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An Introduction to Regulatory Budgeting

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Contents

The Competitive Enterprise Institute (CEI) is a non-profit public policy research organization dedicated to advancing individual liberty and free enterprise. We appreciate the opportunity to discuss issues surrounding regulatory budgeting, and thank Mr. Chairman Price, Ranking Member Van Hollen, and Members of the Committee.[1]

SUMMARY

> *[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.*[2]
>
> —Economic Report of the President (Jimmy Carter), 1980

The federal spending budget captures only part of government's presence in the market economy. Regulatory costs are equivalent to a sizable percentage of the level of government spending itself, and those non-tax dollars government requires to be dispensed on compliance, and the economic effects of such intervention, argue for scorekeeping.

Congress could enact regulatory transparency reporting, then either specify a limit on downstream regulatory compliance costs for newly enacted laws or reauthorization of existing law; or Congress could enact a more ambitious full-scale budget paralleling the fiscal budget, a riskier approach whose risks some might feel decline daily under the unbridled status quo. Whatever regulatory budget conception, any agency desiring to go beyond its allocation needs congressional approval.

A comprehensive regulatory budget would presumably require Congress to divide a total budget among agencies roughly in proportion to potential lives saved or other metrics. For health and safety mandates, agencies' responsibility would be to rank hazards from most to least severe and address them within their budget constraint. They would henceforth operate based on what Congress thinks they can do in context of the overall regulatory state, not the good the agency itself claims to do writing itself a blank check. Agencies rarely acknowledge rules' negligible benefit, and an array of special interest groups silently stand by. Budgeting could change incentives by imposing consequences for the regulatory decision-making quality on agencies rather than on the regulated parties alone. Budgeting would force agencies to compete against other agencies' claims for the authority to regulate. While agencies could regulate unwisely, they consequences could be transfer of the squandered budgetary allocation to a rival agency that saves more lives or performs some task better. Adopting costly and marginally beneficial regulation should impact the agency, not just the public.

However, regulatory budgeting brings grave potential pitfalls and enforcement difficulties. Ways to promote success include:

1. Initiate an incremental rather than total budget, and build from there
2. Assemble and summarize annual "report card" data on agency regulations
3. Establish a regulatory cost freeze and implement a regulatory reduction commission
4. Employ separate budgets for economic versus environmental/social regulation

5. Control indirect costs by limiting the regulatory methods that most often generate them.

As Congress assumes greater accountablity and delegation becomes more limited than it is today, a cautious budget deserves consideration. Tracking spending and regulation remain vital to planning and controlling government spending.

IMPROVING REGULATORY REVIEW WITH REGULATORY BUDGETING

> *Measure what is measurable, and make measurable what is not so.*[3]
>
> —Quote frequently attributed to Galileo, that, alas, probably was not his.

> *It's all right*
> *to be little-bitty*.
>
> Alan Jackson[4]

Nobody sees the same rainbow, and nobody necessarily sees the same cost and benefit of any given regulation

Let us commence the case for budgeting federal regulations by recognizing that perfectly tabulating costs is impossible. Some compliance burdens aside, tabulating the subjective and indirect costs of regulations experienced both at the individual level and economy-wide is a tough thing to do, perhaps impossible.

Cost, properly construed, as James M. Buchanan, the 1986 recipient of the Nobel Memorial Prize in Economic Sciences, put it, "is that which the decision-taker sacrifices or gives up when he makes a choice."[5] As Buchanan counseled, there are no "objectively identifiable magnitudes" available to the third-party regulator: "Cost cannot be measured by someone other than the [regulated] decision-maker because there is no way that subjective experience can be directly observed."[6] And if, as Ludwig von Mises proclaimed, "Economic Calculation in the Socialist Commonwealth"[7] is impossible, so too is regulatory cost calculation in an essential sense. Cost experienced subjectively by someone who's not you, cannot be measured by you.

That said, try we must. Even if government collected a negligible percentage of Americans' incomes in taxes, we would still keep track of taxation to prevent its abuse. The same applies to regulatory costs imposed on the private sector, which are far from negligible. Moreover we should pay attention to *categories* of regulation as the driver of cost as well, such as locking up of western lands from resource use, or failure to privatize spectrum or other commons and creating misallocation. That is, if government steers in some area of practical endeavor it can create costs even as no rules are issued.

The unreliability of regulatory cost estimates may be fatal to budgeting *precision*, but not to the need for formal disclosures that keep cost burdens on the front burner of policy making.

A regulatory budget will always deal only in approximations. Therefore the very intractability of regulatory costs underscores the urgency for Congress to take responsibility for regulatory actions bureaucracies impose—both the measurable and the non-measurable—and to impose processes that force hidden costs to the surface in order to assess their gravity.

Interestingly, despite the growth of government in recent years, the U.S. House of Representatives' fiscal year 2017 budgeting process showcased some potential new controls over the Washington behemoth.

