Regulatory Reform *and* Agency Oversight

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A Pro-Growth Agenda for the 115th Congress

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Regulatory Reform and Agency Oversight

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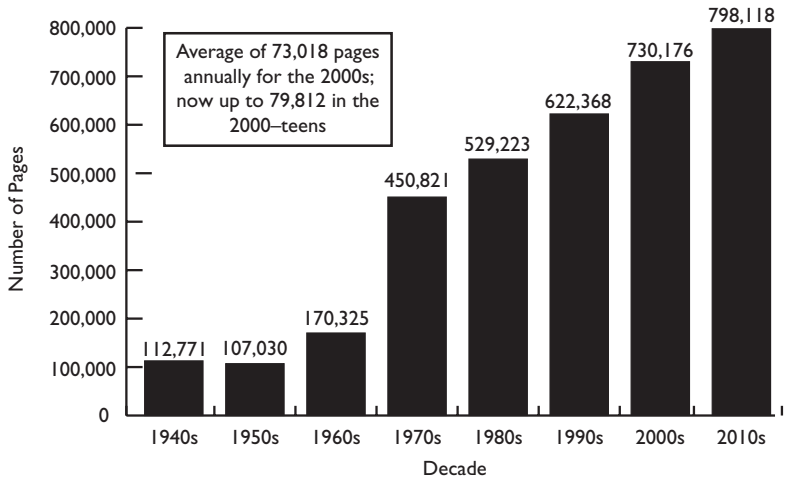
All legislative Powers herein granted shall be vested in a Congress of the United States.

—Article 1, Section 1, U.S. Constitution

The United States of America has debated "Energy in the Executive" since the *Federalist Papers* championed the new Constitution's ratification. But along with a doubling of the national debt in less than a decade, recent years have brought executive branch power and regulation to the forefront as the regulatory enterprise has attained new heights. Pages in the *Federal Register*, the daily repository of all proposed and final federal rules and regulations, occupy historic levels, having finished 2015 at 80,260 pages (Figure 1.1).

Although regulators overreach, Congress has stood by without using existing tools at its disposal to rein in the ever-growing regulatory state—including oversight hearings, insistence on agency adherence to the Administrative Procedure Act (APA), defunding and appropriations process options, and the resolution of disapproval process established by the Congressional Review Act (CRA). As 2016 House of Representative task forces on Article I powers and economic liberalization contended, Congress should reassert its constitutional oversight responsibilities and implement a series of regulatory reforms and liberalizations. Those include, broadly, limiting regulatory agency authority, reforming the rulemaking process, employing the power of the purse to regulate agencies, and increasing oversight.

Figure 1.1 *Federal Register* Pages per Decade



Source: Clyde Wayne Crews Jr., *Ten Thousand Commandments*, 2016 edition, https://cei.org/10KC2016.

What is the effect of regulatory excess? Unemployment is "down" because statistics omit those who have given up the job hunt, as labor force participation is at historic lows. Instead, we see reduced business ownership, lower self-employment rates among the young, declining rates of small business formation, and more businesses closing than are being created.

To put the upcoming recommendations into context, we should note specific shortcomings in oversight of the ordinary, everyday rules and regulations.

First, the central review process conducted by the White House Office of Management and Budget (OMB)—to presumably ensure that rules' benefits exceed costs—is lacking. That executive branch regulatory review was initially formalized by President Ronald Reagan's Executive Order 12291 (February 17, 1981) and extended in less strict form by subsequent executive orders from other presidents. As Table 1.1 shows, of over 3,500 rules issued by agencies annually, cost–benefit analyses reviewed by the OMB exist for only about a dozen, with a handful of other rules accompanied by a reviewed cost analysis.

Congress should:

- Defund unapproved agency initiatives and use the Congressional Review Act to rein in agency overreach.
- Improve regulatory disclosure, transparency, and cost analysis of regulations and guidance. A first step would be implementing a Regulatory Report Card to tally regulatory costs and flows in a user-friendly way and to promote more accurate reporting and enable analysis of the regulatory enterprise by third parties.
- Implement a bipartisan Regulatory Reduction Commission and regulatory sunset procedures.
- Require votes on major and controversial rules—those with estimated annual costs of $100 million or more. One option is to enact the Regulations from the Executive in Need of Scrutiny (REINS) Act.
- Implement a regulatory budget.

