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Hearing on:

Removing the Burdens of Government Overreach
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- Introduction
- What restrains the administrative/regulatory state?
- Prior attempts to "Remove Burdens of Government Overreach"
- The limitations of OIRA's Central Regulatory Review are now more clear
- How much regulation gets review?
- Improving regulatory processes to remove the burdens of government overreach
    - Enact the REINS Act (Regulations from the Executive In Need of Scrutiny)
    - Enact a Regulatory Budget
    - Create a Regulatory Reduction Commission
    - Enforce, strengthen, and codify existing executive orders on regulation
    - Continue regulatory moratoria and arrange revocation of existing rules
    - Boost Office of Information and Regulatory Affairs resources and free market law and economics staff at agencies
    - Continue to pursue "one-in, two-out" and sunsetting
    - Reduce dollar thresholds that trigger Regulatory Impact Analyses and/or OIRA review
    - Enact the GOOD Act to scrutinize all agency decrees and regulatory dark matter that affects the public, not just rules
    - Require rule publication in the Unified Agenda of Federal Regulations
    - Monitor federal regulations that accumulate as business sectors grow
    - Compile better annual Regulatory Transparency Reporting
    - Report separately on economic, health/safety, social, environmental, and paperwork regulations
    - Improve "transfer" and "budget rule" regulatory cost assessments
    - Continue to formalize "Do Not Regulate" or "Office of No" reporting and offices
- Conclusion

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 *Removing the Burdens of Government Overreach*, and I thank Chairman Arrington, Ranking Member Boyle, and Members of the Budget Committee for the opportunity to testify today.

Introduction

Members of both major political parties have long recognized that federal regulatory burdens can operate as a hidden tax. But when the administrative state era began, few likely imagined its dense tangle of rules enveloping the economy and society. As a policy concern, regulation merits attention no less than the $31 trillion national debt does, since both spending and regulation are capable of extraordinary transformation of the economy and reallocation of societal resources.[1]

While we can pinpoint the amounts of the debt and deficit, much regulatory intervention is not captured in the traditional OMB cost benefit assessments. Reasons include the absence of independent agencies like the Federal Trade Commission and the financial bodies, the presence of countless guidance documents, and spending programs like the Inflation Reduction Act and the American Rescue Plan. Echoing the Obama-era "pen and phone," compounding the increasing opaqueness of the regulatory state is Joe Biden's "whole-of-government" cross-agency expansion of an array of progressive pursuits including "equity," "competition policy," "digital currency" and "climate crisis" (the latter dubbed "existential"[2] this month by Senior Advisor Mitch Landrieu, whom Biden has placed in charge of coordinating implementation of the Infrastructure Investment and Jobs Act).

Biden's re-regulatory movement is an ambitious one, requiring a congressional response. The good bits of Donald Trump's streamlining of the regulatory process have been ejected entirely. Trump's flagship was Executive Order 13,771 on "Reducing Regulation and Controlling Regulatory Costs,"[3] establishing a one-in, two-out requirement for certain significant regulatory actions. E.O. 13,771 also implemented a rudimentary regulatory budget by directing that the "total incremental cost of all new regulations, including repealed regulations … shall be no greater than zero." The Trump impulse was to regulate bureaucrats rather than the public, and certain large-scale regulation slowed dramatically (there were exceptions[4]).

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[1] 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.

[2] https://www.youtube.com/watch?v=WdJ-4dtHNVY.

[3] 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.

[4] https://cei.org/publication/swamp-things-trumps-discordant-regulatory-impulses-offset-his-deregulatory-successes-and-expanded-the-administrative-state/

The Biden administration's "Modernizing Regulatory Review" memorandum and new E.O. 14,094[5] of the same name have raised thresholds for what regulatory actions are considered "significant" (from $100 million annually to $200 million) and triggered a rewrite of the Office of Management and Budget "Circular A-4" guidance on "regulatory analysis" that places OIRA in a regulatory advocacy rather than watchdog role.[6] Biden's transformations did not emerge in a vacuum. There was of course "resistance"[7] to Trump's program, but progressivism has been around for a long time. Groups like Public Citizen[8] and the Center for Progressive Reform[9] disavow negative impacts of regulation on the economy and jobs, as do many pundits.[10] We find Ivy League scholars in the *Washington Post* from the "Constitutional disobedience" school of thought[11] ponder dispensing with Congress altogether in favor of a president that both makes and executes laws,[12] and elsewhere mulling "giving up on the Constitution."[13] It is in this environment in which courts also tend to defer to agencies' "expertise."

This testimony highlights incremental reforms addressing regulatory overreach and how to secure for rulemaking the same disclosure, transparency and accountability demanded of taxing and spending. While regulatory reform is contentious, we know from reforms in the 1990s like the Unfunded Mandates Reform Act and the Small Business Regulatory Enforcement Fairness Act that streamlining sometimes becomes overwhelmingly bipartisan.

What restrains the administrative/regulatory state?

Seemingly no corner of life escapes the federal government's purview. In *Is Administrative Law Unlawful?* Philip Hamburger sees the modern administration state as a reemergence of the absolute power practiced by pre-modern kings.[14] Writing in *Imprimis*, Hamburger described the return of monarchical prerogative—the very condition our Constitution was drafted to eliminate:[15]

