

**This seminar was given on Thursday, March 4, 2021 by Bridget Dooling, Research Professor with the GW Regulatory Studies Center at George Washington University and is part of the Regulatory Policy Program's weekly webinar series.**

Joe Aldy:

Welcome to the regulatory policy seminar. I'm Joe Aldy, the Faculty Chair of the Regulatory Policy Program at the Mossavar-Rahmani Center for Business and Government, at the Harvard Kennedy school. Let me open with a few reminders regarding the logistics of our online seminar. We are recording this seminar and we'll post it online. So if you know someone who is interested, but could not attend the talk live, please let them know that they can access the seminar at the M-RCBG YouTube channel. And I'll put that link in the chat in just a moment. You can also remind friends and colleagues to register for Zoom links for each seminar at the Regulatory Policy Program webpage. And I'll also put that link into the chat.

Joe Aldy:

Today we will take questions through the Q&A function in Zoom. So please click on Q&A at the bottom of your screen and type your questions. At the end of our presentation, I'll take the questions and pose them to our speaker. We're excited to have Bridget Dooling join us in the regulatory policy seminar to present Bespoke Regulatory Review. Professor Dooling is a Research Professor with the George Washington Regulatory Studies Center. Previously she was a Deputy Chief Senior Policy Analyst and Attorney for the Office of Information And Regulatory affairs at the US Office of Management and Budget.

Joe Aldy:

She was OMB's voting member of the Administrative Conference of the United States, and now serves as a senior fellow with ACUS. Professor Dooling's earlier professional experience includes a clerkship for an administrative law judge at the US Department of Labor. Positions in the Antitrust Division of the US Department of Justice. A US airlines legal department and the economics team of an aviation trade association. And most recently, Professor Julian served on the OMB agency review team as a part of the Biden-Harris presidential transition team. Bridget, welcome to the regulatory policy seminar.

Bridget Dooling:

Thank you, professor Aldy. It's such a pleasure to be here with you. I'm going to have some slides. So while I work on those, let me just say that it's such a pleasure to be here at the Mossavar-Rahmani Center for Business and Government. Thank you for the opportunity to share my work with you. It's an honor to be invited to present at this regulatory policy seminar. So I'm Bridget Dooling. I'm a research professor at the GW Regulatory Studies Center. And I'm going to talk with you today about something that I call bespoke regulatory review. For those less familiar with the term, bespoke is actually a term from fashion. It refers to clothing that's tailor-made rather than mass produced. And maybe you don't often think about the nexus between high fashion and regulatory review, but that ends today. We're going to find one for you.

Bridget Dooling:

Okay. So let's start with a roadmap. Today we're going to talk about how the rise of judicial review of regulatory agencies creates some increased risk for the regulatory output of independent regulatory agencies. There've been some efforts to address that status quo, but they haven't worked out. So what I'm offering you today is another way forward, and that's what I call bespoke regulatory review.

Bridget Dooling:

So Let's get into the rise of judicial review of regulatory agencies. And this is something that's going on in regulation writ large, not just with respect to the independent agencies. But since about 2009, the Supreme Court's been taking steps towards recognition of cost benefit analysis as a tool to help support agency decision-making and rulemaking. And since I'm here at the Kennedy School, instead of the law school, I'll take some liberties and just summarize it this way.

Bridget Dooling:

So previously the court would look for textual commitment for consideration of costs, evidence that Congress told the agency that it needed to consider costs when it was making its choices in analyzing its regulatory options. But since 2009, unless the statute says that an agency may not consider costs, then it should do so. So there's quite a flip going from looking for a clear commitment from Congress to the consideration of costs over into the absence of language about costs implies that the agency should do so itself. And there's a similar trajectory in the lower courts. So if you want the details on that ark, I include all that in my paper, but I'm just going to paint with broad strokes here just to get the concept on the table.

Bridget Dooling:

All right. And that's, I should say, actually let me just go back. That's something of an oversimplification, right? Because each of these cases should be considered in the context of the statutes under which they arose, but the trajectory overall is clear enough, and I'm not aware of persuasive arguments that the court isn't coming around to this manner. So that's the first plank of this paper, is that there's this rise of judicial review of regulatory agencies and an increased interest in looking at the economic underpinnings of how agencies make their decisions.

Bridget Dooling:

So the increased scrutiny of these economic underpinnings of agency decision-making poses particular risks for the set of agencies known as the independent regulatory agencies. To get into this, we have to talk a little bit about independent agencies in general, because independent regulatory agencies is a subset of the category of independent agencies. Now, independent agencies regulate key sectors of the economy like telecommunications at the Federal Communications Commission or consumer products, which is handled by the Consumer Product Safety Commission. We don't have great ways to estimate the role of independent agencies relative to other agencies, but just to throw some numbers out there so you can get a sense of the scope, the scale of these, in 2019 they made up about 12% of the planned regulatory output in the government's regulatory agenda. And about 13% of the regulatory restrictions as measured using data based on the code of federal regulations.