On the fiscal side, in January Congress adopted a dynamic scoring rule for major legislation, which would allow tax cuts to favorably affect official federal revenue estimates by taking macroeconomic variables into account.[8]

On the regulatory side, the concept of a "regulatory budget" has gained new currency among lawmakers.[9] The Fiscal Year 2017 Budget Resolution contained a lengthy Policy Statement on Federal Regulatory Budgeting and Reform.[10] This was appropriate, since, while the federal government can fund programs either by raising taxes, increasing the federal budget, or by borrowing, increasing the federal debt, the government can also "fund" policy through regulatory mandates that compel the private sector and state and local governments to bear the costs of federal initiatives. To shine a light on these costs, scattered pertinent and relevant regulatory data should be summarized and reported publicly to help create pressures for even better disclosure and reform.

While presidents have issued fiscal budget requests that tangentially addressed regulatory issues or even explicitly encouraged the creation of a regulatory budget,[11] the 2017 resolution was a distinctive marking of territory by *Congress* in the realm of overall budgetary planning.

The confluence of dynamic scoring and the new emphasis on the concept of regulatory budgeting may not be coincidental, but inevitable given the times. Public discussion over federal regulation's effects on employment, output, GDP, and the federal budget's own bottom line will become unavoidable as uncharacteristically low interest rates return to historical norms.[12] In a July 2015 Joint Economic Committee hearing on dynamic scoring, former Texas Sen. Phil Gramm remarked: "[D]ynamic scoring is not just about taxes. It is about spending. It is about policy. It is about *regulation*."[13] [Emphasis added]

Annual federal spending is set to soon surpass $4 trillion, adding to a mounting national debt that threatens to become unserviceable as discretionary spending cuts and entitlement reforms remain controversial and remote. Mounting interest on the debt can overwhelm yearly spending, leaving economic liberalization as the only remaining option to spur economic growth and employment. Thus, we may soon see renewed bipartisan concern over regulatory overreach and greater interest in economic liberalization.[14] This seems to happen about once a generation when the political stars align.[15]

A functioning regulatory budget would make government's reach more visible to lawmakers and the public. Further, it would incentivize lawmakers to a) limit what agencies may compel the private sector to spend on regulatory compliance and b) set the stage for minimizing indirect losses arising from regulatory interventions.

Aside from the appropriations process itself, the primary regulatory control has been centralized executive branch review of agency regulations; that process was first carried out to a limited extent by the Council on Wage and Price Stability and the Regulatory Analysis Review Group in the 1970s.[16] The Council on Wage and Price Stability and the Regulatory Analysis Review Group selected for review a handful of regulations out of each year's total. That concept of centralized review was expanded and continued during the 1980s and remains administered by the Office of Management and Budget. Review has never wielded the force of law; it has simply meant that an agency's initiatives may be subject to limited audit, more limited after President Bill Clinton's executive order 12866 replaced E.O. 12291. And President Barack Obama has issued a set of four executive orders addressing regulation and regulatory review. Review might be expected to aid a slightly more rational regulatory process under a liberalization-minded administration or one that recognized that occasionally regulations do more harm than good; but perhaps not otherwise.

By providing a single gatekeeper to which those subjected to regulation might appeal during the rulemaking stage, centralized review could aid consumers by increasing marginal returns to less powerful interest groups participating in the regulatory process.[17] Absent central review, where regulatory decision making is scattered among many federal agencies, tightly organized interest groups have an advantage over the dispersed and relatively voiceless, non-organized "rationally ignorant" general public. That condition potentially leads to "capture" of the regulatory agency by the regulated party. Costs to the unorganized of influencing outcomes are high. But a central clearinghouse for regulations may reduce the cost of "lobbying" and strengthen the relative influence of less-well-organized parties. For consumers, the potential gains for lobbying increase, while expected gains for entrenched groups may remain the same or even decrease. Centralized review can thereby help balance the power of competing interest groups

Another matter is that government exercises considerable power over the public in the first place, and regulation is derivative of that. Another is that voters do not elect the people who impose regulations. Over-delegation of lawmaking power allows Congress to strut when regulations do good things, but to avoid blame and scapegoat agencies when rules do bad things, as documented for example by professor David Schoenbrod.[18] So one brake on excessive regulation would be a dramatic scaling back, of "regulation without representation," the widespread delegation of power to agencies.

When every agency regulates whenever it believes benefits exceed costs, costs will increase. No one can regard the whole but Congress. Expanding review with a regulatory budget could contribute to enhanced congressional accountability. The concept of a regulatory budget is neither new, nor partisan. Robert Crandall of the Brookings Institution first mentioned the use of "shadow budgets" for expenditures required of the private sector in 1978.[19]

Democratic Texas Sen. Lloyd Bentsen, who served as Secretary of the Treasury in the Clinton Administration, proposed an "annual regulatory budget" in 1979.[20] Speaking in the Senate chamber on March 5, 1979, Bentsen said:

> A regulatory budget would put an annual cap on the compliance costs each agency could impose on the private sector through its rules and regulations. The process for establishing the annual regulatory budget would resemble the process

> currently used to set the fiscal budget—we would have a proposed budget from the President and annual budget resolutions from the budget committees. This would make it possible to coordinate the regulatory and fiscal budgets. We need a regulatory budget in order to reduce the impact of unnecessary, excessive and conflicting Government regulations.[21]

Regulatory budgeting was also considered as a reform option in President Jimmy Carter's 1980 *Economic Report of the President*.[22]

The simplest regulatory budget is a one-in, one-out freeze. A step up would have Congress set a regulatory cost cap for each mandate contained in new and reauthorized laws, and if an agency desired to exceed that limit it would need further regulatory authorization and appropriation from Congress.