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[5] https://www.govinfo.gov/content/pkg/FR-2023-04-11/pdf/2023-07760.pdf
[6] Draft Circular A-4, https://www.whitehouse.gov/wp-content/uploads/2023/04/DraftCircularA-4.pdf.
[7] https://www.washingtonpost.com/news/book-party/wp/2017/02/02/the-crucial-fight-that-the-anti-trump-resistance-is-forgetting/?utm_term=.55bbdc22f5fd.
[8] http://www.judiciary.senate.gov/imo/media/doc/10-06-15%20Narang%20Testimony.pdf.
[9] http://www.progressivereform.org/CPRBlog.cfm?idBlog=DA6A88BC-AFC3-D090-2C768107F7CD3367.
[10] http://www.huffingtonpost.com/2011/11/17/deregulation-job-growth_n_1099579.html.
[11] Described in Gasaway, Robert R. and Parrish, Ashley C. (2017), "Administrative Law in Flux: An Opportunity for Constitutional Reassessment," 24 *George Mason Law Review* 361, Winter. https://ssrn.com/abstract=2920778 or http://dx.doi.org/10.2139/ssrn.2920778.
[12]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.
[13] http://www.nytimes.com/2012/12/31/opinion/lets-give-up-on-the-constitution.html.
[14] Hamburger, Philip. 2014. *Is Administrative Law Unlawful?* Chicago: University of Chicago Press. http://www.amazon.com/Administrative-Law-Unlawful-Philip-Hamburger/dp/022611659X. Hamburger expanded on themes of administrative law in a summer 2014 Washington Post blog series. http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/14/prof-philip-hamburger-columbia-guest-blogging-on-his-is-administrative-law-unlawful/.
[15] Hamburger, Philip. 2014. "The History and Danger of Administrative Law," *Imprimis*, September. Vol. 43, No. 9. http://imprimis.hillsdale.edu/file/archives/pdf/2014_09_Imprimis.pdf.

> *[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.*

The basis of the prevailing rulemaking process is the post-New Deal Administrative Procedure Act (APA) of 1946 (P.L. 79-404) which established the process of public advance notice-and-comment for rulemakings. We often see not laws but proposed and final rule publication in the daily depository known as the *Federal Register*. 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. But there is wiggle room in the APA. Agencies for "good cause" can bypass notice and comment where "impracticable, unnecessary, or contrary to the public interest."

The result is that agencies do the bulk of the lawmaking. There were 247 public laws passed by Congress and signed by the president in calendar year 2022. Meanwhile agencies, implementing laws passed earlier and by earlier Congresses, issued 3,162 rules and regulations—a multiple of 13 rules for every law (compared to 17 and 31 rules for every law in 2020 and 2021 respectively). Legislatures too often fail to control spending, let alone the even less-disciplined tentacles of the regulatory enterprise governed by the APA.

Prior attempts to "Remove Burdens of Government Overreach"

During the late 1970s and early 1980s, concern over regulations' effects bred inquiries and reforms meant to reinvigorate the economy while stemming that era's inflationary pressures.[16] Agency tendencies to overstate or selectively express benefits was also a concern. Prominent deregulation occurred in trucking, rail, and airlines and in financial services.[17] Antitrust enforcement was relaxed and attention was paid to reducing paperwork. Regulatory review processes began with Nixon, were expanded by Ford, and embraced more fully by President Carter. A significant advance was the Reagan Administration's formalization of the central regulatory review housed at OIRA.

Created by the Paperwork Reduction Act of 1980, OIRA first concentrated on reducing private sector paperwork burdens. OIRA's authority was expanded by President Reagan's February 17, 1981 Executive Order 12291 to encompass a larger portion of the regulatory process by requiring that new major executive agency regulations' benefits outweigh costs where not prohibited by statute (independent agencies, while subject to notice and comment, remain exempt from review to this day). Earlier administrations' regulatory review efforts, such as ones conducted by the

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[16] Hopkins, Thomas D. 1976. An Evaluation of the Inflation Impact Statement Propgram, Prepared for the Economic Policy Board, by the Staff of the Council on Wage and Price Stability and the Office of Management and Budget, White Paper. December 7. http://www.thecre.com/pdf/Ford_HopkinsReport.PDF.

[17] Firey, Thomas A. 2011. "A Salute to Carter, Deregulation's Hero," *Herald-Mail.com*. February 20. http://articles.herald-mail.com/2011-02-20/opinion/28614285_1_jimmy-carter-deregulation-peanut-farmer..

Council on Wage and Price Stability, the Council of Economic Advisers and the interagency Regulatory Analysis Review Group, lacked extensive enforcement powers.[18] These earlier bodies could seek regulatory cost analysis if not statutorily prohibited, but could not enforce net-benefit requirements; appeals to the president were possible.[19] Net benefit analysis sports problems of its own[20] that are being exacerbated by Biden's transformations, but the act of consciously addressing significant regulation seemed promising at the time. The early and mid-1980s saw declining costs and flows, particularly in economic regulation in contrast to social and environmental regulation.[21]

Over the years, OIRA review and supplements, like the first President George Bush's Council on Competitiveness tasked to screen regulations, faced political opposition,[22] narrow scope of authority[23] and limited resources.[24] In 1993, President Bill Clinton replaced Reagan's E.O. 12291 with E.O. 12866 "Regulatory Planning and Review." The Clinton approach retained the central regulatory review structure, but "reaffirm[ed] the primacy of Federal agencies in the regulatory decision-making process," weakening the "central" in central review. The directive 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.

When Congress is able to mobilize on regulatory 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."[25] The RFA has (imperfectly) recognized a need to scale federal actions to the size of those expected to comply. A major development during the Clinton years was the Unfunded Mandates Reform Act of 1995 (P.L. 104-4.), driven largely by agitation over rules for which

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[18] DeMuth, Christopher C. 1980. "Constraining Regulatory Costs, Part One: The White House Review Programs," *Regulation*. January/February. pp. 16 and 20. http://www.aei.org/publication/constraining-regulatory-costs-part-i-the-white-house-review-programs/.

[19] Ibid.

[20] Crews Jr., Clyde Wayne. 2013. "Federal Regulation: The Costs of Benefits," *Forbes.com*. July 7. http://www.forbes.com/sites/waynecrews/2013/01/07/federal-regulation-the-costs-of-benefits/.

[21] Hopkins, Thomas D. 1992. "The Costs of Federal Regulation," *Journal of Regulation and Social Costs*. Volume 2, Number 1, March.

[22] Bloomberg Business. 1991. "Dan Quayle, Regulation Terminator," November 3. http://www.bloomberg.com/bw/stories/1991-11-03/dan-quayle-regulation-terminator.

