Regulatory reform and government efficiency

1

Regulations raise the cost of groceries, energy, and housing at a time when families are still smarting from the post-pandemic inflation. Regulations make it harder to start new businesses, build new infrastructure, and deliver medicine to sick people. They cost the average household more than $15,000 per year, and the burdens are still growing. The time for reform is now.

Nearly all of the Competitive Enterprise Institute's (CEI) work involves regulation in one way or another. We have specialists in tech policy, labor policy, energy and environment, and several other regulatory areas. These beginning chapters are about the regulatory system itself, rather than individual regulations.

One of CEI's policy mantras is that institutions matter. Think of institutions as the rules of the game, rather than the game itself. In regulatory policy, institutions are things such as the government's separation of powers, how the rulemaking process is structured, procedures for cost-benefit analysis and public comments, and procedures for unwinding rules that are obsolete or do not work as intended.

In short: If you want a better game, adopt better rules.

This chapter briefly maps the extent of federal regulation, outlines a few principles for institution-level reform, then looks at recent legislation that would improve the rules of the regulatory game.

You may be wondering: Exactly how much regulation is there?

The federal government has a spending budget that shows the public how much each department is spending, and on what, and how much tax revenue the government raises. It has no equivalent for regulations. This makes it nearly impossible to give definitive estimates on federal regulatory burdens.

The Competitive Enterprise Institute's Wayne Crews fills this gap with his annual *Ten Thousand Commandments* report, which collects disparate government data into one document. The government should be doing this, by law. Until it does, *Ten Thousand Commandments* will have to suffice.

All federal regulations are collected in a Code of Federal Regulations. The most recent print edition contains 243 volumes and roughly 188,000 pages. These pages contain about 1.1 million individual regulatory restrictions.

That is just the stock of existing regulations. There is also a constant flow of more than 3,000 new regulations every year. The twice-annual Unified Agenda, which lists planned regulations from every agency, typically contains more than 3,500 regulations.

The daily Federal Register publishes all proposed and final regulations from every agency. It also contains presidential documents, agency notices, and other documents that often serve as informal rulemakings. These are known as "regulatory dark matter" for their lack of transparency. The Federal Register topped 100,000 pages for the first time in 2024, breaking 2016's record of 96,994 pages.

Total compliance costs for federal regulations is at least $2.1 trillion per year, or more than $15,000 per household. That is nearly 8 percent of GDP. Paperwork burdens for just the year 2022 were more than 10 billion hours, equivalent to nearly 15,000 human lifetimes.

Now that we know the rough extent of federal regulations, how to reform them becomes terribly important. Here are four principles for regulatory reform that lasts:

1. Institutions matter. Getting rid of specific regulations is not enough. Congress must also reform the systems that create those regulations.
2. Congress needs to be involved in reform. Use legislation, not just Executive Orders.
3. Congress should require agencies to be more transparent about the regulations they issue and their cost.
4. Remember that regulations are made and enforced by the real-world government we have, not the ideal government we want.

Let's look at each of these in turn.

Institutions matter: It is not enough to get rid of specific rules that are harmful, redundant, or do not work as intended. Reformers must also reform the institutions that generate bad regulations in the first place.

Current regulatory institutions make it too easy to pass new regulations, and too difficult to get rid of old ones. It lacks transparency, and the executive branch has too much power to enact regulations that Congress never intended. For regulatory reform to last longer than a change of power, reformers must enact system-level reforms. Otherwise, repealed regulations will just come back after a few years.

Congressional involvement matters: Congress must be more involved in rulemaking, and the executive branch should have a smaller role. There are two reasons for this. One is that the Constitution states, "All legislative Powers herein granted shall be vested in a Congress of the United States." It gives none to the executive.

In 2023, Congress passed 68 bills, and agencies issued 3,018 new regulations. The difference is a factor of 44. Executive branch agencies have passed major new regulations on issues ranging from net neutrality to non-compete clauses that Congress never approved, or in the case of cap-and-trade rules for emissions, policies that Congress specifically voted against. While such rules are often overturned in court, it takes years, and success is not guaranteed.

The second reason is permanence. Donald Trump issued a series of Executive Orders early in his term enacting several institution-level regulatory reforms. These included a one-in, two-out rule for new regulations; a centralized public portal for publishing regulatory dark matter such as guidance documents.

