ESSAY

ON NEGLECTING REGULATORY BENEFITS

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The administrative state faces a pervasive problem: "benefit neglect," understood as insufficient attention to the benefits of regulation. In 2017, for example, President Donald Trump issued Executive Order 13,771, calling for a regulatory budget of $0 and directing agencies to eliminate two regulations for every regulation that they issue. The order has two laudable ambitions: to reduce the stock of unjustified regulations and to discipline the flow of new regulations. But because it entirely ignores the benefits of regulations and focuses only on costs, it is a singularly crude instrument for achieving those goals. In both theory and practice, it threatens to impose large net costs (including significant increases in mortality and morbidity). It would be much better to abandon the idea of a regulatory budget, focused solely on costs, and to engage instead in two sustained but independent efforts: (1) a continuing "look back" at existing regulations, with the goal of simplifying or eliminating those that are unwarranted, and (2) cost-benefit discipline for new regulations. A third goal, no less important than (1) and (2), should be a very high priority, which is to produce institutional mechanisms to overcome potential agency torpor or capture, and to promote issuance of regulations that would have high net benefits (including reductions in mortality and morbidity). Congress, courts, and the Executive Branch should take steps to combat benefit neglect.

I. THE FOUNDATIONS OF REGULATORY REFORM

Suppose that in a random year, the aggregate annual cost of federal regulations is $8 billion, but that the aggregate annual benefit is $60 billion.

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The net benefits are $52 billion. If the $60 billion figure is transformed into its equivalent in terms of lives saved,[1] we are speaking of the equivalent of 6,000 lives. In a good year, regulatory benefits will consist of a large number of lives actually saved, as (for example) through air pollution regulations, motor vehicle safety regulations, occupational safety regulations, and food safety regulations. The COVID-19 pandemic of 2020 puts this point in sharp relief. In the domain of health and safety, some regulations, including some costly ones, can produce significant savings in terms of both morbidity and mortality.

Now consider three propositions about the modern regulatory state:

1. In many contexts, new regulatory requirements could achieve a great deal of good. About 480,000 Americans die each year from smoking.[2] Drug overdoses killed more than 70,000 in 2017 (68% from opioids).[3] Over 35,000 die annually from motor vehicle accidents.[4] Over 5,000 die on the job.[5] Approximately 3,000 die from food-borne illness.[6] Regulatory interventions, of one kind or another, could make serious dents in all these problems.

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1. *See generally* Memorandum from Molly J. Moran, Acting Gen. Counsel, U.S. Dep't of Transp., & Carlos Monje, Assistant Sec'y of Transp., U.S. Dep't of Transp., to Secretarial Officers & Modal Adm'rs, U.S. Dep't of Transp., Guidance on Treatment of the Economic Value of a Statistical Life (VSL) in U.S. Department of Treasury Analyses – 2016 Adjustment (Aug. 8, 2016) [hereinafter DOT Memorandum], https://www.transportation.gov/sites/dot.gov/files/docs/2016%20Revised%20Value%20of%20a%20Statistical%20Life%20Guidance.pdf (discussing the "reduction of fatalities and injuries" and increased value of a statistical life (VSL) in 2016).

2. *Smoking & Tobacco Use: Fast Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm#diseases (last reviewed May 21, 2020).

3. *America's Drug Overdose Epidemic: Data to Action*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/injury/features/prescription-drug-overdose/index.html (last reviewed Mar. 24, 2020) (stating that on average 130 Americans die every day from an opioid overdose).

4. Press Release, U.S. Dep't of Transp., U.S. Transportation Secretary Elaine L. Chao Announces Further Decrease in Roadway Fatalities (Oct. 22, 2019), https://www.nhtsa.gov/press-releases/roadway-fatalities-2018-fars.

5. *The Latest Workplace Fatality Statistics in 2019*, ARNOLD & ITKIN LLP (Aug. 5, 2019), https://www.arnolditkin.com/personal-injury-blog/2019/august/the-latest-workplace-fatality-statistics-in-2019/ (summarizing statistics on workplace deaths by event, industry, occupation, state, and city).

6. *Estimates of Foodborne Illness in the United States*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/foodborneburden/2011-foodborne-estimates.html (last reviewed Nov. 5, 2018).