[23] Bolton, Alex, Rachel Augustine Potter and Sharece Thrower. 2014. "How Politics and Organizational Capacity Influence OIRA Rule Review," White Paper, May 2. http://www.lsa.umich.edu/UMICH/polisci/Home/Events/Thrower,%20Presidential%20Oversight%20and%20Regulatory%20Delay.pdf.

[24] Dudley, Susan E, Prepared Statement of Director, George Washington University Regulatory Studies Center, Trachtenberg School of Public Policy and Public Administration; Hearing on Federal Regulation: A Review of Legislative Proposals, Part II, Before the Homeland Security and Governmental Affairs Committee, United States Senate, July 20, 2011, https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley_HSGAC_20110718.pdf.

[25] *Federal Register*, Vol. 74, No. 233, December 7, 2009, pp. 64131–32.

compliance was disrupting states' own budgetary priorities.[26] So popular was UMRA that the Senate version was dubbed "S. 1." The 1996 Congressional Review Act (CRA) required agencies to submit reports to Congress and the GAO (which maintains a database) on their "major"—roughly $100 million—rules.

The CRA provides Congress a window of 60 legislative days in which to review a major rule and pass a "resolution of disapproval" rejecting it. 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 before the Trump administration: a Labor Department rule on workplace repetitive-motion injuries in early 2001. Trump era rejections of Obama rules and Biden's use on Trump rules has brought the total to 20. The CRA is undermined by final rules not being properly submitted to the Government Accountability Office and to Congress as required under the law.[27] The "Regulations from the Executive In Need of Scrutiny" or REINS Act, which appears most recently in this Spring's debt limit legislation, would instead require affirmation of major agency regulations before they are effective.

Before Trump, Obama's January 18, 2011 E.O. 13565 on "Improving Regulation and Regulatory Review" affirmed the Clinton order and articulated a pledge to address unwarranted regulation. Obama achieved a few billion dollars in savings (even ridiculing in the 2013 State of the Union Address a rule that had categorized spilled milk as an "oil"[28]) though was known more for adding costs. Notably, Obama's July 11, 2011 E.O. 13579 ("Regulation and Independent Regulatory Agencies") called upon independent agencies to fall into line on disclosure.[29]

The limitations of OIRA's Central Regulatory Review are now more clear

Central regulatory review, when it works, is an institution recognizing that agencies and departments gain immensely—in budget allocation, staffing, and political and career status—the more extensive the regulatory empires they oversee.[30] It seeks to block such ambition. 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 brunt, and are unlikely to face stiff repercussions even when interventions are wasteful or harmful.

Social welfare rationales dominate policy rhetoric, but regulation benefits regulatory advocates, pressure groups and the regulator, and creates permanent constituencies favoring rules instead of

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[26] Dilger, Robert J., and Richard S. Beth. 2014. "Unfunded Mandates Reform Act: History, Impact, and Issues," Congressional Research Service. November 17 http://fas.org/sgp/crs/misc/R40957.pdf.

[27] Copeland, Curtis W. 2014. "Congressional Review Act: Many Recent Final Rules Were Not Submitted to GAO and Congress," July 15. White Paper. http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2014/07/25/National-Politics/Advance/Graphics/CRA%20Report%200725.pdf; and see Crews, "Many Federal Agency Rules and Guidance Documents are Still Not Properly Reported to Congress and the GAO as Required by the Congressional Review Act," Competitive Enterprise Institute, November 4, 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4219091.

[28] White House. 2012. State Of The Union Address, January 25. http://www.whitehouse.gov/photos-and-video/video/2012/01/25/2012-state-union-address-enhanced-version#transcript.

[29] 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).

[30] Niskanen Jr., William A. 1971. *Bureaucracy and Representative Government*. Chicago: Aldine-Atherton.

market processes. Many businesses not only favor regulation, but often pursue regulation in the first place.[31] Consumers enjoying falling prices and growing output were and are not necessarily demanding an Interstate Commerce Commission, or state regulation of utilities,[32] or the antitrust laws, or regulation of Uber, or Biden's EV charging network. Taxes obviously transfer wealth and profits. Regulations do likewise; pollution controls, accounting requirements, privacy mandates and the like do not impact every firm equally. They can create artificial entry barriers and erode competitive enterprise, benefitting some while punishing others.

Cronyism aside, executive branch regulatory review processes cannot function when a president's philosophy is that government rather than private enterprise should dominate finance, energy, manufacturing, health care, tech policy, artificial intelligence, digital currencies and other spheres of human action. Obama embodied this belief system with repeated pledges to go around Congress. Temporary regulatory pauses and strengthening of executive branch central review are no match for the likes of Biden's whole-of-government pursuit of progressive transformations, now reinforced by the equally significant transformation underway in the Circular A-4 regulatory oversight rewrite. Meanwhile recent large-scale progressive legislation will generate derivative rules for this newly sympathetic OMB to "review" that shouldn't exist in the first place.

We have learned the hard way that central review mechanisms can block neither legislators nor presidents who act to circumvent that oversight. To the extent that Congress passes onerous laws, requires rapid statutory deadlines for new regulations, prohibits cost analysis of rules, creates loopholes, or acts to benefit special interests, effective regulatory review remains improbable. The Trump advances in regulatory review were vulnerable to a non-sympathetic successor, and got it in Biden.

If nothing else, policymakers must get better at measuring regulation. Let's look at the comprehensiveness or lack thereof prevailing now, before Biden lowers the bar further.

How much regulation gets review?

Biden's increase in the significant regulatory action threshold to $200 million via E.O. 14,094 and his directive to revamp Circular A-4 guidance occur in a setting wherein central review is already incomplete. The annual *Report to Congress on the Benefits and Costs of Federal Regulations* is routinely overdue; the last to appear was a 2018-2020 composite report culminating in the fiscal year 2019 roundup. The aggregate cost estimate directed by the Regulatory Right-to-Know Act was abandoned early and replaced with a 10-year lookback that has itself vanished in the aforementioned composite edition. These annual reports survey a subset of the thousands of proposed and final rules issued annually by executive agencies. Independent agencies' rules, as noted, 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.