A stronger full regulatory budget model would limit the total regulatory costs individual agencies could impose on the economy, with agency tallies adding up to a total "national" regulatory budget paralleling the fiscal budget, and would assign maximum compliance costs within each agency such that the overall cap is not exceeded. This process might mirror the fiscal budgeting requirements for authorization and specific appropriation for various spending programs. More modest versions should be attempted first because of a number of potential risks of implementing a regulatory budget. As Americas annual deficit and accumulated debt demonstrate, formal budgeting is no guarantee of fiscal restraint. The principle is that Congress should ensure that there is no such thing as an off-budget, unacknowledged, government-mandated burden on any citizen.

Agencies tend to regard all their regulations as bestowing net benefits. To remedy this, agencies subject to a budget should not be allowed to offset regulatory costs with benefits, since few regulations would fail to qualify under agencies' internal criteria. Instead, Congress would specify the total budget and divide it appropriately among agencies based on prospective effectiveness, such as potential lives saved. Budgeting would induce health and safety agencies to rank hazards, most to least severe, before applying regulations.

The effort poses some risks, and a poorly executed one would be worse than leaving things alone. For starters, agencies tend to emphasize benefits and lowball costs. The Heritage Foundation's James Gattuso raises some valid concerns about budgeting efforts set on autopilot and paired with slippery calculations. He observes:

> Members [of Congress] certainly don't abide by the fiscal budget now. And it is hard to imagine lawmakers declining to authorize a new rule that regulators say would save lives at little cost, based only on—ultimately artificial—budget allocations.[23]

A regulatory budget is best suited to a constitutional republic rooted in limited government principles and congressional accountability, rather than an administrative state that operates largely without supervision. But the unfortunate reality that the U.S. could not "keep the republic," as Benjamin Franklin warned,[24] is not entirely fatal to the idea of regulatory budgeting as a liberating device from the modern regulatory Leviathan. Cautious experiments within a broader rubric of congressional accountability for both agencies' regulations and informal "guidance" are urgently needed and should be undertaken.

A regulatory budget is only part of the sound government arsenal. More important than budgeting or any other administrative reform is limiting government's regulatory power as such. As economist William Niskanen put it, "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."[25]

THE ROLE OF REGULATION IN SOCIETY: TWO VIEWS

Setting aside for a moment the question of whether politics serves the public interest better than the private sector does, there are two public interest justifications for regulation:

> (1) to approximate competition where markets are allegedly inadequate or failed; and
> (2) to protect public health and safety.

One justification is economic, the other social. Health and safety concerns usually dominate today's debate over regulatory process reform, thus most regulatory reform efforts stress risk assessment and cost-benefit analysis. Economic deregulation on the other hand typically involves introducing competition in one industry or sector at a time, such as trucking, banking, telecommunications or electricity.

Research in the public choice and Chicago economics traditions has shown much of economic and even health and safety regulation benefits not the public, but the very business entities subject to regulation. These insights point to the other reason for imposing regulations, a reason that stems from less-noble private interest motivations: to protect firms from competition by raising competitors costs or excluding them from the marketplace altogether.[26] Like taxes, regulations transfer wealth from one party to another, often cloaking them in public interest appeals. Such regulatory pork harms rather than helps the public for the sake of the regulation's beneficiary.[27] Uncertainty about the extent of regulation is reason enough to consider implementing a budget; but the fact that poorly controlled regulation often does more harm than good and can even derive from ill motives makes harnessing the regulatory state all the more urgent.

INADEQUATE REGULATORY CONTROL

Although regulatory costs are imposed directly on firms (and governments) that must comply, firms pass much of these costs to customers, who may see increases in grocery, utility, health, housing, and local tax bills.

Office of Management and Budget regulatory review function maintained by Presidents Reagan and Bush was scaled back by President Clinton. The Reagan/Bush cost-benefit review effort, which had been based primarily upon Executive Order (E.O.) 12291, was replaced by a Clinton executive order that "reaffirm[s] the primacy of Federal agencies in the regulatory decision-making process."[28] In practice, "reaffirming primacy" of agencies means agencies are relieved of accountability for regulatory excess. Ranking and making rational choices requires an outside auditor or a budget that rewards agencies based on quality of decisions. Without oversight, rational priorities can't be set even *within* agencies, let alone ranked across numerous bureaucracies.

