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The Competitive Enterprise Institute (CEI) is a non-profit public policy research organization dedicated to advancing individual liberty and free enterprise with an emphasis on regulatory policy. I appreciate the opportunity to discuss issues surrounding regulatory oversight and the

new Regulatory Reform Task forces, and I thank the Chairs, Ranking Members and Members of the Subcommittees.[1]

Introduction: The OIRA and Regulatory Reform Task Force Roles in Overseeing the Federal Regulatory Enterprise

When policymakers neglect federal regulation, they ignore arguably the greatest element of governmental influence in the United States' economy and perhaps in society itself. As a policy concern, regulation merits attention like the $20 trillion national debt receives, since both spending and regulation profoundly redirect societal resources.

When the era of executive regulation began in the 1920s, few likely imagined the dense tangle of rules it would produce nor how they would envelop the economy and society. But over decades, the federal regulatory state has continued expanding, with rules accumulating year after year. Members of both major political parties have long recognized that federal regulatory burdens can operate as a hidden tax.[2] President Donald Trump has echoed that view.[3] In response, his administration issued a memorandum titled "Regulatory Freeze Pending Review" to executive branch agencies.[4] (That is a typical step taken by new presidents wishing to review their predecessor's pending actions and to prioritize their own.[5]) The president also issued during his first 100 days a series of executive actions related to reforming the regulatory process, in particular **Executive Order 13771** "Reducing Regulation and Controlling Regulatory Costs,"[6] and **Executive Order 13777,** "Enforcing the Regulatory Reform Agenda."[7] The first established

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[1] This testimony in part updates and expands upon "One Nation, Ungovernable? Confronting the Modern Regulatory State," in *What America's Decline in Economic Freedom Means for Entrepreneurship and Prosperity*, Fraser Institute: Montreal, 2015. pp. 117-181; and 2016 House Judiciary Testimony.

[2] For example, consider President Jimmy Carter's *Economic Report of the President* in 1980: "[A]s more goals are pursued through rules and regulations mandating private outlays rather than through direct government expenditures, the Federal budget is an increasingly inadequate measure of the resources directed by government toward social ends." Council of Economic Advisers, *Economic Report of the President*, Executive Office of the President, January 1980, p. 125, http://www.presidency.ucsb.edu/economic_reports/1980.pdf.

[3] Jacob Pramuk, "Trump Tells Business Leaders He Wants to Cut Regulations by 75% or 'Maybe More,'" CNBC, January 23, 2017, http://www.cnbc.com/2017/01/23/trump-tells-business-leaders-he-wants-to-cut-regulations-by-75-percent-or-maybe-more.html.

[4] This memorandum took the additional step of incorporating agency guidance documents. White House, Office of the Press Secretary, "Memorandum for the Heads of Executive Departments and Agencies from Reince Priebus, Assisatant to the President and Chief of Staff, Regulatory Freeze Pending Review," January 20, 2017, https://www.whitehouse.gov/the-press-office/2017/01/20/memorandum-heads-executive-departments-and-agencies.

[5] For example, the first action of the incoming Obama administration in 2009 was likewise a Memorandum for the Heads of Executive Departments and Agencies, from then-Chief of Staff Rahm Emanuel, on "Regulatory Review," https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/information_and_regulatory_affairs/regulatory_review_012009.pdf.

[6] White House, Office of the Press Secretary, "Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs," news release, January 30, 2017, https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling. Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs," *Federal Register*, Vol. 82, No. 22, February 3, 2017, https://www.gpo.gov/fdsys/pkg/FR-2017-02-03/pdf/2017-02451.pdf.

[7] White House, Office of the Press Secretary, "Presidential Executive Order on Enforcing the Regulatory Reform Agenda," news release, February 24, 2017, https://www.whitehouse.gov/the-press-office/2017/02/24/presidential-executive-order-enforcing-regulatory-reform-agenda. Executive Order 13777, "Enforcing the Regulatory Reform Agenda," *Federal Register*, Vol. 82, No. 39, March 1, 2017, https://www.gpo.gov/fdsys/pkg/FR-2017-03-

the one-in, two-out expectation for certain economically significant rules where not in violation of law. It also directed that "total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero" for executive departments and agencies. The second executive order launched Regulatory Reform Officers and Regulatory Reform Task Forces at agencies to oversee provisions of E.O. 13771 and prior consistent orders.

Other significant and related executive actions have included a presidential memorandum on "Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing,"[8] and Executive Order 13755, "Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects,"[9] and Executive Order 13772, "Core Principles for Regulating the United States Financial System."[10] Importantly also, a September 7, 2017 memorandum[11] from new Office of Information and Regulatory Affairs (OIRA) administrator Neomi Rao directed agencies for the first time to propose an overall incremental regulatory cost allowance in the Fall 2017 edition of their "Unified Agenda" on regulations. Prior Agenda editions, since the 1980s, would label rules as "economically significant," but never has there been such a "regulatory budget" incorporated within. Rao says, "OMB expects that each agency will propose a net reduction in incremental regulatory costs for FY 2018."

In that context, this testimony looks at OIRA's and Trump's Regulatory Reform Task Forces' recent improvements in regulatory oversight, and urges reinforcement by Congress and the administration. Concern over regulatory growth lies not solely with the prior administration's "pen and phone" stance. Congressional Republicans have acknowledged neglecting their own role in regulatory oversight, as the June 2016 House Task Forces addressing Article I and delegation issues made abundantly clear.[12]

On the regulatory front, the first nine months of the Trump administration have brought the issuance of the above executive actions, as well as the enactment of Congressional Review Act resolutions eliminating 14 of former President' Barack Obama's rules (among hundreds eligible). Capping weeks of the Obama White House's touting of a "pen and phone" (Rucker 2014) strategy to further expand federal economic, environmental and social regulation and

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01/pdf/2017-04107.pdf.

[8] White House, Office of the Press Secretary, "Presidential Memorandum Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing," news release, January 24, 2017, https://www.whitehouse.gov/the-press-office/2017/01/24/presidential-memorandum-streamlining-permitting-and-reducing-regulatory.

[9] White House, Office of the Press Secretary, "Executive Order Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects," news release, January 24, 2017, https://www.whitehouse.gov/the-press-office/2017/01/24/executive-order-expediting-environmental-reviews-and-approvals-high. Executive Order 13766, "Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects," *Federal Register*, Vol. 82, No. 18, https://www.gpo.gov/fdsys/pkg/FR-2017-01-30/pdf/2017-02029.pdf.

[10] White House, Office of the Press Secretary, "Presidential Executive Order on Core Principles for Regulating the United States Financial System," news release, February 3, 2017, https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-executive-order-core-principles-regulating-united-states. Executive Order 13772, "Core Principles for Regulating the United States Financial System," *Federal Register*, Vol. 82, No. 25, February 8, 2017, https://www.gpo.gov/fdsys/pkg/FR-2017-02-08/pdf/2017-02762.pdf.

[11] https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/FY%202018%20Regulatory%20Cost%20Allowances.pdf.

[12] The "BetterGOP" Task Force reports are archived at http://abetterway.speaker.gov/.

intervention (White House, 25 February 2014), Obama at that time vowed that, "[I]if Congress won't act soon…, I will. I will direct my cabinet to come up with executive actions we can take, now and in the future (Marks 2013)."

While the 114th Congress objected to such aspirations, it faced "the year of the veto (Sink and Wong 2015)." The president promised vetoes on regulatory reforms like the REINS Act and Regulatory Accountability Act (which now await Senate action in the 115th Congress), and followed through on a veto of the Keystone XL pipeline (White House, 2 February 2015) in contrast to America's onetime ethos of rapid, roiling infrastructure growth (Gordon 2004).

While the Constitution has not come to the rescue, we are not without options. In light of Congress' over-delegation of power to federal agencies, this testimony surveys Trump's actions thus far in light of the formal oversight procedures that ostensibly exist for the thousands of regulations issuing annually. Next we note that central oversight of regulation sports theoretical inconsistencies and gaps, and present data demonstrating that federal regulatory review is far from comprehensive. While central review's shortcomings (it is weak compared to the administrative state as such) hasn't worked to halt the advance of the vast administrative state, in recent months it has played a far greater role, and can go further still. Given that reality that code or administrative agency law is here to stay for the time being, this testimony offers proposals for the Task Forces and OIRA, while remaining cognizant of central review's limitations. The aim of these proposals is to (1) help legitimize Congress' case for regulatory liberalization and enable a revival of some semblance of constitutional order; and to (2) facilitate the executive branch's deployment of the "pen and phone" in *defense* of liberty. An alternate take on "Energy in the Executive" (*Federalist Papers* No. 70, 1788) is a welcome contrast to its usage in undermining institutions of limited government and destabilizing core values of classical liberal society.

Early Results in the Trump White House; And Overseas Rule-in, Rule-Out Experiences

The Trump mode has been to regulate bureaucrats rather than the public. New, large-scale regulation has slowed dramatically in 2017, and where it hasn't, new costs are required to be offset. The president capped the end of the fiscal year and began the new one with high-profile events on tax reform[13] and cutting red tape, respectively. He highlighted these issues in a speech to the National Association of Manufacturers on September 29, the last working day of the federal government's 2017 fiscal year. Then on Monday, October 2, the 2018 fiscal year began and the White House hosted a "Cut the Red Tape" event[14] to discuss the administration's regulatory reform plans.

Under Reagan, both final rules and Federal Register pages dropped more than one-third.[15] Thus far, Trump, OIRA and the agency Task Forces have reduced the flow of new regulation by large magnitude as well. Trump's agencies have eliminated some of the higher-profile guidance documents of Obama's administration as well.

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[13] https://www.c-span.org/video/?434888-1/president-defends-puerto-rico-hurricane-response-touts-tax-cuts-plan&live=.
[14] https://www.bna.com/trump-preview-regulatory-n73014464392/.
[15] https://cei.org/sites/default/files/Wayne%20Crews%20-%20Channeling%20Reagan%20by%20Executive%20Order.pdf.

Notably, the Federal Register stood at 45,678 pages[16] at the end of the 2017 fiscal year. Last year at fiscal year-end, Barack Obama's Federal Register stood at 67,900 pages.[17] (Indeed, Obama's 2016 Federal Register set an all-time-record: 97,110 pages.[18]) Compared to Obama at this time last year, Trump's page count is down 32 percent.

It took a few years for Ronald Reagan to achieve his ultimate one-third reduction in Federal Register pages following Jimmy Carter's then-record Federal Register. So by this metric, Trump is moving faster.

Trump's regulatory flows in terms of executive branch and independent agency rules and significant issued compared to the same period (Jan. 20-Sept. 30) under President Obama in 2016 are also lower.

Nine Months of Trump Regulations vs. Obama (Jan 20-September 30)

	Rules	**"Significant" Rules**
Trump 2017	2,183	116
Obama 2016	2,686	274

In nine months, the Trump administration had issued 2,183 rules. Obama issued 2,686 rules in the corresponding time period in 2016. Trump's tally represents an 18 percent decrease. Keep in mind, even getting rid of a rule requires issuing a "rule" in order to comply with the Administrative Procedure Act's notice-and-comment requirements. So these tallies obscure that some of Trump's rules have been eliminations or delays of earlier rules that hadn't reached their effective date. For example, here are several delayed Environmental Protection Agency rules.[19] Moreover, new costs agencies impose must net out at zero. (This witness has urged that Congress, or Trump via executive order, needs to change the nomenclature to consolidate overly abundant rule types so we can compare apples and apples.[20])

Significant rules issued, generally those with an impact of $100 million or more, were down an astonishing 58 percent compared to Obama for this partial fiscal-year window. Trump's agencies issued 116 significant final rules during his first nine months, while Obama's issued 274 over the corresponding nine-month period in 2016. This also ignores any portion of Trump's rules that are deferrals or freezes.

The tally above is for rules finalized, but rules entering the pipeline in the first place are way down too. Proposed rules are those in the process of being created, written, and commented upon. Their bulk implies either a higher or lower level of final rules (what we just covered) that one would expect to see later. The flows are less than seen with predecessors.

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[16] https://www.gpo.gov/fdsys/pkg/FR-2017-09-29/pdf/FR-2017-09-29.pdf.
[17] https://www.gpo.gov/fdsys/pkg/FR-2016-09-30/pdf/FR-2016-09-30.pdf.
[18] https://www.gpo.gov/fdsys/pkg/FR-2016-12-30/pdf/FR-2016-12-30.pdf.
[19] https://www.federalregister.gov/documents/2017/03/20/2017-05462/further-delay-of-effective-dates-for-five-final-regulations-published-by-the-environmental.
[20] https://cei.org/sites/default/files/Wayne%20Crews%20-%20What%20is%20the%20Difference%20Between%20Major%20and%20Significant%20Rules.pdf.

Trump's First Fiscal Year: Proposed Rules Compared to Predecessors

(January 20 - September 30)

		Proposed Rules	"Significant" Proposed
Trump	**(2017)**	1241	65
Obama	**(2016)**	1737	290
Obama	**(2009)**	1413	216
Bush	**(2008)**	1707	276
Bush	**(2001)**	1757	129
Clinton	**(2000)**	1976	198
Clinton	**(1997)**	2134	169

Trump's overall proposed rules in the pipeline are down 28 percent compared to the corresponding time frame from Obama's final year (Trump: 1241, Obama: 1737). Note that Trump's "significant" proposed rules are drastically below any predecessor. They are down 77 percent compared to Obama (Trump: 65, Obama: 290).