Table 1.1 Proposed Breakdown of Economically Significant Rules

Year	Rules with costs and benefits	Rules with costs only	Total rules with costs	Federal Register final rules
2001	14	13	27	4,132
2002	3	0	3	4,167
2003	6	4	10	4,148
2004	11	7	18	4,101
2005	13	2	15	3,943
2006	7	1	8	3,718
2007`	12	4	16	3,995
2008	13	6	19	3,830
2009	16	12	28	3,503
2010	18	8	26	3,573
2011	13	6	19	3,807
2012	14	9	23	3,708
2013	7	11	18	3,659
2014	13	3	16	3,554
Total	160	86	246	53,838

Sources: Costed rule counts, OMB, *2015 Report to Congress* on regulatory costs; *Federal Register* final rules, author search on FederalRegister.gov advanced search function.

Second, the Administrative Procedure Act's notice-and-comment rulemaking process is broken. Agencies routinely fail to issue notices of proposed rulemaking for a substantial portion of their rules, thereby undermining democratic accountability and the public's opportunity to weigh in on rules affecting them, according to a December 2012 Government Accountability Office (GAO) report.

Third, Congress rarely defunds agency actions that overstep an agency's statutory authority.

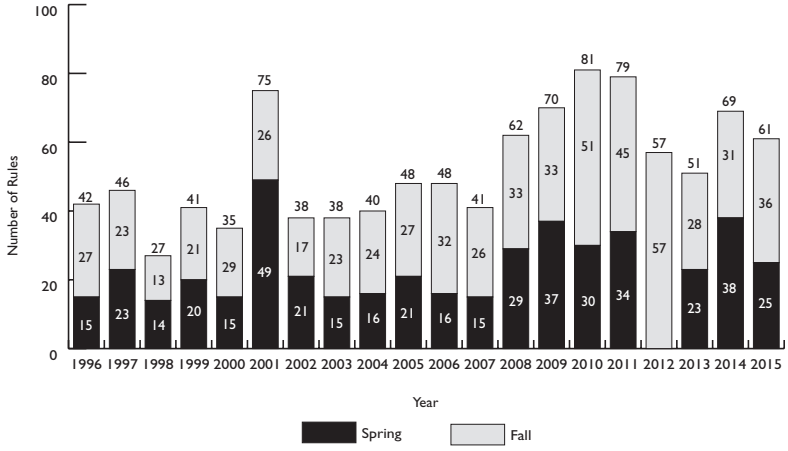
Fourth, Congress rarely uses its most powerful accountability tool, the Congressional Review Act, to pass resolutions of disapproval of costly or controversial agency rules. To improve regulatory cost accountability, in 1996 Congress passed the CRA, which sets up a 60-day period following agency publication of a regulation during which the rule will not take effect. That 60-day pause affords Congress an opportunity to pass a resolution of disapproval to halt the regulation. Congress has used it sparingly. And apart from the 2001 repeal of an intrusive Department of Labor ergonomics rule that would have put undue burdens on home offices, no CRA vote has resulted in repeal of a final rule.

Fifth, even if Congress were inclined to aggressively assert its legitimate author-ity over the regulatory enterprise, the CRA itself is further undermined by agency nonobservance of its procedures. As Curtis W. Copeland, a specialist in American government, demonstrated in a white paper prepared for the Administrative Conference of the United States, agencies no longer properly submit many final rules to the GAO's comptroller general and to Congress as required by the CRA. That submission is viewed as necessary should Congress introduce a formal CRA resolution of disapproval of an agency rule, so its neglect creates a major lapse in accountability.

With spotty public notice and inadequate accountability, it is imperative that Congress frequently go on record regarding the merits of particular regulations. That process matters, because although overall rules have since settled around the 3,500 mark annually, the costly "economically significant" subset has risen, as Figure 1.2 shows.

