA, which defines “rulemaking” to be the “process for formulating, amending, or repealing a rule.” Therefore, in order to amend or repeal an existing legislative rule, an agency generally must comply with the same notice-and-comment rulemaking procedures, outlined in § 553 of the APA, that governed the original promulgation of the rule.”). See also *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (noting that “the [APA] makes no distinction, however, between initial agency action and subsequent agency action undoing or revising that action”); *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1206 (2015); Susan E. Dudley, *Regulatory Reset: How Easy is it to Undo Regulation?*, GEORGE WASHINGTON UNIV. REG. STUDIES CTR. (Nov. 30, 2016), <https://regulatorystudies.columbian.gwu.edu/regulatory-reset-how-easy-it-undoregulation>.

¹³⁰ See 5 U.S.C. § 706(2)(A); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

¹³¹ Gayer et al., *Evaluating the Trump Administration’s Regulatory Reform Program*, at 12.

¹³² Cecot & Livermore, *The One-in, Two-Out Executive Order Is A Zero*, at 12.

presidential directive is sufficient to satisfy *State Farm* rationality review,¹³³ the Trump Administration would surely be on firmer legal ground were Congress to bless a regulatory budget. At least one court has already been asked to rule on several of these questions.¹³⁴

Legislative Proposals

Congress has also expressed interest in regulatory budget measures. As discussed above, Congressional efforts date back to the late 1970s.¹³⁵ More recently, several members of Congress have proposed bills which, if enacted, would implement regulatory budget mechanisms. The proposed regulatory budget measures vary greatly in their scope and ambition, especially with respect to Congress's role.¹³⁶ This section will review two that are emblematic of this variance.

A bill introduced by Rep. Mark Meadows (R-NC) in 2017 represented a more limited and less ambitious effort.¹³⁷ Specifically, the Lessening Regulatory Costs and Establishing a Federal Regulatory Budget Act of 2017 would, with respect to regulatory budgeting, do little more than

¹³³ See Adam White, *The D.C. Circuit's "Trump Card" for Executive Orders*, 36 YALE J. ON REG.: NOTICE & COMMENT (Mar. 13, 2017), <http://yalejreg.com/nc/the-d-c-circuits-trump-card-for-executive-orders> (discussing *Sherley v. Sebelius*, 689 F.3d 776 (D.C. Cir. 2012) cert. denied, 568 U.S. 1087 (2013), and noting that "[t]he agencies were constitutionally bound to follow the policy set forth in President Obama's Executive Order, regardless of public comments to the contrary, precisely because President Order had ordered it"). But see Nicholas Bagley, *Sherley You're Joking*, 36 YALE J. ON REG.: NOTICE & COMMENT (Mar. 22, 2017), <http://yalejreg.com/nc/sherley-youre-joking> ("Whatever the best way to rehabilitate the case may be, it'd be a mistake to take *Sherley* too seriously. A confused and poorly reasoned decision shouldn't be read to shield agencies from judicial review whenever they happen to be following an executive order.").

¹³⁴ See *Second Am. Compl., Public Citizen*, No. 1:17-cv-00253 RDM (D.D.C. Apr. 20, 2018). For a series of articles discussing the merits of this litigation, see *A Debate Over President Trump's "One-In-Two-Out" Executive Order: Series of Essays*, THE REGULATORY REVIEW (Jun. 26, 2017), <https://www.theregreview.org/2017/06/26/debate-one-in-two-out-executive-order>.

¹³⁵ See Rosen & Callanan, at 848-850.

¹³⁶ See C. Jarrett Dieterle, *Regulatory Reform in the 114th and 115th Congresses*, R STREET INSTITUTE, R STREET POLICY STUDY NO. 91 (2017), <http://2o9ub0417chl2lg6m43em6psi2i.wpengine.netdna-cdn.com/wp-content/uploads/2017/04/91.pdf> (reviewing regulatory reform bills, including those which would implement a regulatory budget). See also *Regulatory Reform Legislation*, Regulatory Reform Tracker, U.S. CHAMBER OF COMMERCE (accessed Mar. 14, 2017), <https://www.uschamber.com/regulatory-reform-tracker/regulatory-reform-legislation>.