2. Many imaginable regulatory requirements would do more harm than good. Unduly aggressive regulation of e-cigarettes, for example, might have harmful effects on human health.[7] Unduly aggressive regulation of nuclear power might increase reliance on fossil fuels and aggravate health problems.[8] New administrative burdens, including paperwork requirements, might not merely cost time and money; they could also deprive people of access to important goods and services (including licenses and permits).[9]
3. Many existing regulatory requirements should be streamlined or eliminated. In the domain of health care, for example, such requirements impose significant burdens and costs, and it is far from clear that all of them can be justified.[10] Aggressive deregulation, including elimination of administrative burdens, could achieve a number of important goals.[11]

These propositions suggest three urgent goals for regulatory reform and administrative law. First, new steps should be taken to ensure that justified regulations are actually issued. Second, agencies should reduce or eliminate the flow of new regulations that are not beneficial. Third, agencies should act aggressively to reduce or eliminate, from the stock of existing regulations, those that are no longer, or never were, worthwhile. (This last category includes administrative burdens and paperwork requirements.) Of course, it is true that because of divisions of fact or value, people might disagree about whether some regulations are justified, beneficial, or worthwhile, or even about the right framework for resolving such disagreements. Cost-benefit analysis provides

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7. *See* Henry Saffer et al., *E-Cigarettes and Adult Smoking: Evidence from Minnesota* 1–3, 12, 21 (Nat'l Bureau Econ. Rsch., Working Paper No. 26589, 2019), https://www.nber.org/papers/w26589.pdf (finding in a study that Minnesota's tax on e-cigarettes actually increased adult smoking and reduced smoking cessation).

8. *See* Matthew J. Neidell et al., *Be Cautious with the Precautionary Principle: Evidence from Fukushima Daiichi Nuclear Accident* 4–5 (Nat'l Bureau Econ. Rsch., Working Paper No. 12687, 2019), https://papers.ssrn.com/sol3/Delivery.cfm/dp12687.pdf?abstractid=3475793&mirid=1 (suggesting that the decision to cease nuclear production contributed to more deaths than the Fukushima Daiichi nuclear accident itself).

9. *See* PAMELA HERD & DONALD P. MOYNIHAN, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS 16–24 (2018); Cass R. Sunstein, *Sludge and Ordeals*, 68 DUKE L.J. 1843, 1847–50 (2019).

10. *See generally* David M. Cutler & Dan P. Ly, *The (Paper)Work of Medicine: Understanding International Medical Costs*, 25 J. ECON. PERSP., Spring 2011, at 3 (discussing international healthcare spending measures in comparison to those in the United States).

11. *See* HERD & MOYNIHAN, *supra* note 9, at 24 (arguing that streamlining administrative processes reduces compliance costs and, in turn, results in greater access to critical social welfare programs).

one such framework, and while it has attracted broad support across political lines, it is hardly uncontested.[12] The only point is that whatever framework we choose, we should be willing to agree with propositions (1), (2), and (3).

A continuing problem is that as administrative law now stands, it provides only limited help, especially with (1) and (3). Because agency inaction is presumed to be unreviewable,[13] courts are generally unavailable to do anything about the absence of regulatory safeguards. Although statutes do not generally require agencies to reconsider existing regulations, their failure to do so is rarely subject to judicial review; it is a form of inaction.[14] Courts are available, of course, to review new regulations and so can help with (2). But in light of the deferential nature of arbitrariness review,[15] there is a large difference between what courts will strike down and what is doing more harm than good.

The current situation needs correction. As we shall see, courts should be taking stronger steps to respond to unlawful or arbitrary inaction, and on appropriate occasions, to invalidate insufficiently protective regulations. Any sensible regulatory reform legislation should respond to the problem of benefit neglect. But in the absence of new legislation, real progress on (1), (2), and (3) must come from the Executive Branch. A sympathetic understanding of relevant executive orders suggests a possible approach. Executive Orders 12,866[16] and 13,563[17] could be read to mandate regulatory action when it is justified, to forbid it where it is not, and to require a sustained reassessment of existing regulations. Determined to make that progress, an administration might build on existing requirements to move aggressively on all three fronts.

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12. *See generally* MATTHEW D. ADLER, WELL-BEING AND FAIR DISTRIBUTION: BEYOND COST-BENEFIT ANALYSIS (2011) (critiquing cost-benefit analysis and recommending an alternative framework for evaluating government policies); CASS R. SUNSTEIN, THE COST-BENEFIT REVOLUTION (2017).