Much overregulation stems from a breakdown of checks and balances under the Constitution's separation of powers. Overdelegation by Congress has enabled regulatory agencies to pursue ambitious efforts to assert control over wide swaths of the Amer-

Figure 1.2 Annual Completed Economically Significant Rules in the Unified Agenda, 1996–2014



Source: Clyde Wayne Crews Jr., *Ten Thousand Commandments*, 2016 edition, https://cei.org/10KC2016.

ican economy through both rules and guidance. On the one hand, executive branch and regulatory actions require far more congressional oversight, including hearings, better information disclosure, and slashing budgets of agencies when they exceed their bounds. On the other hand, Congress needs to grapple with the reality that lawmakers themselves are the source of overdelegation, and that Congress has relinquished much of its legitimate authority to the executive branch.

In a two-pronged approach, Congress must heighten disclosure of regulatory matters, and its own accountability for the "law" that regulatory agencies make, either formally as notice-and-comment regulation or informally as guidance and "dark matter." Congress can start by recognizing the fundamental need to enforce the Administrative Procedure Act's scrutiny of rules and incorporate "regulatory dark matter" into the process.

IMPROVE REGULATORY OVERSIGHT AND ACCOUNTABILITY

Recent years have seen growing overreach by the executive branch, as the administration and regulators increasingly attempt to impose policy while circumventing Congress. Yet Congress has often stood by in the face of that power grab. Such regulatory excess has led to:

- Historically low labor force participation;
- Reduced business ownership;
- Lower self-employment rates among the young;
- Declining rates of small business formation; and
- More businesses closing than are being created.

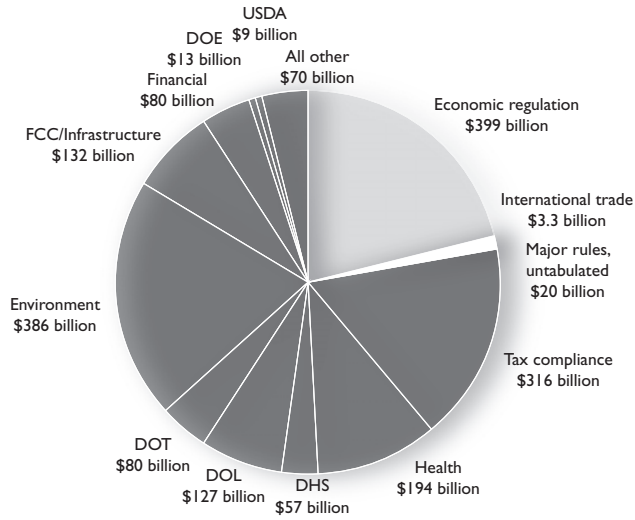
In its 2014 *Information Collection Budget of the U.S. Government*, the Office of Management and Budget estimates that 9.453 billion hours were necessary in FY 2013 to complete the paperwork requirements issuing from 28 executive departments and independent agencies. In addition, OMB's *2015 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates*, which surveys regulatory costs and benefits, pegs the cumulative costs of 120 selected major regulations during the decade from 2004 to 2014 at between $68.4 billion and $102.9 billion annually (in 2010 dollars). The 2016 draft report is late as of this writing; the 2015 report was the latest ever.

Federal spending is the squeaky wheel, particularly since the federal debt has nearly doubled since 2008, but decades of cumulative regulation may have even greater effects. Official disclosures fail to adequately capture the nearly $2 trillion regulatory

Congress should:

- Hold oversight hearings on aggressive agency initiatives.
- Insist that agencies adhere to the Administrative Procedure Act's notice-and-comment rulemaking process.
- When appropriate, defund appropriations for agency initiatives that Congress has not approved.
- Introduce resolutions of disapproval under the Congressional Review Act for unpopular or controversial rules.

Figure 1.3. Annual Cost of Federal Regulation and Intervention, 2016 Estimate, $1.885 Trillion



Source: Clyde Wayne Crews Jr., *Ten Thousand Commandments*, 2016 edition, https://cei.org/10KC2016.

state, with its interventions, bans, uncertainty, wealth destruction, job loss, stifling of entrepreneurship, and loss of liberty (see Figure 1.3). Many government controls simply do not show up in statistics. Regulation is often redistributive, burdensome, costly, and destabilizing, since coercive government solutions to perceived market failures can have consequences worse than the problem they allegedly address. Regulatory bureaus cannot respond rapidly to changes in fields like health care provision, finance, infrastructure, and cybersecurity. Central, bureaucratic regulation undermines actual regulation and discipline. Agency pursuit of "benefits" imposes costs of its own when agencies interfere with the improvements in health and safety driven by competitive processes and consumer and social demands.