¹³⁷ See *Lessening Regulatory Costs and Establishing a Federal Regulatory Budget Act of 2017*, H.R. 2623, 115th Cong. (2017), <https://www.Congress.gov/bill/115th-Congress/house-bill/2623>.

codify the relevant portions of EO 13771.¹³⁸ Rep. Meadows’s primary objective appears to be making it more difficult for future administrations to undo these efforts. For example, in an interview he gave regarding the bill, Rep. Meadows suggested that “it’s critical that Congress follow [President Trump’s] lead and not let this opportunity go to waste. We have to make sure that these regulatory reforms can last beyond the Trump administration.”¹³⁹ The bill begins by noting the parallels between fiscal expenditure and mandated private expenditure through regulation: “In addition to the management of the direct expenditure of taxpayer dollars through the budgeting process, it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations.”¹⁴⁰ Indeed, one of its stated purposes is to “to prudently manage and control the cost of planned regulations through an annual budgeting process.”¹⁴¹ To that end, Section 7 of the bill would codify the executive-only regulatory budget established by EO 13771. Aside from this codification, the bill does not contemplate any ongoing regulatory budgeting role for Congress.¹⁴²

The bill drew opposition from the Democratic committee members at markup. Then-Oversight Ranking Member Elijah Cummings (D-MD) advocated for a provision to empower the Director of OMB to override certain restrictions, arguing that the bill “sends the message that rulemaking should be an arbitrary process that values money over health and human safety.”¹⁴³

¹³⁸ See *id.* See also C. Jarrett Dieterle, *Rep. Meadows introduces bill to lock in regulatory budgeting*, R STREET INSTITUTE, (Aug. 21, 2017), <http://www.rstreet.org/2017/08/21/rep-meadows-introduces-bill-to-lock-in-regulatory-budgeting>.

¹³⁹ Jared Meyer, *Congress Can Strengthen Trump’s Regulatory Reforms*, FORBES (Nov. 7, 2017), <https://www.forbes.com/sites/jaredmeyer/2017/11/07/Congress-can-strengthen-trumps-regulatory-reforms/#3c7f30f198a6>.

¹⁴⁰ See H.R. 2623.

¹⁴¹ See *id.*

¹⁴² See *id.*

¹⁴³ *Ranking Member Cummings’ Statement of HR 2623*, HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM (Nov. 30, 2017), <https://democrats-oversight.house.gov/legislation/hearings/full-committee-business-meeting-18>.

He seemed to oppose certain aspects of regulatory budgeting more broadly, arguing that “[a]gencies should make decisions to issue new rules or modify or repeal rules based on evidence. . . . This bill instead tells agencies to make decisions based on arbitrary money caps.”¹⁴⁴

A bill introduced by Sen. Mike Lee (R-UT) represented a more ambitious effort at regulatory budgeting. Specifically, the Article I Regulatory Budget Act of 2016 would establish a comprehensive regulatory budget process with Congress at the center.¹⁴⁵ Rep. Mark Walker (R-NC), introduced a companion bill in the House of Representatives.¹⁴⁶ First, the bill would require agencies to submit “a cost estimate and cost benefit analysis of any new proposed regulations, rules, or statements that would have a Federal regulatory cost . . . of at least \$100,000,000 for any fiscal year.”¹⁴⁷ The bill defines “Federal regulatory cost” to include “all costs incurred by, and expenditures required of, the private sector, States, or local governments in complying with any Federal regulation, rule, or statement or any Federal statute,” but excludes benefits.¹⁴⁸ Presumably this is broad enough to encompass full societal costs.

More significantly, however, the bill amends the Congressional Budget Act of 1974 to create a five-year rolling regulatory analog that would run alongside the fiscal budgeting process: “In addition to the requirements under section 301, a concurrent resolution on the budget for a fiscal year shall set forth the appropriate level for the Federal regulatory cost for the fiscal year

¹⁴⁴ *Id.*

¹⁴⁵ See Article I Regulatory Budget Act of 2016, S.R. 2982, 114th Cong. (2016), <https://www.Congress.gov/bill/114th-Congress/senate-bill/2982>.