13. *See* Heckler v. Chaney, 470 U.S. 821, 837–38 (1985) (holding that the Food and Drug Administration's (FDA's) decision not to initiate enforcement action was not subject to judicial review under the Administrative Procedure Act (APA)).

14. For relevant discussion, see Cass R. Sunstein & Adrian Vermeule, *The Law of "Not Now": When Agencies Defer Decisions*, 103 GEO. L.J. 157 (2014).

15. *See* Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1356, 1362 (2016) (finding that the Supreme Court understands arbitrary and capricious review of agency's decisions to entail a "predictably and sensibly deferential review of agency policy judgments").

16. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

17. Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

II. BENEFIT NEGLECT

In 2017, President Donald Trump issued Executive Order 13,771.[18] Complementing rather than displacing Executive Orders 12,866 and 13,563,[19] it contains two principal requirements. The first creates a kind of regulatory budget — of *zero*. It states: "For fiscal year 2017, which is in progress, the heads of all agencies are directed that the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero, unless otherwise required by law or consistent with advice provided in writing by the Director of the Office of Management and Budget."[20] The exceptions and qualifications are important, but for present purposes,[21] what matters is the general idea. Agencies may not act in such a way as to produce (say) $1 billion in net costs.

The second requirement, known as "one in, two out," states as follows: "[A]ny new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations."[22] If the Environmental Protection Agency is finalizing a new regulation that costs $1 billion, it must eliminate two existing regulations whose total cost is at least $1 billion.

On its face, Executive Order 13,771 seems to be designed to achieve two salutary goals. The first is to reduce the costs of existing regulations. The "one in, two out" rule gives agencies a strong incentive to do exactly that. The second is to reduce the flow of new regulations. Aware that they cannot issue new rules without eliminating two old ones, agencies ought to be expected to issue fewer regulations than they otherwise would. The regulatory budget of zero underlines the point. If agencies are not permitted to add net costs, they will have a strong incentive to issue few new regulations.

The evidence suggests that to a significant extent, Executive Order 13,771 has succeeded, at least with respect to its goal of reducing the flow of new regulations. That conclusion emerges clearly from the relevant reports of the Office of Information and Regulatory Affairs (OIRA), which is required by

18. Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

19. *See id.*; *see also* Exec. Order No. 13,563, 76 Fed. Reg at 3821 (reaffirming Exec. Order. 12,866).

20. *See* Exec. Order No. 13,771, 82 Fed. Reg. at 9339.

21. *See* Memorandum from Dominic J. Mancini, Acting Adm'r of the Off. Info. & Reg. Affs., Off. Mgmt. & Budget, Guidance Implementing Executive Order 13771, Titled "Reducing Regulation and Controlling Regulatory Costs" (Apr. 5, 2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf.

22. *See* Exec. Order No. 13,771, 82 Fed. Reg. at 9339.

law to issue such reports on an annual basis.[23] To be sure, the government's numbers must be taken with many grains of salt. For many regulations, costs and benefits are not quantified, and when numbers are given, they might reasonably be disputed. My goal is not to say that they should be taken as authoritative or as unbiased, but to say more modestly that they provide valuable information, especially about comparisons across years and administrations. In this regard, it is relevant that the numbers are typically produced by civil servants, not by political actors.

The 2018, 2019, and 2020 draft report of the OIRA[24] reports regulatory costs of $0.1 to $0.3 billion[25] in fiscal year 2018, and up to $0.6 billion in fiscal year 2019.[26] These are extremely low numbers by historical standards. In fiscal year 2017, for example, the costs were $2.3 billion to $3.5 billion;[27] in fiscal year 2014, they were between $3.6 billion and $5.4 billion;[28] and in fiscal year 2011, they were between $7.3 billion and $14.7 billion.[29] As the following table suggests, the numbers for 2018 and 2019 were at an all-time low in terms of the available record:[30]

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23. 31 U.S.C. § 1105.

24. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, 2018, 2019 AND 2020 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 3 (2019) [hereinafter 2018–2020 DRAFT REPORT], https://www.whitehouse.gov/wp-content/uploads/2019/12/2019-CATS-5899-REV_DOC-Draft2018_2019_2020Cost_BenefitReport11_20_2019.pdf.