Policy makers' choice has never been between regulation and no regulation, but over what institutional frameworks are more appropriate to advancing health, safety, and efficiency. For every market failure cited to justify government intervention, one can find offsetting political and bureaucratic failure. Price regulation either increases prices or creates shortages. Internet net neutrality regulation will undermine communications infrastructure's potential. Much environmental regulation arose because of the

lack of property or use rights in resources and amenities in the first place—government failures.

Unfortunately, many businesses not only favor regulation but actively pursue it to disadvantage competitors. So at the very minimum, policy makers should challenge agency benefit claims and demand better justification since agencies may selectively overstate.

Expert: Clyde Wayne Crews Jr.

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REIN IN OVERREGULATION AND REGULATORY "DARK MATTER"

Congress should make far greater use of defunding unapproved agency initiatives as a routine matter and of engaging the Congressional Review Act to rein in agency overreach.

Regulations require more transparency and scrutiny, but so do executive orders, agency guidance documents, memoranda, bulletins, and other "nonrules" that duck notice and comment and the central review process that is already inadequately applied to routine rules. Thousands of such "regulatory dark matter" documents are issued annually—far more than the number of rules—that amount to off-the-books regulation.

The basis of the modern regulatory process is the post–New Deal Administrative Procedure Act of 1946 (Pub. L. No. 79-404), which set up the process of public advance

Congress should:

- Apply the Administrative Procedure Act's notice-and-comment requirement to rules with heightened force.
- Abolish, downsize, reduce the budgets for, and deny appropriations to agencies, subagencies, and programs that pursue regulatory actions not authorized by Congress.
- Repeal or amend enabling statutes that sustain a particularly objectionable regulatory enterprise or program.
- Subject regulatory dark matter, alongside ordinary rules, to more intense review by the Office of Management and Budget. By exposing the costs of guidance, this step can provide a public record for future legislative reforms of guidance-as-regulation. President Reagan's Executive Order 12291 provides a model in that it puts the burden of proof on agencies to demonstrate the need for a new rule. Guidance should be held to the same standard.
- Apply the Congressional Review Act's 60-day resolution of disapproval process to rules, and extend it to guidance. Then, if guidance grows, the public will be able to see those instances in which Congress could have acted to stop or call attention to it but did not.
- Introduce bills to repeal guidance as appropriate.

notice of rulemakings and provided the opportunity for the public to offer input and comment before agencies finalize proposed rules and again before a final rule becomes effective. However, agencies can avoid notice and comment for self-determined "good cause." As a 2016 Congressional Research Service report noted:

> *While the Administrative Procedure Act (APA) generally requires agencies to follow certain procedures when promulgating rules, the statute's "good cause" exception permits agencies to forgo Section 553's notice and comment requirement if "the agency for good cause finds" that compliance would be "impracticable, unnecessary, or contrary to the public interest" and bypass its 30-day publication requirement if good cause exists.*

That leaves agencies with a huge loophole to avoid scrutiny of a wide array of rules.

Amendments to the Adminstrative Procedure Act have intended that complex and expensive rules be subject to additional analysis. These reforms include the Paperwork Reduction Act of 1980 (Pub. L. No. 96-511, 94 Stat. 2812, codified at 44 U.S.C. §§ 3501–21), Regulatory Flexibility Act (to address small business impacts, Pub. L. No. 96-354), and Congressional Review Act, which enables Congress to vote on a resolution of disapproval to reject agency regulations (5 U.S.C. §§ 801–8).

In addition, various presidential executive orders govern central review of rules by the OMB to address cost–benefit analysis for some rules. Ronald Reagan's Executive Order 12291 set up central review of agency rules by the OMB. Bill Clinton's E.O. 12866, however, restored "primacy" to agencies, thereby weakening the process. Although President Obama issued several orders to ostensibly streamline regulation, his underlying "pen and phone" approach to policy making eclipsed any regulatory curtailment.

Moreover, the APA's already-weakened "good-cause" requirement to publish notice of proposed rulemaking and allow public comment does not apply at all to agency guidance, memoranda, and other regulatory dark matter.