Over 20 years ago, the fiscal year 1993 federal budget solicited cost-benefit data from agencies for the first time with the aim of assembling a rudimentary regulatory budget database, [29] but this effort also withered with the changing of administrations, the passage of time, and the steady growth of the national government. This is unfortunate, since that initial survey data revealed that few agencies perform cost analyses, let alone benefit analyses, which still holds. Rules are implemented regularly without concern for calculating costs, let alone far more nebulous benefits which are correspondingly more difficult to quantify. Even under Reagans E.O. 12291, only about six percent of agency rules reviewed at OMB were "required" to feature cost-benefit assessments, according to data from the final edition of the *Regulatory Program of the U.S. Government*.[30] (The *Program* was published annually between 1981 and 1992.)

Cost reports we already have are sometimes delayed. The final *Report to Congress on the Costs and Benefits of Federal Regulations*, which has appeared regularly since 1999, has been late in recent years[31] It is difficult for cCommon reform proposals such as strengthened cost-benefit analysis harness regulation when agencies "calculate" costs and benefits of the very regulations they themselves write, with no audit. Government will say the government is doing a good job; or when there are few constraints on regulatory costs agencies can impose or "offset" with claimed benefits, and

The issue is more fundamental than one of simply regulating the wrong hazards. Some regulations threaten to cost lives by creating perverse behavioral incentives (such as TSA body scanners inducing individuals to drive rather than fly.) To the extent regulation reduces productivity and costs jobs in the aggregate economy, it also reduces incomes and the ability to afford a healthier, more secure lifestyle. To the extent they are made artificially poorer, consumers may forego preventive health care, healthier food, bigger cars, safety apparatus like smoke detectors and fire extinguishers, and adequate insurance coverages.

PROPOSED VERSIONS OF A REGULATORY BUDGET

Several regulatory budget proposals have appeared since Lloyd Bentsen's 1979 offering. Even the OECD has explored the matter.[32] Unsurprisingly, different things are meant by the term regulatory budget.

Recent legislative offerings include Sen. Marco Rubio's (R-Fla.) National Regulatory Budget,[33] and Sen. Mike Lee's (R-Utah) 2016 Article I Regulatory Budget Act.[34] Also, the June 2016 House Task Force on Reducing Regulatory Burdens released a series of recommendations for economic liberalization and growth with a regulatory budget among them.[35]

The Contract with America supported by House Republican candidates prior to the 1994 elections featured a regulatory budget as part of the package of regulatory reform provisions contained under the "Job Creation and Wage Enhancement Act." As the bill made its way through the House, the regulatory budget provisions were not included, but they would have required agencies to issue an annual report illustrating the cost of regulations to the private sector. Regulatory costs would have been capped below the current level to induce agencies to design more cost-effective regulation and ensure that benefits exceed costs.[36]

A few other versions appeared in the 1990s. During the 103rd Congress, Senator Orrin Hatch (R-Utah) proposed a simple three-year regulatory "cost cap" version of a regulatory budget.[37] Hatch's budget was basically a freeze: it would have capped regulatory costs at the level prevailing at the time of adoption by requiring any new regulation to be offset by repeal or modification of an existing one. An agency would be free to issue any new regulation, but it would have to offset the cost by eliminating one or more existing mandates of roughly equal cost, or by negotiating with another agency to eliminate a regulation on its behalf. This relatively simple, low-risk procedure would be a sensible way to establish the rudiments of a regulatory budget before adopting a more complicated variant. A newer version of such a cap is the "one in, one out" proposal noted by Virginia Senator Mark Warner in 2010.[38] In the 114th Congress, Sen. Dan Sullivan's (R-Alaska) RED Tape Act contains similar provisions and also included guidance documents. The approach has been implemented in Canada.[39]

Also back in the 103rd Congress, Rep. Lamar Smith (R-Texas) introduced a regulatory budget bill noting that regulation at the time (1993) cost some $580 billion, or over nine percent of GDP. Smith sought to halve that level over seven years, by requiring a 6.5 percent annual reduction in regulatory costs for each of seven years (roughly a $38 billion annual reduction back in those days) to bring costs down to five percent of GDP. The bill would have instructed the House and Senate Budget Committees to allocate regulatory costs allowances to the relevant authorizing committees who in turn would allocate costs among agencies. The bill would have strengthened points of order against committees exceeding their budget allocation, and would have allowed any member to offer legislation under an expedited procedure to freeze regulation within an offending committee's jurisdiction. Separately, the bill required proportional reductions in agency overhead totaling $2.2 billion over seven years, and required cost-benefit analysis of any new initiative costing $10 million annually. (The threshold triggering cost-benefit analysis since Reagans Executive Order 12291 has been $100 million.)