¹⁴⁶ See Article I Regulatory Budget Act, H.R. 5319, 114th Cong. (2016), <https://www.Congress.gov/bill/114th-Congress/house-bill/5319/text>. See also Sen. Mike Lee, *The Case for a Regulatory Budget*, THE DAILY SIGNAL (May 23, 2016), <http://dailysignal.com/2016/05/23/the-case-for-a-regulatory-budget> (discussing the bicameral legislative effort).

¹⁴⁷ S.R. 2982.

¹⁴⁸ *Id.*

and for at least each of the 4 ensuing fiscal years.”¹⁴⁹ Procedurally, “the joint explanatory statement accompanying the conference report on a concurrent resolution” allocates total regulatory costs among the relevant committees by functional budget category and by agency.¹⁵⁰ Relevant committees are then responsible for suballocating this cost “among its subcommittees[,] . . . among programs over which the committee has jurisdiction[,] . . . and by agency.”¹⁵¹ It also includes default rules in the event no new levels are set.¹⁵²

The bill has two enforcement mechanisms. First, to prevent Congress from legislating beyond the cost caps, the bill prohibits (subject to waiver) Congress from considering any measure “that does not include a provision prohibiting amounts made available under the measure from being obligated or expended to enforce a Federal regulation, rule, or statement that would cause a breach of any level or allocation of the Federal regulatory cost in effect for a fiscal year.”¹⁵³ Second, to prevent agencies from cost overruns, the bill empowers (and mandates) OMB to police compliance and creates a private right of action for individuals subject to rules which OMB has determined exceed cost caps.¹⁵⁴ Notably, the bill exempts from the regulatory budget’s ambit certain categories of regulations such as rules involving the military or rules designated by the president as necessary to prevent “imminent threat to health or safety or other emergency,” for criminal law enforcement, or national security.¹⁵⁵

The bill also establishes a process to formulate a regulatory baseline which is at first calculated by the president, but the baseline-setting responsibility eventually transitions to

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

Congress.¹⁵⁶ Specifically, for the first four years, a regulatory cost baseline is submitted by the president, but beginning with the fifth year, “and for every second fiscal year thereafter, CBO, in consultation with OMB, shall submit to the President, the Senate, and the House of Representatives a regulatory baseline, consisting of a projection of the Federal regulatory cost for the fiscal year and at least each of the 4 ensuing fiscal years.”¹⁵⁷

Sen. Lee’s bill, in contrast to both EO 13771 and Rep. Meadows’ bill, intentionally puts Congress at the center of the regulatory budget effort. According to a one-pager released by the Article I Project (which Sen. Lee started¹⁵⁸):

[The Article I Regulatory Budget Act of 2016] would, for the first time, require Congress to vote on the total regulatory burden each federal agency may impose on the American people each year – a budget for federal regulatory costs to mirror Congress’s annual budget for taxes and spending. Under the discipline of a regulatory budget, Congress would be directly responsible for the size and scope of the regulatory state. Executive agencies could still issue and enforce their rules, but only so long as their impact fits within the regulatory-cost limits established by Congress.¹⁵⁹

The one-pager also suggests that the bill is more aimed at accountability than necessarily restricting the size of the regulatory state:

Though we are all conservatives who believe in a limited federal role in regulating American life, the regulatory budget process we propose would not tip the scales in favor of “bigger” or “smaller” government. It would simply help ensure that the American people have a government of the size, shape, character, and cost that they want.¹⁶⁰

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Michelle Cottle, *Mike Lee’s New Crusade*, THE ATLANTIC (Feb. 12, 2016), <https://www.theatlantic.com/politics/archive/2016/02/mike-lee-article-one-project/462564> (reporting that Sen. Lee “rolled out the Article One Project, . . . [which] comprises a bicameral clutch of conservatives looking to promote legislation to give Congress control of the budget and the regulatory system”).