Bridget Dooling:

So a pretty sizable chunk of the regulatory regime in this country is coming out of independent agencies. And the way those agencies make rules is the same as other agencies. They use the same procedures. They end up side by side in the code of federal regulations. And just looking at a rule, you wouldn't have

a great way to tell if it was written by an independent agency or not. Also the way the courts review these rules is the same too. So to the extent that you have thoughts about independent agencies at all, you might not think of them, or you might think of them as a well-defined category, a binary, on or off, you're either independent or you're not. Well, it turns out this is not true, not even close. In my article I lift up scholarship from law and political science that map the features of independent agencies, and come to the conclusion that this binary is not real.

Bridget Dooling:

When Congress makes a new independent agency, they don't refer to some central and settled definition of independence. Instead, Congress gives an agency a mix of different kinds of features. Now the classic feature is limiting a president's ability to fire an agency head for anything less than good cause. So that's a term of art, and it means that the president can't just fire someone because he's in a disagreement with them. This is commonly understood as the hallmark of an independent agency, this type of limitation on the president. Other features include limiting who the president can appoint to an agency in the first place, giving the agencies multi-headed structures rather than single heads, imposing party balancing requirements, so there have to be this many Democrats and this many Republicans, or expertise requirements, for example, all of which can be imposed on those leadership roles. And there are other forms of insulation too, such as giving agencies control over their budgets, their regulations, which we'll talk more about today, their litigation strategies and more.

Bridget Dooling:

In all, Dr. Jennifer Sellin mapped 50 different features of agency independence. And her work shows us that you see a distribution of these features across agencies thought of as independent, as well as agencies that we don't really think about that way. So for example, the head of the social security administration has that for-cause removal protection, that hallmark feature that I described for you above. We don't usually think of SSA as an independent agency. Meanwhile, the Securities and Exchange Commission, which is closer to what we think about when we talk about independent agencies, they do not. They do not have statutory for-cause removal protection for their heads. So scholars have also shown that these features can change over time, which adds a temporal dimension to agency independence too. The language in the scholarship is especially vivid. So I want to share some of that with you today.

Bridget Dooling:

So, Professor Neal Devins refers to agency independence as "fluid and slippery thing." Professor Anne Joseph O'Connell talked about the binary view of agencies that, are you independent or not, as a cramped view of the administrative state. And professor Adrian Vermeule raises the idea that independence is unstable as a legal category. One of my favorites is from [inaudible 00:09:48], and Richard Revesz, Professor Richard Revesz, who take this insight about independent agencies and our views that it cast out on the idea of a constitutional force field surrounding these agencies. And if you can believe it, this is all just a prelude of what I want to share with you today, but I linger on it because I really don't think the conventional wisdom has caught up with the academy here, and it's worth laying all this out. Key takeaway, independence is not a binary condition.

Bridget Dooling:

So I mentioned before that one of the insulating features is for Congress to tell an agency that is not subject to regulatory review, or that it has more control over its regulatory review. And this includes

limiting whether the Office of Information Regulatory Affairs, where I used to work, reviews those rules. And I feel I can shortcut this overview somewhat, because your last speaker, Professor Livermore, teed up so many of these issues so well. So I would definitely recommend going back and listening to his seminar if you didn't get a chance to catch it. And that's available on YouTube.

Bridget Dooling:

When I was on the career staff at OIRA, my job was to apply our government's regulatory policy, sort of policy on policy to the regulatory matters of the day. That work is governed by Executive Order 12866, which sets out the steps for regulatory analysis that agencies are supposed to take. These policies, I would argue, are the best ones we have so far to help the government make good choices. And they look a lot like the kinds of steps we might put our own personal choices through if we were thinking clearly. So first, what's the problem? What's the problem we're facing here? Second, what are my options to solve it? What are my alternatives? Then third, what are the pros and cons or costs and benefits of each available option? And then lastly, all of those options, which one makes me or society, me, if it's a personal decision, society, if it's a governmental decision, better off.

Bridget Dooling:

If these principles sound fairly reasonable, it might surprise you that not all agencies are subject to them. In fact, there's a small number of agencies known as the independent regulatory agencies that are carved out. It includes big regulatory agencies like the Federal Communications Commission, the Securities and Exchange Commission, the Consumer Product Safety Commission, and more. It's a set list of agencies that you can look up in the law. I understand this to have been something of a political compromise when Executive Order 12866 was established. A calculation that it was best to avoid an intrusion into the domain of these independent agencies. If you will, an intrusion into that constitutional forcefield that Revesz and [inaudible 00:12:45] referred to earlier.

Bridget Dooling:

But let me show you what this looks like in practice. So I gave myself two minutes to brainstorm a bunch of regulated products or services, and then I divvy them up between those agencies that are subject to Executive Order 12866, and which ones aren't. This is obviously just a tiny, tiny, tiny snapshot of the products and services that are subject to federal regulation. And just skimming down this list, I don't know about you, but it's not immediately obvious to me why air transport regulations should be subject to these regulatory steps that I referred to earlier, while ocean transport rules are not. Same with cell phones and prescription drugs, children's products and medical devices, and so on down the list. We ask agencies to consider alternatives and costs and benefits when it comes to endangered species, but not nuclear power plants. There's just no through line here, other than which type of agency wrote the rules. And that's just analytically not defensible, right? If we think these steps are good steps to take, there's a pretty strong normative argument for extending them to all of the relevant rules.