Still another 1990's effort was Rep. Thomas J. Bliley, Jr.'s (R-Virginia) H.R. 1636, the Regulatory Accounting Act of 1995 on May 15, 1995. This simple budget's role would have been informational only. It would not set or enforce a maximum budget. It would merely require the president, after a notice and comment period, to report to Congress on the total costs and benefits of agency regulations for the current and upcoming five fiscal years. This accounting statement would include "the annual expenditure of national economic resources for the regulatory program," and "other quantitative and qualitative measures of costs as the President considers appropriate." Where actual cost figures were not available, costs would be explained qualitatively. The President would also submit a companion statement describing the general affects of regulation on job growth, competitiveness and other measures of economic health. The downside of Bliley's bill was that he doesn't forbid agencies from offsetting their calculated costs with benefits.

POTENTIAL BENEFITS OF A REGULATORY BUDGET

A More Comprehensive Accounting of the National Government's Presence in the Economy

One hazard of unaccountable regulation is that many otherwise observable fiscal budgetary initiatives may be shoved off-budget as regulation. For example, tax dollars can be used to pay for a public waste water treatment—or alternatively, firms can be required by regulation to treat their waste before dumping (something property rights regime would compel too, a factor sometimes ignored[40]). Spending is an observable outlay, capable of being summed across the economy; but regulatory costs are not easy to track, and usually are not tracked. As fiscal budget deficits mount and as pressure on the federal budget increases, the choice between spending and regulation to achieve governmental ends can tilt toward regulation.

A regulatory budget could potentially lessen incentives to transfer expenses off-budget. Disclosure of government's level of compulsion would happen on the fiscal or regulatory budget—which will account for much opposition to the concept; far better to hide compulsion and its costs. Since regulation and direct taxes both are means of achieving governmental ends, and since both have effects on employment, output and prices in the aggregate, the goal should be to tolerate no such thing as an off-budget expense.

To the extent that the commons are privatized and individual rights and contracts prevail in civil society, questions over regulation get taken out of the public sphere altogether, limiting the scope of complicated public regulatory budgeting procedures. That too is a proper end of regulatory budgeting; to hasten the shift toward competitive and other disciplines rather than expecting political and regulatory discipline, which do not work and are corrupted by cronyism and turf concerns.

Better Ranking of Risks and Recognition of Opportunity Costs

Agencies lack a budget constraint when issuing regulations with self-proclaimed "net benefits," so can ignore opportunity costs, unlike the rest of society. "Opportunity cost" is economic jargon for the most highly valued alternative given up whenever one makes a choice. But agencies don't give anything up.

Proper regulatory decision-making requires linkage between choosing and bearing the consequences of the choice. Agencies lack this since unlike other non-governmental entities, agencies' future actions are unconstrained upon making any given present choice: there is no tradeoff for the agency, only for others. Each agency can regulate with no concern for the cost of its regulations or that regulating one aspect of the economy or public health will impact its ability to regulate another. Agencies also regulate heedless of what other agencies are doing and make no *inter*-agency tradeoffs. Only an overseer, viewing the regulatory enterprise as a whole, can do that.

A regulatory budget imposed on agencies could change behavior. If limited in the total amount of regulatory costs they may impose, agencies would need to rank risks and target the most pressing ones first, all within the limits of the individual budget constraint (while Congress establishes the overall one). Regulating one hazard might mean not regulating a different one. Outside a statutory requirement that an agency regulate a lower-ranking risk, there would be fewer such irrational cases as chasing down infinitesimal risks. Agencies operate under conditions such that only the matters under their particular jurisdiction are relevant to their decision making process. An agency cannot itself account for, react to, and regulate in accordance with societal opportunity costs. The administrative agency model inherently undermines the task. There is no effort—nor can there be at the agency level—to rank risks relative to those overseen by other agencies. This is why Congress must set each agency's budget and the overall amount of tolerable regulatory burden. The Food and Drug Administration for example, could analyze the relative merits of regulations under its jurisdiction under a budget, but it could not evaluate its own rules in relation to, for example, EPAs. This tunnel vision is one of the primary pitfalls of cost-benefit analysis and risk assessment as regulatory control tools, despite their reputation among reformers. Under a net benefit standard propelled by agencies, *government must grow without end.*

Cost-benefit analysis in the private sector is primarily an internal evaluation device rather than one attuned to the context of agency decision-making. There is no single end of the political process: rather, there are conflicting goals.[41] The private sector asks, "What is the impact on our bottom line if we do X?" But such constraints are alien to agencies, and discrete cost-benefit analyses are not always appropriate for an administrative regulatory state. Even assuming agencies would not overstate benefits, cost-benefit analysis has nothing to say about superior benefits that may have accrued if an agency's budgetary allotment belonged instead to another agency. But Congress, in a budgetary oversight capacity, can attempt to incorporate societal opportunity costs into the administrative regulatory state. Consider health and safety regulation aimed at saving lives. Via regulatory budget experimentation, Congress could evaluate aggregate risks broadly construed by asking the obvious questions one must ask when not otherwise consumed with chasing ever-vanishing hazards within an agency's self-centered net-benefit regime:, "What are people suffering from or dying of that is *genuinely* within the various federal agencies jurisdictions?"