¹⁵⁹ *Leashing Leviathan: The Case for a Congressional Regulatory Budget*, Office of Senator Mike Lee (May 25, 2016), <https://www.lee.senate.gov/public/index.cfm/2016/6/leashing-leviathan-the-case-for-a-congressional-regulatory-budget>.

¹⁶⁰ *Id.*

This theme—that the bill sought to implement a regulatory budget in order to increase democratic accountability—was reiterated in numerous fora.¹⁶¹ The discussion surrounding EO 13771, by contrast, has been much more focused on achieving a deregulatory effect.¹⁶² This is also a necessary consequence of its executive-only structure.

IV. CHALLENGES

Although the regulatory budget has benefited from decades of consideration by various stakeholders, actually implementing the idea poses numerous logistical challenges. Indeed, two scholars recently opined that “[t]he practical difficulty of creating a sensible budget might be why President Reagan picked cost-benefit analysis over a budget when he was evaluating various regulatory reforms.”¹⁶³ This section will explore several of the issues and challenges that any regulatory budget effort is likely to have to confront.

¹⁶¹ See, e.g., Sen. Mike Lee & Rep. Mark Walker, *Make Government Accountable Again*, WASHINGTON EXAMINER, (May 26, 2016), <https://www.washingtonexaminer.com/make-government-accountable-again/article/2592334> (“The Article I Regulatory Budget Act is not a silver bullet. The Executive Branch would still retain far too many powers delegated away by Congress. But it would be a first step towards putting Congress back in charge of the federal regulatory state. And once the bureaucracy is out of the shadows and under the public’s control, we can begin the hard work of winning back the people’s trust and rebuilding this still exceptional nation.”). See also Kevin R. Kosar, *Will Congress Claw Back Power from the Regulatory State?*, NATIONAL REVIEW (Jul. 14, 2016), <https://www.nationalreview.com/2016/07/cut-regulations-restore-Congressional-power-senator-lee-leads-way> (“It is the responsibility of every member of the legislative branch, irrespective of party or ideology, to uphold the Constitution and to hold the executive accountable. Senator Lee’s bill will not reverse decades of executive aggrandizement, but it is a step in the right direction. It ought to receive serious consideration from both sides of the aisle.”).

¹⁶² Neomi Rao, Administrator, Office of Information and Regulatory Affairs, Discussion at the Brookings Institution: What’s next for Trump’s regulatory agenda: A conversation with OIRA Administrator Neomi Rao (Jan. 26, 2018), <https://www.brookings.edu/events/whats-next-for-trumps-regulatory-agenda-a-conversation-with-oira-administrator-neomi-rao> (focusing in her introductory remarks almost exclusively on the Trump administration’s deregulatory efforts). Then-Administrator Rao also suggested that the deregulatory actions to date have passed the requisite CBA review, *see id.* (stating that “for a deregulatory action to move forward it has to be more beneficial than costly. So we’re getting rid of regulations that are not in fact benefitting the public”). However, she did not mention whether all of these are economically significant in the context of EO 12,866. See MAEVE P. CAREY, CONG. RESEARCH SERV., REP. NO. R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE FEDERAL REGISTER 1,4 (2016); Exec. Order No. 12,866 (1993). For a comprehensive tracker of deregulatory actions to date, see Tracking deregulation in the Trump era, Brookings Institution (accessed Apr. 27, 2016), <https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era>.

¹⁶³ Cecot & Livermore, *The One-in, Two-Out Executive Order Is A Zero*, at 6-7.

Cost Measure

In one of the first robust papers that explored a regulatory budget, Chris DeMuth warned against an expansive definition of cost in the context of regulatory budgeting:

[B]udgeted costs would of necessity be something less than total social opportunity costs. The reason is that measurement of some types of regulatory costs, such as the lost consumer surplus resulting from retarded innovation or premarketing regulatory delays is inherently speculative and inevitably hedged about with ifs, ands, and buts. Arguments over elasticities of demand and supply, adjustments to account for risk aversion, exogenous variables insufficiently accounted for, and the reality of the economist's fundamental assumptions could swamp the budgeting process in controversy and destroy its programmatic neutrality.¹⁶⁴