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[31] Stigler, George J. 1971. "The Theory of Economic Regulation," *Bell Journal of Economics and Management Science*. Vol. 2, Spring. pp. 3-21.

[32] Geddes, R. Richard. 1992. "A Historical Perspective on Electric Utility Deregulation," *Regulation*. Winter. pp. 75-82.

When they draw attention to these reports at all, administrations stress "net benefits" of the regulatory enterprise as a whole,[33] but based on an incomplete survey of that whole. The process tends to ignore the proposition that benefits we seek to elevate via *regulation*—public health, financial stability, food safety, auto safety, airspace allocation, privacy, cybersecurity and so forth—are also forms of wealth, and require market disciplines, not just administrative ones, to flourish. Markets and competitive enterprise make the world not just richer, but fairer, safer and cleaner.[34] Regulation and the administrative state do not get all the credit.

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 the *Report to Congress* for rules with cost-only estimates, however are not tallied and highlighted by OMB in its "net benefit" assertions (nor is there any indication of requiring this in the Circular A-4 rewrite). Instead, today's narrative still maintains that this OMB-reviewed subset of major executive branch rules accounts for the bulk of regulatory costs. There generally are a few hundred "significant" rules OMB looks at, often not quantified. Notable are the many "budget rules" implement transfers. Regarding these as non-regulatory may have been appropriate in a limited government context, but not when the federal government dominates ever more economic and social activity like retirement and medical insurance, and is in pursuit of "whole-of-government" social justice and equity campaigns.

Roughly over the past two decades, some 10 percent of rules have been reviewed whether or not costs and benefits enter into the picture. As a percentage of the annual flow of final rules in the *Federal Register,* the proportion of the few hundred costed "major" rules averages around a third; but the proportion of *all* rules with cost analysis has averaged less than a percent. Benefits, which the federal government declare justify the modern regulatory state, fare even worse; but that is unlikely to disabuse claims that net benefits are present in forthcoming regulations. OMB's onetime recognition that costs "could easily be a factor of ten or more larger than the sum of the costs...reported"[35] was a more helpful stance.

Notices, guidance documents, memoranda, bulletins and other notices got insufficient OMB scrutiny before Trump despite the presence of a practical set of OMB "Good Guidance Practices" in the form of a Bush-era memorandum to agencies.[36] With Biden's revocation of the Trump "portals" and final rules on guidance procedures set up in E.O. 13,891 on "Promoting the Rule of Law Through Improved Agency Guidance Documents,"[37] guidance documents, likely to assume greater importance in today's enlarged federal state, are once again untethered.

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[33] Sunstein, Cass, 2012. "Why Regulations are Good—Again," *Chicago Tribune*. May 19. http://articles.chicagotribune.com/2012-03-19/opinion/ct-oped-0319-regs-20120319_1_regulation-baseball-scouts-requirements.

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

[35] U.S. Office of Management and Budget. 2002. *Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, p. 37. http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/2002_report_to_congress.pdf.

[36] See Crews, "Mapping Washington's Lawlessness: A Preliminary Inventory of Regulatory Dark Matter, Competitive Enterprise Institute, Issue Analysis, No. 4, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733378.

[37] https://www.govinfo.gov/content/pkg/DCPD-201900706/pdf/DCPD-201900706.pdf.

These gaps in knowledge of rule costs and the burdens of sub-regulatory guidance show there is much work to do in reckoning with an increasingly assertive progressive regulatory enterprise. We are confronted with an increasing fusion of spending and regulation, exploitation of contracting and procurement and even interference in investment stewardship to achieve progressive ends, and legislative transformations that increasingly result in government steering while the market merely rows in economic matters as well as in ordinary household duties and responsibilities. Prospective regulatory overseers must pay increased attention to unmeasured categories of intervention and interference, not just discrete rules, that propel costs as well. Interventions like antitrust, the locking up of western lands, government management of spectrum, and the delivery of drones and likely soon EV charging stations into century old public-utility models or regulatory confines can result in costs that compound but are never measured.

Improving regulatory processes to remove the burdens of government overreach

Congressional Republicans have acknowledged neglecting their own role in regulatory oversight and the over-delegation of power to agencies,[38] and have called for reform. As it stands, there are many important reforms that merit fulfilment. Some, not in a particular order, are highlighted below. (In addition, this witness' article "Laws Against Laws: A 118th Congress Regulatory Reform Agenda For Rightsizing Washington,"[39] surveys some options available to this Congress.)

Enact the REINS Act (Regulations from the Executive In Need of Scrutiny)

The aforementioned REINS Act (Regulations from the Executive In Need of Scrutiny) would require an expedited congressional vote on certain major rules before they are effective, in a sense replacing the Congressional Accountability Act's resolution of disapproval with affirmation.[40] Congress should broaden REINS to cover any controversial rule, whether or not tied to a cost estimate deeming it "major," as well as extend the requirement for congressional approval to guidance documents and other weighty agency decrees.

Enact a Regulatory Budget

The regulatory 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*

[38] The "BetterGOP" Task Force reports are archived at https://www.novoco.com/sites/default/files/atoms/files/ryan_a_better_way_policy_paper_062416.pdf..

[39] Crews, "Laws Against Laws: A 118th Congress Regulatory Reform Agenda For Rightsizing Washington," Forbes, March 15, 2023, https://www.forbes.com/sites/waynecrews/2023/03/15/laws-against-laws-a-118th-congress-regulatory-reform-agenda-for-rightsizing-washington/?sh=68a67dcb7a23.

[40] For an overview of the latest version, see Ryan Young," Regulatory Reform Bills in the 118th Congress: The REINS Act," Competitive Enterprise Institute, February 8, 2023, https://cei.org/blog/regulatory-reform-bills-in-the-118th-congress-the-reins-act/.

