

**Phillip J. Cooper.** *The War against Regulation: From Jimmy Carter to George W. Bush.* Studies in Government and Public Policy Series. Lawrence: University Press of Kansas, 2009. 288 pp. \$34.95, cloth, ISBN 978-0-7006-1681-7.



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Phillip J. Cooper is an accomplished scholar of the executive branch of the U.S. government and its interaction with the courts. In this his most recent book on the topic, he gives a no-holds-barred account of the presidential and U.S. Supreme Court's efforts from 1976 to 2008 to dismantle a considerable portion of the administrative state. He analogizes the effort to a war, replete with generals, opposing forces, armaments, tactics, and strategies. As Cooper well knows, this is an apt analytical device for a book that discusses presidential and judicial activities from the late 1970s to 2008.

In these years, politicians in the United States too eagerly characterized policy initiatives as wars, most notably in the War on Drugs, but also extending to almost virtually every single aspect of domestic policy making. Cooper's purpose is not to encourage militaristic thinking, but the opposite. He makes the case that the presidential and judicial attacks on regulation are, in the words of General Omar Bradley, "the wrong war

in the wrong place at the wrong time with the wrong enemy."

He begins his substantive account with the pioneering efforts of President Jimmy Carter. Though often labeled a liberal in favor of regulation (like his fellow Democrat Bill Clinton), Carter was an inveterate, innovative, and fierce warrior against regulation. With Alfred Kahn at the Civil Aeronautics Board playing a critical role, Carter availed himself of every weapon against regulation: counter-staffing (when you appoint agency personnel to dismantle or hinder their own agency); implementing legislation to "reform" bureaucracy that actually damages the agency's ability to perform its mission; executive orders that set up cumbersome and contrary to law processes to stifle regulatory efforts; driving out good personnel to deprive agencies of their most effective employees; and mandating other means of carrying out regulatory functions than the normal operation of agencies charged with the job. Alongside publicity campaigns that sponsored an anti-regulation sentiment, Carter actually cut budgets, dismantled

consumer protections, and hamstrung enforcement to the point where it endangered public safety, all in the name of economic efficiency.

In Cooper's retelling of this history, the Ronald Reagan presidency differs in its essentials from Carter's only in its ideological fervor. The all too familiar events of one of the most antigovernment governments in U.S. history are here spread before us anew. Industry lobbyists cleared the regulatory path for the industries they were supposed to be policing. Government economists decried the inefficiency of government regulation as they found the human values that the regulators guarded not worth protecting. Growth in the economy was placed in opposition to public health and safety and growth won out. Materialism was elevated into a political philosophy. Even the courts (whose appointees were increasingly antiregulatory) found some Reagan administration actions so egregious they violated even limited executive branch duties. Then came the baleful consequences of deregulation: the savings and loans debacle, polluted water and air, and an increasingly dysfunctional government, just to name three.

In as much as the presidency of George H. W. Bush did not seem to share its predecessor's commitment to the struggle, Cooper might have bought into the myth that the elder Bush was not a vigorous commander in chief in the regulation war. Not so. Bush senior waged his own war, and even added a new wrinkle his successor would follow: using a commission headed by his vice president—in Bush's case, Dan Quayle—to hamstring federal regulation by oversight. Then he exported the war to the developing world through trade policies.

The arrival of the "New Democrats" in the form of Clinton and his vice president, Al Gore, did not signify a departure as much as a renewal of the war under different command. In addition to the "reinventing government" initiative Gore headlined, state governments found themselves

stymied by the Clinton administration's Justice Department. A new front had opened in the war that environmentalists, public health advocates, and civil rights activists believed Clinton and Gore had campaigned to end. It was not the first time progressive or liberal groups would be disappointed in their candidate, nor would it be the last.

By the time we reach George W. Bush, the program seems tame, consistent rather than revolutionary. His signing statements, appointees, executive orders stifling the scientists, and outsourcing of government activities are for Cooper only the extension of prior developments. The outcomes are certainly the same: bailouts; the failed response to natural disasters like Katrina; the increasing occurrence of man-made disasters like mine cave-ins; and the belated, half-hearted attempts to deal with epidemics like mad cow disease, to name just a few. Not a little touch of irony is present when Cooper notes that the Bush administration had to seek immense government intervention in the economy in order to avoid the complete collapse of the financial sector that he and his predecessors had done so much to bring about by supporting deregulation.

But Cooper's research and writing does not stop with the executive branch and Congress. Cooper devotes his fourth and largest chapter to the war against regulation in the courts, in particular the U.S. Supreme Court. Beginning with Associate Justice Rehnquist's early attempts to rework the commerce clause and subsequently with his more successful efforts as chief justice, the highest tribunal was intimately involved in reversing the post-*Carolene Products* and New Deal set of precedents allowing for regulation of the economy. In case after case, Cooper explores the arguments that an increasingly activist and conservative majority used to stifle regulation, using everything from the commerce clause to preemption doctrine to the Eleventh Amendment to eminent domain to restricting the individual's right to sue for government's failure to enforce the laws. He

certainly does not pull his punches in his disagreement with these cases, at one point decrying Rehnquist's reasoning as "making it up as he went along" (p. 158) and his statement that he "rewrote the Constitution" in another case (pp. 158, 161). It is truly in this fourth chapter that we find a key thrust of this very knowledgeable scholar's take on the issue: there is simply no substitute for regulation in many areas of the law.

Cooper extends this point in his last chapter entitled "Imagining a Different Future." He laments the damage the assault on regulation has done to individuals, the country, and the conversation about government. By misusing the concept of "reform," we set up our government to fail in some, if not all, of its basic functions: a government unable to safeguard the well-being of its citizens. An appropriate approach to regulation and decision on when to regulate should come from a reasoned understanding of the subject, not the least of which is a recognition that economics, with its emphasis on an ethereal efficiency, is the wrong discipline on which to rely in analyzing what is a political activity not necessarily concerned with "efficiency."

This is a very well done, thoughtful survey of a very complicated, controversial topic. Although Cooper, with his extensive knowledge of the subject, could have provided a more detailed explanation of the origins of the anti-regulation movement, he has given us a work appropriate for advanced classes on government and modern U.S. political history courses, as well as for those who have an interest in the subject. At the very least, he has given us food for thought about the development of recent debates about the interaction of policy and the requirements of law, the shaping of our public conversation about the functioning of our government, and important assumptions in our national life that require a reexamination.

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