> *Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause*

Recent Examples of Regulatory "Dark Matter"

- **Internal Revenue Service** and **Department of Health and Human Services** waivers of provisions of the Patient Protection and Affordable Care Act
- **Housing and Urban Development** guidance decreeing landlord and home seller denial of those with criminal records a potential violation of the Fair Housing Act
- **Environmental Protection Agency** Clean Water Act interpretive guidance on "Waters of the United States"
- **Securities and Exchange Commission** interpretive "Commission Guidance Regarding Disclosure Related to Climate Change"
- **Commodity Futures Trading Commission** "Staff Advisory" guidance on international financial transactions between overseas parties "arranged, negotiated, or executed" by a U.S.-based individual
- A series of **Department of Education** guidance documents imposing new mandates on colleges and schools on issues ranging from bullying and harassment to gender identity
- The **U.S. Department of Agriculture's Forest Service** "Notice of Final Directive" permanent Ecosystem Restoration policy
- **Department of Labor Wage and Hour Division** "Administrative Interpretations" on independent contracting and on joint employment
- **Department of Labor** guidance documents regarding the Process Safety Management standards for hazardous chemicals
- **Equal Employment Opportunity Commission** series of guidance documents on pregnancy discrimination and accommodation in the workplace, credit checks on potential employees, and criminal background checks
- **Consumer Financial Protection Bureau** "Bulletin" on "Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act"
- **Council on Environmental Quality** Revised Draft Guidance for Greenhouse Gas Emissions and Climate Change

> *finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. (Pub. L. No. 79-404, Section 553)*

With respect to "significant guidance," some executive (not independent) agencies comply with a 2007 OMB memorandum on "Good Guidance Principles"—in effect, guidance for guidance. "Significant" guidance often means having an economic effect

of $100 million annually, similar to the definition for significant and major rules. With conspicuous exceptions—such as the Departments of Energy, Housing and Urban Development, and Health and Human Services—some agencies not only continue to invoke the 2007 OMB memo but follow its directive of maintaining Web pages devoted specifically to their "significant guidance." Unfortunately, that is a suggestion rather than a command, which allows, for example, the Food and Drug Administration to report no "significant guidance," even though it has 1,184 acknowledged final guidance documents.

Unelected agencies' declarations face insufficient oversight, yet they are binding. Congress needs to require adherence to the APA, thereby affirming the concept of separation of powers, outlined above.

Expert: Clyde Wayne Crews Jr.

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STRENGTHEN DISCLOSURE WITH A "REGULATORY REPORT CARD"

A greater level of disclosure is needed for regulatory guidance documents, memoranda, and other regulatory dark matter that have been neglected in the regulatory oversight process. Regulatory information is often available but difficult to compile or interpret. A regulatory report card that makes that information more accessible would go a long way toward increasing transparency. Since the early 1980s, regulatory oversight has been governed primarily by the semiformal central review of economic, environmental, and health and safety regulations by OMB's Office of Information and Regulatory Affairs. The process is insufficient, as OMB review captures a fraction of the regulatory enterprise. As a result, less than 1 percent of rules have an "audited" cost–benefit analysis. By requiring a periodic publication summarizing available but scattered data, Congress could make complex regulatory data more user-friendly and encourage public accountability.

The Reagan and George H. W. Bush administrations formalized such disclosure, in a document accompanying the federal budget known as the *Regulatory Program of the United States Government*. The compilation included a lengthy appendix, "Annual Report on Executive Order 12291," which could provide a template for accessible disclosure of information about rules, as well as guidance and dark matter. The *Regulatory Program*'s run concluded in 1993 when the Clinton administration replaced E.O. 12291 with E.O. 12866 as part of that administration's reaffirmation of agency

Congress should:

- Require agencies to present data regarding regulation and guidance to Congress and the public in a format comparable to the federal budget's Historical Tables.
- Require streamlined, single-location online disclosure of economically significant guidance from both independent and executive agencies, augmenting what a few agencies already voluntarily publish in accordance with the 2007 OMB memorandum to agencies.
- Require centralized disclosure of the thousands of guidance documents issued annually that do not rise to agencies' reckoning of "significant." Currently, those documents are scattered under numerous monikers and across various websites, if published at all.