Other nations have long operated rule-in, rule-out campaigns efforts. Canada's rule-in, rule out effort was praised by NPR in 2015.[21] British Columbia is a realm where the size of TV's in restaurants and the size of nails in small bridges are no longer regulated. Britain's rule-in, rule out process addressing broad "Care," "Energy" and "Waste" categories has recently morphed into one-in, three-out, and is credited with cutting $10 billion pounds in permitting burdens and reducing overlap in agencies.[22] Future goals and targets matter: British Columbia's program sought and achieved a 1/3 reduction in "requirements," and cut hundreds of thousands of paperwork hours. Britain's version seeks to cut another $10 billion by 2020. In garnering savings overseas and under Trump's initiative, it may ultimately make more sense to locate and reduce equivalent *burdens*, not necessarily rule counts, elsewhere; perhaps dollar for dollar rather than rule for rule reductions.[23]

Of course reducing future regulatory flows is not the same as a review and rollback of the existing body accumulated over decades, which also matters in budgeting. Accordingly, Britain's in-out "budget" is paired with a Cutting Red Tape review program. A similar proposal in the U.S. was President Obama's executive order on retrospective review, but is most embodied now in Sen. Angus King's bipartisan Regulatory Improvement Commission, an idea endorsed by the Progressive Policy Institute, which makes the commonsense observation that regulations that make sense alone might not when layered atop one another (Mandel and Carew 2013). Regulatory cost budgeting experiments are already complicated, so reducing the universe of subject matter can help. If it's so difficult to remove rules administratively now, with a president so actively engaged in doing it, that fact underscores the reality of unrelieved rule accumulation over decades under more detached executives, highlighting the role that Congress must play in reform. OIRA Director Neomi Rao points out that "Congress can simply deregulate through legislation and override an agency's determination."[24]

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[21] http://www.npr.org/2015/05/26/409671996/canada-cuts-down-on-red-tape-could-it-work-in-the-u-s.
[22] https://www.rstreet.org/wp-content/uploads/2016/03/RSTREET54.pdf and https://www.gov.uk/government/news/government-going-further-to-cut-red-tape-by-10-billion.
[23] https://www.cato.org/blog/president-trumps-one-two-out-rule-lessons-uk.
[24] https://www.bna.com/new-regulatory-task-n73014470829/.

A Legacy of Regulatory Overreach, A Future of Competitive Discipline

> *I think that is really where the thrill comes from. And it is a thrill; it's a high.… I was born to regulate. I don't know why, but that's very true. So long as I am regulating, I'm happy (Quoted in Olson 2001).*
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> —OSHA safety standards program director Marthe Kent in 2001.

Seemingly no corner of life escapes the modern state's purview, and much emanates not from an elected Congress but from the president and from unelected bureau personnel. Concern over executive branch ambition ranges across the policy spectrum—from a House Republican lawsuit against President Obama's unilateral actions (Walsh and Bash 2014), to Georgetown law professor Jonathan Turley's 2014 House Judiciary Committee testimony that, "We are in the midst of a constitutional crisis with sweeping implications for our system of government (Turley 2014)."

Until the Trump reforms, those doing the regulating saw no problem whatsoever and have engaged in "resistance" since then[25]; meanwhile and groups like Public Citizen[26] and the Center for Progressive Reform[27] disavow a negative impact of regulation on the economy and jobs, and other pundits likewise deny any linkage.[28] Others continue seeing things differently. Unemployment is "down" in part because statistics omit those who've given up the job hunt. A remarkable 94 million Americans 16 and older not in the labor force.[29] New banks aren't opening.[30] Data point to high debt per capita, and to the highest part-time and temporary-job creation rates in contrast to full time career positions.[31] A popular blog lamented the "slow death of American entrepreneurship" (Casselman 2014) Headlines occasionally told painful tales, like *Investor's Business Daily* in 2015 reporting on businesses dying faster than they're being created. Likewise a Brookings study on small business formation noted declining rates, as did a *Wall Street Journal* report on reduced business ownership rates among the young (Simon and Barr 2015). One recruiter detailed to the *Wall Street Journal* how regulations undermine employment (Moore 2013), while others point to an inverse correlation between regulation and innovation (Kritikos 2014). Industry anecdotes paralleled the general statistics; In food service, regulations were driving restaurants out of business and even sending them abroad (Little 2013). In this age of tax reform, regulations constitute a "hidden tax."

Congress blamed overreach and its consequences on president Obama and agencies, but as noted the recent House Task Forces on regulatory and Article I issues, Congress has acknowledged it delegated that power inappropriately. The over-delegation phenomenon of unelected and unaccountable agency personnel doing the lawmaking was detailed in David Schoenbrod's *Power Without Responsibility* (1993). In *Is Administrative Law Unlawful?* Philip Hamburger

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[25] https://www.washingtonpost.com/news/book-party/wp/2017/02/02/the-crucial-fight-that-the-anti-trump-resistance-is-forgetting/?utm_term=.55bbdc22f5fd.
[26] http://www.judiciary.senate.gov/imo/media/doc/10-06-15%20Narang%20Testimony.pdf.
[27] http://www.progressivereform.org/CPRBlog.cfm?idBlog=DA6A88BC-AFC3-D090-2C768107F7CD3367.
[28] http://www.huffingtonpost.com/2011/11/17/deregulation-job-growth_n_1099579.html.
[29] https://data.bls.gov/timeseries/LNS15000000.
[30] https://cei.org/blog/administrations-regulatory-uncertainty.
[31] http://www.huffingtonpost.com/2011/11/17/deregulation-job-growth_n_1099579.html.

sees the modern administration state as a reemergence of the absolute power practiced by pre-modern kings (2014). In *Imprimis*, Hamburger describes the return of monarchical prerogative—the very condition our Constitution was drafted to eliminate (November 2014):

> *[T]he United States Constitution expressly bars the delegation of legislative power. This may sound odd, given that the opposite is so commonly asserted by scholars and so routinely accepted by the courts. …The Constitution's very first substantive words are, "All legislative Powers herein granted shall be vested in a Congress of the United States." The word "all" was not placed there by accident.*

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It is in *this* environment in which OIRA and Trump's new Task Forces operates; one in which courts also tend to defer to agencies' "expertise" (R. J. May 2010), and Ivy League scholars in the *Washington Post* from the "Constitutional disobedience" school of thought (described in Gasaway and Parrish 2017) ponder dispensing with Congress altogether in favor of a president that both makes and executes laws,[32] and giving up on the Constitution.[33] Supreme Court Justice Clarence Thomas probed the roots of today's deference to the Administrative State. (*Perez v. Mortgage Bankers Association*, 2015. 19):

> *Many decisions of this Court invoke agency expertise as a justification for deference. This argument has its root in the support for administrative agencies that developed during the Progressive Era in this country. The Era was marked by a move from the individualism that had long characterized American society to the concept of a society organized for collective action.*

The combination of that progressive victory, delegation, inertia, and a ratchet effect that expands and never unwinds government power (Higgs 1987) dictates that the Constitution is not coming to the rescue in the short term. For all intents and purposes, code law has won, and is here to stay, until Article I reinstatement of congressional accountability to voters replaces bureaucratic unaccountability. Congress enabled bureaucratic and presidential hubris, and only it can reverse "regulation without representation" (Schoenbrod and Taylor 2003). As William A. Niskanen made clear in *Market Liberalism* (1992, 114):

> *More promising than any identifiable change in the regulatory process would be a revival of the constitutional doctrines limiting restraints on interstate commerce, restrictions on private contracts, the uncompensated taking of property rights, and the undue delegation of policy decisions to regulatory agencies.*

However with the right leadership and backing, OIRA's administrative oversight and the new Task Forces can lay a foundation for future liberalization and re-establishment of democratic accountability. This begins with what is underway now: Assuring that the regulatory state

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[32] https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwiy3MjGooLXAhXnwVQKHRSrDc0QFggoMAA&url=https%3A%2F%2Fwww.washingtonpost.com%2Fnews%2Fin-theory%2Fwp%2F2016%2F01%2F11%2Fimagine-theres-no-congress%2F&usg=AOvVaw0LP1fhb4_Cw_XcjCi5WiSu and https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2920778.

[33] http://www.nytimes.com/2012/12/31/opinion/lets-give-up-on-the-constitution.html.

ultimate endures the disclosure, transparency and accountability demanded of taxing and spending.

We next confront the regulated nation we live in and address constraints that prevent America's traditional tools from doing much about it. But this is not a pessimistic survey; we will highlighting incremental reforms addressing regulatory overreach that today's energized OIRA and Task Force structure can implement, now that a president is engaged.

What Restrains the Administrative/Regulatory State?

Legislatures rarely control spending, (the fiscal 2017 deficit was $666 billion[34]), let alone the tentacles of a regulatory enterprise enabled through design and apathy. As lawmaking disengaged from the legislature and relocated to unelected and unaccountable bureaucracies, economic, environmental and social intervention escalated. To compare, there were 214 public laws passed by Congress and signed by the president in calendar year 2016 (U.S. GPO); meanwhile agencies, implementing laws passed earlier and by earlier Congresses, issued 3,853 rules and regulations—a multiple (I like to call it the "Unconstitutionality Index") of 18 rules for every law.

On those occasions when Congress gets traction on regulatory liberalization and is able to mobilize for reform, small business burdens and job concerns are often the inspiration. Since 1980, the Regulatory Flexibility Act has directed federal agencies to assess their rules' effects on small businesses and describe regulatory actions under development "that may have a significant economic impact on a substantial number of small entities (*Federal Register*, Vol. 74, No. 233, December 7, 2009, pp. 64131–32)." The RFA has (imperfectly) recognized the importance of vitality in small business and the need to scale federal actions to the size of those expected to comply, and occasional attempts to update it occur but have not been implemented. Another development was the Unfunded Mandates Reform Act of 1995 (P.L. 104-4.), driven largely by governors mobilized against Washington's rules for which compliance was disrupting states' own budgetary priorities (Dilger and Beth 2014). So popular was the Senate version it was dubbed "S. 1."

The 1996 Congressional Review Act (CRA) requires agencies to submit reports to Congress on their major—roughly $100 million—rules. Maintained in a Government Accountability Office database, these reports allow one to more readily observe which of thousands of final rules issued each year are major and which agencies are producing the rules (U.S. GAO).

The CRA gives Congress a window of 60 legislative days in which to review a major rule and, if desired, pass a "resolution of disapproval" rejecting the rule. The CRA, in spirit, is one of the more important recent affirmations of the separation of powers. But despite the issuance of thousands of rules since passage, including many dozens of major ones, only one rule was rejected until this years' elimination of 14 by the Trump administration: a Labor Department rule on workplace repetitive-motion injuries in early 2001.

[34] https://www.treasury.gov/press-center/press-releases/Pages/sm0184.aspx.

Such concerns were recognized early, and upgrading CRA to require an affirmation of major agency regulations before they are effective is required. In the 115th Congress, the House but not the Senate has passed such legislation (the REINS Act). Meanwhile the CRA itself is undermined by final rules not being properly submitted to the Government Accountability Office and to Congress as required under the law (Copeland 2014), an arguably indispensable step since Congress needs the reports to introduce a formal disapproval resolution. The Pacific Legal Foundation's RedTapeRollback project has begun compiling examples.[35]

So the Constitution has not come to the rescue, and alas, nor has Congress. We have settled for what the executive branch review of regulations embodied at OIRA could achieve—something now greatly amplified by the Trump Administration. The basis of the prevailing regulatory process is the post-New Deal Administrative Procedure Act (APA) of 1946 (P.L. 79-404) which set up the process of public advance notice of rulemakings and provided the opportunity for the public to provide input and comment before a final rule is published in the *Federal Register* subject to a 30-day period before it becomes effective. The *Federal Register* is the daily depository of all these proposed and final federal rules and regulations (such as the 3,853 rules of 2016). While the APA established formal rulemaking processes with quasi-judicial proceedings for significant regulations, these are rarely used. Instead, APA's "informal rulemaking" procedure of notice and comment ("Section 553" rulemaking) is most common (Carey 2014). But there is wiggle room even for that. As noted in a 2014 survey by the Congressional Research Service, "The APA specifically authorizes any federal agency to dispense with its requirements for notice and comment if the agency for good cause finds that the use of traditional procedures would be 'impracticable, unnecessary, or contrary to the public interest' (Carey 2014)."

During the late 1970s and early 1980s, concern over regulations' economic effects bred inquiries and reforms meant to reinvigorate the economy while stemming that era's inflationary pressures (Hopkins 1976). Alongside cost concerns, agency tendencies to overstate or selectively express benefits was recognized. Prominent regulatory liberalizations began in the 1970s, and included certain trucking, rail, and airline deregulatory moves, partial financial services reforms, relaxed antitrust enforcement and paperwork reduction (Firey 2011). The regulatory review regime began with President Nixon, was expanded by President Ford, and embraced more fully by President Carter. A significant advance was the Reagan Administration's formalization of more activist central regulatory review at the OIRA within the Office of Management and Budget.

Created by the Paperwork Reduction Act of 1980, OIRA first concentrated on reducing the private sector's federal paperwork burdens. Later, OIRA's authority was expanded by President Reagan's February 17, 1981 Executive Order 12291 to encompass (theoretically) a larger portion of the regulatory process by requiring that any new major executive agency regulation's benefits outweigh costs where not prohibited by statute (independent agencies were exempt), and to review agencies rules and analyses. Earlier administrations' regulatory review efforts such as ones conducted by the Council on Wage and Price Stability, the Council of Economic Advisers and the interagency Regulatory Analysis Review Group, lacked extensive enforcement powers (DeMuth 1980). These earlier bodies could seek regulatory cost analysis if not statutorily prohibited, but could not enforce net-benefit requirements; agencies could reject reviewers' counsel and appeals to the president were possible, but rare (DeMuth 1980). Net benefit analysis

[35] https://www.redtaperollback.com/.

sports insurmountable problems of its own ("The Costs of Benefits" in Crews 2013; and Crews, *Forbes* 7 July 2013), but the intent was significant in the new context of consciously addressing regulation. The early and mid-1980s saw declining costs and flows, particularly in economic regulation in contrast to social and environmental (Hopkins 1992).