25. All numbers are reported in 2020 dollar amounts and all inflation conversions to the 2020 dollar amounts were performed using the conversion function available at https://www.officialdata.org/.

26. *See* 2018–2020 DRAFT REPORT, *supra* note at 24, at 11.

27. *See id.*

28. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, 2017 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 18 (2019) [hereinafter 2017 REPORT], https://www.whitehouse.gov/wp-content/uploads/2019/12/2019-CATS-5885-REV_DOC-2017Cost_BenefitReport11_18_2019.docx.pdf.

29. *Id.* at 18.

30. I report on numbers going back to 2001, though the reports actually go back to 1998. *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, 1998 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS (1999), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/OMB/inforeg/costbenefitreport1998.pdf. Before 2001, however, the numbers are murkier and comparisons are more difficult.

It is important to emphasize that the numbers here are offered with an understanding that they are incomplete. As noted, many regulations do not come with quantified costs. *See* Jonathan S. Masur & Eric. A. Posner, *Unquantified Benefits and the Problem of Regulation Under Uncertainty*, 102 CORNELL L. REV. 87 (2016). Recall, too, that it is possible to wonder whether

Year	Reported Regulatory Costs (billions in 2020$)
2001	$14.4[31]
2002	$0.9 – $3.2[32]
2003	$2.8 – $2.9[33]
2004	$3.8 – $4.1[34]
2005	$5.5 – $8.9 [35]
2006	$1.6 – $2.0[36]
2007	$13.7 – $15.6[37]

the numbers are accurate; perhaps they are self-serving (and so costs are described as lower than they in fact turn out to be) or a reflection of the epistemic power of the regulated sector (and so costs are described as higher than in fact they turn out to be).

31. *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, 2011 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 19 (2011) [hereinafter 2011 REPORT], https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/inforeg/inforeg/2011_cb/2011_cba_report.pdf.

32. *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, 2012 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 20 (2013) [hereinafter 2012 REPORT], https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/inforeg/inforeg/2012_cb/2012_cost_benefit_report.pdf.

33. *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, 2013 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 22 (2014) [hereinafter 2013 REPORT], https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/inforeg/inforeg/2013_cb/2013_cost_benefit_report-updated.pdf.

34. *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, 2014 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 21 (2015) [hereinafter 2014 REPORT], https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/inforeg/inforeg/2014_cb/2014-cost-benefit-report.pdf.

35. *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, 2015 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 20 (2016) [hereinafter 2015 REPORT], https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/inforeg/inforeg/2015_cb/2015-cost-benefit-report.pdf.

36. *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, 2016 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 19 (2016) [hereinafter 2016 DRAFT REPORT], https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/legislative_reports/draft_2016_cost_benefit_report_12_14_2016_2.pdf.

37. 2017 REPORT , *supra* note 28, at 18.

2008	$1.8 – $2.2[38]
2009	$5.4 – $14.0[39]
2010	$9.3 – $18.1[40]
2011	$7.3 – $14.7[41]
2012	$21.6– $28.4[42]
2013	$2.9 – $3.6[43]
2014	$3.6 – $5.4[44]
2015	$6.1 – $7.7[45]
2016	$4.8 – $7.1[46]
2017	$2.3 – $3.5[47]
2018	$0.1 – $0.3[48]
2019	$0.0 – $0.6[49]

Other things being equal, low regulatory costs should be applauded. But the important question is net benefits, not costs. Suppose, for example, that in a fiscal year, we could observe three imaginable sets of outcomes from the Department of Transportation:

1. No regulations; regulatory costs of $0.
2. One new regulation, costing $200 million and providing benefits of $500 million, and two regulations eliminated, both costing $100 million.
3. Three new regulations, each costing $200 million, and each providing benefits of $500 million.

Both (1) and (2) comply with Executive Order 13,771; (3) does not. It should be readily apparent that (2) is much better than (1), because it generates not only no net costs but also $500 million in benefits. At the same time, (3) is much better than (2), because it generates $900 million in net

38. *See id.*
39. *See id.*
40. *See id.*
41. *See id.*
42. *See id.*
43. *See id.*
44. *See id.*
45. *See id.*
46. *See id.*
47. *See* 2018–2020 DRAFT REPORT, *supra* note 24, at 11.
48. *See id.*
49. *See id.*

benefits. Why would executive agencies focus only on costs, be licensed to proceed with (1) and (2), and be forbidden from proceeding with (3)?