Since Congress never passed legislation to codify these Executive Orders, Joe Biden repealed them when he took office, and the reforms went away. Trump was distracted by other matters, and Congress was distracted with him. Republicans then lost their congressional majority in the 2018 midterm elections, and with it went their chance to enact permanent legislation. Executive Orders are not enough. Congress must pass legislation which will outlast a change in power.

Transparency matters: Agencies need to disclose more and higher-quality information about their regulatory burdens. Transparency declined during the Biden administration. However, since Biden repeated Trump's mistake of using Executive Orders instead of congressional legislation, reformers can easily restore lost transparency.

Things were already bad. Fewer than 1 percent of rules receive full cost-benefit analysis. Then the Biden administration changed cost-benefit procedures. The Office of Information and Regulatory Affairs (OIRA) inside the Office of Management (OMB) was traditionally charged with providing objective cost-benefit information that agencies could use in decision-making.

Biden's Executive Order 14094 changed OIRA's job to justifying the regulations agencies send to it. Analysts were ordered to become cheerleaders. New discount rate rules resulted in automatically lower long-term cost estimates. Biden also doubled the cost threshold from $100 million to $200 million for larger regulations that receive additional scrutiny, so that fewer rules receive that scrutiny. These rules were also renamed from the descriptive "economically significant" to the anodyne "Section 3(f)(1)." Congress should pass legislation restoring that lost transparency.

Enforcement matters: Regulations are made and enforced by the government we have, not the government we want. Many well-intentioned policies fall prey to bureaucratic bungling, regulatory capture (whereby businesses game the regulatory process to hobble competitors), or both. It is important to remember what a real-world government is capable of doing—and what it cannot do.

A cardinal rule of politics is not to give yourself powers you would not want your opponent to have. In a democracy such as ours, power regularly changes hands. This is an important lesson for Congress to keep in mind as it passes legislation to address the problems of the day.

Moreover, a federal response is not always appropriate. America's federal system has multiple levels of government, with different strengths and weaknesses. That flexibility is crucial for allowing public policy to respond to a rapidly unfolding crisis, especially in a country as large and diverse as the United States. Some policy matters are truly nationwide, and deserve a federal response. Other policy areas are better addressed by state and local governments that are closer to the problem.

Governance does not always require government. Markets need rules and standards to thrive. Sometimes these come from government, and sometimes they don't. People capable of coming up with a surprising amount of regulatory solutions on their own. Private governance standards can evolve more quickly to meet changing times than can distant government regulators. Bottom-up often outperforms top-down.

Still, there are a number of regulatory reform measures that would do much to fix the issue of overregulation. In CEI's estimation, Congress should:

- Pass the REINS Act;
- Pass the GOOD Act; and
- Pass the LIBERATE ACT.

REINS Act: The separation of powers is tilted too far towards the executive branch. The Regulations from the Executive In Need of Scrutiny (REINS) Act would restore some balance by requiring congressional votes on all agency rules costing more than $100 million per year. This would enable Congress to ensure that executive branch regulations are in line with congressional intent. The REINS Act has already passed the House in multiple congressional sessions.

A new version of REINS, introduced late in the 118th Congress by Sen. Rand Paul (R-KY) and Rep. Kat Cammack (R-FL), is stronger than previous version. It includes guidance documents as well as traditional regulations; exempts deregulatory measures from REINS votes; allows individuals to sue agencies if their rules dodge a required REINS vote; and it allows individuals to "argue that the average

person would not have known their actions violated federal law if the statue did not clearly state it."

This gives Congress an incentive to write more detailed legislation that does not give agencies a blank check. It also gives agencies an incentive to make sure their regulations fit their authorizing legislation.

GOOD Act: The Guidance Out Of Darkness (GOOD) Act, sponsored by Rep. Bob Good (R-VA) and Sen. Ron Johnson (R-WI), brings transparency to regulatory dark matter. Agencies issue guidance documents to clarify ambiguities and fill gaps in their regulations. Guidance documents are not technically binding, but courts have traditionally treated them that way. This gives agencies a way to issue new regulations without going through the required notice-and-comment rulemaking process that has been in place since 1946.

The GOOD Act would create a central public portal where all agencies are required to publish all guidance documents. Guidance that does not make it into the portal by a certain deadline becomes null and void. A Trump Executive Order similar to the GOOD Act uncovered more than 100,000 guidance documents.

Although Joe Biden nullified Trump's GOOD Act-style Executive Order, he did say he would sign the GOOD Act if it crossed his desk. The bill also passed its committee with unanimous bipartisan support, which means the GOOD Act has good political prospects, regardless of which party is in power. This should make it a priority for reformers.