Over the years, OIRA review—and that at the first President George Bush's Council on Competitiveness tasked to screen regulations (Bloomberg Business 1991)—faced political opposition, narrow scope of authority (Bolton, Potter and Thrower 2014) and limited resources (Dudley 2011). On September 30, 1993, President Bill Clinton's replacement of Reagan's E.O. 12291 with E.O. 12866 "Regulatory Planning and Review" reduced OIRA's authority. The Clinton approach retained the central regulatory review structure, but "reaffirm[ed] the primacy of Federal agencies in the regulatory decision-making process" (*Federal Register*, Vol. 58, No. 190, October 4, 1993), weakening the "central" in review. The new order also changed the Reagan criterion that benefits "outweigh" costs to a weaker stipulation that benefits "justify" costs. But the order retained requirements that agencies assess costs and benefits of "significant" proposed and final actions, conduct cost benefit analysis of "economically significant" ($100 million-plus), and to assess "reasonably feasible alternatives" for OIRA to review. As with E.O. 12291, independent agencies, while they are subject to APA notice-and-comment, remained exempt from enforceable review, as they still remain under Trump's E.O. 13771.

President Obama's January 18, 2011 E.O. 13565 on review and reform ("Improving Regulation and Regulatory Review") carried on the Clinton order and articulated a pledge to address unwarranted regulation (*Federal Register*, Vol. 76, No. 14, January 21, 2011). Obama achieved a few billion dollars in savings, even wisecracking in the 2013 State of the Union Address about a rule that had categorized spilled milk as an "oil" (White House 2012), but roadblock to rolling back regulations became and remain apparent under Trump's initiative. Too often, the few billions of dollar cut via executive actions have been swamped by rules otherwise issued.

A president cannot change congressional directives with respect to independent agencies, but can use the pen and phone bully pulpit to, if not to restrain agencies, to not encourage their excesses. President Obama's July 11, 2011 E.O. 13579 ("Regulation and Independent Regulatory Agencies") called upon them to fall into line on disclosure (*Federal Register*, Vol. 76, No. 135, July 14, 2011).[36]

But formal executive branch regulatory review processes cannot work when a president's philosophy is that government, not private individuals and interactions, should dominate finance, health care, energy policy, manufacturing and other spheres of human action. While Obama embodied this belief system with repeated pledges to go around Congress attest to this while every instance from net neutrality to breath-mint serving size rules to school lunch mandates underscores a federal government disinclined to leave the public alone. Like the original E.O. 12291, the *potential* for executive orders to boost oversight and review is high when the motivation exists.

The Limits of OIRA's Central Regulatory Review

[36] In all, four of President Obama's executive orders addressed the role of central reviewers at OIRA (All available on OMB's "Regulatory Matters" site, https://www.whitehouse.gov/omb/inforeg_regmatters#eo13610).

Executive branch central review has been improved markedly by Trump's orders, but congressional action will be needed for permanence.

Rent-seeking and agency self-interest

For one thing, it is not entirely accurate, as OMB has been known to proclaim, that "businesses generally are not in favor of regulation" (U.S. OMB 1997)." Business not only generally favors regulation, but often pursued regulation in the first place (Stigler 1971). Taxes obviously transfer wealth and affect profits, but regulations do likewise; pollution controls, accounting requirements, privacy mandates and the like do not impact every firm equally. They create artificial entry barriers and hobble competition, they benefit some producers while punishing others. This aggravates cronyism and attempts at regulatory capture. Consumers enjoying falling prices and growing output were not demanding the Interstate Commerce Commission, or the state regulation of utilities (Geddes 1992), or the antitrust laws, or regulation of Uber: such are sought by political elites and producers protecting profits by eliminating competition. Small businesses, when they get big, may look more favorably upon rent-seeking and score-settling (Tollison 1982).

Social welfare rationales that dominate policy rhetoric, but regulation benefits regulatory advocates, pressure groups and, obviously, the regulator, and creates a constituency favoring command-and-control rules over market processes. This generates legislation and derivative rules requiring OMB "review" that perhaps shouldn't exist in the first place. Just as *economic* regulatory agencies are captured by special interests, much of what is considered *social* or *health/safety* or environmental regulation may undermine consumers as well (Crandall 1992). Even when regulation "works," the overall or societal benefits of can be outweighed by costs, or may ignore wealth transfers, regulatory takings and due process.

Executive review, when it works, is an institution recognizing that agencies and departments do not benefit from *curtailing* operations, from *not* regulating. Rather they gain immensely—in budget allocation, staffing, and political and career status—the more extensive the regulatory empires they oversee. Output for bureaus is not directly measurable, but must be inferred from the level of activity, creating a slippage in the ability to closely monitor agency effectiveness (Niskanen 1971). Unlike profit-making firms, unaccountable bureaus can disregard minimizing the costs of their "product" (regulations) since others (private sector entities and their customers) bear the impact of their actions. Turf-building assures agencies will sometimes not care all that much about anything more than cosmetic benefit-cost concerns, enough to create the appearance regulatory justification. Unlike private actors, bureaus are unlikely to face stiff repercussions when their interventions prove scientifically, socially or economically wasteful and harmful.

"Regulatory Dark Matter" that OIRA misses

Even if APA notice and comment worked optimally, and OIRA review (and that of the new agency Task Forces) exceeds expectations, it only a partially adequate safeguard since the already incomplete discipline of rulemaking—which provides OIRA the subject matter to review in the first place—downplays agency guidance documents ("non-legislative" rules), memoranda,

notices, Administrator Interpretations and bulletins. Such "regulatory dark matter"[37] can influence policy yet avoid not just the constitutional lawmaking process, but skirt the public notice-and-comment requirements of the Administrative Procedure Act and OIRA review (Mercatus Institute symposium, 2014) and potentially that of the agency Task Forces.

Until Trump's E.O. 13771 incorporated them, guidance documents largely skirted central review, since the APA's requirement of publishing a notice of proposed rulemaking doesn't apply to "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." That, along with the "good cause" exemption for legislative rules (P.L. 79-404. Section 553) provides a workable loophole. This witness's partial inventory finds 617 pieces of acknowledged "significant guidance" in play (as of March 2017), but there are many tens of thousands of guidances in existence[38]

President Obama's waivers of Patient Protection and Affordable Care Act elements were among the most prominent, but alongside was other conspicuous and sometimes headline-grabbing executive and independent agency guidance documents, as seen below.

Recent Prominent and Headline-Grabbing Guidance Documents Call for Greater OIRA, Task Force and Congressional Oversight

Social Policy

- **Housing and Urban Development** guidance decreeing landlord and home seller denial of those with criminal records a potential violation of the Fair Housing Act.[39]

- A series of **Department of Education** guidance documents, issued at a rate of one per business day, imposing mandates on colleges and schools.[40] According to the bipartisan Senate-appointed Task Force on Federal Regulation of Higher Education, "In 2012 alone, the Department [of Education] released approximately 270 "Dear Colleague" letters and other electronic announcements"[41] recalibrating regulation of

[37] Clyde Wayne Crews Jr., "Mapping Washington's Lawlessness: A Preliminary Inventory of 'Regulatory Dark Matter'," *Issue Analysis 2017 No. 4*, Competitive Enterprise Institute, March 2017. https://cei.org/sites/default/files/Wayne%20Crews%20-%20Mapping%20Washington%27s%20Lawlessness%202017.pdf; also available on SSRN Social Science Research Network. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733378.

[38] Crews, Regulatory Dark Matter, 2017. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733378.

[39] U.S. Department of Housing and Urban Development, Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions, April 4, 2016, http://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHAStandCR.pdf. Camila Domonoske, "Denying Housing Over Criminal Record May Be Discrimination, Feds Say," National Public Radio, April 3, 2016, http://wamu.org/news/16/04/03/denying_housing_over_criminal_record_may_be_discrimination_feds_say.

[40] Hans Bader, "Education Department Floods Schools with New Uncodified Bureaucratic Mandates," Competitive Enterprise Institute Blog, February 25, 2015, https://cei.org/blog/education-department-floods-schools-new-uncodified-bureaucratic-mandates.

[41] *Recalibrating Regulation of Colleges and Universities*, Report of the Task Force on Federal Regulation of Higher Education, p. 10, http://www.help.senate.gov/imo/media/Regulations_Task_Force_Report_2015_FINAL.pdf.

colleges and universities. Those that do not comply stand to lose funding.[42] High-profile, controversial recent Education Department guidance has included:

- Guidance (a 2011 "Dear Colleague") to colleges and universities on sexual assault and harassment.[43] The campus environment has generated strong responses from and organization among mothers of accused students.[44]
- Guidance letter (a 2010 "Dear Colleague") on bullying and harassment.[45]
- Guidance (a 2016 "Dear Colleague"), co-produced with the **Department of Justice's Civil Rights Division**, requiring inclusion of "gender identity" in the definition of 'sex" and requiring schools to allow transgender students to choose which bathroom or locker room to use.[46] The transgender bathroom dispute has been a driver of headlines as well as of state reaction, notably that of Texas and other state attorneys general suing the Education and Justice Departments over 'their efforts to unilaterally re-write the law in flagrant disregard for the checks and balances provided by the other branches of government" and 'systematically abus[ing] the exceptions to the rulemaking process."[47]
- 2016 Policy Statement from the Education Department and the **Department of Health and Human Services** "preventing and severely limiting expulsion and suspension practices in early childhood settings"[48] without basis in law or notice and comment.[49]

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[42] John O. McGinnis, "Deregulate to Undermine Political Correctness," Library of Law and Liberty Blog, November 23, 2016, http://www.libertylawsite.org/2016/11/23/deregulate-to-undermine-political-correctness/.

[43] U.S. Department of Education, Office for Civil Rights, Dear Colleague letter on Sexual Violence: Background, Summary, and Fast Facts, April 4, 2011, http://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201104.pdf.

[44] Fred Barbash, "Toxic Environment" for Sons Accused of Campus Sex Offenses urns Mothers into Militants," *Washington Post*, August 29, 2016, https://www.washingtonpost.com/news/morning-mix/wp/2016/08/29/toxic-environment-for-sons-accused-of-campus-sex-offenses-turns-mothers-to-militants/?utm_campaign=buffer&utm_content=bufferaa012&utm_medium=social&utm_source=facebook.com&utm_term=.1e143b1c9ae6&wpisrc=nl_evening&wpmm=1

[45] United States Department of Education, Office for Civil Rights, Dear Colleague letter, October 26, 2010, http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.

[46] U.S. Department of Justice Civil Rights Division and U.S. Department of Education Office for Civil Rights, Dear Colleague letter, May 13, 2016, http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf. Devlin Barrett, "Obama Administration Issues Guidance on Transgender Bathroom Use in Schools," *Wall Street Journal*, May 13, 2013, http://www.wsj.com/articles/obama-administration-directs-public-schools-on-transgender-bathroom-rights-1463112023.

[47] United States District Court, Northern District of Texas, Wichita Falls Division, Civil Action No. 7:16-cv-00054-O, August 3, 2016, https://www.texasattorneygeneral.gov/files/epress/Harrold_Reply_Brief.080416.pdf. This brief adopted the term "regulatory dark matter," citing the December 2015 edition of this report. Christopher Collins, "States' Attorneys Say Feds Using 'Regulatory Dark Matter' in transgender case," *Times Record News*, August 4, 2016, http://www.timesrecordnews.com/news/politics/states-attorneys-say-feds-using-regulatory-dark-matter-in-transgender-case-3942497b-9172-7c0e-e053-0-389224521.html.

[48] U.S. Department of Health and Human Services and U.S. Department of Education, Policy Statement on Expulstion and Suspension Policies in Early Childhood Settings, http://www.acf.hhs.gov/sites/default/files/ecd/expulsion_suspension_final.pdf.

[49] Hans Bader, "Obama's Central Planning for Preschools Is Overreaching," Competitive Enterprise Institute blog. June 16, 2016, https://cei.org/blog/obamas-central-planning-preschools-overreaching.

- The **General Services Administration** reiterated the Obama Justice and Education Departments" definition of 'sex" interpretation with an August 2016 "clarification" Bulletin on transgender access, declaring that 'the nondiscrimination requirement includes gender identity as a prohibited basis of discrimination under the existing prohibition of sex discrimination for any facility under the jurisdiction, custody, or control of GSA."[50]

Labor Policy

- The **Department of Labor Wage and Hour Division's** blog post and "Administrative Interpretation No. 2015-1" informing the public that many independent contractors may now be classified as employees.[51]

- The **Department of Labor Wage and Hour Division's** "Administrative Interpretation No. 2016-1" asserting a possible redefinition of "joint employment" under the Fair Labor Standards Act on case-by-case basis in contracting situations "to ensure that all responsible employers are aware of their obligations."[52] With this interpretation, the DOL "will hold more employers liable for wage violations against employees they do not directly employ. The enforcement effort will focus on the construction, hospitality, janitorial, staffing agencies, and warehousing and logistics"[53] and potentially "penalize any industry that utilizes contractors and labor suppliers."[54]

- The **Department of Labor's** guidance for Executive Order 13673, "Fair Pay and Safe Workplaces" guidance (and accompanying rule[55]) on prior labor law violation disclosure catalogs "explicit new instructions for Federal contracting officers to consider a contractor's compliance with certain Federal and State labor laws as a part of the determination of contractor 'responsibility' that contracting officers presently

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[50] General Services Administration, Bulletin, "Federal Management Regulation; Nondiscrimination Clarification in the Federal Workplace," August 18, 2016, https://www.federalregister.gov/articles/2016/08/18/2016-19450/federal-management-regulation-nondiscrimination-clarification-in-the-federal-workplace. Dominic Holden, "Bathroom Access a 'Must' for Transgender People in Federal Facilities," BuzzFeed News, August 15, 2016, https://www.buzzfeed.com/dominicholden/bathroom-access-a-must-for-transgender-people-in-federal?utm_term=.mb8dlplBq#.mpRlQDQno.