This question suggests the central problem with Executive Order 13,771: benefit neglect. And OIRA's annual report confirms the existence of that problem. In fiscal year 2018, the benefits were between $0.2 billion and $0.7 billion; in 2019, the benefits were between $0.3 billion and $3.8 billion. If we take the midpoint of the ranges,[50] the net benefits were $300 million in 2018, and they were in the vicinity of $1.8 billion in 2019. In 2017, by contrast, the benefits were between $6.4 billion and $10.5 billion, meaning that the net benefits were in the vicinity of $5.6 billion. On balance, 2017 was a much better regulatory year for Americans.

The following table captures monetized benefits and net benefits over time:

Year	**Reported Regulatory Benefits (billions in 2020$)**	**Net Benefits (billions in 2020$)**
2001	$32.8 – $40.5[51]	$22.3
2002	$2.2 – $9.3[52]	$3.7
2003	$2.3 – $6.6[53]	$1.6
2004	$12.8 – $101.5[54]	$53.2
2005	$40.6 – $259.4[55]	$142.8
2006	$3.6 – $7.3[56]	$3.7
2007	$41.7 – $268.3[57]	$140.4
2008	$10.2 – $35.7[58]	$21.0
2009	$12.5 – $44.7[59]	$18.9
2010	$27.1 – $125.1[60]	$62.4
2011	$50.0 – $130.4[61]	$79.2

50. Admittedly, that is somewhat arbitrary because agencies do not report probabilities to accompany ranges. The only goal is to give a general sense for purposes of comparison.

51. *See* 2011 REPORT, *supra* note 31, at 19.

52. *See* 2012 REPORT, *supra* note 32, at 20.

53. *See* 2013 REPORT, *supra* note 33, at 22.

54. *See* 2014 REPORT, *supra* note 34, at 21.

55. *See* 2015 REPORT, *supra* note 35, at 20.

56. *See* 2016 DRAFT REPORT, *supra* note 36, at 19.

57. *See* 2017 REPORT , *supra* note 28, at 18.

58. *See id.*

59. *See id.*

60. *See id.*

61. *See id.*

2012	$77.5 – $167.0[62]	$97.3
2013	$37.3 – $98.0[63]	$64.4
2014	$11.8 – $27.5[64]	$15.2
2015	$28.6 – $53.8[65]	$34.3
2016	$20.4 – $40.8[66]	$24.7
2017	$6.4 – $10.5[67]	$5.6
2018	$0.2 – $0.7[68]	$0.3
2019	$0.3 – $3.8[69]	$1.8

The general conclusions are straightforward. Cost-benefit discipline, with an intense focus on net benefits, makes a great deal of sense notwithstanding its imperfections. A regulatory budget makes no sense because it creates a rigid cost cap when net benefits are what matter most. By contrast, a retrospective review of existing regulations, with an intense focus on net benefits, makes a great deal of sense while a rule of "one in, two out" makes no sense. For the future, the institutional implication is also straightforward. Before issuing new regulations, agencies should be subject to cost-benefit discipline while respecting statutory overrides (that is, prohibitions on consideration of cost).[70] They should also, where legally permissible, consider factors that cost-benefit analysis cannot readily capture, including nonquantifiable variables such as equity, human dignity, and distributional considerations.[71] In addition, agencies should be required, on a periodic basis, to investigate existing regulations and to eliminate those that impose net costs, again with qualifications for statutory overrides and for consideration of nonquantifiable variables.

In light of these objections, is there anything that can be said for Executive Order 13,771? The best justification would be that though it is hard to defend in theory, it is a plausible response to some intensely practical problems. Presidential control of the Executive Branch is far from simple.

62. *See id.*
63. *See id.*
64. *See id.*
65. *See id.*
66. *See id.*
67. *See* 2018–2020 DRAFT REPORT, *supra* note 24, at 11.
68. *See id.*
69. *See id.*
70. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 465–68 (2001) (holding that the Environmental Protection Agency was prohibited from considering costs in setting national ambient air quality standards).
71. *See* Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011).