Table 1.2 Proposed Breakdown of Economically Significant Rules

Category 1	> $100 million < $500 million
Category 2	> $500 million < $1 billion
Category 3	> $1 billion < $5 billion
Category 4	> $5 billion < $10 billion
Category 5	> $10 billion

primacy. Worse, in recent years, federal agency oversight reports—such as the Unified Agenda of Federal Regulations, the OMB *Report to Congress* on regulatory benefits and costs, and the *Information Collection Budget*—have been published late—or not at all in the case of the Unified Agenda.

A regulatory report card could take the form of a modified and reinstated *Regulatory Program* or a compilation of regulatory data published as chapters or appendixes in the federal budget, the *Economic Report of the President*, the OMB *Benefits and Costs* report, or other existing data sources.

Whatever its format, a federal regulatory transparency report card should include the following:

- Tallies of economically significant, major, and nonmajor rules by department, agency, and commission;
- Tallies of significant and other guidance documents and memoranda by department, agency, and commission;
- Numbers and percentages of rules and guidance documents affecting small business;
- Depictions of how agencies' regulations accumulate as a business grows;
- Numbers and percentages of regulations that contain numerical cost estimates;
- Tallies of existing cost estimates, including subtotals by agency and grand total;
- Numbers and percentages that lack cost estimates, with reasons for absence of cost estimates (such as rules for which weighing costs and benefits is statutorily prohibited);

- Aggregate cost estimates of regulation: grand total, paperwork, economic (for example, financial, antitrust, communications sector), social, health and safety, and environmental;
- *Federal Register* analysis, including numbers of pages and proposed and final rule breakdowns by agency;
- Number of major rules reported on by the GAO in its database of reports on regulations;
- Rankings of most active executive and independent rulemaking agencies;
- Identification of agency actions that are deregulatory rather than regulatory;
- Rules and guidance purported to affect internal agency procedures alone;
- Number of rules new to the Unified Agenda;
- Number of rules that are carryovers from previous years;
- Numbers and percentages of rules facing statutory or judicial deadlines that limit executive branch options to address them;
- Rules for which weighing costs and benefits is statutorily prohibited;
- Percentages of rules reviewed by the OMB and action taken.

Regulations fall into two broad classes: (a) those that are economically significant, that is, costing more than $100 million annually; and (b) those that are not. However, many rules that technically fly below that threshold can still be very significant in the real-world sense of the term. Congress could require agencies to break cost categories into tiers more descriptive of their real-world costs. Table 1.2 provides one possible itemization.

Expert: Clyde Wayne Crews Jr.

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IMPLEMENT A REGULATORY REDUCTION COMMISSION AND SUNSET PROCEDURES

Much concern is expressed over agencies' new regulations, but Congress should also aggressively address those already on the books, which have accumulated over decades. An option is to create a Regulatory Reduction Commission and task it to convene periodically and propose a repeal package.

Modeled on the successful military Base Realignment and Closure (BRAC) Commission, the Commission on Regulatory Relief and Rollback was first proposed in 1995 by then-Sen. Phil Gramm (R-Tex.). A similar 2004 House proposal—the Commission on the Accountability and Review of Federal Agencies—would have addressed agencies and programs in need of rollback. The Progressive Policy Institute has detailed a similar idea, calling it a Regulatory Improvement Commission.

The BRAC model's bipartisan, independent structure helped resolve the politically intractable task of closing obsolete military bases that provide jobs in members' districts by bundling them into a single legislative package. BRAC formulated a list of recommended base closures set to go into effect after a given time interval unless Congress enacted a joint resolution of disapproval. If no such resolution was passed, the closures happened automatically. That technique could be applied to the similarly difficult regulatory arena.

Any commission recommendation requiring no legislation might be implemented by the president. The filtering process of holding hearings combined with the bundling of regulations would make the commission's recommendations more difficult to oppose politically—everybody stands a good chance of getting "hit," providing political cover.

Congress should:

- Appoint a bipartisan Regulatory Reduction Commission to conduct hearings, assess agencies' accumulated rules and regulations, and assemble a yearly package of proposed regulatory reductions, subject to an up-or-down vote by Congress, with no amendments allowed.
- Include sunset provisions for rules in any new legislation that directs agencies to implement regulations.