[51] David Weil, "Employee or Independent Contractor?" U.S. Department of Labor Blog, July 15, 2015, https://blog.dol.gov/2015/07/15/employee-or-independent-contractor/. Weil, "The Application of the Fair Labor Standards Act's 'Suffer or Permit' Standard in the Identification of Employees Who Are Misclassified as Independent Contractors," Administrator's Interpretation No. 2015-1, DOL, Wage and Hour Division, July 15, 2015, http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf.

[52] DOL, Wage and Hour Division, Administrator's Interpretation No. 2016-1, Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act. January 20, 2016, https://www.dol.gov/whd/flsa/Joint_Employment_AI.pdf. For overview and concerns, see Rochelle Spandorf, "Twelve Tips for Licensors to Reduce Joint Employer Risks under Today's Legal Standards—Revisited," *Business Law Today*, American Bar Association, February 2016, http://www.americanbar.org/publications/blt/2016/02/06_spandorf.html.

[53] Trey Kovacs, "Labor Policy Developments to Watch in the New Year," Competitive Enterprise Institute Blog, January 22, 2016, https://cei.org/blog/labor-policy-developments-watch-new-year.

[54] Ibid.

[55] Federal Acquisition Regulation, Fair Pay and Safe Workplaces, RIN 9000-AM81. October 25, 2016, http://hr.cch.com/ELD/2016-19676.pdf.

must undertake before awarding a Federal contract."[56] This effort has been criticized by critics as blacklisting and part of a series of "anti-employer policies."[57]

- An **Occupational Safety and Health Administration** interpretation letter proclaiming that during a workplace inspection, employees of a non-union firm may authorize and be represented by a union representative accompanying OSHA compliance officers. The letter maintained that "there may be times when the presence of an employee representative who is not employed by that employer will allow a more effective inspection."[58]

- Greater use by the **National Labor Relations Board** of memoranda that affect non-union employers.[59]

- A series of **Equal Employment Opportunity Commission** guidance documents on pregnancy discrimination and accommodation in the workplace, credit checks on potential employees, and criminal background checks.[60]

- A September 2016 **U.S. Commission on Civil Rights** 306-page report, *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties*, which features this Chairman's statement:

> The phrases "religious liberty" and "religious freedom" will stand for nothing except hypocrisy so long as they remain code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian supremacy or any form of intolerance. ... Religious liberty was never intended to give one religion dominion over other religions, or a veto power over the civil rights and civil liberties of others. However, today, as in the past, religion is being used as both a weapon and a shield by those seeking to deny others equality. [61]

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[56] DOL, Final Guidance, Guidance for Executive Order 13673, "Fair Pay and Safe Workplaces," August 25, 2016, https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=FEDERAL_REGISTER&p_id=27458.
[57] Mark Pulliam, "A Lawless Labor Agenda," Library of Law and Liberty, November 2, 2016, http://www.libertylawsite.org/2016/11/02/a-lawless-labor-agenda/#more-21492.
[58] DOL, Occupational Safety and Health Administration, February 21, 2013, https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=28604. Roy Maurer, "OSHA: Unions May Represent Nonunion Workplaces during Inspections," Society for Human Resource Management, April 24, 2013, https://www.shrm.org/resourcesandtools/hr-topics/risk-management/pages/osha-unions-represent-nonunion-inspections.aspx. Ben Huggett, "Workplace Policy Institute—OSHA Changes Course: Will Allow outside Representatives, including Union Agents, to Enter Non-Union Worksites During OSHA Inspections," Littler Insight Blog, April 23, 2013, https://www.littler.com/workplace-policy-institute-%E2%80%94-osha-changes-course-will-allow-outside-representatives-including-union.
[59] Sean Higgins, "Comrades in Arms," *Washington Examiner*, May 18, 2015, http://www.washingtonexaminer.com/comrades-in-arms/article/2564545.
[60] National Federation of Independent Business, *The Fourth Branch & Underground Regulations*, September 2015, http://www.nfib.com/pdfs/fourth-branch-underground-regulations-nfib.pdf.
[61] U.S. Commission on Civil Rights, *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties*, September 2016, http://www.newamericancivilrightsproject.org/wp-content/uploads/2016/09/Peaceful-Coexistence-09-07-16-6.pdf.

Health Policy

- **Centers for Disease Control and Prevention** Guidelines to physicians[62] that have become controversial on the part of groups and individuals concerned with pain management and substitution of riskier alternatives.[63]

- A Notice of Intent from the **Drug Enforcement Administration** (DEA) that places the plant kratom on schedule I of the Controlled Substances Act 'to avoid an imminent hazard to the public safety,"[64] to considerable controversy.[65] The DEA has not accepted comments, but a public petition in opposition to the ban has over 100,000 signatures.[66]

Environmental Policy

- The **Environmental Protection Agency's** (EPA's) Clean Water Act interpretive guidance on "Waters of the United States."[67] This directive took the step of soliciting notice and comment per the APA, though with significant controversy over manufactured endorsement.[68] This rule represents an instance in which the House and Senate supported a resolution of disapproval, but the president naturally objected to overturning his own administration's rule.

- The **Securities and Exchange Commission's** interpretive Commission Guidance Regarding Disclosure Related to Climate Change, on disclosing potential disruption from "significant physical effects of climate change" on "a registrant's operations and results," and disclosing international community actions that "can have a material impact on companies that report with the Commission."[69] The guidance observes:

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[62] Deborah Dowell, Tamara M. Haegerich, and Roger Chou,"CDC Guideline for Prescribing Opioids for Chronic Pain—United States," March 18, 2016, Vol. 65, No. RR-1, pp. 1–49, http://dx.doi.org/10.15585/mmwr.rr6501e1.
[63] Josh Bloom, "Have Opioid Restrictions Made Things Better or Worse?" American Council on Science and Health, November 3, 2016, http://acsh.org/news/2016/11/03/have-opioid-restrictions-made-things-better-or-worse-10400.
[64] Drug Enforcement Administration, "Schedules of Controlled Substances: Temporary Placement of Mitragynine and 7-Hydroxymitragynine Into Schedule I," August 31, 2016, https://www.federalregister.gov/documents/2016/08/31/2016-20803/schedules-of-controlled-substances-temporary-placement-of-mitragynine-and-7-hydroxymitragynine-into.
[65] Jacob Sullum, "The DEA's Contrived Kratom Crisis," Reason.com, October 5, 2016, http://reason.com/archives/2016/10/05/the-deas-contrived-kratom-crisis.
[66] Center for Regulatory Effectiveness, "An Open Letter to the Obama White House Staff," September 15, 2016, http://www.thecre.com/forum11/?p=109.
[67] Environmental Protection Agency, "Documents Related to the Clean Water Rule," http://www2.epa.gov/cleanwaterrule/documents-related-clean-water-rule. Daren Bakst, "What You Need to Know about the EPA/Crops Water Rule: It's a Power Grab and an Attack on Property Rights," *Backgrounder* No. 3012, Heritage Foundation, April 29, 2015, "http://www.heritage.org/research/reports/2015/04/what-you-need-to-know-about-the-epacorps-water-rule-its-a-power-grab-and-an-attack-on-property-rights.
[68] William Yeatman, "Understanding the EPA's Power Grab through the "Waters of the U.S. Rule," Competitive Enterprise Institute Blog, June 1, 2015, https://cei.org/blog/understanding-epa%E2%80%99s-power-grab-through-%E2%80%9Cwaters-us-rule%E2%80%9D.
[69] Securities and Exchange Commission, "Commission Guidance Regarding Disclosure Related to Climate Change," February 8, 2010, https://www.sec.gov/rules/interp/2010/33-9106.pdf. John Berlau, "Energy Bill Greens Financial Agencies," Daily Caller, February 5, 2016, http://dailycaller.com/2016/02/05/energy-bill-greens-financial-agencies/.

"Many companies are providing information to their peers and to the public about their carbon footprints and their efforts to reduce them."

- The **U.S. Department of Agriculture's Forest Service's** Notice of Final Directive permanent Ecosystem Restoration policy to replace Interim Directive, Ecological Restoration and Resilience Policy, in Forest Service Manual 2020, providing broad guidance for restoring ecosystems.[70]

- Three **Department of Labor** guidance documents regarding the Process Safety Management standards for hazardous chemicals, which have been highlighted by Sen. James Lankford as bringing a range of manufacturers and retailers within the scope of regulation without the opportunity for public comment. A letter from Sen. Lankford to the Labor Department noted:

  > These three guidance documents are expected to dramatically expand the universe of regulated parties, create extreme logistical and financial burdens on regulated parties, and convert flexible recommended practices into mandatory requirements—all without the opportunity for public comment. We therefore ask that OSHA immediately withdraw these memoranda.[71]

  Subject matter of the three guidance documents concerned engineering practices, retail exemptions, and chemical concentrations subject to Process Safety Management standards.

- The **Environmental Protection Agency** consent decree, in response to automaker Volkswagen's deploying "defeat device" software to circumvent EPA emissions standards for nitrogen oxides,[72] will now review commitments by the company to build electric vehicle charging stations in the United States.[73] Such decrees, penalties aside, have the potential effect of improperly influencing the market trajectory of an entire sector. Noting the penalties, however, CEI's William Yeatman has stressed the capability of this specific consent decree (and those of the future, if allowed to stand) being abused by presidents or the executive branch to circumvent Congress' power of the purse and achieve extra-legislative regulatory ends by extractive fines of even greater magnitude than a president dared ask of Congress. With regard to the Volkswagen settlement specifically, and noting that President Obama had previously sought similar zero-emission vehicle infrastructure investments, Yeatman notes:

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[70] U.S. Department of Agriculture, Forest Service, Ecosystem Restoration Policy (RIN 0596–AC82), *Federal Register*, Vol. 81, No. 81, April 27, 2016. pp. 24785-24793, https://www.gpo.gov/fdsys/pkg/FR-2016-04-27/pdf/2016-09750.pdf.

[71] Office of Sen. James Lankford, "Lankford, Senators Challenge Department of Labor Regulatory Actions," news release, September 29, 2015, https://www.lankford.senate.gov/newsroom/press-releases/lankford-senators-challenge-department-of-labor-regulatory-actions.

[72] EPA, "Volkswagen Light Duty Diesel Vehicle Violations for Model Years 2009-2016," accessed February 9, 2017, https://www.epa.gov/vw.

[73] "EPA asks Volkswagen to make electric cars in U.S.: Welt am Sonntag," Reuters, February 21, 2016. http://www.reuters.com/article/us-volkswagen-emissions-usa-idUSKCN0VU0JA.

> The proposed consent decree would give the government authority over $1.2 billion in zero-emissions vehicle investments, which is four times what the administration unsuccessfully sought from Congress for effectively the same purpose in 2011.
>
> If allowed to stand, the $1.2 billion electric-car money grab would provide a powerful model for future presidents to cut Congress out of the appropriations process. All future presidents would have to do is allocate resources into regulatory enforcement and then pursue settlements whereby the regulated entity "voluntarily" agrees to fund the president's preferred policies.[74]

- The **Council on Environmental Quality's** Revised Draft Guidance for Greenhouse Gas Emissions and Climate Change Impacts, which in effect turns the National Environmental Policy Act into a vehicle for implementing climate policy, particularly through federal land management decisions.[75] The guidance document, which is under seemingly perpetual review, holds that "agencies should consider both the potential effects of a proposed action on climate change, as indicated by its estimated greenhouse gas emissions, and the implications of climate change for the environmental effects of a proposed action," and expanding upon 2010 draft guidance, "applies to all proposed Federal agency actions, including land and resource management actions." Elizabeth Lake on the site Law360 assets that the new draft "appears to push federal agencies to use NEPA to take a more activist stance in reducing GHG emissions":

  > [W]hile courts have held that NEPA is a procedural statute, requiring only a "hard look" at environmental impacts (*NRDC v. Morton*, 458 F.2d 827, 838 (D.C.Cir., 1972)), this CEQ proposed guidance goes well-beyond this doctrine by instructing agencies to use the NEPA process to force the substantive reduction of GHG emissions.[76]

  Meanwhile, a multi-agency body called the U.S. Global Change Research Program recently hosted a 2016 Advisory Committee for the Sustained National Climate Assessment that incudes ideological environmental advocacy groups.[77]

Financial Policy

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[74] Yeatman, "Obama's Electric Car Money Grab," *Wall Street Journal*. November 2, 2016. http://www.wsj.com/articles/obamas-electric-car-money-grab-1478041904.

[75] White House Council on Environmental Quality, Revised Draft Guidance for Greenhouse Gas Emissions and Climate Change Impacts, August 2016, https://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/ghg-guidance.

[76] Elizabeth A. Lake, "No Consensus On CEQ Draft Guidance For NEPA Reviews," Law360, May 22, 2015, http://www.law360.com/articles/658194/no-consensus-on-ceq-draft-guidance-for-nepa-reviews.