President. Trump demonstrated the potential (and limitations) of an executive-driven approach encompassing individual agencies. Congress should therefore explore allocating regulatory cost authority among agencies in a regulatory cost budget that distinguishes between categories like economic, health/safety, environmental, and paperwork. Only Congress can compare questionable rules across the board to the benefits that could be gained if the compliance costs went elsewhere. The approach could give a shot in the arm to supervisory mechanisms like central review and sunsetting 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, as they would continue to do even with the Circular A-4 rewrite underway. The 118th Congress's leading vehicle is Rep. Bob Good's Article I Regulatory Budget Act (H.R.261).[41] It would amend the Congressional Budget Act and the Regulatory Flexibility Act to enlist multiple offices (White House, the Congressional Budget Office, Government Accountability Office, Bureau of Economic Analysis) to determine and capping the costs of regulations and guidance documents.

Presumably, a comprehensive regulatory budget paralleling the fiscal one would divide a total budget constraint among agencies roughly in proportion to potential lives saved or other metrics. While agencies could regulate unwisely, stupidly or even maliciously, Congress could shift the squandered budgetary allocation to a rival agency that saves more lives.

To be clear, in invoking 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.[42] If, as the economist Ludwig von Mises proclaimed, "Economic Calculation in the Socialist Commonwealth" is impossible,[43] then impossible too is *regulatory* cost calculation in an elemental sense. Cost experienced subjectively or indirectly by someone who's not the regulated, cannot be measured. We must instead transact in magnitudes, thresholds and "idiosyncratic guesstimates"[44] and, even as we budget as best we can, require Congress to approve rules.

Create a Regulatory Reduction Commission

A potential option for bipartisan, cross-branch, and bicameral cooperation is the "regulatory improvement commission." First proposed in the 1990s by then-Sen. Phil Gramm (R-Texas) This body would initiate review, similar to the military base closure and realignment commission, of the entire existing regulatory apparatus and select a bundle of rules for rollback with expedited congressional vote. That it proved so difficult to remove rules administratively even in the Trump administration underscores the intractability of decades of unrelieved accumulation and highlights the role Congress must play. The Commission's activities could

[41] See Crews, "A Case For The Article I Regulatory Budget Act," Forbes, February 16, 2023, https://www.forbes.com/sites/waynecrews/2023/02/16/a-case-for-the-article-i-regulatory-budget-act/?sh=24cffa622e64.
[42] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2502883.
[43] von Mises, Ludwig. 1920. *Economic Calculation in the Socialist Commonwealth*, Mises Institute: Auburn Alabama. (2012 Edition) http://library.mises.org/books/Ludwig%20von%20Mises/Economic%20Calculation%20in%20the%20Socialist%20Commonwealth_Vol_2.pdf.
[44] https://www.newsbusters.org/blogs/nb/clyde-wayne-crews/2016/07/23/washington-post-fact-checker-column-still-denial-over.

also boost the aforementioned regulatory budget. Various iterations exist; even Obama's executive order on retrospective review bore some of the spirit. A decade ago, Sen. Angus King's (I-Maine) Regulatory Improvement Commission was endorsed by the Progressive Policy Institute, which observed that regulations that make sense alone might not when layered atop one another.[45]

Enforce, strengthen, and codify existing executive orders on regulation

We now have a decades-long series of executive orders meant to address the flows and costs of regulation. Congress should insist upon their strict application and strengthen them, which in the short term means preventing OMB from proceeding with a Circular A-4 rewrite by whatever reasonable and legitimate means necessary. Ultimately, these historical instruments can be codified and extended to independent agency rules and to guidance document production and reporting. The Regulatory Accountability Act, which has been reintroduced in the 118th Congress, would upgrade agency rulemaking procedures and effectively codify some provisions contained in some of the governing executive orders, as well as facilitate formal public hearings for high impact rules and address guidance documents.[46]

Continue regulatory moratoria and arrange revocation of existing rules

Absent the consolidations of institutions like a regulatory reduction commission, getting regulations off the books requires the same laborious public notice and comment procedures of a new rule.[47] While awaiting congressional reform of the APA that addresses the need for new streamlined processes for eliminating old rules, collaborative efforts should build upon lessons of past moratoria, and lawfully freeze regulation (and guidance) for lengthier and more thorough audits, publish reports on the data generated and knowledge acquired, and seek public comment on which rules should go and so forth (much as the UK sought public comment on its in-out program). Creativity will produce information to support subsequent reforms.

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

When the Circular A-4 process and related guidance are reconstituted to implement a strong watchdog role, more money and staff could enhance OIRA's review function. (Otherwise, energy should shift to replacing OIRA). Congress might also shift personnel and funds to concentrate on reforms at key agencies. The aforementioned moratoria could help in reorientation. 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.

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[45] Mandel, Michael and Diana G. Carew, "Regulatory Improvement Commission: A Politically-Viable Approach to U.S. Regulatory Reform, Progressive Policy Institute Policy Memo. May 2013, http://www.progressivepolicy.org/wp-content/uploads/2013/05/05.2013-Mandel-Carew_Regulatory-Improvement-Commission_A-Politically-Viable-Approach-to-US-Regulatory-Reform.pdf.

[46] Matthew Adams, "Regulatory reform in the 118th Congress: Regulatory Accountability Act," Competitive Enterprise Institute, May 5, 2023, https://cei.org/blog/regulatory-reform-in-the-118th-congress-regulatory-accountability-act-2/.

[47] 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.

Congress could give these economists "Bureau of No" marching orders to look for reasons not to regulate, to challenge conventional RIAs that seem to 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 stemming the unbroken 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.