LIBERATE Act: This bill would help repeal old and obsolete regulations. Its full title is the Locating the Inefficiencies of Bureaucratic Edicts to Reform and Transform the Economy Act. Sen. Mike Lee (R-UT) introduced it in the 118th Congress as S. 4920. The idea is similar to the Base Realignment and Closure (BRAC) Commissions of the 1990s.

When the Cold War ended, the military wanted to close unneeded military bases. But no member of Congress would vote to close a base in their district and risk political blowback. The solution was to outsource the tough decisions to an independent commission.

It examined every base, determined which ones were no longer needed, and sent a recommendation package to Congress. It was an up-or-down deal, with no amendments allowed, to prevent it from being watered down. Congress was also required to hold a vote within a certain amount of time, so the commission's work would not die through neglect.

The BRAC model worked. Multiple rounds saved taxpayers billions of dollars.

Today, the same model can work for regulations. A regulatory BRAC-style Commission should annually comb portions of the 188,000-page Code of Federal Regulations for obsolete, harmful, or redundant regulations, and send a repeal package to Congress for a time-limited up-or-down vote.

The LIBERATE Act is one of several ways to structure a regulatory BRAC Commission, each with its pros and cons. Other methods have been introduced in recent years by Rep. Virginia Foxx (R-NC), Rep. Josh Gottheimer (D-NJ), Sen. Rick Scott (R-FL), and others. What is important is that Congress pass some version of the idea.

Neither Congress nor agencies are willing to trim unneeded regulations on their own, even though most of them agree on the need to do so. A commission can solve the collective action problem and stimulate the economy without increasing spending.

End the spending-regulation continuum

While administrative state reforms are crucial, they are not enough. Most aspects of American life, from the structure of industry to the homes we live in, the food we eat, and the health choices we make, are not public policy matters – and certainly not federal ones! Along with restoring the non-delegation doctrine to safeguard this separation, the doctrine of strictly limited enumerated powers must also be remembered.

An alarming trend in recent years has seen spending and regulation united as one, sometimes without the consent of our representatives. This is most clear in implementation of the CHIPS and Science Act where the Department of Commerce added "strings" to federal funding after passage of the bill, without Congress ever weighing in. Commerce Secretary Gina Raimondo added stipulations saying any companies requesting federal dollars for semiconductor business must then offer paid parental leave.

The CHIPS and Science Act and other Biden-era inflation, infrastructure, and tech laws, for instance, were profoundly regulatory in nature even before administrators pick up the implementation baton. Unfortunately, restoring Article I lawmaking power to Congress offers limited utility when legislators in both parties recognize few constraints on their own power. The fusion of what should be plainly seen as unconstitutional hyper-spending with hyper-regulation illustrates that Congress's disregard for enumerated powers, on top of over-delegation to agencies, poses a huge challenge to the liberty of Americans.

To build on things like the REINS Act, GOOD Act, and LIBERATE Act, Congress should:

- Terminate several departments and agencies;
- Anticipate post-*Chevron* strategic mobilization;
- Ensure current regulatory reform laws are followed; and
- Enact an Abuse of Crisis Prevention Act.

Terminate: During the 119th Congress, we will undoubtedly hear much talk about downsizing bureaucracy. Congress should follow that by taking the bold step of abolishing entire federal departments and agencies, returning governance to states, localities, and civil society. Growth of the federal bureaucracy has saddled the nation with a staggering $35 trillion debt and left constitutional norms behind.

The time for merely tweaking a few regulations has passed and most arguments for better regulations are misguided. For example, many on the center-right still treats antitrust intervention as a legitimate pursuit so long as the coercion advances nebulous "consumer welfare." In reality, antitrust deeply undermines consumer welfare. It disrupts not merely firms but entire industries and the broader economy's natural evolution and efficiencies.

Across the bureaucracies, legislators should prioritize the repeal of entire statutes that birthed the administrative state in the first place, privatize, and ultimately restore federalism.

Anticipate: The Supreme Court's June 28, 2024, decision *Loper Bright Enterprises v. Raimondo* decision ended the Chevron deference doctrine established in 1984's *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* ruling. Under Chevron, courts deferred to federal agencies' reasonable interpretations of ambiguous statutes.