[77] U.S. Global Change Research Program, "NOAA Appoints Members to Advisory Committee for the Sustained National Climate Assessment," June 29, 2016, http://www.globalchange.gov/news/noaa-appoints-members-advisory-committee-sustained-national-climate-assessment.

- Guidance from the **Consumer Financial Protection Bureau** in the form of a bulletin on "Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act" that limits the ability of automobile dealers to offer discounts to customers allegedly in the name of credit fairness and eliminating racial bias ("When such disparities exist within an indirect auto lender's portfolio, lenders may be liable under the legal doctrines of both disparate treatment and disparate impact").[78] Given the size of the auto lending marketplace, this is clearly an economically significant measure that at the very least required a rulemaking. Even the CFPB recognized internally that it was overestimating bias.[79] That led to bipartisan passage in the House of Representatives of the Reforming CFPB Indirect Auto Financing Guidance Act (H.R. 1737) to revoke the guidance.[80] The bill would force CFPB "to withdraw the flawed guidance that attempts to eliminate a dealer's ability to discount auto financing for consumers. The bill also requires the minimal safeguards the agency failed to follow, such as public participation and transparency."[81]

- A **Commodity Futures Trading Commission** staff advisory guidance document on international financial transactions between overseas parties "arranged, negotiated or executed" by a U.S.-based individual.[82] The guidance was delayed several times (indicating it perhaps should be a commented-upon rule, instead) and said by Republican commissioners to jeopardize thousands of jobs by potentially sending them offshore.[83]

- A **Federal Reserve** Secure Payments Task Force, which was set up without statutory authority,[84] and sets the stage for a government-run real-time electronic payment network.[85]

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[78] Consumer Financial Protection Bureau, Bulletin 2013-02, March 21, 2013, "Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act," http://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf.

[79] Rachel Witkowski, "CFPB Overestimates Potential Discrimination, Documents Show," *American Banker*, September 17, 2015, http://www.americanbanker.com/news/law-regulation/cfpb-overestimates-potential-discrimination-documents-show-1076742-1.html.

[80] John Irwin, "U.S. House passes bill revoking CFPB auto lending guidance," *Automotive News*, November 18, 2015, http://www.autonews.com/article/20151118/FINANCE_AND_INSURANCE/151119809/u.s.-house-passes-bill-revoking-cfpb-auto-lending-guidance.

[81] National Automobile Dealers Association, "Bipartisan CFPB Transparency Bill Passes House Overwhelmingly," news release, November 18, 2015, https://www.nada.org/CustomTemplates/DetailPressRelease.aspx?id=21474842886.

[82] U.S. Commodity Futures Trading Commission, Division of Swap Dealer and Intermediary Oversight, CFTC Staff Advisory No. 13-69, "Applicability of Transaction-Level Requirements to Activity in the United States," November 13, 2015, http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/13-69.pdf.

[83] J. Christopher Giancarlo, "Now Federal Job-Killers Are Coming After Derivatives," *Wall Street Journal*, November 19, 2014, http://www.wsj.com/articles/j-christopher-giancarlo-now-federal-job-killers-are-coming-after-derivatives-1416442215.

[84] Iain Murray, "Federal Reserve Week: The Fed Takes Over," National Review Online, December 14, 2015, http://www.nationalreview.com/corner/428487/federal-reserve-week-fed-takes-over-payments.

[85] U.S. Federal Reserve, In Pursuit of a Better Payment System website, "Federal Reserve's Secure Payments Task Force Survey Extended," November 8, 2016, https://fedpaymentsimprovement.org/federal-reserves-secure-payments-task-force-identifies-key-priorities-seeks-industry-feedback/.

Economic/Technology Policy

- The **Department of Transportation's Federal Aviation Administration** restrictive June 2016 final rule on drones, "Operation and Certification of Small Unmanned Aircraft Systems," which requires line-of-sight and no night-time operations among much else, ignoring the ability of technological and contractual solutions to address risk, and refusing to stand down to local law enforcement solutions.[86] It also contains declarations from the agency regarding case-by-case waivers, as well as a large quantity of forthcoming guidance, much of which would seem to be economically significant, on issues, including:
  - Industry best practices;
  - Risk assessment;
  - Potential guidance on external load operations;
  - Guidance associated with not dropping objects in ways that damage persons or property;
  - Advisories on training and direction to air traffic control facilities;
  - Preflight checks for safe operation;
  - Vehicle conditions for safe operations; and
  - Guidance "on topics such as aeromedical factors and visual scanning techniques."

- A **Federal Aviation Administration** rule interpretation on drones via a Notice of Policy[87] that temporarily outlawed commercial activity (in violation of the Administrative Procedure Act), before a reversal by the National Transportation Safety Board.[88]

- The **National Highway Traffic Safety Administration**'s Federal Automated Vehicles Policy guidelines "to speed the delivery of an initial regulatory framework and best practices to guide manufacturers and other entities in the safe design, development, testing, and deployment of highly automated vehicles."[89]

- The **National Highway Traffic Safety Administration's** federal "commonsense guidelines" on altering smartphones to create a "Driver Mode" to purportedly "help designers of mobile devices build products that cut down on distraction on the road."[90] Consumer Technology Association president Gary Shapiro responded:

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[86] Department of Transportation, Federal Aviation Administration, Office of the Secretary of Transportation (RIN 2120–AJ60), Operation and Certification of Small Unmanned Aircraft Systems, June 2016, http://www.faa.gov/uas/media/RIN_2120-AJ60_Clean_Signed.pdf. Marc Scribner, "FAA's Long-Delayed Drone Certification and Operations Rule Disappoints," Competitive Enterprise Institute Blog, June 21, 2016, https://cei.org/blog/faas-long-delayed-drone-certification-and-operations-rule-disappoints.

[87] Department of Transportation, Federal Aviation Administration, "Unmanned Aircraft Operations in the National Airspace System," *Federal Register*, Vol. 72, No. 29 (February 13, 2007), http://www.gpo.gov/fdsys/pkg/FR-2007-02-13/html/E7-2402.htm.

[88] Marc Scribner, "Commercial Drones Face Sky-High Regulatory Barriers," Competitive Enterprise Institute Blog, July 11, 2014, https://cei.org/content/commercial-drones-face-sky-high-regulatory-barriers.

[89] National Highway Traffic Safety Administration, Request for Comment on "Federal Automated Vehicles Policy" Docket No. NHTSA–2016–0090, Federal Register, September 23, 2016, pp. 65703-65705, https://www.gpo.gov/fdsys/pkg/FR-2016-09-23/pdf/2016-22993.pdf. Policy guidelines at http://www.nhtsa.gov/AV.

[90] National Highway Traffic Safety Administration, Statement, and Notice of Proposed Visual-Manual NHTSA

> NHTSA's approach to distracted driving is disturbing. Rather than focus on devices which could reduce drunk driving, they have chosen to exceed their actual authority and regulate almost every portable device. … This regulatory overreach could thwart the innovative solutions and technologies that help drivers make safer decisions from ever coming to market.[91]

Shapiro added: "NHTSA doesn't have the authority to dictate the design of smartphone apps and other devices used in cars—its legal jurisdiction begins and ends with motor vehicle equipment."[92]

- The **Federal Trade Commission's** staff report on the "sharing economy," which incorporates public comment and acknowledges technology's role in reducing rationales for regulation, yet nonetheless aims at an FTC role in "ensuring that consumers using these online and app-enabled platforms are adequately protected."[93]

- The United States **Department of Agriculture's Agricultural Marketing Service's** Notice revising the United States Standards for Grades of Canned Baked Beans. Text in the "Product Description" was changed by removing the text: "[T]he product is prepared by washing, soaking, and baking by the application of dry heat in open or loosely covered containers in a closed oven at atmospheric pressure for sufficient prolonged time to produce a typical texture and flavor," and replacing it with: "[T]he product is prepared by heating beans and sauce in a closed or open container for a period of time sufficient to provide texture, flavor, color, and consistency attributes that are typical for this product."[94]

The Trump administration has already rolled back some of these guidances, such as the transgender restroom "guidelines"[95] and the Department of Labor's controversial "Administrator's Interpretations" on franchising and on independent have also been revoked.[96] Dozens of Education Department guidances have now been rescinded.[97] OIRA and the Task

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Driver Distraction Guidelines for Portable and Aftermarket Devices, November 21, 2016, http://www.nhtsa.gov/About-NHTSA/Press-Releases/ci.nhtsa_distraction_guidelines_phase2_11232016.print.

[91] Melanie Zanona, "Feds Want "Driver Mode" for Smart Phones," *The Hill*, November 23, 2016, http://thehill.com/policy/transportation/307357-feds-want-driver-mode-for-smart-phones.

[92] Todd Shields and Alan Levin, "Phonemakers Asked to Alter Devices to Cut Driver Distraction," *Washington Post*, November 27, 2016, http://washpost.bloomberg.com/Story?docId=1376-OH3T4M6JIJV201-0IS1SCG3L3MKIQH4N1SF1TLJTD.

[93] Federal Trade Commission, Press Release, "FTC 'sharing Economy" Report Explores Evolving Internet And App-Based Services," November 17, 2016, https://www.ftc.gov/news-events/press-releases/2016/11/ftc-sharing-economy-report-explores-evolving-internet-app-based.

[94] Agricultural Marketing Service, United States Department of Agriculture, Final Notice, "United States Standards for Grades of Canned Baked Beans," May 9, 2016, https://www.federalregister.gov/documents/2016/05/09/2016-10743/united-states-standards-for-grades-of-canned-baked-beans.

[95] https://www.reuters.com/article/us-usa-trump-lgbt/trump-revokes-obama-guidelines-on-transgender-bathrooms-idUSKBN161243.

[96] http://thehill.com/regulation/business/336733-labor-department-rescinds-obama-era-guidance-on-joint-employers.

[97] https://c.ymcdn.com/sites/copaa.site-ym.com/resource/resmgr/docs/accessible_2017/OSERS_list_of_rescinded_guid.pdf.

Forces should assume more affirmative oversight, particularly since OIRA already does review some indeterminate number of "Notices," albeit via indeterminate standards.[98] Systematic studies of the total quantity of agency guidance have not been performed, but guidance document volume dwarfs that of rulemaking, which is not surprising when no one can even say with authority how many agencies exist.[99] Even back in 1992 *Duke Law Journal* article noted that "Federal Aviation Administration rules are two inches thick while corresponding guidance totals forty feet; similarly, IRS rules consume a foot of space while supporting guidance documents total over twenty feet" (Strauss 1992).

Indeed, "sub rosa" regulation has been an issue for decades. In *Regulation and the Reagan Era*, Robert A Rogowski (1989) was clear:

> *Regulatory bureaucracies are able to accomplish their goals outside the realm of formal rulemaking….An impressive underground regulatory infrastructure thrives on investigations, inquiries, threatened legal actions, and negotiated settlements. … Many of the most questionable regulatory actions are imposed in this way, most of which escape the scrutiny of the public, Congress, and even the regulatory watchdogs in the executive branch.*

One must appreciate that attempts to force more of this informal regulatory dark matter into the notice and comment stream might induce agencies to become even more creative in skirting review, such as with informal provision of information regarding agency expectations (Shapiro 2014), doubtless of the "Nice business you got there, shame if something were to happen to it" variety at times. New constraints could spur other measures by agencies to escape oversight, effectiveness of which could depend "significantly on how easy it is for OIRA to detect avoidance, and for OIRA, the courts, and others to respond" (Mendelson, Nina A. and Wiener 2014). Agencies can also raise the costs of presidential review of what they do, "self-insulating" their decisions with "variations in policymaking form, cost-benefit analysis quality, timing strategies, and institutional coalition-building (Nou 2013)." This seems to be affirmed by agency "resistance"[100]

But on the other hand, how review levels the playing field

Tough centralized review of regulations has been argued to help empower consumers and citizens, relative to the rent-seeking and capture that typically prevails. Without central regulatory review, costs of influencing laws are high since policy formation is dispersed among numerous agencies and lawmakers. Producer groups whose members are often more concentrated (crony types, not infrequently), hold a relative advantage in securing favorable policy since lower organization costs enable them to prevail at the expense of those less favorably positioned. For scattered consumers, political organization costs are higher and tendencies to free-ride on the efforts of others can dominate even when ire is raised, derailing the ability to push back on over-regulation or to even recognize it (The seminal discussion on free-riding and group behavior is Olson 1965). Regulation therefore grows over time because it costs

[98] Crews, Regulatory Dark Matter, 2015. p. 29. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733378
[99] https://cei.org/blog/nobody-knows-how-many-federal-agencies-exist.
[100] http://robertreich.org/post/155456448785.

consumers more to organize and prevent having a dollar taken away than it costs for them to simply accept the loss. Consumers become the put-upon "suppliers" in the equation of "demanders and suppliers of wealth transfers" (McCormick and Tollson 1982).

Centralized regulatory review may come to the "rescue" by helping level the playing field for the usual losers in the rent-seeking game. Theoretically again, centralization of review in one spot can increase the "rate of return" to lobbying for dispersed groups (like consumers) relative to that of concentrated interests because they need influence only one entity rather than many (Miller, Shughart and Tollison 1984). Meanwhile, expected benefits for concentrated groups are likely to be little influenced or even reduced (since they would have taken most of the pie anyway without central review). If that holds, "commissions (i.e., the reviewing entities) that are responsible for regulating several industries are less likely to be captured by a single industry, and thus are more likely to be responsive to the diverse interests of consumers and consumer advocates" (Mueller 1989).