Continue to pursue "one-in, two-out" and sunsetting

Long before Trump, other nations had experimented with rule-in, rule-out campaigns. A project in Canada was praised by NPR in 2015.[48] Britain's rule-in, rule out process addressing broad "Care," "Energy" and "Waste" categories morphed into one-in, three-out, and was credited with cutting $10 billion pounds in permitting burdens and reducing overlap in agencies.[49] Granted, that may not be earthshaking, but goals and targets matter: British Columbia's program sought and achieved a one-third reduction in "requirements," and was proclaimed to have cut hundreds of thousands of paperwork hours. It may ultimately make more sense to locate and reduce equivalent *burdens*, not necessarily rule counts; perhaps dollar-for-dollar rather than rule-for-rule reductions.[50]

Relatedly, Congress occasionally considers regulatory sunsetting, including in the 118th. The president too could, in pen and phone fashion, require agency-generated regulatory requirements to expire or sunset within a set period of time unless they are re-proposed with public notice and comment.

Of course, without an engaged executive, rule sunsets or 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 will help assess whether streamlining or supervision really happens. If the answer turns out to be no, the record capable of prompting Congress to act will have been automatically generated. Criteria can be developed to help isolate burdensome or counterproductive rules, something recognized, again, even in Obama's E. O. 13563 on retrospective review.

As it stands, little about aggressively reducing existing regulation appears in OIRA's reports to Congress. Where agency analyses under the various executive orders appear not to justify a rule, OIRA ought to be forthright and say so, and it should challenge non-major rules as well. OIRA could recommend modifications to entire regulatory programs. It could note costs of presumably

[48] http://www.npr.org/2015/05/26/409671996/canada-cuts-down-on-red-tape-could-it-work-in-the-u-s.
[49] 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.
[50] https://www.cato.org/blog/president-trumps-one-two-out-rule-lessons-uk.

beneficial regulations, and compare those benefits to superior advantages available elsewhere. While the thrust of the Circular A-4 rewrite precludes it, OIRA has the experience and know-how to create a yardstick to critique high cost, low benefit rules. As would occur in a regulatory budgeting project, agencies could be pressed to rank regulations and prove that their least effective rules are superior to those of other agencies. Findings should be published, and government rolled back from the places it ought not occupy.

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. Instead of raising the review threshold as Biden's new executive order does and Circular A-4 reaffirms, it should be reduced. The Federal Communications Commission's open Internet (net neutrality) order, for example, was not regarded as significant, but mere "prophylactic," for example.[51] despite huge economically significant, industry-altering effects. Granted that's an exempt independent commission; but that only makes the need for universal review even clearer.

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"[52] With a $200 million threshold, costs could be understated just enough by agencies to escape scrutiny. Along with reinstating moratoria, devising criteria for a periodic review and codifying what has worked in executive order-driven review, Congress could reduce the flow of rules that escape analysis simply by instructing OMB to lower the threshold at which written Regulatory Impact Analyses are asked to be prepared. In some cases, 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[53] while in reality pursuing an expansion of scope and influence. Such behaviors can be confronted, however. For example, President 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.

Enact the GOOD Act to scrutinize all agency decrees and regulatory dark matter that affects the public, not just rules

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 "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 for a good deal of "regulation."

It does not suffice for executive agency "significant" or "major" rules to receive OMB review. "Regulatory Dark Matter"[54] that can influence policy yet skirt the public notice-and-comment

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[51] Federal Communications Commission. 2011. Preserving the Open Internet, *Federal Register*, Vol. 76, No. 185. September 23. http://www.gpo.gov/fdsys/pkg/FR-2011-09-23/pdf/2011-24259.pdf.
[52] DeMuth, 1980.
[53] DeMuth, 1980.
[54] 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-

requirements of the Administrative Procedure Act and OIRA review can gain increasing ground on the more readily observable. The Federal Trade Commission's recent Policy Statement on "unfair methods of competition" is a notable example;[55] so too is the Commerce Department requiring firms receiving funds under the CHIPS and Science Act to provide child care.[56]

Guidance comes in many forms. Non-legislative rules and proclamations like presidential and agency memos, guidance documents, policy statements, bulletins and press releases may enact policy directly or indirectly—even by implied threat.[57] Interpretations may be articulated by agencies, with regulated parties feeling pressured to comply with no understanding of costs. Trump's efforts such as the guidance portals and public-protection rules have been noted. Those should be restored by passage of the "Guidance Out of Darkness Act"[58] as well as a series of other "emergency" reforms targeting the guidance document phenomenon.[59] All potentially significant decrees by agencies need scrutiny and democratic accountability, not just "rules."

Require rule publication in the Unified Agenda of Federal Regulations

Agencies are expected to alert the public to their priorities in the semi-annual "Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions." The Agenda depicts the flow in the regulatory pipeline as it details rules recently completed, those anticipated within the upcoming 12 months by federal departments, agencies, and commissions. However, there is no legal obligation on agencies to adhere to schedules that confine their regulatory activities to what they proclaim in the Unified Agenda.

Trump's E.O. 13771 altered this, declaring 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…" Legislation introduced in the 118th Congress would likewise direct that agencies confine their regulatory activities to what appears in the Agenda.

Monitor federal regulations that accumulate as business sectors grow

For perspective on the small-business regulatory climate, the below list of "Federal Workplace Regulation Affecting Growing Businesses" shows basic, non-sector-specific laws and

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%20Mapping%20Washington%27s%20Lawlessness%202017.pdf; also available on SSRN Social Science Research Network. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733378.

[55] Crews, "The Unfairness of the FTC's Policy Statement Regarding the Scope of Unfair Methods of Competition," Competitive Enterprise Institute, November 14, 2022, https://cei.org/blog/the-unfairness-of-the-ftcs-policy-statement-regarding-the-scope-of-unfair-methods-of-competition/.

[56] Andrea Hsu, "Biden has big ideas for fixing child care. For now a small workaround will have to do," NPR, March 17, 2023, https://www.npr.org/2023/03/17/1162869162/child-care-chips-semiconductors-manufacturing-raimondo-subsidies.

[57] Brito, Jerry. 2014. "'Agency Threats' and the Rule of Law: An Offer You Can't Refuse," Mercatus Center White Paper. http://www.harvard-jlpp.com/wp-content/uploads/2014/05/37_2_553_Brito.pdf.