Even with the benefit of over thirty years of experience since then, the challenge of measuring costs remains real.¹⁶⁵ As Dudley recently observed, “[t]he task of gathering and analyzing information on the costs of all existing regulations in order to establish a baseline budget would be enormous, and the resulting numbers not very reliable. Even defining what should be considered ‘costs’ would be challenging.”¹⁶⁶ And while a regulatory budget mechanism may be able to benefit from the procedural lessons learned in the fiscal budget context, “[e]stimating the opportunity costs of regulations is not as straightforward as estimating fiscal budget outlays, where past outlays are known and future outlays generally can be predicted with some accuracy.”¹⁶⁷ It is perhaps surprising, then, that—as discussed above—EO 13771 seems to employ a full social opportunity cost.¹⁶⁸

¹⁶⁴ DeMuth, *The Regulatory Budget*, at 38.

¹⁶⁵ See Jeff Rosen, *Putting Regulators on a Budget* (“Now that we have more than 30 years of experience with other forms of regulatory analysis, it is clear that there are two primary continuing challenges. One is the measurement of costs.”).

¹⁶⁶ Dudley, *Can Fiscal Budget Concepts Improve Regulation?*, at 268.

¹⁶⁷ *Id.*

¹⁶⁸ See Gayer et al., *Evaluating the Trump Administration's Regulatory Reform Program*, at 14 (“According to its February 2017 guidance, the Trump administration will opt for the most difficult of these measures, opportunity cost.”). See also OMB Apr. 5 (directing agencies to use the procedures outlined in OMB Circular A-4).

There do not seem to be clear answers to this problem. And the problem is further complicated by the dynamic nature of regulatory burdens. As Rosen and Callanan point out, “the baseline problem would be complicated by the natural change in regulatory costs over time, as large transition costs give way to smaller recurring costs.”¹⁶⁹ Litan and Nordhaus have argued that one way around at least this latter problem is for the budget to cover the costs imposed “over the lifetime of the rule.”¹⁷⁰ Their proposal seems to employ an incremental approach whereby the regulatory budget covers only new rules promulgated during the relevant timeline.¹⁷¹ “Because regulations are excluded from the budget after the first year,” they explain, “there must be a device to assure that agencies do not backload the cost of their regulations.”¹⁷² They proceed to call for “the use of an *ex ante accounting convention*” which “uses estimates rather than actual outlays in settling dollar limits.”¹⁷³ But it is hard to imagine how this would avoid the kind of challenges DeMuth highlighted.¹⁷⁴ Even under their proposal—which would require an administrative law judge to rule on the agency’s cost estimate¹⁷⁵—cost estimates remain a serious challenge. It may be necessary, at least at the beginning, for the political actors who set cost caps to employ very rough ranges.¹⁷⁶ It will be interesting to see how the Trump Administration confronts this challenge, as well as other related problems such as joint causation.¹⁷⁷

¹⁶⁹ Rosen & Callanan, at 846.

¹⁷⁰ LITAN & NORDHAUS, at 145.

¹⁷¹ *See id.*

¹⁷² *Id.* at 145.

¹⁷³ *Id.* at 146.

¹⁷⁴ *See* DeMuth, *The Regulatory Budget*, at 39 (“The problem is, in any event, serious enough that any budgeting program would need to be preceded by several years of effort to develop a uniform methodology of cost measurement applicable on a program-by-program basis.”).

¹⁷⁵ *See* LITAN & NORDHAUS, at 145.

¹⁷⁶ *See, e.g.,* DeMuth, *The Regulatory Budget*, at 38 (“For purposes of setting an overall restraint on regulatory activities and obliging regulators to recognize the trade-offs among policies, agency budgets applied only to the nearest \$10 million would be more than sufficient.”).

¹⁷⁷ *See id.* at 39.

Stock and Flow Questions

Another challenge any regulatory budget proposal is likely to face is what to do with extant regulations that have been on the books long before the regulatory budget was enacted.