Cabinet heads may have their own agendas, and they have large and deeply informed staffs, sometimes with agendas of their own. Even if they are asked to stem the flow of new regulations or to carefully reassess existing regulations, they might fail to do so. Of course, OIRA can assist and manage a presidential effort in this vein, especially if the principal goal is to stem the flow. But a regulatory budget, combined with "one in, two out," might be defended as a type of presidential hammer, ensuring a kind of discipline that a president would normally have a hard time achieving.

In support of this argument, consider an even cruder mechanism: a regulatory moratorium.[72] In principle, a moratorium on new regulations makes little sense essentially for the reasons sketched here. But in practice, a moratorium in certain periods would greatly simplify life, from the standpoint of the White House, and even if it sacrifices net benefits (in monetary equivalents, say $3 billion), that sacrifice might be deemed to be a price worth paying. The point is not that a regulatory moratorium would make sense; in most times and places, it would not. The point is only that an imaginable justification, in some times and places, is not self-evidently wrong. And if this is so, perhaps a regulatory budget, alongside the "one in, two out" rule, could be justified on pragmatic grounds.

The problem is that notwithstanding the difficulty of achieving full presidential control of the Executive Branch's operations, a more fine-grained approach is perfectly feasible. Insisting on the requirements of existing executive orders,[73] a president can give a strong signal that new regulations must be shown to produce net benefits, by reference to the best available science and the most objective criteria. Agencies must also undertake a serious effort to reassess existing regulations by engaging both internal staff and the general public to identify those that impose the highest net costs. If a president is concerned to spur action in certain areas (say, to reduce deaths from smoking, pandemics, or road accidents), or to reduce regulatory burdens in certain areas (say, health care), he can do exactly that through supplemental executive orders or presidential memoranda.

A budget of zero, or a rule of "one in, two out," might achieve some good, but it is much inferior to these alternatives. At worst, it will ensure that citizens will fail to receive high benefits or face high costs, perhaps in terms of high rates of mortality and morbidity that might have been prevented

72. *See* Kathryn A. Watts, *Regulatory Moratoria*, 61 DUKE L.J. 1883, 1936 (2012) (arguing against the use of moratoria lasting more than a year while highlighting the potential utility of brief use).

73. *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993); Exec. Order No. 13,563, 76 Fed. Reg. at 3822 (requiring retrospective review of existing regulations).

through considerations of benefits and not merely costs. (Returning to the COVID-19 epidemic of 2020, precautionary measures at various stages, some of them regulatory, might well have prevented many deaths.)[74] Tragically, it appears that Executive Order 13,771 has achieved exactly that.[75] For illustration, suppose that it has ensured $5 billion less in annual net benefits than would have been obtained without it. That figure is the equivalent of 500 avoidable deaths each year.[76] We might say that if Executive Order 13,771 has eliminated regulations that would prevent 500 avoidable deaths, it has taken a toll equivalent to 10% of the annual workplace deaths in the United States.[77]

III. IN SEARCH OF REMEDIES

Executive Order 13,771 puts a bright spotlight on the problem of benefit neglect, but that problem arises in every administration in one form or another. What can be done? That is an exceedingly large question, and I will address it with a broad brush. The simplest answer is that both regulatory policy and principles of administrative law need significant reforms from all three branches of government.

In some periods, excessively high regulatory burdens, rather than unduly low regulatory benefits, have been the focus of all three branches of government, and appropriately so. Cost-benefit discipline, introduced by President Ronald Reagan, was partly motivated by the goal of eliminating those burdens.[78] Notably, that form of discipline might have been meant to respond to the problem of insufficient regulatory benefits. A requirement of cost-benefit balancing might well have been designed to reduce that problem by ensuring that agencies proceed whenever the benefits justify the costs. But under President Reagan, the focus was on excessive regulation, not insufficient regulation.[79] In Congress, reform proposals have generally tackled the problem of excessive costs with little or no attention to insufficient benefits.[80]

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74. *See* Sen Pei et al., *Differential Effects of Intervention Timing on COVID-19 Spread in the United States* 3–4 (Nat'l Ctr. for Biotechnology Info., Working Paper No. 32511526, 2020).

75. Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

76. *See* DOT Memorandum, *supra* note 1.

77. *See* ARNOLD & ITKIN LLP, *supra* note 5 (reporting the most recent figures of workplace deaths, as of December 2018).