But central review mechanisms can block neither legislators nor presidents who act to circumvent such oversight. To the extent Congress passes onerous laws, requires unnecessarily rapid statutory deadlines for new regulations, prohibits cost analysis of rules, creates loopholes that prevent or enable avoidance of review, or frontally acts to benefit special interests, aggressive regulatory review remains improbable. In short, the Trump advances are vulnerable to a successor.

Policymakers must get better at measuring regulation, too. So let's look where OIRA central review stands now.

Baseline: What the Numbers Say about OIRA's Pre-Trump Central Review of Regulation

The central review process is incomplete. In December 2016, Obama's OMB finally released the *2016 Draft Report to Congress on the Benefits and Costs of Federal Regulations*.[101] The final 2016 report is overdue, and there is as yet no 2017 draft. These annual reports show the results of OMB's reviews of a subset of the thousands of proposed and final rules issued annually by executive agencies (not independent agencies, some of which are highly influential). Notices, guidance documents, memoranda and bulletins get no scrutiny here and, as described, rarely anywhere else. When they draw attention to these reports at all, administrations stress net-benefits of the regulatory enterprise as a whole (Sunstein 2012). A problem with the regulatory mindset is that the benefits we seek to elevate via *regulation*—public health, financial stability, food safety, auto safety, airspace allocation, privacy and cybersecurity—are also *forms of wealth*, and require market disciplines, not just political ones, to flourish. So we contend markets and competitive enterprise make the world not just richer, but fairer, safer and cleaner.[102] Regulation doesn't get all the credit nor even the bulk of it.

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[101] OMB, Office of Information and Regulatory Affairs, *2016 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act*, December 23, 2016, https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/legislative_reports/draft_2016_cost_benefit_report_12_14_2016_2.pdf.

[102] https://cei.org/content/morality-and-virtues-capitalism-and-firm.

In any event, the latest report pegs the annual costs of 129 selected "major" regulations from 2005 to 2015 at between $74 billion and $110 billion (in 2014 dollars).[103] The estimated range for benefits in the new report spanned $269 billion to $872 billion (in 2014 dollars). According to OMB, 21 rules subjected to both benefit and cost analyses during the fiscal year ending September 2015 show added annual costs of $5.5 to $6.9 billion (2014 dollars).[104] The OMB cost–benefit breakdown incorporates only those rules for which agencies have expressed both benefits and costs in quantitative and monetary terms. Several billion dollars more in annual rule costs generally appear in these reports for rules with only cost estimates, however they are not tallied and highlighted by OMB.

Today's narrative maintains that this OMB-reviewed subset of major or "economically significant" executive branch rules (those anticipated to have a $100 million economic impact) account for the bulk of regulatory costs. The OMB (2014, 22) holds that:

> *[T]he benefits and costs of major rules, which have the largest economic effects, account for the majority of the total benefits and costs of all rules subject to OMB review*.

But OMB's breakdowns incorporate benefits and costs of only the few "major" executive agency rules that agencies or OMB have expressed in quantitative, monetary terms.

Only 21 rules in the 2016 Draft had both cost *and* benefit analysis performed, out of 59 executive agency major rules that OMB reviewed. OMB listed another six rules with dollar costs assigned, without accompanying benefit estimates. There were a few hundred non-quantified "significant" rules OMB looked at, and hundreds more it did not review (as noted over 3,000 rules and regulations are finalized each calendar year).

The "subject to OMB review" clause in the italicized quote above is a critical qualifier. Plenty gets left out, like non-major rule impacts, as well as the aforementioned guidance documents, memoranda and other notices. Ominously, independent agencies' thousands of rules get no OMB review, not even the many rules stemming from high-impact laws like the Dodd–Frank Wall Street Reform and Consumer Protection Act. In instances like the independent Consumer Financial Protection Bureau created by Dodd-Frank, the concern goes well beyond lack of regulatory review (Murray 2014): There exists a fundamental lack of accountability as such, either executive or legislative or judicial, since the President cannot remove the director, and since Congress does not fund the self-financing agency. Congress lacks even the necessary "power of the purse" to ensure even an appearance of accountability to voters (Murray 2014).

Twenty-nine other major rules in the 2016 draft report implemented transfer programs; such "budget rules" are officially considered transfers rather than regulations. Paying little regard to

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[103] OMB, *2016 Draft Report*, Table 1-1, "Estimates of the Total Annual Benefits and Costs of Major Federal Rules (For Which Both Benefits and Costs Have Been Estimates) by Agency, October 1, 2005–September 30, 2015 (billions of 2001 or 2014 dollars)," p. 9, https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/legislative_reports/draft_2016_cost_benefit_report_12_14_2016_2.pdf.

[104] OMB, *2016 Draft Report*, Table 1-5, "Estimates, by Agency, of the Total Annual Benefits and Costs of Major Rules: October 1, 2014–September 30, 2015 (billions of 2001 or 2014 dollars)," p. 22.

these may be appropriate in a limited government context, but not when the federal government dominates ever more economic and social activity like retirement and medical insurance.

Over the years, some 10 percent of all rules have been reviewed whether or not costs and benefits enter into the picture. The 2016 draft *Benefits and Costs* report tells us that:

> *From FY 2006 through FY 2015, Federal agencies published 36,289 final rules in the Federal Register. OMB reviewed 2,753 of these final rules under Executive Orders 12866 and 13563. Of these OMB-reviewed rules, 555 are considered major rules, primarily as a result of their anticipated impact on the economy.*

As noted, for FY 2016, OMB reviewed 59 major rules and a few hundred significant ones, 27 of which had a cost estimate. However, again, 3,853 rules were finalized by 60 federal departments, agencies and commissions during the 2016 calendar year.

OMB's once-common recognition that costs "could easily be a factor of ten or more larger than the sum of the costs...reported," (U.S. OMB 2002, 37) was a more helpful stance, since, of several thousand agency rules issued, and the several hundred reviewed annually by OMB, only a handful of executive agency rules (and no independent agency rules) feature cost analysis alone, let alone the cost-benefit analysis that could justify claims of net-benefits for the entire regulatory enterprise.

As a percentage of the annual flow of final rules in the *Federal Register,* the proportion of costed rules averages around 35 percent of the few hundred designated "major"; but the proportion of *all* rules with any cost analysis at all has averaged less than a percent. Benefits, which the federal government declares justifies the modern regulatory state, fare even worse.

These gaps in knowledge of rule costs and the burdens of sub-regulatory guidance show there is much work for Trump's agency Task Forces to do.

How OIRA and the Regulatory Reform Task Forces Can Improve Processes

To the extent ill-founded, overlapping and unclear regulations (and tax policy) dominate, businesses cannot plan, hiring becomes an insupportable risk (businesses will not hire if they know they cannot fire thanks to labor law) and citizens suffer. This is what Trump's executive orders attempt to change. Moreover, policymakers and regulators often fail to recognize that, while businesses want to "create jobs" as a matter of good citizenship, that goodwill does not change the reality that jobs are a cost, a *liability*. If businesses feel punished for hiring, or cannot predict regulations coming their way, it is little wonder that they don't expand, or that business startups recently hit record lows (Reuters 2012). The threat of regulation can induce companies to behave in reactive ways, distorting markets and creating economic inefficiency, compounding stagnation.

President Obama promised to veto (Executive Office of the President 2015) key reform legislation like the Regulatory Accountability Act, the 114th Congress' signature regulatory reform bill that had passed House the second week of the new session in January 2015. The RAA

would have codified some provisions contained in the executive orders discussed so far, making them enforceable, as well as allow formal semi-judicial proceedings for major rules and address guidance documents. A veto was also promised on the House-passed REINS Act (Regulations from the Executive In Need of Scrutiny), which had also passed in both the 112th and 113th Congresses. REINS would require an expedited congressional vote on all major or significant rules before they are effective (Adler 2013 for background). REINS would convert the Congressional Accountability Act "resolution of disapproval" into a positive affirmation. Both RAA and REINS have passed the House in the 115th Congress, and President Trump would presumably sign them. Each awaits Senate action.

There are other important congressional reforms in the "wish list" category. Changing statutory language that induces some agencies to disregard economic concerns in evaluating their regulations (Manheim 2009) is one. Congress needs to broaden REINS to any controversial rule, whether or not tied to a cost estimate that deems it a major rule; and in the era of regulatory dark matter, the requirement for congressional approval should extend to guidance documents and other agency decrees. Trump appears to be maximizing the potential of executive driven regulatory budgeting on the part of individual agencies; but only Congress can compare questionable rules across the board to the benefits that could be gained if the compliance costs went elsewhere, so should explore allocating regulatory cost authority among agencies in a regulatory cost budget that distinguishes between categories like economic, health/safety, environmental regulations, and paperwork (Crews 1998). The incentives the approach creates could advance typical supervisory mechanisms like central review and sunsets, and inspire agencies to "compete" with one another in terms of lives they save or some other regulatory benefit rather than think within their own box. The budgeting concept is neither new nor traditionally partisan. Former Democratic Texas Sen. Lloyd Bentsen, who served as Treasury Secretary in the Clinton Administration, proposed in 1979 an "an annual cap on the compliance costs each agency could impose on the private sector" to "make it possible to coordinate the regulatory and fiscal budgets." Regulatory budgeting was also referenced back in President Jimmy Carter's 1980 *Economic Report of the President*. Today, one can find a survey of recent offerings in the House Budget Committee's September 2016 "Introduction to Regulatory Budgeting" report. Presumably, a comprehensive regulatory budget paralleling the fiscal one to better account for gov'ts presence in economy would require Congress to divide a total budget among agencies roughly in proportion to potential lives saved or other metrics. While agencies could regulate unwisely, stupidly or even with malice, the squandered budgetary allocation could shift to a rival agency that saves more lives, to equalize margins. Yet another potential option for bipartisan, cross-branch, and bicameral cooperation is the aforementioned "regulatory improvement commission" contained in the Regulatory Improvement Act of 2013 (Stemberg 2013). This body would initiate review, similar to the military base closure and realignment commission, of the entire existing regulatory apparatus as distinct from the one-by-one appraisal that characterizes OMB review. The commission would select a bundle of rules for rollback with expedited congressional vote. If it's so difficult to remove rules administratively now, with a president so actively engaged, that only underscores the reality of their unrelieved accumulation for decades under more detached executives. This highlights the role Congress must play in reform.

While making a case for regulatory budgeting, this witness's starting assumption is that, apart from certain payroll-rooted paperwork/compliance burdens, objective costs of each years' thousands of regulations cannot be calculated.[105] If, as Ludwig von Mises proclaimed, "Economic Calculation in the Socialist Commonwealth" is impossible, then impossible too is *regulatory* cost calculation in an *elemental* sense. Cost experienced subjectively or indirectly by someone who's not you, cannot be measured by you. We must instead transact in magnitudes and thresholds and "idiosyncratic guesstimates."[106] Moreover, prospective regulatory budgeters will have to pay increased attention to unmeasured *categories* of intervention and interference, not just discrete rules, propel costs as well. When government steers in some area of practical endeavor while the market merely rows, that creates compounding costs *even if* no "budgetable" future rules are issued, such as antitrust, the freezing up of western lands, the reluctance to move spectrum into the wealth creating disciplines to bridge digital divides, and the delivery of the Internet, drones, and likely soon driverless cars, into century old public-utility models.

The legislative reforms just covered are unlikely to become law with today's slim Republican Senate majority, and even if the Senate had such a majority this witness suspects it may balk at REINS. Certainly, today's policy climate is quite different from the 1990s, when Republicans proposed outright elimination of agencies like the Department of Energy (Competitive Enterprise Institute 1994).

So we find ourselves watching Trump, observing what the executive pen and phone might do to boost OIRA and reduce rather than increase government influence in the economy. We knew from our Constitution's framers and we know now from the modern pen and phone era that, for better or worse, an energetic executive's hands are far from tied. Alexander Hamilton sought a king (Papers of Alexander Hamilton 1962), but settled for vigorously defending "Energy in the Executive." And to be sure, an "energetic" liberalization attitude prevailed in the executive branch during past presidencies and resulted in the creation of the executive branch review and oversight process itself.

We know from reforms in the 1990's that not everyone wants to go to the mat maintaining a regulatory state that harms their constituents. Steps underway by Trump, OIRA, and presumably the agency Task Forces and tweaks from Congress can enable more fundamental legislative reform in a future favorable climate.

Enforce, strengthen and codify existing executive orders on regulation

Culminating in Trump's E.O.s 13771 and 13777, we now have a decades-long series of executive orders meant to address the flow of regulation. Congress should insist that existing executive orders on cost analysis and review be strictly applied, strengthened, and ultimately codified, and further, extended to independent agency rules, guidance documents and other agency proclamations. The new agency Task Forces can lay groundwork for this, and for superior data-gathering about the regulatory enterprise and its effects.

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[105] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2502883.

[106] https://www.newsbusters.org/blogs/nb/clyde-wayne-crews/2016/07/23/washington-post-fact-checker-column-still-denial-over.