According to Malyshev:

The budget, at the most ambitious level, would cover the total costs of all regulations past and present, not just new ones. The budget would allow agencies to offset the cost of new regulations with savings made by reducing existing expenditures. This would provide incentives for agencies to re-examine their regulatory stock, as simplification or removal of regulation would be treated as a credit and provide additional space to spend on new regulations.¹⁷⁸

Such an effort, while certainly more analytically sound, would require the herculean task of establishing a baseline of the costs created by current regulations.¹⁷⁹ And, EO 13771's model compounds this challenge by prohibiting agencies from using dated Regulatory Impact Analyses.¹⁸⁰

Moreover, even if the various stakeholders agree that we should have a baseline, there is no guarantee that they would agree regarding what that baseline should look like. If the debate regarding the fiscal budget baseline is indicative, regulatory budgeters can expect extreme disagreement.¹⁸¹ To avoid some of these problems, Rosen and Callanan have suggested “an

¹⁷⁸ Nick Malyshev, *A Primer on Regulatory Budgets*, at 2-3.

¹⁷⁹ See, e.g., Rosen & Callanan at 845-46 (“To establish a baseline before budgeting could even begin, agencies would first have to monetize their existing inventory of rules, currently spanning more than 160,000 pages in the Code of Federal Regulations.”).

¹⁸⁰ See OMB Feb. 2; OMB Apr. 5. See also Gayer et al., *Evaluating the Trump Administration's Regulatory Reform Program*, at 15 (“Even supposing that the administration does furnish a relatively clear set of rules for estimating costs, the workload of doing so will be quite significant. This is especially the case because of OMB's instruction that agencies should not generally just dust off ex ante cost estimates previous conducted as part of the original rulemaking, but should instead do new cost estimates informed by evidence as to costs in practice.”).

¹⁸¹ See, e.g., Jared Shirk & Francis Shen, *The Role of Estimation in Budget Procedures: Baselines* (May 4, 2005) (Briefing Paper No. 4), http://www.law.harvard.edu/faculty/hjackson/Baselines_4.pdf.

incremental budget that covers only the costs of *new* or *modified* regulations that reach a minimum economic threshold.”¹⁸² Dudley has made similar recommendations.¹⁸³

As Rosen and Callanan note, “[a]n incremental budget may lay the foundation for a comprehensive budget, but concerns about administerability clearly counsel in favor of a more modest initial approach.”¹⁸⁴ Perhaps this is why Sen. Lee’s bill does not require a regulatory cost baseline until the fifth fiscal year after a budget mechanism is enacted.¹⁸⁵

Regulatory sunseting represents another potential solution to this problem. In the regulatory context, “[s]unset provisions would require agencies to reconsider—and sometimes to repromulgate—regulations for them to have continuous effect.”¹⁸⁶ The idea is not new and has actually been proposed quite frequently,¹⁸⁷ including in 2015.¹⁸⁸ Instead of having to inventory all existing regulations, Congress could pass a broad sunseting bill¹⁸⁹ and require repromulgated regulations to comply with a regulatory budget.

¹⁸² Rosen & Callanan, at 846.

¹⁸³ See Dudley, *Can Fiscal Budget Concepts Improve Regulation?*, at 268 (“An incremental approach, such as a ‘regulatory PAYGO,’ would avoid some of these difficulties while retaining many of the benefits of a regulatory budget, as the experience of other countries . . . shows.”).

¹⁸⁴ Rosen & Callanan, at 846.

¹⁸⁵ See S.R. 2982.

¹⁸⁶ Congressman Nick Smith, *Restoration of Congressional Authority and Responsibility over the Regulatory Process*, 33 HARV. J. ON LEGIS. 323, 337 (1996)

¹⁸⁷ See, e.g., Regulatory Sunset and Review Act, H.R. 994, 104th Cong. (1995). See also VIRGINIA A. MCMURTRY, CONG. RESEARCH SERV., REP. NO. RL31455, FEDERAL SUNSET PROPOSALS: DEVELOPMENTS IN THE 94TH TO 107TH CONGRESSES (2016) (“Over 70 sunset bills were introduced in the 94th Congress proposing various sorts of sunset frameworks.”).