[58] Crews, "The 'Guidance Out Of Darkness Act' Is The Low-Hanging Fruit Of Regulatory Reform," Forbes, March 21, 2023, https://www.forbes.com/sites/waynecrews/2023/03/21/the-guidance-out-of-darkness-act-is-the-low-hanging-fruit-of-regulatory-reform/?sh=571551f2ccc8.

[59] Crews, "An Emergency Law to Extinguish Regulatory Dark Matter," Competitive Enterprise Institute, April 7, 2022, https://cei.org/blog/an-emergency-law-to-extinguish-regulatory-dark-matter/.

regulations that affect small businesses as they expand. This incomplete list, however, assumes non-union, non-government 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 these, numerous other laws and regulations would apply (The National Association of Automobile Dealers has provided one roundup,[60] and Congress should seek others).

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

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[60] National Automobile Dealers Association. 2014. *The Impact of Federal Regulations on Franchised Automobile Dealerships*, Prepared by the Center for Automotive Research. April. http://www.nada.org/NR/rdonlyres/A873EF86-8A0D-4C28-A072-F8AF94D619F1/0/CAR_The_Impact_of_Federal_Regulations_on_Franchised_Automobile_Dealerships_.pdf. p. 1

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

The federal government should build upon this by revealing how federal *regulations* (along with laws depicted above) 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

Improving annual public disclosure for regulatory and guidance output and trends is one realm in which OIRA could undertake unilateral transparency initiatives. That could happen, but in the current setting it seems Congress would need to mandate it.

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 around the time that the Clinton administration's E.O. 12866 replaced E.O. 12291 with the aforementioned reaffirmation of agency primacy.

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 would help 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.

Regulatory Transparency Report Card:
Suggested Official Summary Data by Program, Agency & Grand Total
(with Five-Year Historical Tables)

- Tallies of "economically significant" rules and minor rules by department, agency, and commission, by cost tier (an "ALERT Act" component)

Breakdown of "Economically Significant" Rules	
Category 1	> $50 million, <$500 million
Category 2	> $500 million, < $1 billion
Category 3	> $1 billion
Category 4	> $5 billion

Category 5 >$10 billion

- Number and percentage of interim final rule (IFR) enactments and reviewed, since all are presumably "significant" but escaped notice and comment.
- Breakdowns of the broader number of rules that are "major" and "significant" Tallies of significant and other guidance documents, memoranda, and other "regulatory dark matter" by department, agency, and commission.
- Ranking of most active rule-making agencies.
- Identification of which agencies increased rule output most in absolute and percentage terms.
- Numbers and percentages of executive and independent agency rules deemed "Deregulatory" (that is, a restoration of the distinction made in Trump's E.O 13,771).
- Numbers and percentages of rules affecting small business by significance, with RFA-required and non-required; Deregulatory component.
- Depictions of how regulations/guidance accumulate as a small business grows.
- Tallies of regulatory and guidance cost estimates, including subtotals by agency and grand total by category: paperwork, economic (for example, financial, antitrust, communications), social, health and safety, environmental; Aggregate cost estimates of regulation and guidance (Restoration of Right-to-Know Act requirements).
- Numbers and percentages of regulations that contain these numerical cost estimates.
- Numbers and percentages lacking cost estimates, with explanation (Compile "statistics" on what we do not know about regulatory burdens).
- Traditional *Federal Register* analysis, including number of pages and proposed and final rule breakdowns by agency, and reconciliations with other reporting vehicles, such as numbers of rules new to the *Unified Agenda*; numbers that carry over from previous years.
- Number of major rules reported on by the GAO in its database of reports on regulations.
- Number/percentage of agency rules and guidance documents presented properly to Congress in accordance with the Congressional Review Act.
- Assessment of rules that purportedly affect internal agency procedures alone.
- Numbers and percentages of rules facing statutory or judicial deadlines that limit executive branch ability to restrain them, or for which weighing costs and benefits is statutorily prohibited.
- Percentages of rules and guidance documents reviewed (and not reviewed) by the OMB and action taken. (This could entail a reconstruction of items from the one-time *Regulatory Program of the U.S. Government*.)

Some elements shown above have been incorporated in yet to be enacted legislation going back a number of years (such as 2014's H.R. 2804, the ALERRT Act (Achieving Less Excess in Regulation and Requiring Transparency), and before that, S. 3572, the "Restoring Tax and Regulatory Certainty to Small Businesses" Act in the 112th Congress. Proposed legislation in the 118th Congress also takes up the baton. Regular highlights would reaffirm the importance of disclosure and in the process, expose to what extent Congress itself causes regulatory excess with over-delegation and the imposition of statutory deadlines that can undermine regulatory analysis. Such reporting also can be especially useful as Congress explores formal hearing requirements for mega rules, such as the high-impact ($1 billion-plus) rules of note in the Regulatory Accountability Act proposal.

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

While economic regulation lost favor in the 1980s relative to environmental or health and safety rules, it has resurged in banking, energy, telecommunications, antitrust and more in the wake of the post-COVID legislation surge. These sectors often are the domain of independent agencies exempt from OIRA review.

This economic regulatory surge is particularly galling since the executive branch regulatory review was driven 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."[61] Whether the proposition is "fine-tuning" of the macro economy, outright government management of a 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 cronyism in economic concerns is more obvious than ever, but ignored in Biden's various interventions.

Since health and safety regulation ostensibly differs so from economic regulation, separate presentation across all channels—in the *Report to Congress*, in any Regulatory Transparency Report or elsewhere—is important from the standpoint of comparing relative merits of regulations particularly as the OMB Circular A-4 project rolls along with its straining of the concept of net benefits. With executive buy-in (someday), to the extent that analyses such as the OIRA *Report to Congress* once again help to delegitimize economic regulation, those realms can be freed from government purview altogether. That would leave Congress and OIRA with the "lesser" task of documenting and controlling costs of environmental, health, and safety regulations. Where these reveal that they, too, reflect private interests or are publicly detrimental, a motivated executive can secure their rollback and sunsetting as well.