Bridget Dooling:

So with the rise of judicial review and that exemption from 12866, my argument is that this places independent regulatory agencies rules at increased risk of losses in court. OIRA review lends rigor to the use of analytical tools. That's because of OIRA's own expertise, but also because of the way it facilitates review of rules by other agencies that have relevant expertise as well. So you can think of that as facilitating a type of peer review within the government.

Bridget Dooling:

Now, some agencies are trying to go it alone. They're acting on their own, perhaps because of some of this pressure created by the courts to try to bring these analytical tools to bear on the regulatory choices. They're doing so in a way that's piecemeal, isolated and ultimately pretty duplicative. If they could just find a way to interact with OIRA and others in government who have this expertise, it might save them a lot of time and get them up to speed faster, rather than reinventing the wheel.

Bridget Dooling:

But the sticking point has been, how do they do that without compromising their independence, those features that were given to them by Congress? The worry that there's a wonderful bit in my piece of the best criticism I've received about this idea, is the idea that it's Hansel and Gretel, right? That the independent agencies don't want to work with the OIRA, because they don't want to get drawn into a loss of their independence, right? They're wandering through the woods and they don't want to stop by the witch's cabin, which fair enough, we'll talk more about the realities of what this could look like, and why the independent agencies, maybe rightly have stayed away up until now. What I'm arguing is that the conditions on the ground are changing such that they might want to revisit those priors and come a little bit closer in thinking about how and whether they can leverage the benefits of what OIRA and the inter-agency review process can offer.

Bridget Dooling:

So the carve-out in 12866 can be understood as a political choice that had these unintended consequences while trying to give those independent agencies wide lane for them to make their choices in an independent manner, simultaneously cut them off from that technical expertise. So if there was a way to resolve that, to let the independent agencies retain independence where merited, while still giving them access to some of this technical expertise, we should try to find a way to do that, try to find a way to reconcile.

Bridget Dooling:

But we haven't figured it out so far, this original decision to separate the independent agencies out was made in 1981. It locked in a list of agencies, and as new agencies have been created, sometimes Congress will add them to this list. And sometimes they don't. And it's been deadlocked since then basically, despite interest from presidents, from legislators, certain legislators and scholars in revisiting whether this is sensible, particularly because of that table I showed you, where you have these requirements applying in a fairly arbitrary way. So my assessment is that a simple fix must not be at hand, that if it was easy we would have done it by now. So something's in the way, right? And I would say that there is a risk of, some of the solutions that have been offered would just, in one fell swoop, write an executive order that calls these agencies in, and it's a fait accompli and it's done and off you go.

Bridget Dooling:

So there's a risk there of going too far, right? Of not respecting those boundaries that Congress set up for the independent agencies. There's a potential for something of a chaotic implementation of this too, right? This is not one or two agencies. And as I say, it does account for a pretty sizable component of the regulatory activity going on at any given time. So doing it in one fell swoop seems to me like a recipe for some chaos. It calls constitutional questions such as, what happens if they disagree? What does it mean for the independent agency to have any kind of decision-making independence, if they're subject to the OIRA review process, as we know it. And then of course, resource issues on both sides, right? OIRA is a

really small agency, it's only about 50 or 60 people, and increasing its workload by over a dozen agencies all in one go, seems like a really tough lift. So those strike me as problems with simple stroke of a pen executive order solutions that have been offered in the past.

Bridget Dooling:

So what I offer instead is bespoke regulatory review. This is a series of bilateral negotiations that would result in memoranda of agreement between an independent agency and OIRA, basically scoping out how that review would work. And you might say that's fine. That sounds okay, let's go with it. But why would these parties negotiate with each other? Why would they come to the table? On the independent agency side, I've tried to lay it out for you why conditions on the ground have changed. And as courts look more closely at their analysis, those agencies are lagging behind. The rules are at risk. And just thinking about an agency's incentives, agencies don't want to be spending years and precious, precious staff resources writing rules that the courts are ultimately going to remand. They would rather write rules that can make it. And so if there is a way to extract some of that technical knowledge from the rest of the executive branch via the OIRA process, that's something that they probably in their self-interest, would like to find a way to do.

Bridget Dooling:

And on the flip side, can't the president just go ahead and do this? Why does he have to negotiate any of these terms? Can't he just do it? And in fact, DOJ's Office of Legal Counsel has told him that he can. He can just go ahead and do it as a legal matter. But he hasn't, right? So that reveals something. Some thing's in the way, right? There's some sort of bind that the president must be in, if he hasn't gone ahead and do this himself. And I'm not so much referring to President Biden in particular, this is a long running problem, basically since 1981. So every president has faced some number of questions about whether he should call in the independent agencies in this way. And yet OLC's guidance has been clear, and the answer, as a legal matter, has been that, yes, he can.