Congress could then use that knowledge, which is not obvious as the modern regime presumes, to distribute appropriately limited and representative budgets among agencies, allocating the compliance costs they may impose. Each agency could pursue its own ends with as much tunnel vision as it likes, but it can expect to be audited. A regulatory budget capped at a given amount and allocated among agencies roughly in proportion to potential lives saved means any agency that overspends could be viewed by competing agencies as extracting an allowance properly theirs, an allowance they could have used to save more lives. Under an (obviously unachievable) ideal regulatory budget, any reshuffling of agency budget allocation could not save more lives, it would harm the cause of life-saving. A regulatory budget would make tradeoffs explicit, however, inducing Congress to do a better job placing the priorities of OSHA, EPA and other agencies in context.

Under regulatory budget constraints, the decision about whether to adopt a new regulation that may offer a minuscule improvement in lives saved will be directly weighed against the much greater and more cheaply achieved benefits of some other federal priority, or letting states and localities, or private sector stakeholders call the shots. If liberty also matters in anyone's calculus, there could be less deference to nanny style regulation of personal behavior, and greater recognition that some risks are undertaken willingly.

With no budget, only the regulated entities face costs: with a budget, however, regulated entities do face costs, but so does the regulator; an agency's own choices can constrain it in the future, inducing wiser choices.

Competition for the Right to Regulate

The presumed objectivity of agencies remains the conceit of the administrative state. In contrast, a regulatory budget instead explicitly or implicitly acknowledges the inherent conflict between agency political rewards and admission that a rule has no benefits. A budget would relieve agencies of benefit calculation responsibilities altogether (somewhat; most rules already sport no quantitative benefit assessments rendering agencies already so relieved) requiring them to instead concentrate exclusively and exhaustively on more effectively assessing rule costs. Congress would have set an overall budget level within which an agency must attempt to maximize benefits lest its budget allocation be revoked or transferred, so monitoring benefits would be advantageous. But Congress would not need to explicitly require it since a budget would provide self-enforcing incentives for agencies to ensure that benefits exceed costs they impose or risk forfeiting their allocation. Regulated entities and third party observers such as scholars, economists and lawyers could perform cost calculations to compare with agency assessments.

Beyond eliminating a politically insurmountable conflict of interest, relieving agencies of benefit-calculating responsibilities would cut agency workloads by up to one half that required of them under the alternative of a stringent benefit-cost regime (which does not exist).

The task of allocating compliance cost allowances among the various agencies and departments could become a competitive, even cutthroat endeavor. As noted, Congress would presumably base compliance cost allowances upon the potential benefits that could reasonably fall within a given agency's jurisdiction. Since agencies have differing impacts on human health (and on the economy), individual agency budgets will vary. Among third-party monitors of the federal bureaucracy, an external statistic that might be expected to emerge under a regulatory budget could be the "cost of the last life saved" at a given agency. Cross-agency comparisons could become fixtures of public health and public policy literature. The crucial contribution of such data is that a competitive environment may be fueled in which regulatory benefits are actively calculated and monitored by *non*-agency personnel. Agencies would feel pressure to save lives at low cost or lose their budget allocations to other agencies that can do better with the same resources. Agencies, in other words, would compete against one another for the "right" to regulate.

Budgeting would force health and safety agencies to compete with one another on the most meaningful bottom line: an agency would want its least effective mandates to save more lives per dollar (or correct some alleged market imperfection better) than the rules of another agency. The unattainable "perfect" regulatory budget would be distributed such that further reshuffling of regulatory cost caps among them could save no more lives and would actually do harm.

Potential for Limited Self-Enforcement

Incentives of agencies to underestimate compliance costs and of regulated parties to overstate them would persist under a budget. Initial budgetary assessments of a law's regulatory burden, along with later public comment and OMB review of the resulting agency proposed regulations, could help force more reasonable values to surface. Aggressive comment from the academic community could also be vital. Interest group politics would remain a disruptive factor, but Congress would be unable to blame agencies for outcomes.

Correcting mechanisms potentially could be devised that might tend to force cost estimates of agencies and regulated parties to converge. An example given by economist Lawrence White is requiring an agency's setting of non-compliance fees to be paid by those unable to obey a particular regulation, such as an emission standard.[42] If a non-compliance fee is set too high, an agency unnecessarily depletes part of its budget allowance and cannot address other potentially more serious hazards; too low a fee and firms pay to "opt out." If firms opt out, the regulatory goal is never met and the budget will in all likelihood get transferred to another agency. This is a risky option presented here for thought experiment purposes only, given that the scope of government and resources in government hands is so great (see pitfalls section, below), but it does illustrate the kind of thinking needed. Better estimates of the cost of regulatory goals could emerge from such interactions as agencies are forced to direct their budgets toward real hazards or lose their budget share to another agency. In an iterative process creativity may help establish techniques useful in developing future budgets and streamlining the overall process. Where regulations now go unenforced, White's proposal, under today's system of ubiquitous regulation, would bankrupt firms forced to pay non-compliance fees for those regulations for which they now escape liability.