Improve "transfer" and "budget rule" 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. Still, these should be actively disclosed and challenged where appropriate. To the extent these programs are not needed or should be privatized, their displacement or deadweight effects matter. Similarly, service-related paperwork ought not be lumped in the same category with the tax compliance burden and other involuntary, non-service-

[61] U.S. Office of Management and Budget.1997. *Report to Congress on the Costs and Benefits of Federal Regulations*, Chapter II. Estimates of the Total Annual Costs and Benefits. http://georgewbush-whitehouse.archives.gov/omb/inforeg/chap2.html

related process costs such as workplace reporting requirements. All these are hardly minimal, and should be tallied and reduced where possible.

OIRA has recognized at times that these transfers "may impose real costs on society," may "cause people to change behavior" and result in "deadweight losses"; and it has occasionally noted that it "will consider incorporating any such (cost-benefit) estimates into future Reports."[62] Especially as the Circular A-4 update proceeds in its advancement of the progressive social agenda, these transfers and their impacts on individual rights and economic growth need closer monitoring. That's because, as more of the economy succumbs to federal supervision, there is less inclination for subsequent generations of inoculated Americans to recognize government programs as the regulation or interference that they actually entail.

Acknowledge and minimize indirect costs of regulations

We have referenced unmeasured, unfathomed and unacknowledged costs, and noted that objectively assessing precise regulatory costs is impossible. Indirect costs play a significant role. If indirect costs of regulation are too difficult for policymakers to compute, our government cannot credibly argue that compliance is feasible or fair or affordable—yet it does.

Compliance-focused regulatory cost estimates like some of those seen in Circular A-4 may inadvertently or purposely omit indirect costs. The uncertainty surrounding them requires that indirect costs (which may sometimes or even usually exceed direct costs) be guarded against and minimized. Fairness and accountability require greater acknowledgement of indirect costs. Otherwise, officials will systematically underestimate them, downplay regulatory impacts and thus overregulate. Taxing and spending are substitutes for the hidden tax of regulation; that means if regulation is perceived as an artificially cheap alternative means of achieving federal ends, policymakers will exploit it. 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 incorporating indirect cost presents serious challenges, but if the executive branch and Congress emphasize cost over net-benefit assessments as they should, manpower and resources are freed to better assess indirect regulatory effects.

Dealing with indirect costs, and all costs for that matter, however, will ultimately require congressional approval of final agency rules. The aim of annual regulatory accounting cannot be an unachievable level of precision, but to make Congress more accountable to voters for regulatory burdens, and to induce agencies to minimize indirect costs by ensuring that they "compete" before Congress for the "right" to regulate in a regulatory budgeting setting. Even imperfect recognition of indirect cost magnitudes can provide a basis for allocating scarce resources in loose correspondence with where a (perhaps one day) more accountable Congress believes benefits to lie.

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[62] U.S. Office of Management and Budget. 2015. *2015 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, various tables. https://www.whitehouse.gov/sites/default/files/omb/inforeg/2015_cb/2015-cost-benefit-report.pdf.

Continue to formalize "Do Not Regulate" or "Office of No" reporting and offices

The tendency of bureaucracy is to expand, and a counterweight is needed. Beyond internal agency operations and the OIRA role, some have called for an independent congressional office of regulatory analysis resembling the Congressional Budget Office (for example, U.S. House of Representatives Report 105-441, 1998). This step would go beyond the additional resources for OIRA or for agency economists noted above. There are scenarios in which this version of an independent office could be a good idea, such as if the entity were formally chartered with an anti-regulatory "bias" to offset the pro-regulatory bias prevailing in the remainder of the federal government.[63] Some formal entity is needed to highlight that the prevalent concern of our day is political failure rather than market failure, which is the opposite of the OIRA stance in the Circular A-4 rewrite. This body could showcase instead the desirability of market alternatives over command options for every regulation. The new institution, we might call it the "Office of No," should continually present the case for eliminating existing rules and create plans for elimination of regulatory agencies themselves, especially as advancing technologies eliminate legacy arguments of market failure and public goods.

Conclusion

The modern conceit is that untethered regulation and rulemaking work. They often do not. Bureaucracy and administrative state overreach may not only impede economic efficiency but also undermine health, safety and environmental progress. Sound policy 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 hundreds of thousands that already exist. Meanwhile the public has a right to know the ways federal agencies have harmed and still harm that which they oversee, and how those negatives can propagate beyond the agency and throughout the economy and society.

The 118th Congress should enact regulatory liberalizations to demonstrate a commitment to reform and streamlining. Biden is unlikely to sign any of these but Congress can lay important groundwork for, as this hearing calls for, "Removing the Burdens of Government Overreach."

It is not enough just to cut federal spending and talk of balancing the budget. Congress needs to offset the march of bureaucracy and regulation, or at least be ready for the bipartisan momentum for economic and regulatory reform that can emerge unexpectedly, as it did a generation ago. If Congress fails to act, 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. 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 in the spirit of what the REINS Act would do. In its entirety, it reads:[64]

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[63] Crews, "Congress Should Charter An "Office Of No" To Counter Federal Overregulation," Forbes, October 25, 2021, https://www.forbes.com/sites/waynecrews/2021/10/25/congress-should-charter-an-office-of-no-to-counter-federal-overregulation/?sh=7fc70d9c4928.

[64] "Regulation Freedom Amendment," Ballotpedia, Administrative State Project, accessed September 27, 2022,

> *Whenever one quarter of the members of the U.S. House or the U.S. Senate transmit to the president their written declaration of opposition to a proposed federal regulation, it shall require a majority vote of the House and Senate to adopt that regulation.*

The regulatory process and regulators are themselves in need of regulation, primarily in the form of congressional reassertion of authority for lawmaking.[65] The lack of transparency and accountability are both too excessive. If an expensive or burdensome regulation is enacted, elected representatives ought to be on record as for or against it, and thereby answerable to voters. In the meantime, some of the options presented above as well as those already well underway in the 118th should continue to be pursued.

https://ballotpedia.org/Regulation_Freedom_Amendment

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