Bridget Dooling:

So there's some political impediment there. And if he can't therefore move unilaterally, because demonstrably he hasn't. Maybe there's a coordinated move to be heard, a move that can be made through negotiation. But the parties can probably only get there if they soften a bit, right? Because if your stance is that the president should control all of these agencies are unconstitutional, well, the independence would stay away. They'll say, "Look, you're not respecting the features that Congress gave to us." And on the flip side, if the independent agencies cling to the notion of there being a constitutional force field around them, then they would probably never want to engage with the executive. So both parties would probably have to soften somewhat on some of those historical postures in order to just get them to the table in the first place.

Bridget Dooling:

But there is actually precedent for negotiation on matters like this. So this is not an entirely novel idea. Actually, the more I looked at the precedent, the more I thought this is not at all a novel idea, OIRA has been negotiating over the scope of its review for a long time. So just to give some examples, right after Executive Order 12866 was issued, then Administrator Sally Katzen, issued a lengthy list of the types of rules and agencies, whose rules would be exempt from 12866 and or sort of carving out this type of rule, not that type of rule. So there was an early process when 12866 came out, to figure out, okay, where does this order apply and where it doesn't it.

Bridget Dooling:

And then also in terms of transactional reviews, just speaking from my experience as a desk officer, there are often conversations about what is going to be covered in review. How long will that review go on. Who will be involved with it. Many of those details are up for grabs in the ordinary OIRA review process. So the idea of negotiating that on a meta scale, just isn't at all shocking to me, that actually seems quite standard, and like the kind of thing that happens anyway, between OIRA and the regulatory agencies that it already works with.

Bridget Dooling:

And then more specifically in terms of the memorandum concept and memorializing those terms in that way, there is now a memorandum of understanding between OIRA and the CFTC. And that really gives CFTC the ability to come to OIRA to seek technical assistance. It's very hands-off on the OIRA side, or just something of a passive advisor under the terms of this MOU. And just thinking about the incentives there, it's not clear that that type of arrangement creates enough of an engagement between OIRA and the agency to serve as a model. Most recently, OIRA renegotiated the terms of its memorandum of understanding with IRS to cover tax rules.

Bridget Dooling:

So previously the majority of tax rules had been carved out from a OIRA's review, and following a series of prompts from others in Washington, OIRA took this back up and renegotiated different set of agreements with IRS. And actually wrote them down and into a memorandum of agreement that both parties signed, and that's publicly available. You can look at it. And in my piece I go through some of the details about the terms that are in these various memoranda. So you could see what they look like, right? What types of terms do the parties feel like they need to write down in an agreement with themselves? So that's a long way of saying that actually there is quite a bit of negotiation going on when it comes to the scope of OIRA review already. And so what I'm arguing for is something of a program of extension to use that groundwork to do it for the independent regulatory agencies.

Bridget Dooling:

And the terms are essential. The terms are essential. So dispute resolution is probably number one. What happens if the parties disagree? What happens in the course of a review when OIRA recommends a certain regulatory, a certain approach to answering an analytical question, and the agency says, no. Is that it? Does the president have to fire the head of the agency? The goal would be to work out enough points of contact, elevation points between OIRA and the independent, so that they could have a way of managing dispute resolutions, that it doesn't just jump to that ultimate constitutional question every single time folks in OIRA and folks at the agency have a disagreement. You want to find ways to cool that process down, to let the parties stay at the table and keep talking to each other when it comes to any particular rule.

Bridget Dooling:

So I think they could do it if they wrote in their memorandum of agreement, some expectations about, what happens when we disagree? Who going to call who? Who's going to be at the table to help resolve the decision? And for agencies that are multi-member bodies, what role did do those folks play in this process? Is OIRA negotiating with them or perhaps with the executive director of an agency? They're all structured a little bit differently. And so you would want to know in advance, who's calling who? Who is

whose point of contact as we work this out? All of that can be hashed out in a memorandum of agreement.

Bridget Dooling:

And then other terms would be things like phase-ins. You probably don't want to go from zero to 60 in 30 days. You probably want to have some way of phasing this in, both for that resource issue that I mentioned before, but also just because there's just technical knowledge and maybe even some hiring that needs to happen in order to make this fruitful type of partnership, maybe even they send staff to each other on short or long-term rotations to start building that capacity on both ends.

Bridget Dooling:

And then also things like the details of the review process, how long would that review go? Are they using, what I call the chess clock approach where, each time when a reg comes in, OIRA does its work, and then when it passes that work back to the agency, do they press the chess clock for how they're going to calculate the days? So this is really in the weeds. But just to say, these weeds can be hashed out, and these weeds tend to be important to agencies in the OIRA review process. And so you could front load some of that and give everybody some comfort by writing down how is this going to work.

Bridget Dooling:

And then lastly, of course, just putting different types of terms on the table for you, so you can conceptualize what these memorandum might include. It would be things like, how do you comply with the Sunshine Act in the context of regulatory reviews? Sunshine Act usually requires independent agencies to be quite disclosive when certain conditions are met. And the OIRA review process in contrast with the other agencies tends to operate behind the deliberative process fail. And so there are just some understandings to be made about how and when information will be disclosed and by whom and in what manner. And again, all of that lends itself to a type of memorandum of agreement process.