THE DANGERS: POTENTIAL PITFALLS OF A REGULATORY BUDGET

Unintentional Expansion of the Legitimate Scope of Government

The most elemental risk in devising a regulatory budget was suggested by Christopher C. DeMuth, who served as administrator of OMB's Office of Information and Regulatory Affairs during President Reagan's first term.[43] DeMuth wrote a defense of cost budgeting concepts in 1980, but cautioned that a regulatory budget could potentially bring more of the economy's private expenditures under government's purview by incorporating them into the workings of a "formal public budget," such that "it might come to seem equally appropriate to treat them as public expenditures, with consequences that are difficult to foresee." [44] He therefore warned: "It is worth pondering at length before we invest too much effort in the details of implementation."[45] This is crucial. There is a risk, in both perception and reality, of effectively conceding legitimacy of government oversight over vast swaths of the economy as a matter of default, and at a time when the federal government already dominates 20 percent of the economy via taxing, borrowing, and spending.[46]

Philosophies of limited government reject federal management of the economy. But when government grows large and unconstrained, *not* being subject to regulation comes to be regarded as government favor. Taxation offers a direct analogy. The federal government implicitly regards all income as belonging to it. Amounts that individuals and businesses are allowed to deduct from taxable income are referred to officially as "tax expenditures." Tax breaks in effect get classified as losses to the federal Treasury.[47] Therefore, the risk that exemption from regulation could come to be perceived in future policy debates as a government favor is not remote. A regulatory budget must expose and *control* government's intervention in the economy, not perversely aggravate over-delegation to unelected regulatory agency personnel, the very circumstance it is intended to remedy.

Risk of Elevating Utilitarianism Over Individual Rights

Although critics contend cost-benefit analysis trades lives for dollars, tradeoffs in the public sphere are, as attorney Malcom Wheeler notes, "a necessity logically compelled by the decision-making process."[48] Implicit cost-benefit inferences are inherent in the act of deciding what to regulate—or not. The solution is to acknowledge that most matters are not public policy questions at all, but we are well beyond that limited government view today, when the federal government heavily steers sectors such as energy and environmental policy, transportation, health care, finance, communications and the Internet, and privacy.

Moreover, some deeper problems of cost-benefit analysis are rarely acknowledged in policy debates. Pretending to "balance" societal costs with societal benefits can descend into a utilitarian "greatest good for the greatest number" formulation that dispenses with protection of individual rights and property rights, particularly in the absence of compensation for those expected to bear the costs. Costs consist of more than dollars. They involve time lost and roads not taken, loss of liberties, and lost opportunities discernible only to the individual experiencing them. These are not quantifiable. A regulatory budget that incorporates net benefits could potentially green-light unbounded government growth, since every agency argues nearly every rule they produce confers net benefits. There are real, social costs to overregulation, not just the lack of it.

The utilitarianism concern is potentially resolved by a regulatory budget that levies only cost calculation duties on agencies, relieving them of conducting benefit assessments. Such questions are the domain of Congress, which presumably surveys the benefits landscape before making regulatory law in the first place. Just as Congress must evaluate whether the benefits of direct spending are worthwhile, it is Congress' job, as the people's elected representatives, to decide whether the indirect costs of regulation are worthwhile. Congress is accountable to the electorate in a way agencies can never be.

If treated properly as an information gathering, reporting, and control instrument, a regulatory cost budget could greatly improve upon inadequate existing cost-benefit practices by making Congress more accountable for the cost of rules that result from its delegating to agencies. The underlying solution to regulatory overreach is to limit executive power to constitutional bounds by reining in over-delegation. When unaccountable, regulators and the inevitable cronyism of a mixed economy prevail, we get the greatest good for only a few, underscoring the need for accountability.

Impossibility of Measuring Costs

As noted, costs cannot be measured with precision, a difficulty that was recognized by early proponents of regulatory budgeting. For example, the George H.W. Bush administration endorsed a regulatory budget, but the Office of Management and Budget highlighted the following potential difficulties:[49]

- A regulatory budget can create confusion about conflicting cost estimates because agencies would have powerful incentives to understate costs to avoid depleting an imposed budget. Regulated parties have incentives to overstate for the opposite reason. The deeper problem is the fundamental subjectivity of costs.
- A budget cannot isolate which private sector expenditures result from regulation and which would have been made anyway.
- A budget must cope with indirect costs. OMB argued that incorporating only direct costs in a regulatory budget would create a bias toward banning, rather than regulating or controlling products to avoid having costs appear in the budget. Likewise, as the Heritage Foundation's Gattuso emphasized, "rules with real but intangible costs—such as violations of religious liberty—would actually be free to regulators."[50]

Apart from intangible costs, OMB believed these difficulties could be overcome, and argued that cost estimates need only be "unbiased and defensible."[51] Besides, cost-benefit analysis as currently conducted is beleaguered with the same problems to much greater extent, since the benefit side of the equation is exploited to justify rulemaking.[52] Furthermore only a handful of agency rules have cost-benefit analyses that get reviewed by OMB anyway.[53]

Regulatory intervention can create unseen costs in the form of forgone opportunities for entrepreneurship and wealth creation. Flying cars were nipped in the bud by auto safety regulations.[54] A merger of Blockbuster and Hollywood Video might have given the combined firm a chance to compete against Netflix and Redbox; it was derailed and both companies folded.[55] Immunity and regulation from the Price-Anderson Act preempted market provision—and discipline—in liability insurance markets for nuclear power generation, which made the technology's actual viability far more difficult to discern.