Continue regulatory moratoria and arrange revocation of existing rules

Immediately upon entering office, President Obama's chief of staff announced a regulatory freeze as part of a first 100 days initiative (Associated Press 2009). The march of rulemaking wasn't appreciably reduced, but no permanent reduction followed a 90-day moratorium implemented by President George H. W. Bush in the early 1990s either, who had directed agencies to look for rules to waive.[107] Each generated just a few billions in savings (Sunstein 2011). Moreover, many rules implement statutory requirements and are exempt from executive waiver (although with respect to the Patient Protection and Affordable Care Act, waivers applied via bulletin, memo and press release by the Internal Revenue Service (Graham and Broughel 2014)). Trump implemented a moratorium, and went further than predecessors by also incorporating guidance for the first time.[108]

Obama's unilateral waivers notwithstanding, in the normal course of events, getting regulations off the books requires the same laborious public notice and comment procedures of a new rule. "Going back and reviewing stuff is as hard as drafting regulations," said one Environmental Protection Agency representative way back during the Bush effort (Quoted in Davis 1992). This eternally pro-government state of affairs needs to be changed legislatively. It is clearly making it difficult for Trump's administration to roll back Obama-era (or earlier) regulation.[109]

While awaiting congressional reform of the APA that addresses the need for new designations and processes for eliminating old rule, a new effort should build upon the lessons of past moratoria, and lawfully freeze regulation—and guidance—for a lengthier, more thorough audit, publish reports on the data generated, seek public comment on which rules should go and so forth (much as Great Britain sought public comment on its in-out program). Creativity will produce information to support other reforms such as ensuring that for every new rule, one within or outside the agency should be eliminated, the by now familiar status quo "regulatory budget."

Boost Office of Information and Regulatory Affairs resources and free market law and economics staff at agencies

Along with the Regulatory Reform Officer and agency Task Forces, more money and staff could enhance OIRA's review function, or that of some subsequent body (See Dudley 2011 on expanding OIRA resources). Where political circumstances prevent that, the administration and Congress might shift personnel and funds to concentrate on key agencies (or some subset). dditional analytical help can and does come from employees borrowed from federal agencies and departments. The aforementioned moratoria could help the process of regrouping.

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[107] With the Bush moratorium, agencies were being asked to describe what they did badly—a task at odds with self-interest and bureaucratic turf building. Furthermore, Bush's three-month campaign was considerably less time than needed to examine the fruits generated by an intense, thorough audit.

[108] Cass Sunstein, https://www.bloomberg.com/view/articles/2017-01-25/the-fine-print-in-trump-s-regulation-memo.

[109] Susan Dudley, "Trump Wants to Deconstruct the Administrative State. Can He?" *NBC News*, October 16, 2017. https://www.nbcnews.com/think/opinion/trump-wants-deconstruct-administrative-state-can-he-ncna810576.

Alternatively, economists and/or divisions at agencies whose job is benefit and cost assessment and Regulatory Impact Analysis preparation could be moved out of less active agencies. The president or OIRA chief or Congress could give these economists "Bureau of No" marching orders in the spirit of the Task Forces, to look for reasons not to regulate, to challenge conventional RIAs that somehow always find net benefits rather than net costs, and to underscore the role of competitive discipline and other factors that "regulate" economic efficiency and health and safety apart from Washington bureaus. Agency economists, deployed where objectively more useful in blocking the ceaseless regulatory flow, could provide greater assurance that more complete analyses were being carried out even without changes at OIRA.

It must be emphasized that *it is not enough for economists reviewing agency output to focus on Regulatory Impact Analyses*. Only a few get prepared and reviewed. The flow, the rising costs and the limited scrutiny that even major rules get indicates that the ignored costs of "minor" rules and of regulatory dark matter may actually be very large. Recall that non-major rules and independent agency rules make up the regulatory bulk. Economists can get better at concentrating efforts if there is presidential encouragement (and there now is), and bipartisan support, of their role and acknowledgement of their importance.

Continue to systematize review, sunsetting, revision and repeal of regulations

In keeping with the spirit of Trump's executive orders and retrospective reviews that agencies purportedly conduct already,[110] more aggressive periodic rule review by OMB and agencies would be valuable. Congress occasionally considers regulatory sunsetting; the president too could, in pen and phone fashion, require agency-generated regulatory requirements to expire or sunset within a given period of time unless they are re-proposed with public notice and comment.

Without an engaged executive sunsets or rule phase-outs will be disregarded without legislative backup, formal reporting on deadlines, extensions and non-extensions and disclosing ratios of what gets retained and what gets discarded helps quantify whether streamlining or supervision really happens. If the answer turns out to be no, we have automatically generated the record capable of prompting Congress to do so. Criteria by which agencies could routinely evaluate outstanding rules include:

- Which rules can be eliminated or relaxed without becoming bogged down in scientific disputes over risk assessment? Which rules are just silly? Which are paternalistic?
- Are the data that regulated entities are required to report being used at all?
- Does the rule create unfavorable health costs (such as health costs of advertising restrictions on some needed drug)?

Such questions can help isolate burdensome or counterproductive rules. President Obama had encouraged retrospective review with E. O. 13563's call for agencies to develop and execute plans to:

[110] Detailed at https://www.federalregister.gov/blog/learn/regulatory-improvement/retrospective-review-documents.

> *[P]periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome.*

We noted above, however, the barriers to actually eliminating a rule affected Obama and Trump alike (new Task Forces, same old obstacle[111]). Little about aggressively reducing existing regulation appears in OIRA status reports. Agency RIAs and the entire executive branch review process should reflect a higher burden of proof regarding rules' value. Where agency analyses under the various executive orders appear not to justify a rule, OIRA should be more forthright about saying so, and it should challenge non-major rules as well. OIRA could recommend modifications to entire regulatory programs based on plain common sense, regardless of executive orders. OIRA might note costs of presumably beneficial regulations, and compare those benefits to superior advantages available elsewhere. In other words, OIRA has the experience and know-how to create a benefit "yardstick" to objectively critique high cost, low benefit rule, which can help inform the "Transparency Report Card" we will note shortly). President Trump and the agency Task Forces can continue pressing agencies about rule reductions, and demand that they rank regulations and show that their least effective rules are superior to another agency's rules. Findings should be published, and government rolled back from the places it should not be.

Reduce dollar thresholds that trigger Regulatory Impact Analyses and/or OIRA review

Non-major rule costs are typically disregarded since analysis is often not required. Review is accordingly non-existent and burdens ignored. The Federal Communications Commission's open Internet (net neutrality) order was not regarded as significant, but mere "prophylactic," for example (Federal Communications Commission 2011), despite huge economically significant, industry-altering effects.

During the Carter-era regulatory review programs, when the $100 million major-rule threshold originated, there were a "suspiciously large number of regulations…projected to cost $90-95 million" (DeMuth 1980, 21). Costs may have exceeded the threshold but been ignored or understated just enough by agencies to evade scrutiny. Along with reinstating moratoria, devising criteria for a periodic review and stressing executive order-driven review, President Trump (or of course Congress) may also reduce the flow of rules that escape analysis simply by lowering the threshold at which written Regulatory Impact Analyses are asked to be prepared.

The current $100 million threshold translates into written, quantified and reviewed analysis for a handful of rules, as described earlier. More rules would be subject to review simply by lowering the bar to $50 million or $25 million. Doing so will not automatically improve how RIA cost and (especially) benefit tallies are performed, of course. Note also that some agencies may strategically adapt behavior to the likelihood of review, and present major rules larger than truly intended in order to "negotiate" and create an appearance of compromise (DeMuth 1980, 21), but in reality expand their scope and influence. Such behaviors can be confronted; President

[111] https://www.bna.com/new-regulatory-task-n73014470829/ https://www.disabilityscoop.com/2017/10/20/trump-rescinds-special-ed-guidance/24323/.

Reagan's E.O. 12291 permitted the Director of OMB to order rules to be treated as major even when at first blush they do not appear to be, thereby activating the RIA requirement.

Scrutinize all agency decrees and dark matter that affects the public, not just rules

With tens of thousands of agency proclamations annually, it does not suffice for executive agency "significant" or "major" rules to receive OMB review. Nor is it enough any longer to include independent agencies. "Regulatory dark matter" is gaining ground on the readily observable, and such guidance documents get no objective review.

Today, non-legislative rules and proclamations like presidential and agency memos, guidance documents, bulletins and press releases may enact policy directly or indirectly—and even by implied threat (Brito 2014). Interpretations may be articulated by agencies, and regulated parties pressured to comply with no actual formal regulation nor understanding of costs. To address this loophole, former OIRA director John Graham and James Broughel propose options such as reinstating a George W. Bush requirement to prepare analysis for significant guidance documents, explicitly labeling guidance documents as nonbinding, and requiring notice and comment for significant guidance documents (Graham and Broughel 2014). Numerous other reforms should be applied as well.[112]

As a July 2012 U.S. House of Representatives Committee on Oversight and Government Reform report expressed it (2011, 7):

> *Guidance documents, while not legally binding or technically enforceable, are supposed to be issued only to clarify regulations already on the books. However… they are increasingly used to effect policy changes, and they often are as effective as regulations in changing behavior due to the weight agencies and the courts give them. Accordingly, job creators feel forced to comply.*

Governance ought never to have descended to this level. Clearly all potentially significant decrees by agencies need scrutiny and democratic accountability, not just "rules." OIRA does conduct some indeterminate amount of review of "notices." Trump's executive actions apply to "significant guidance," but sub-significant guidance, which swamps significant guidance and rules, gives too much slack to agencies. It is surely the case that agencies will attempt to strategically adapt to new scrutiny (Shapiro 2014). But a highly engaged executive, and ultimately Congress, can definitively address quasi- or semi-regulatory activity.

Require rule publication in the Unified Agenda of Federal Regulations

There are rules, and then there are rules. Agencies are supposed to alert the public to their priorities in the semi-annual "Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions" (the Agenda). It normally appears in the *Federal Register* each fall and, minus the Regulatory Plan, each spring. The Agenda is intended to give researchers a sense of the flow in the regulatory pipeline as it details rules recently completed, plus those anticipated

[112] https://cei.org/sites/default/files/Wayne%20Crews%20-%20Why%20Congress%20Must%20End%20Regulation%20by%20Guidance%20Document.pdf.

within the upcoming 12 months by federal departments, agencies, and commissions. But there is a whopper of a disclaimer, as the *Federal Register* has noted (7 December 2009, 64133):

> *The Regulatory Plan and the Unified Agenda do not create a legal obligation on agencies to adhere to schedules in this publication or to confine their regulatory activities to those regulations that appear within it.*

For the first time, Trump altered this by his E.O. 13771, proclaiming that "Unless otherwise required by law, no regulation shall be issued by an agency if it was not included on the most recent version or update of the published Unified Regulatory Agenda...." Future legislation likewise should direct that agencies *do* confine their regulatory activities to those appearing in the Agenda. OIRA and Task Forces could indicate for rules whether or not the agency had prioritized them before.

Tally federal regulations that accumulate as business sectors grow

The observation that there's no free lunch applies especially to the small businessperson. The "Small Business Anthem," heard on the *Small Business Advocate* radio program, goes in part (SmallBusinessAdvocate.com):

> *Even though you make payroll every Friday,*
> *You don't have a guaranteed paycheck.*
> *You're a small business owner, and you eat what you kill.*

President Trump has issued proclamations with respect to reducing permitting burdens on construction and infrastructure projects. For perspective on the small-business regulatory climate, the nearby list of "Federal Workplace Regulation Affecting Growing Businesses" shows basic, non-sector-specific laws and regulations that affect small businesses as they grow that can provide guidance on Task Force focus. This list, however, assumes nonunion, nongovernment contractor firms with interstate operations and a basic employee benefits package. Only general workforce-related regulation is included: omitted are categories such as environmental and consumer product safety regulations and regulations applying to specific types of businesses, such as mining, farming, trucking, or financial firms. For those enterprises, numerous other laws and regulations would apply (For one industry-specific roundup, see National Association of Automobile Dealers 2014).

Federal Workplace Regulation Affecting Growing Businesses

1 EMPLOYEE

- Fair Labor Standards Act (overtime and minimum wage [27 percent minimum wage increase since 1990])
- Social Security matching and deposits
- Medicare, Federal Insurance Contributions Act (FICA)
- Military Selective Service Act (allowing 90 days leave for reservists, rehiring of discharged veterans)
- Equal Pay Act (no sex discrimination in wages)

- Immigration Reform Act (eligibility that must be documented)
- Federal Unemployment Tax Act (unemployment compensation)
- Employee Retirement Income Security Act (standards for pension and benefit plans)
- Occupational Safety and Health Act
- Polygraph Protection Act

4 EMPLOYEES: ALL THE ABOVE, PLUS

- Immigration Reform Act (no discrimination with regard to national origin, citizenship, or intention to obtain citizenship)

15 EMPLOYEES: ALL THE ABOVE, PLUS

- Civil Rights Act Title VII (no discrimination with regard to race, color, national origin, religion, or sex; pregnancy-related protections; record keeping)
- Americans with Disabilities Act (no discrimination, reasonable accommodations)

20 EMPLOYEES: ALL THE ABOVE, PLUS

- Age Discrimination Act (no discrimination on the basis of age against those 40 and older)
- Older Worker Benefit Protection Act (benefits for older workers to be commensurate with younger workers)
- Consolidation Omnibus Budget Reconciliation Act (COBRA) (continuation of medical benefits for up to 18 months upon termination)

25 EMPLOYEES: ALL THE ABOVE, PLUS

- Health Maintenance Organization Act (HMO option required)
- Veterans' Reemployment Act (reemployment for persons returning from active, reserve, or National Guard duty)

50 EMPLOYEES: ALL THE ABOVE, PLUS

- Family and Medical Leave Act (12 weeks unpaid leave or care for newborn or ill family member)

100 EMPLOYEES: ALL THE ABOVE, PLUS

- Worker Adjustment and Retraining Notification (WARN) Act (60-day written notice of plant closing)—Civil Rights Act (annual EEO-1 form)

By statute, executive order or OIRA and agency Task Force initiative, the federal government should build upon this by revealing how federal regulations (along with laws) and guidance now accumulate in specific sectors. This will give some sense of impacts in particular industries and economic subdivisions, which can help guide reforms and liberalization.