Bridget Dooling:

So if I have... Let's see. There we go. A couple of considerations and then we'll wrap up. So there's probably are other ways for the independent agencies to get access to the type of technical expertise that they need. And so, going to OIRA is not the only way. And I walked through some of those other ways in the paper. They could, say for example, pool some resources among them, and create some folks who are dedicated to working with those tools of regulatory analysis. We could also start up some type of other office of information and regulatory affairs to just review independent regulatory agency output. You could put something like that in Congress, for example, if you wanted to. So there are different ways to think about how to replicate some of the function of what OIRA and the inter-agency review process is bringing to the table. In my paper I'm ultimately not persuaded that there isn't a way to allow OIRA to actually just work with these folks rather than replicating the function, that we can find a way to come to terms that are mutually agreeable.

Bridget Dooling:

So on the upside this approach rationalizes the application of analytical tools to regulations. That chart I showed you where it just doesn't really make sense why we're using analytical tools for some rules and not others. This allows us to make some progress on this issue. It also should serve to protect independent agency rules from judicial review, right? Because if they can learn a little bit more from the

rest of the executive branch, what they need to be doing in their rules to help them navigate the courts, that would be a good thing. And I think is in both the public's interest and the agency's interest itself.

Bridget Dooling:

And in a higher level, this resolves this long running stalemate between the president and the independent agencies in a way that allows for some coordination, some presidential direction, while also respecting those features that Congress gave the independent agencies. So, it pierces that constitutional force field concept, and says, let's find a way to work together in a way that respects the boundaries that Congress drew around how we should work together. And then also it's an incremental approach. It allows for learning, it allows for working within resource constraints, which is just important to keep in mind when it comes to making change in Washington, it is hard. And so solutions that just assume resources will fall from the sky are not ones that sometimes end up with a happy ending. So here what I'm offering instead is a way to make some progress in the interim, while we work on these larger questions.

Bridget Dooling:

So with that, I think I will just wrap up by saying, the rise of judicial review poses acute risks for independent regulatory agencies. We have a better understanding now of what independence means. And OIRA review has never been one size fits all, anyway. So I think that we can find a way to come up with mutually beneficial terms between OIRA and the independent regulatory agencies, with the end game being better regulatory analysis that survives in court, and allows rules to move forward. And hopefully that the content of those rules will reflect those sensible principles that I laid out for you earlier in the talk. So thank you. And I look forward to your questions.

Joe Aldy:

Great. Thank you, Bridget. That was fantastic. I want to remind everybody to use the Q&A button at the bottom of your Zoom screen to submit questions. We've already received a few, and I've got a couple via email as well. But I'm going to ask a question that I have. And it's a question I've had for a while, about how we think about the relationship with the OIRA administrative and independent agencies under the Congressional Review Act. So, under the Congressional Review Act, agencies have to submit information to Congress. They have to submit their final rules. They have to identify it. They have to report additional information such as assessment of benefits and costs, and the event of the rule is identified as major. And it's that major classification under the congressional review act that also then starts a clock of whether or not Congress wants to file and vote on a resolution of disapproval on that regulation.

Joe Aldy:

As I understand it under the Congressional Review Act, the OIRA administrator is the one who makes the determination of whether a rule is major. One could argue that, because one of the criteria for a major rule is that it imposes at least a hundred million dollars of impact on the economy, that maybe the OIRA administrator, in order to make a major declaration for an independent agencies regulation, needs to have that agency conduct some analysis of its economic impact. And I'm wondering whether or not that has been thought of as a potential opportunity that, from a congressional mandate, OIRA can require some form of economic analysis for that major determination, and whether or not that could actually at the end of the day, be something very similar to what is called for under 12866, and the associated OMB guidance?

Bridget Dooling:

I think that's a great question. And actually you saw some progress on that during the Trump administration. And so, Administrator Neomi Rao, who was the head of OIRA for a time, issued a memo that would do a version of what you just described. So would you take advantage of the major determination that OIRA is obliged by statute to make, and say, "Look, OIRA has to make this determination, but we need information to do it. We can't just do it in the back of the envelope way, or we can, but we just need inputs into that back of the envelope if that's how we're going to do it." So there was a memo issued. I can't remember the year, but in the Trump administration, calling for independent agencies to give OIRA more specifics in the course of that major determination process.

Bridget Dooling:

So, that does give OIRA a window into it. We don't know a lot about how that's been working in practice. While the outcome of a regulatory review ends up often getting memorialized in the preamble of an agency's rule. The major determination it's either major or it's not. There isn't often a whole lot of public disclosure about how that played out, whether there were disagreements, and what some of the main assumptions were there. So I would say, I think that I saw that just in tea leaf reading mode, I saw that is a step in that direction absolutely.