International precedent exists for streamlining. The Netherlands and the United Kingdom both set up autonomous, nongovernmental bodies to review regulation—the Regulatory Reduction Committee in the Netherlands and the Better Regulation Commission in the UK. Both sought to reduce regulatory burdens by 25 percent over a four-year period, and they achieved some success.

Review and sunset requirements built into laws and regulations could also incentivize agencies to repeal outdated rules. Although continuation of rules will likely be common, the procedure could improve the transparency reporting urged earlier, thereby inspiring reforms indirectly. Widespread sunsetting across government could lessen the effectiveness of the interest-group mobilization that could be prompted by an approaching sunset deadline affecting a single agency.

Expert: Clyde Wayne Crews Jr.

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REQUIRE VOTES ON MAJOR OR CONTROVERSIAL RULES

Congress passed 114 laws in 2015, while agencies issued 3,410 rules—a ratio of 30 rules for every law. As administrative law has steadily displaced the representative republican government our Founders envisioned, congressional overdelegation to bureaucrats has widened the disconnect between the power to establish regulatory programs and the responsibility for the results of those programs. Legal scholar Philip Hamburger has detailed the emergence of a preconstitutional, monarchy-style prerogative, a development defying the Constitution, which "expressly bars the delegation of legislative power."

The Congressional Review Act's resolution of disapproval process represents a significant tilt back toward congressional accountability, but has been rarely used. A serious flaw is that the CRA effectively requires a two-thirds supermajority to strike "laws" that Congress never passed in the first place. So the flow of rules only increases. The solution is to require congressional affirmation for agency rules, guidance, and other proclamations likely to have significant economic impact, or that are societally or socially controversial.

The basic principle for public accountability for Congress and agencies should require that no major or controversial agency rule becomes law until it receives an affirmative vote by Congress. This principle is particularly important since most agencies do not quantify most rules' costs. In addition, many costly rules can escape the "significant" classification by their cost estimates coming in below the $100 million threshold. The REINS Act passed the House of Representatives in the 112th, 113th, and 114th Congresses and deserves to be revisited. Democratic accountability is most important.

Congress should:

- Pass the Regulations from the Executive in Need of Scrutiny (REINS) Act, which would establish an affirmation procedure for major rules with annual costs of $100 million or more.
- Expanding the REINS Act to cover any controversial rule, whether it is tied to a cost estimate or not.
- Extend the REINS Act to apply to guidance documents and other agency decrees.

Cost–benefit analyses matter less when every elected representative goes on record as either supporting or opposing a particular regulation.

Expert: Clyde Wayne Crews Jr.

For Further Reading

Clyde Wayne Crews Jr., "The Other National Debt Crisis: How and Why Congress Must Quantify Regulation," *Issue Analysis* 2011 No. 4, Competitive Enterprise Institute, October 4, 2011, https://cei.org/issue-analysis/other-national-debt-crisis.

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IMPLEMENT A REGULATORY COST BUDGET

Federal spending, taxes, and the deficit get plenty of attention. But it is equally important to monitor and reduce nontax expenditures that the government imposes. The concept is both bipartisan and not new. For example, then-Sen. Lloyd Bentsen (D-Tex.) proposed an "annual regulatory budget" in 1979. Recent legislative offerings include the National Regulatory Budget Act, introduced by Sen. Marco Rubio (R-Fla.) in 2014, and the Article I Regulatory Budget Act, introduced by Sen. Mike Lee (R-Utah) in 2016.

A regulatory budget could help incentivize other reforms, such as cost analysis and sunsets. It would also allow Congress to allocate regulatory cost authority among agencies and better distinguish between categories like economic, health and safety, and environmental regulations.

A comprehensive regulatory cost budget would include individual tallies from agencies, paralleling the fiscal budget. Congress would specify the total cost budget for which it is willing to be held accountable and divide it among agencies. Budgeting would force agencies to "compete" to ensure that their least-effective, more poorly performing mandates save more lives per dollar or correct some alleged market imperfection better than another agency's rules. That approach should improve decision making and encourage adherence to congressional intent.