However, the majority opinion in *Loper* concluded that this deference undermined the separation of powers, expanding executive authority at the expense of judicial oversight. Regulatory advocates will mobilize quickly and they have much to work with. Indeed, most of the leverageable administrative apparatus was erected long before *Chevron*, and remains intact.

The problem, especially post-COVID, is less about agency misinterpretation of ambiguous statutes, as in *Loper,* and more about agencies' implementation of unambiguous things that Congress actually passed. These include bills to ban things that Congress has no business banning, such as TikTok; subsidies and grants to seduce the private sector; and the federal government throwing its procurement and contracting weight around.

The 119th Congress must not overlook the fact that, *Loper* notwithstanding, Congress has already given progressives the tools they need to cherry-pick among statutes and authorize nearly anything.

A glaring example is student loan forgiveness debacle. The Biden administration jumped from a COVID emergency rationale to a dubious exploitation of the 2002 HEROES (Higher Education Relief Opportunities for Students) Act.

Another way for Congress shore up *Loper* would be requiring formal rulemakings for statutes with significant regulatory implications. While the Section 553(c) default in the Administrative Procedure Act is notice-and-comment rulemaking, Congress has it in its power to raise that bar.

Ensure: The 119th Congress should appreciate that several laws aimed at improving regulatory transparency and oversight are already on the books but are routinely ignored. It is time to rectify this neglect. These laws include the Regulatory Right-to-Know Act's requirements for annual and aggregate cost estimates; the Congressional Review Act's (CRA) mandate that rules be reported to the Government Accountability Office and both houses of Congress; the Paperwork Reduction Act's annual paperwork burden accounting; the routinely ignored Regulatory Flexibility Act, and more. Even the inventory of federal programs required by the Government Performance and Results Act (GPRA) remains unfulfilled.

Enacting new reform laws is futile if those already in place continue to be disregarded. Congress should insist on compliance and apply penalties if that doesn't happen.

Enact: The exploitation of crises in the twenty-first century—such as 9/11, the 2008 financial meltdown, and COVID—lies at the root of significant explosions in spending and regulation. Legislation which we would call the Abuse of Crisis Prevention Act is urgently needed to prevent the next inevitable economic shock from triggering another multi-trillion-dollar, hyper-regulatory surge.

A map of such legislation might look something like this: Title I would focus on dismantling the administrative state through regulatory reforms detailed above; Title II would commit policymakers to prioritizing the promotion of intergenerational wealth over the accrual of intergenerational federal debt; Title III would encourage businesses and corporations to shore themselves up against "rainy day" events, thus reducing many bad reactions to crises; Title IV would limit abuse of emergency declarations and advance comprehensive insurance market reforms that privatize preparedness; Title V would strengthen state and local sovereignty, empowering them in ways that transcend the unfulfilled promises of conventional federalism. Lastly, Title VI would have sanctions for political exploitation of crises, so that regulators and officials would think twice before going there.

Conclusion

Conventional regulatory reforms are essential. Congress must also go beyond merely combating bureaucracy by confronting its own interventionist and paternalistic tendencies. It is popular for reformers to insist that Congress must reclaim its lawmaking authority from the executive branch, and they have a point. However, Congress's own disregard of enumerated powers has caused tremendous problems as well. By committing to thoroughgoing reform of the bureaucracy and also to checking itself, Congress can begin to turn around the problems caused by and out-of-control regulatory state.

Experts: Clyde Wayne Crews Jr., Ryan Young

For further reading:

Clyde Wayne Crews Jr., Ten Thousand Commandments: Sizing up the Federal Government's New Rules and Regulations: 2024 Edition, Competitive Enterprise Institute, 2024, https://cei.org/studies/ten-thousand-commandments-2024/.

Clyde Wayne Crews Jr., The Case for Letting Crises Go to Waste: How an 'Abuse-of-Crisis Prevention Act Can Help Rein in Runaway Government Growth, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4151917.

Clyde Wayne Crews Jr., Congress Must Prevent a Progressive OMB Rewrite of 'Circular A-4' Guidance on Preparation of Regulatory Impact Analyses, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4434081.

Ryan Young, "How to Make Sure Reformed #NeverNeeded Regulations Stay that Way," WebMemo No. 57, Competitive Enterprise Institute, July 2020, https://cei.org/studies/how-to-make-sure-reformed-neverneeded-regulations-stay-that-way/.

Philip Hamburger, Is Administrative Law Unlawful? (Chicago: University of Chicago Press, 2014).