78. *See* Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981).

79. *Id.* at 13,193–94 (establishing the interagency review and cost-benefit analysis of regulations lead by the Office of Information and Regulatory Affairs (OIRA)).

80. *See, e.g.*, Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017) (explicitly weighing cost as a factor of analysis throughout multiple provisions of the legislation).

In courts, growing interest in cost-benefit analysis has been mostly an effort to set aside unjustified burdens, seen as a form of arbitrariness.[81]

In terms of both theory and practice, the problem of insufficiently high regulatory benefits has received bafflingly little in the way of systematic and sustained attention.[82] It is true that on important occasions, presidents have specifically directed their subordinates to undertake action,[83] but no executive order or presidential memorandum creates a *systematic* response to the problem of low benefits. As we have seen, courts have adopted a presumption against judicial review of agency inaction, which means that judicial involvement will usually be minimal in cases of insufficient regulatory benefits.[84]

To be sure, there are important exceptions. Judicial involvement is possible in the face of statutory mandates, preferably accompanied by specific deadlines. In such cases, inaction is a palpable form of reviewable lawlessness and will be treated as such.[85] A final rule can also be attacked as unduly weak.[86] If cost-benefit analysis is used as an input into judicial review for arbitrariness, we could readily imagine that an agency's choice of an approach with $100 million net benefits, rather than with $300 million net benefits, would be unlawfully arbitrary. We could also imagine arbitrary "inputs" into agency

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81. *See* Michigan v. EPA, 135 S. Ct. 2699, 2710–11 (2015) (emphasizing judicial error in overstating the influence of cost when the Court reviews different stages of regulatory decisionmaking); Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENVTL. L. REV. 1, 10 (2017) (noting utilization of cost-benefit analysis in judicial decisions to provide context for understanding effects of regulatory intervention).

82. *See* Michael A. Livermore & Richard Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1370 (2013). An important contribution bearing on this issue is Caroline Cecot, *Deregulatory Cost-Benefit Analysis and Regulatory Stability*, 68 DUKE L.J. 1593, 1593 (2019).

83. For a catalogue, see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

84. *See* Heckler v. Chaney, 470 U.S. 821, 823–33 (1985).

85. *See, e.g.*, Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1171–73, 1176–78 (9th Cir. 2002) (holding that agency lacked discretion to act beyond the Endangered Species Act's time limitations); Ctr. for Food Safety v. Hamburg, 954 F. Supp. 2d 965, 971–72 (N.D. Cal. 2013) (holding that FDA failed to timely promulgate regulations while acknowledging that the process to ensure food safety may not align with a timetable); Telecomms. Rsch. & Action Ctr. v. FCC, 750 F.2d 70, 79–81 (D.C. Cir. 1984) (retaining jurisdiction over an unreasonable delay claim to compel agency to inform court of its progress toward resolution). *But see In re* Barr Labs., Inc., 930 F.2d 72, 74–76 (D.C. Cir. 1991) (withholding equitable relief notwithstanding that agency failed to act within the statute's timeframe).

86. *See generally* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 34 (1983) (finding an agency's rulemaking action arbitrary and capricious where it "failed to present an adequate basis and explanation").

choice, such as a low value of a statistical life or a low social cost of carbon, that would be struck down in court.[87] It is important to underline this point. The problem of unduly weak regulation is often, in practice, fueled or made possible by scientific or economic judgments that are difficult to support.

Greater judicial intervention could have a significant impact. For instance, the ban on the pesticide DDT was initiated by courts,[88] and the same is true for regulatory action against carbon emissions.[89] In some cases, judicial review can make all the difference.[90] In general, however, such review is a weak response to the problem of benefit neglect, certainly as such review now stands. Even if courts strike down a rule as insufficiently aggressive, agencies need not respond quickly; they have techniques of delay and evasion.[91]

For the future, it would be desirable to see reforms from all three branches of government. Executive Order 13,771 should be repealed. A new executive order should emphasize not only the importance of careful reassessment of rules on the books with a view toward streamlining and repealing them, but also the importance of eliminating "sludge," understood as administrative burdens that frustrate important social objectives and prevent people from obtaining access to goods and services.[92] To control the flow of new regulations, such an executive order should underline the requirement of cost-benefit discipline and call for use of the best available science and economics, insulated from politics.[93] To combat the problem of unduly weak or insufficient regulation, a new executive order should mandate action when the benefits justify the costs. In part to signal an effort to solve the problem of benefit neglect, OIRA should renew its issuance of "prompt letters," designed to request agencies to initiate action.[94]

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87. *See* Sunstein, *supra* note 81, at 11–12 (emphasizing areas where the courts must resolve conflict despite lacking expertise or competence).