¹⁸⁸ See Regulatory Review and Sunset Act of 2015, S.1067, 114th Cong (2015), <https://www.congress.gov/bill/114th-congress/senate-bill/1067>.

¹⁸⁹ *The Federalist Society 2011 National Lawyers Convention*, 16 TEX. REV. L. & POL. 339, 349 (2012) (discussing the pros and cons of broader federal sunseting legislation).

Enforcement

Another critical question involves what—if any—formal enforcement mechanism should backstop a regulatory budget. EO 13771 seems to rely only on OMB’s power of persuasion,¹⁹⁰ as does Rep. Meadows’s bill codifying the Order.¹⁹¹ OMB would require an agency to, “within 30 days of the end of the fiscal year, submit for the OMB Director’s approval a plan for coming into compliance,” or OMB could “recommend that an agency take additional steps to achieve compliance, such as publishing a notice in the Federal Register requesting ideas from the public on EO 13771 deregulatory actions to pursue.”¹⁹² But it is unclear how much coercive currency would back up these threats, especially if numerous agencies end up blowing through their budgets or if a non-compliant agency has the backing of its congressional supervisors. As discussed above, Sen. Lee’s bill contains a private right of action, but it only seems to cover instances in which an individual is trying to avoid complying with a rule OMB has already determined exceeded an agency’s cost cap.¹⁹³ One can imagine scenarios in which a future head of OMB does not share the current director’s deregulatory agenda.¹⁹⁴

Nevertheless, the difficulty in imagining an enforcement mechanism which is effective, but does not create havoc, is perhaps why so few scholars have explored it in any detail. Moreover, even very early legislative efforts “created no hard sanction for exceeding authorized regulatory costs. Instead, . . . [an agency would] provide [Congress] a ‘full explanation for any costs of compliance which exceeded the regulatory budget for such fiscal year.’”¹⁹⁵ All of this suggests a political, rather than a private, enforcement mechanism may be most appropriate.

¹⁹⁰ See OMB Apr. 5.

¹⁹¹ See H.R. 2623.

¹⁹² OMB Apr. 5.

¹⁹³ *Id.*

¹⁹⁴ See, e.g., Andrew Restuccia, *White House Trumpets Early Success in Wiping out Regulations*, POLITICO (Jul. 19, 2017), <https://www.politico.com/story/2017/07/19/white-house-wiping-out-regulations-240742>.

¹⁹⁵ Jeff Rosen, *Putting Regulators on a Budget*.

However, a notable exception can be found in Sen. Rubio’s (R-FL) National Regulatory Budget Act of 2014.¹⁹⁶ Sen Rubio’s bill would prohibit agencies from issuing new rules until they came into compliance.¹⁹⁷ It would also render any violative rule unenforceable and would create a private right of action allowing citizens to petition a court “to declare that a covered Federal rule has no force or effect because the covered Federal rule was promulgated in violation of [the bill].”¹⁹⁸

CONCLUSION

Regulatory budgeting is hardly a new idea. Scholars, legislators, and even presidents have been exploring the idea for decades, pointing out the numerous ways in which the idea could enhance accountability and incentivize policymakers to consider the broad costs that regulations can impose on private parties. And yet, despite the intellectual and political appeal, regulatory budget proposals have come and gone for decades. To be sure, EO 13771 is an ambitious effort, and may even prove to be a turning point. But it may also have bitten off more than it can chew, both practically and politically. As discussed throughout this paper, a regulatory budget could provide more than just another deregulatory lever. It could also bring more transparency and political accountability into the regulatory policymaking process at a time when many seem to question its legitimacy.¹⁹⁹

¹⁹⁶ See National Regulatory Budget of 2014, S. 2153, 113th Cong. (2014), <https://www.Congress.gov/bill/113th-Congress/senate-bill/2153>.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ See generally Karlyn Bowman, *Where Is The Public On Government Regulation?*, FORBES (Oct. 23, 2017), <https://www.forbes.com/sites/bowmanmarsico/2017/10/23/where-is-the-public-on-government-regulation/#1a1fb07865b9>; PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).