Joe Aldy:

Right. So, we have seen a shift in the composition of the federal courts. This is certainly reflected. I think in some of your comments. We've seen even before the recent conservative shift, which has implications for what do we think is going to be the future of, say, deference to regulators, which I'll get to in a moment. But we even saw before that, for example, the Securities and Exchange Commission losing several court cases, because they basically weren't really rigorously evaluating the benefits and costs of their regulations, even though their statutory authority says they should do that. And I recall, as someone who in my spare time I read, that rule registered, and would read some of the language that they would have describing the benefits and cost of regulation. And what's fascinating is that language often was very similar from one rulemaking to another.

Joe Aldy:

It was sort of boiler plate, they were directing market failures, thus benefits are greater than cost. And so we have that sort of why we've seen, I think some of the financial regulators are saying, we've got to get a little more serious about this. I want to get to CFPB in a moment, our colleague from the law school, [inaudible 00:36:56] has a question about CFPB, which I will get you to move moment.

Joe Aldy:

But we also have this concern now, of course, that the federal courts, we have at the Supreme Court, but also at the appellate level, more conservative judges and justices who have signaled in the past, a view that they think that the Chevron doctrine perhaps is a little bit too deferential, too permissive in its deference to the judicial, deference to the regulatory agency and their expertise. And I wonder whether you think that if we're going to see perhaps some limitation of Chevron deference, what role being able to produce a rigorous benefit costs, and how, say, consistent with the processes of 12866 are consistent with at least a guidance under Circular A-4, whether that helps independent regulators as they try to deploy some discretion, but be able to demonstrate why it is perhaps still consistent with what might be a more limited Chevron standard in the future.

Bridget Dooling:

Yeah, you're so right. There are just major tectonic plate movements going on right now in the administrative law, which I understand if you're coming to this cold, that might sound like the most self-defeating sentence of all time, right? But really are these major, major, major movements underneath all of this. So, we're not sure what the future will hold for deference doctrines, right? One thing that I think is beneficial about the OIRA review process in particular, and I can just speak from my experience as a desk office officer there, a lot of what I was doing was just drawing out from the agencies, why they made the choices that they made, both the regulatory choices and the analytical choices that they made. And the result of that was sort of a documenting of the work, right? Which helped satisfy some of the reason giving demands that we apply to agencies.

Bridget Dooling:

And so that was one of those things that doesn't get talked about a lot in terms of what OIRA review actually produces. But a lot of the time I wasn't in conflict with the agencies, it was more just saying like, help me understand why you made the choices that you made. So rounding out those preambles that they aren't so terse, so not so conclusory, I think is a beneficial thing, and actually helps to encourage potentially the court to defer, right? Because if the court can see its work, can see the agencies work, they can see they put it through some reasonable steps of analysis, then there's less to worry about in terms of how the agency is making its choices. But I think you're right. This little paper takes place in the context of some major, major plate movements within administrative law, including non delegation as well, is right up there.

Joe Aldy:

Right. Yeah. So, if we were to go forward with something bespoke, where we entered into these bilateral agreements with a number of financial regulators and other independent regulatory agencies, how many more staff would OIRA need? Or put in another way, OIRA is a small office.

Bridget Dooling:

Very small.

Joe Aldy:

And if we're really serious about this, it would suggest we actually need to significantly increase the budget and the personnel. Do you have a sense of, if we were serious about this, whether we should to go all the way, but apply 12866, Executive Order 12866, to all these independent regulatory agencies, or to go through this bespoke model, do you have a sense of, are we talking about doubling the size of OIRA? 50% increase? What would it mean if we were to get serious in what the resource demands of you?

Bridget Dooling:

So I think that my general answer is, yes. There would have to be additional resources over time. I think the idea of doubling OIRA within a year just feels really out of reach. And so that's part of what the reality that I'm trying to grapple with in this paper is, how can you make some process progress on this? How can you lay out the theory of the case a bit more and show that this can work, right? Rather than doing it in one fell swoop. And so, I don't know the answer to how many additional staff OIRA would need. I think the intuition is right on, that it would need more. But just right now, OIRA is, I don't know

what the staff count is. It's somewhere between 50 and 60, about half of that number is desk officers covering almost entirety of the domestic policy apparatus for the United States government.

Bridget Dooling:

So already the portfolios are massive, and I think they're accustomed to working that way and they have a way of triaging. So, it's a good question. I think that's part of what you want to analyze with this, especially if you were thinking about doing it in this MOA-based manner, which agencies should we try to roll through quicker, and which ones should we phase. Because then definitely all the independent agencies are different in terms of how much they regulate and how complex the regulations are. So you might even think about staggering them in terms of the resource commitment required.

Joe Aldy:

Let's get back to the courts, we have a question from an alum who is curious about whether there's any evidence that increased engagement with OIRA helps the agency with respect to how it's reviewed and through the courts. Does that help them with the courts, to be able to say we worked with OIRA?

Bridget Dooling:

Yeah. I'm comfortable with saying that the answer is yes, and that we do have some evidence. And if you can bear to weed through my footnotes in the OIRA review article itself, I've got some citations for you in there for, and I'm not an economist. You wouldn't want me doing the study to actually determine this. But people who can do econometrics have done it and regression, and they feel like the answer is yes. So I think the answer is a pretty solid yes on that. I'd always welcome more studies on it. And I think we can always learn more from more data work there. But initial work is that the answer is yes.