88. Envtl. Def. Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 588 (D.C. Cir. 1971).

89. *See* Massachusetts v. EPA, 549 U.S. 497, 504–05 (2007).

90. *See* Am. Acad. of Pediatrics v. FDA, No. 1:16-cv-11985-IT, 2019 WL 1047149, at *1 (D. Mass. Mar. 5, 2019) (ordering the promulgation of a final rule to mandate "color graphic warnings on cigarette packs and in cigarette advertisements as required by the Family Smoking Prevention and Tobacco Control Act of 2009").

91. *See* Sunstein & Vermeule, *supra* note 14, at 167–68.

92. *See* Sunstein, *supra* note 9, at 1853–54.

93. Executive Order 13,563 goes some distance in this direction. *See* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011) (directing the U.S. regulatory system to "be based on the best available science" and embrace reliable innovative techniques).

94. *See OIRA Prompt Letters*, OFF. OF INFO. & REG. AFFS., OFF. OF MGMT. & BUDGET, https://www.reginfo.gov/public/jsp/EO/promptLetters.myjsp (last visited August 6, 2020) (demonstrating that OIRA has not issued a prompt letter since April 13, 2006).

With respect to Congress, any regulatory reform bill should not be limited to using cost-benefit analysis to stem the flow of unjustified regulations, important as that goal is. It should also explicitly tackle the problem of benefit neglect. Congress should direct courts to compel more aggressive agency action when the record clearly justifies it. If the underlying statute calls for quantified cost-benefit analysis, Congress should give courts the ability to mandate action when the agency could not conclude, consistent with the record and the prohibition on arbitrariness, that action is not a good idea.

Finally, courts should be far less reluctant than they are now to use arbitrariness review, under existing standards, to combat benefit neglect.[95] If an agency has refused to consider important benefits (including co-benefits) or if its valuation of benefits is arbitrarily low, its decision should ordinarily be invalidated.[96] At the very least, such an agency would face a powerful burden of justification.[97] Deregulation is often an excellent idea, but we could easily imagine deregulatory efforts that would be inconsistent with the governing statute,[98] or difficult to justify in light of the existing record.[99] After all, regulatory statutes are enacted because of a congressional judgment that some problem ought to be solved, and in some cases, agency failure to act as Congress directed is both reviewable and unlawful.[100] There is room for far more doctrinal development on this front. In fact, that development is imperative.

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95. For the foundational case, see Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29 (1983). For a general overview of recent developments, with decisions founded on diverse rationales, see *Roundup: Trump-Era Agency Policy in the Courts*, INST. FOR POL'Y INTEGRITY, https://policyintegrity.org/trump-court-roundup (last updated July 27, 2020).

96. *See* Cecot, *supra* note 82, at 1635 (arguing that courts should require agencies to consider indirect benefits, unless precluded by statute, just as they have done for indirect costs).

97. It might be able to meet that burden by concluding, for example, that certain benefits are not statutorily relevant. *Cf.* Massachusetts v. EPA, 549 U.S. 497, 510 (2006) (showcasing circumstances where the EPA counsel explicitly claimed statutory authority to regulate carbon dioxide emissions but failed).

98. William W. Buzbee, *Agency Statutory Abnegation in the Deregulatory Playbook*, 68 DUKE L.J. 1509, 1543 (2019).

99. *See State Farm*, 463 U.S. at 42.

100. *See* APA, 5 U.S.C. §§ 551–559, 561–570a, 701–706; *State Farm*, 463 U.S. at 42; Am. Acad. of Pediatrics v. FDA, No. 1:16-cv-11985-IT, 2019 WL 1047149, at *4–6 (D. Mass. Mar. 5, 2019); Ctr. for Food Safety v. Hamburg, 954 F. Supp. 2d. 965, 965–66, 968, 970–71 (N.D. Cal. 2013).