Agencies would concentrate on assessing costs, much as the fiscal budget focuses on costs and not benefits. Benefits are what Congress must supervise in the first place through its lawmaking and budgetary allocations. Although a regulatory budget's compliance cost calculations would be difficult, they would be easier to manage than

Congress should:

- Require agencies to present annual regulatory cost projections to Congress as part of the appropriations process, in order to enable Congress to decide what level of regulatory burden it is willing to impose on a given industry or region.
- Require a "one in, one out" procedure for new rules, which a regulatory budget would make possible. Like the Regulatory Reduction Commission, this idea holds bipartisan appeal. For example, Sen. Mark Warner (D-Va.) recommend offsetting every new rule by eliminating an existing one. Such a "one in, one out" system amounts to a status quo regulatory "budget," or a freeze at current levels.

separate cost and benefit calculations for every single rule, which is not being done anyway. Agencies regulating recklessly could lose the squandered budgetary allocation to a rival agency, or even face elimination.

Pitfalls of regulatory budgeting include:

- The risk of creating perverse incentives to expand rather than reduce the size of government because of the elevation of utilitarianism over individual rights in the pursuit of "social" benefits;
- The reality that apart from raw compliance, cost calculation involves mere estimations; and
- The temptation to include benefits and generate a phony "net benefit" budget—which would mean no end to regulation, as it would give agencies fodder to argue that cutting their regulatory budgets costs lives.

Regulatory transparency; a Regulatory Reduction Commission and rule sunsetting; one-in, one-out approaches; and congressional approval of rules would all lay a needed foundation for any attempt at a regulatory cost budget.

Expert: Clyde Wayne Crews Jr.

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RESTRAIN THE RUNAWAY ADMINISTRATIVE STATE BY REINING IN *CHEVRON* DEFERENCE

Chevron deference is the legal doctrine whereby courts generally defer to regulatory agencies' interpretations of their enabling statutes. That means that when an agency's statutory interpretation undergoes judicial review, it need only be reasonable to pass legal muster. A court may believe that its own interpretation is a superior reading of the law, but under *Chevron* deference, it would have to give way to the agency's construction.

The U.S. Supreme Court established this doctrine in its seminal 1984 ruling in *Chevron v. National Resources Defense Council*. In that ruling, the Court set up a now widely used two-step analytical framework for courts to review agency interpretations of their own rules under the relevant statutes. At step 1, the reviewing court asks "whether Congress has spoken directly to the precise question at issue." At this point, "if the intent of Congress is clear, that is the end of the matter," because courts "must give effect to the unambiguously expressed intent of Congress." However, if "the statute is silent or ambiguous with respect to the specific issue," the court moves on to *Chevron* step 2, whereupon "the question … is whether the agency's answer is based on a permissible construction of the statute."

From an institutional perspective, the problem with *Chevron* deference is that it flies in the face of the judiciary's role, as Chief Justice John Marshall famously put it, "to say what the law is." *Chevron* deference operates under the assumption that Congress intended for courts to defer to agencies' interpretations of statutes. That runs counter to Congress's express stipulation in the Administrative Procedure Act that "the reviewing court shall decide all relevant questions of law."

From a practical perspective, *Chevron* deference has been a crucial impetus for the growth of the administrative state. Because of the richness of the English language, it is easy for an agency to engineer ambiguity into virtually any statutory provision. Having thus engendered a textual imprecision, the agency can then advance an expansive interpretation that grants itself greater regulatory authority.

At its theoretical core, the *Chevron* deference doctrine is based on the Supreme Court's assumption that Congress intended for administrative agencies, rather

Congress should:

- Pass the Separation of Powers Restoration Act, which would direct courts to stop giving controlling deference to agency interpretations of their enabling statutes.
- In expectation of a possible increased administrative burden on Article III courts, complement passage of the Separation of Powers Restoration Act with a modest appropriation to support another 36 appellate judges and 140 district court judges, plus the accompanying clerks and assistants.

than judges, to interpret statutes, because of the former's comparative strengths in expertise and accountability. In making that assumption, the Supreme Court overlooked the possibility that Congress's intent may run counter to that of the executive branch. For example, in light of the growth of the administrative state, it is likely that many members of Congress would give priority to providing an institutional check on the powers of the president through the judiciary, regardless of the supposed advantages in expertise and accountability enjoyed by administrative agencies in interpreting statutes.

Given that *Chevron* deference is a function of supposed congressional intent, it is well past time for Congress to express its will with respect to which branch of government should have the power to interpret the law.

Experts: William Yeatman, Iain Murray

For Further Reading

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