Joe Aldy:

I will say, as an academic, we always need more research.

Bridget Dooling:

Yes. Exactly.

Joe Aldy:

SO let me go to a question that comes from my colleague, [inaudible 00:43:19], who's thought a lot about this, especially in the context of CFPB, where they actually had some pretty clear guidance from Congress in the Dodd-Frank Act about how they think about the role of benefit cost analysis, how they think about the role of retrospective analysis. So he knows that it's quite sympathetic to extending OIRA review to the independent agencies, but a potential concern for an independent agency is whether a bilateral agreement with OIRA effectively raises the bar that the agency must meet to survive judicial review. And alternative approaches, or the cost benefit analysis standard, as the SEC has, without a formal agreement OIRA, and then hiring qualified staff to do the RIA internally. Can't independent agencies improve the quality of their regulatory impact analysis without a formal linkage with OIRA? And arguably the CFPB has achieved this improved quality of RIAs with a statutory prompt from Congress to consider costs and benefits in rulemaking procedures.

Bridget Dooling:

Yeah. So I think you're raising the point of, is this the only way? And the answer's got to be no, right? There's probably different ways to do it. In the paper I stepped through a few examples where there have been agencies that have been trying to go it alone for actually a pretty extended period of time, like the Nuclear Regulatory Commission, as an example, where they set on a lengthy process to study the value of statistical life as applied to their regulatory domains. And my understanding is that they ultimately came to the same general posture that OIRA is in, but it took them an extended many, many years to get there. And so yeah, they absolutely can go it alone.

Bridget Dooling:

The point I'm trying to make is that, gosh, it would be great if folks could just talk to each other, right? And learn from each other. And if they could do so in a way that preserved their independence where warranted that we should do that. We should connect those resources. And so arguably that's what the CFTC MOU was trying to do. Was just trying to say, CFTC, you can approach OIRA for technical assistance when you want to, and just opt in.

Bridget Dooling:

And so where I think that falls short is that there's just a little bit too little enmeshment. In order to have that lead to significant changes in the way you actually analyze your rules. It's a little bit two arms length to keep the parties at the table to work through some of those harder analytical questions where there is a disagreement, and where there needs to be some sort of... I'm sort of falling back on the term dispute resolution, some sort of way to stay in conflict with each other to resolve the question in a way that's satisfactory, rather than just saying, thanks for your advice. We're not going to take it. That doesn't really advance the ball. You have to get the parties to bind themselves to each other, to stay at the table.

Bridget Dooling:

But then ultimately, particularly for an independent agency, you have to have an escape patch. Commensurate with the features that Congress gave it, for how it's going to get out of that negotiation. And so I'd rather let the parties work that out in advance to say, how is this relationship going to work? What do we expect from each other? And then know that there's an exit clause that makes sense for that particular agency.

Joe Aldy:

Well, given what you just said, let me go to a question that our colleague, Lisa Robinson has, which is that, she finds this idea interesting, but unless it's mandated, it seems that many agencies will still want to maintain their independence. For example, maybe the expertise at OIRA, that they bring to the process, without necessarily impress those agencies who have substantial experience conducting their own regulatory analysis, including with their own internal guidance, and wondering how you would address this. And I'll note. It's interesting when we think about these executive orders, you talked about 12866. We had in 2011, in the Obama administration, Executive Order 13563, I think?

Bridget Dooling:

You got it.

Joe Aldy:

In January of 2011 saying, we really like 12866. Maybe I'm not doing justice to that. It says a little bit more than that. But it's really emphasizing the key principles and guidance from 12866. We then had a little bit later that year, Executive Order 13579 which was focused on independent regulatory agencies. And the key distinction between those two executive orders, as I recall, is that the former had the word [inaudible 00:47:54]. So the executive branch agencies covered by 12866, you shall 12866, seriously, the one bit of an [inaudible 00:48:01] is, he said, you should. And should are interpreted very differently under the law [inaudible 00:48:07].

Bridget Dooling:

That's the truth. Thank goodness, right?

Joe Aldy:

And it seems that they haven't really, consistent with Lisa's question, we haven't mandated it. So they haven't really done it that much recognize that you did give us a few examples here, but wondering how do we think about this if we're not going to mandate it. Would they really be up for doing this. How do we help them, how do we dress that reluctance?

Bridget Dooling:

Yeah, I think that's right. So you can force them to the table, right? The president can make a big play here and say, "Look, I have the legal authority to do this. And so I'm doing it." But that's been the state of play for quite a long time, and we haven't seen movement. So I'm basically saying, all right, if you're not comfortable playing that card, what else might you be able to do? And so I'm sort of interpreting the larger environment and saying, I think some things have changed here that have shifted the incentives for the independent agencies themselves, such that they in their own interest actually prefer to come to the table.