Compile better annual Regulatory Transparency Reporting

> *Measure what is measurable, and make measurable what is not so.*
>
> —Quote frequently attributed to Galileo that, alas, probably was not his.

Improving annual public disclosure for regulatory and guidance output and trends is one realm in which the president (and OIRA and Task Forces) can undertake unilateral initiatives without statutory regulatory reform or congressionally stipulated transparency reporting.

An annual Regulatory Transparency Report Card detailing agency regulatory output in digest form, incorporating the current year's data plus historical tables could be encapsulated and published as a chapter in the Federal Budget, the *Economic Report of the President*, the OMB *Benefits and Costs* report, the Unified Agenda or some other format. Before 1994, information such as numbers of proposed and final rules, and major and minor rules was collected and published in the annual *Regulatory Program of the United States Government*, in an appendix called "Annual Report on Executive Order 12291." This report identified what actions OMB took on proposed and final rules it reviewed per that order, and the preceding 10 years' data, with information on specific regulations that were sent back to agencies for reconsideration. The *Regulatory Program* ceased when the Clinton administration's E.O. 12866 replaced E.O. 12291 with the aforementioned reaffirmation of agency primacy.

Significant but valuable *non-cost* information should also be published. Agencies and OMB could assemble quantitative and non-quantitative data into charts and historical tables, enabling cross-agency comparisons. Presenting ratios of rules and guidance with, *and without*, benefit calculations helps reveal whether or not the regulatory enterprise can be deemed as doing the good it claims. The following is a sample of what could be officially summarized and published annually by program, agency and grand total, and with historical tables (Crews, "The Other National Debt Crisis," 2011).

Annual Regulatory Transparency Report Card:

Recommended Official Summary Data by Program, Agency & Grand Total

(with Five-Year Historical Tables)

- Tallies of economically significant, major, and non-major rules and guidance by department, agency, and commission.
- Numbers and percentages of rules and guidance impacting small business.
- Depictions of sectoral regulatory accumulation.
- 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 *lacking* cost estimates, with explanations for absence of cost estimates.
- *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 rule-making agencies.
- There needs to be far greater distinction between *additive* and *subtractive* rules and dark matter; Rules that are deregulatory rather than regulatory need to be better identified.
- Allegedly "non-regulatory" rules that affect internal agency procedures alone (important as federal government expansion into new realms of activity displaces the private sector).
- Number of rules new to the Unified Agenda; number that are carry-overs 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.

Some elements shown here were incorporated H.R. 2804, the ALERRT Act (Achieving Less Excess in Regulation and Requiring Transparency), which passed the House in 2014 (but not the Senate), and before that into S. 3572, the "Restoring Tax and Regulatory Certainty to Small Businesses Act" introduced by Sen. Olympia Snowe (R-Maine) in the 112th Congress, but never passed.

Regular highlights would reaffirm the importance of disclosure and in the process, expose to what extent Congress itself causes regulatory excess via over-delegation and the imposition of statutory deadlines that can undermine regulatory analysis. OIRA and Task Force disclosure will help shift the narrative back to congressional accountability for what agencies do.

Designate multiple classes of major rules and guidance in transparency reporting

Above, we recommended lowering cost thresholds for regulatory review. For decades, regulations have been loosely divided into those that are major or economically significant (over $100 million in annual effects) and those that are not, but this gives only the roughest idea of minimum costs. For example, given the definition an economically significant rule, we can infer that the 200 major rules in the 2014 year-end *Unified Agenda*, when fully implemented, will have economic impacts of around $20 billion annually, minus any rules among them that reduce costs.

A Regulatory Transparency Report like that described above should obviously include the number of economically significant (or major) rules, but this designation could be expanded to disclose more than a minimum level of costs. OMB could develop guidelines separting economically significant rules into categories representing increasing costs and present them in the Regulatory Transparency Report. Here is one suggested breakdown:

One Proposed Breakdown of "Economically Significant" Rules	
Category 1	> $100 million, <$500 million
Category 2	> $500 million, < $1 billion
Category 3	> $1 billion
Category 4	> $5 billion
Category 5	>$10 billion

This particular itemization had been incorporated in the "Restoring Tax and Regulatory Certainty to Small Businesses Act" (S. 3572) and the ALERRT Act (H.R. 2804), but Trump, OIRA and agency Task Forces could facilitate such reporting. For example, some cost estimates of the EPA

New Source Performance Standards rule figure about $738 million annually (U.S. EPA 2001). Appreciating when EPA is imposing "Category 2" rules and the like would be more helpful shorthand than knowing about economically significance. This could be especially useful as Congress explores formal hearing requirements for mega rules, such as the high-impact ($1 billion-plus) rules in the 115th Congress's Regulatory Accountability Act.

Report separately on economic, health/safety, environmental regulations and paperwork

While economic regulation had lost favor in the 1980s relative to environmental or health and safety rules, it has resurged in banking, energy, telecommunications and other realms. These sectors often are the domain of independent agencies exempt from OIRA review.

This is peculiar since the origins of executive branch regulatory review were driven partly by recognition that economic regulation worked against the public interest. Such views may have peaked at OMB's onetime willingness to adopt the premise that some economic regulation "produces negligible benefits (U.S. OMB 1997)." Economic regulations cannot automatically be presumed rooted in the public interest. Whether the proposition is "fine-tuning" of the macro economy, direct government management of an specific industry's output and prices (such as agricultural quotas or electricity generation prices) or entry into an industry (such as trucking), coercive economic interference lacks legitimacy. The reality of governmental failure and acknowledgement of cronyism in economic concerns is more evolved now, as is recognition of the impossibility of central economic planning and calculation (von Mises 1920).

However today, an engaged executive's and even Congress' ability to address economic regulation as opposed to health and safety rules is undermined by the lack of oversight of independent agency rules that increasingly govern. Since the role of health and safety regulation differ so from economic regulation, separate presentation everywhere—in the *Report to Congress*, in any Regulatory Transparency Report or elsewhere—is important from the standpoint of comparing relative merits of regulations. Conceptual differences render meaningless any comparison of, for example, purported economic benefits from an energy regulation with lives saved by a safety regulation, so such categories of costs should be presented and analyzed separately in 2-for-1 processes and in cost budgeting. With executive buy-in, to the extent that analyses such as the OIRA *Report to Congress* and other investigations help in delegitimizing economic regulation, such realms can be freed from government purview altogether (a utopian thought, as aggressions as recent as net neutrality attest). But with that new rationality we would leave Congress, OIRA and Task Forces with the "lesser" task of documenting and controlling costs of environmental, health, and safety regulations. Then where health and safety rules reveal that they too reflect private interests or are publicly detrimental, a motivated executive can urge their rollback as well.

Improve "transfer" and "fiscal budget" regulatory cost assessments

Paralleling the distinction between "economic" and "social" regulation, process rulings like leasing requirements for federal lands and revenue collection standards and service-oriented administrative paperwork—such as that for business loans, passports and obtaining government

benefits already appear separately in OIRA reports, and in some cases the federal *Information Collection Budget*.

Certain of these administrative costs represent not regulation as such, but "services" secured from government by the public, and do not concern us here. But that does not make it appropriate for OIRA and Task Forces not to actively disclose and question them, or to fail to anticipate their entailing future costs or having displacement or deadweight effects. Similarly, it is important not to lump service-related paperwork in the same category with the tax compliance burden and other involuntary, non-service-related process costs such as workplace reporting requirements. All these are hardly minimal and should be tallied and reduced where possible.

OIRA has begun recognizing that these transfers "may impose real costs on society," may "cause people to change behavior" and result in "deadweight losses"; OIRA expressed that it "will consider incorporating any such (cost-benefit) estimates into future Reports" (U.S. OMB 2013, 22). More needs to be done by the agency Task Forces to analyze the costs of these transfers and their impacts on individual rights and economic growth.

As more of the economy—such as health care—succumbs to federal supervision, there is less inclination for subsequent generations of Americans to recognize what government does as regulation or interference; it just "is." This becomes more of a concern as dark matter expands; addressing it all is an increasingly important task of the executive branch and Congress.

Acknowledge and minimize indirect costs of regulations

In its *Report to Congress*, OIRA allows that "many regulations affect economic growth indirectly through their effects on intermediate factors" (U.S. OMB 2013, 48), but is non-committal on whether the net effects are positive or negative. If indirect costs of regulation are too difficult or policymakers themselves to compute, then government cannot credibly argue that compliance is feasible or fair or affordable. But objectively assessing regulatory cost is, of course, impossible.

Compliance-focused regulatory cost estimates may inadvertently or purposely omit indirect costs. That uncertainty requires that indirect costs be guarded against and minimized, since some regulations' indirect costs could even exceed their direct costs, and since OIRA itself occasionally has acknowledged that regulatory costs could be many times the amount it presents annually attaching to major rules (U.S. OMB 2002, 37).

Fairness and accountability in government require acknowledging indirect costs. Without addressing indirect effects, officials will systematically underestimate and downplay regulatory impacts and thus overregulate. Taxing and spending are substitutes for regulation, and if regulation is perceived as an artificially cheap alternative means of achieving governmental ends, policymakers will exploit it and it will increase. Allowing regulators to disregard entire categories of indirect costs (such as bans or disapprovals of pipelines or antitrust regulation or product bans) could inspire more regulations of that very type. Imagine acknowledging only direct costs of regulations—such as the engineering costs of controlling an emission, while ignoring outright input or product bans as indirect costs. Under such scenarios, many regulations

could be expected to feature bans or disapprovals so that regulators could appear to avoid imposing high regulatory costs.

Recognizing and levelheadedly incorporating indirect cost presents serious challenges, but if the executive branch and Congress emphasize cost over net-benefit assessments, manpower and resources are freed to better assess indirect regulatory costs.

Dealing with indirect costs, and all costs for that matter, will ultimately require congressional approval of final agency rules, because complete cost assessments and quantification are impossible for third parties who are mere mortals (Buchanan 1969, 42-43), no matter which government agency they work for. This points to an important principle; the aim of annual regulatory accounting cannot be not solely accuracy, but to make Congress more accountable to voters for regulatory impacts, and to induce agencies to minimize indirect costs by ensuring that they "compete" before Congress for the "right" to regulate. Even imperfect recognition of indirect cost magnitudes by OIRA can provide a basis for allocating scarce resources in loose correspondence with where a (perhaps one day) more accountable Congress believes benefits to lie.

Continue to Formalize "Do Not Regulate" reporting and offices

The agency Regulatory Reform Task Forces represent the most explicit recognition that the tendency of bureaucracy is to expand, and that a counterweight is needs. Beyond internal agency operations, some have called for an independent congressional office of regulatory analysis resembling the Congressional Budget Office (U.S. House of Representatives Report 105-441, 1998). This would go beyond more resources for OIRA, the Task Forces or agency economists. There are scenarios in which the independent office could be a good idea, such as if the entity were formally chartered with an anti-regulatory "bias" (as the agency Task Forces are) to offset the pro-regulatory bias prevailing in the remainder of the federal government. Some formal entity could highlight the desirability of market-oriented alternatives over command options for every regulation, and continually present the case for eliminating existing rules and create plans for elimination of regulatory agencies themselves as years pass. A much stronger version of OIRA or a body that replaces it in conjunction with agency law and economics personnel of laissez-faire persuasion, can bolster this "Bureau of No" role that the Task Forces have kickstarted.

Conclusion: OIRA, Regulatory Reform Task Forces and regulatory liberalization

The modern conceit is that untethered regulation and rulemaking always work. They do not; bureaucracy and administrative state overreach may not only impede economic efficiency but also undermine health, safety and environmental progress. Healthy government requires recognizing downsides to coercive intervention; it requires vigilant legislative and executive institutions and mindsets that seek reasons *not* to add yet another rule or decree to the existing tens of thousands. Meanwhile the public has a right to know the ways federal agencies have harmed and harm that which they oversee, and how those negatives may propagate beyond the agency throughout the economy and society.

It is no longer enough just to cut federal spending and balance the budget. The Trump executive orders and the agency Task Forces reflect the need to offset the march of bureaucracy and regulation. This testimony has proposed ideas for reinforcing them, particularly since the current reality assures that the Constitution isn't coming to the rescue in the immediate term. However, bipartisan momentum for economic and regulatory reform can emerge unexpectedly. If it does not, with conventional options to restore liberties and elevate the rule of law exhausted or ignored, the states themselves may address federal government expansion by taking rightful powers back from Congress and the executive branch. The Constitution's Article V provides for the states to call a convention to amend the Constitution and restore balance of power, and several states are pursuing that option (For example Brown 2014). One proposal with respect to over-regulation specifically is the "Regulation Freedom Amendment" that would stipulate that a quarter of the members of either the House or the Senate could require Congress to vote on a significant federal regulation, very much like the REINS Act legislation would do (Buhler 2013).

The regulatory process has been in need of regulation, and for the first time in a long while the executive and legislative branches are in agreement on congressional reassertion of authority over the making of law and regulation.[113] While it would be preferable for Congress engage by implementing measures such as the Regulatory Accountability Act, Regulatory Improvement Act, or the REINS Act that limit agency authority, those await political alignment. Many recommendations presented here reinforce appropriate executive action by the same pens and phones once used to expand the state. The goal is assurance that, if an expensive or burdensome regulation is enacted, elected representatives are on record for or against it, accountable to voters.

[113] http://thefederalist.com/2017/10/17/trumps-executive-moves-have-strengthened-checks-and-balances/.

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Endnotes