Bridget Dooling:

So the way I envisioned this going down, would be that the president would, I don't know, maybe in a [inaudible 00:49:16] or maybe in a memorandum to OIRA, would say, "OIRA I want you to go on an expedition. I want you to go reach out to these independent agencies and just see what you can get done." So in this proposal, I'm not envisioning the president forcing the independent agencies to the table. I want them to see what they can get through their own self-interest.

Bridget Dooling:

And the fact that it hasn't happened yet might mean that I'm wrong. Right? Might mean that those conditions aren't there, right? It could also mean that it's early yet, in terms of having to go through the pain, frankly, of seeing your rule struck down in court, right? And SCC had just a really hard time of it, right? With the DC circuit. And that led to some pretty significant rethinking about their internal processes. They hired a bunch of economists. They developed their own guidelines. Those guidelines are very similar to the kinds of guidelines that OIRA uses in its review. But they aren't the same. And they do differ. And difference isn't bad. I'm not someone who thinks that it all has to be the same everywhere. There can be perfectly fine differences.

Bridget Dooling:

But that program of spending very many years to build that expertise internally and consider the questions as though they're novel, just holds you back in terms of the ability to get with the program

and move forward. So that's the argument, is that the agencies, and really this argument is not about forcing them to the table. It really is only about them doing it if they being the independent agencies think it's in their own interest to do so.

Joe Aldy:

Right. Now, as we noted at the beginning, you served on the OMB transition team. Part of the work, of course, on the transition team, is trying to think about what the initial actions would be once the president is inaugurated. And I would note that within hours of taking the oath of office, President Biden issued a memorandum to agencies throughout the executive branch, soliciting recommendations on how to modernize regulatory review. And in fact, these ideas here about bespoke regulatory review are an example about how we could actually take some of the tools we have for evaluating the impacts of regulations and bringing them to some of the independent regulators.

Joe Aldy:

But curious about what else you might recommend, beyond how to engage independent regulators, but how else we might modernize regulatory review, make the review more effective, amplify some of the advantages of regulatory review, and help it ensure that its use is one that is in service to democracy, and to the public who these agencies are serving. But hopefully also help us do a better job of correcting the failures that characterize markets that often motivate the need for intervention in the first place.

Bridget Dooling:

Yeah. Thanks. That's a great question. I love thinking about what can come next. So the modernization memo, which, if you're watching this webinar and you haven't read it, if you're the kind of person who's going to watch a webinar like this, you should go ahead and just read that memo, because it will interest you. It's the modernizing regulatory policy memo, I think is what it's called. And it tasks OMB with some pretty significant policy development, basically says, "Okay, we've got 12866. We've got these analytical questions and we're keeping them. And also we have some homework for you. We've got more that we want you to do." And it tasks OMB with particular areas that it wants OMB to do some policy development on.

Bridget Dooling:

And one of those is in the realm of distributional and equity analysis. And I think that's one of the most exciting parts of that memo. Because while 12866, for example, had language about the importance of distributional effects, the government's track record and really putting resources towards coming up with rigorous ways to answer those questions is pretty mixed, just to be frank.

Bridget Dooling:

So I think that's the core analytical challenge of the modernization memo, is figuring out how to build out the way we handle distributional analysis. And not just for its own sake. Not for scholarly sake, but because the question there is, when you think about the impacts, the potential impacts of a rule they're going to fall differently on... Oh, perfect. Thanks for putting the link in the chat. That's great. Yeah. I feel like this audience in particular is going to actually click that link and read it, if they haven't already.

Bridget Dooling:

So, the reason distributional is important is because it gives us a way to think about, okay, where did the effects of regulation fall? Not just at a societal level, when we use tools like cost benefit analysis, we're

looking at a societal level, but sometimes you want to know more specifically than that where those effects going to fall, both on the benefits side and the cost side, right? Who's winning? Who's losing? Are we okay with that balance? Is it a balance? Or is it very, very disproportionate, or who's bearing the cost and who's reaping the benefits?

Bridget Dooling:

So some additional policy work on that is really timely in light of where we are as a society, and in the context of the goals that the Biden-Harris administration has set for itself, and that they're in Washington to achieve. So I think it's going to be a vibrant time to be following regulatory policy. I think it's a good time to be studying it, and a good time to be writing on it, for sure. So there's a lot there, and I look forward to being part of that debate as it moves forward.

Joe Aldy:

Great. Thank you. So, as Bridget noted, if you look in the chat there is the link to the federal register notice where they published the presidential memorandum, modernizing regulatory review. I will note, we're going to continue this conversation on regulatory review next week. So as a reminder, we will meet on Thursday, March 11th at 12:00 PM for a presentation on regulatory review progressive style, suggestions for the Biden-Harris administration by Amy Sinden of Temple University. Finally, please join me in thanking Professor Dooling for her presentation and discussion today. Thank you, Bridget. It's great to see you again.

Bridget Dooling:

Thank you all. Thanks for having me [inaudible 00:55:33].

Joe Aldy:

Hope everyone enjoys the rest of the day. Take care.

Bridget Dooling:

Bye, bye.

Joe Aldy:

Bye.