Determining which costs are due to regulation and which would have been borne anyway is also challenging. Former OMB official John Morrall did not regard this as a significant problem, particularly with incremental budgeting, noting that, "the amount of workplace safety that firms provide is not likely to change much from one year to the next in the absence of new regulations."[56] Morrall noted several pertinent parallels to fiscal budgeting:

> These practical problems [of cost measurement], however, are not insurmountable and mainly differ in degree from their fiscal analogue. For example … the spending forecasts for fiscal budgets do not have to be perfectly accurate for the fiscal budget process to be effective in controlling spending. As long as they are not systematically underestimated, projected cost ceilings serve as a constraint.

> Likewise the spending forecasts for regulatory budgets do not necessarily have to be accurate for the regulatory budget process to act as a constraining device for regulatory spending. Auditing costs for the regulatory budget can be kept to a minimum since all that is needed is *ex post* evaluations of a sample of situations in order to improve economic forecasting models.[57]

Coping with indirect regulatory costs presents thornier problems than direct costs. But as long as preemptive regulation is the order of the day, one could do worse than rough cost estimates that help inform oversight decisions by Congress, which delegates regulatory authority in the first place. Taking the analogy with spending further, former Treasury and OMB official J. T. Young noted that the Budget Act of 1974 and the Congressional Budget Office, "both have become invaluable."

> We would find it unthinkable in fiscal policy today to increase spending or taxes with no means of measuring costs. Yet that is effectively standard regulatory procedure now, because there is no binding constraint on passing these costs to the private sector. [58]

Somebody has to look over the agency's shoulders, and the budget is a way of getting them to do it themselves. Calculation precision is secondary to requiring agencies to operate in an environment of congressional oversight. The objective must be for Congress to vote, even in expedited fashion, before any costly or controversial agency regulation can take effect. Within that framework for regulatory budgeting, even if we do not know what costs are, we have elected officials who can he held accountable.

Temptation to Include Benefits

If a regulatory budget includes benefits, it will fail. In fact it will expand regulation.

As noted, an ongoing threat to regulatory budgeting will be the insistence of agencies to include benefits in their budget calculations, and to use those benefits to offset costs under a budget cap. Yet, benefits do not always lend themselves to measurement by a third party, and abuse will result from the reality that persons enjoying the benefits of regulations and persons paying for those benefits are not always the same people. For example, wetlands and endangered species regulations, which are allegedly intended to benefit all of society, impose costs almost entirely on property owners on whose land wetlands or a protected species may be present.

Given high estimates by an interagency working group on the "social cost of carbon,"[59] broad claims of benefits from emissions regulations are at hand. Similar expansive claims for benefits will emerge from a speculative social cost of methane "guesstimate."[60] Other vague or suspect benefits touted by federal regulators include the "co-benefits" of alleged particulate matter reductions stemming from mercury regulations (without concern for "co-costs"),[61] and the use of linear risk models that assume harm directly proportional to dose in environmental and radiation exposures.[62] The belief that every increment of pollution reduction is equally beneficial to prior reductions has no basis in science, yet agencies often act as though it does.

Including benefits defeats a regulatory budget's purpose. When the costs of a rule that purportedly benefits society in general are imposed on a few political losers, biases toward excessive regulation emerge. From the standpoint of lawmakers, regulation is cheap relative to policies that require on-budget spending. That in turn, induces them to "buy" too much.

A regulatory budget will not help rein in government growth if it condones agency efforts to carry out regulatory wealth transfers by emphasizing benefits. Congress should set the cost budget constraint based on the potential benefits an agency provides, leaving it up to agencies to maximize benefits within that constraint. Net-benefit approaches give agencies, special interests, and even individuals incentives to give undue value to an ineffective regulation. With costs imposed on others, agencies have nothing directly at stake and face no opportunity costs.

Even benefits of federal fiscal budgetary activities are difficult to compare. For example, how does one trade off benefits of federal outlays on infrastructure versus welfare? Such ambiguities would become greatly magnified in a regulatory budget regime that left benefit assessments up to agency whim, since those who gain from regulation have ample incentive to oblige others to shoulder costs. If costs are subjective, benefits are slippery in the extreme. If agencies offset costs of their regulations with self-proclaimed benefits, rarely will any regulation fail the test. Benefits are for the elected Congress to calculate, even if implicitly. In any event, the calculation of benefits by agencies is the exception rather than the rule anyway.

Agency Complaints that "Cutting Our Budget Costs Lives!"

By shedding light on the costs of agency-issued rules, regulatory budgeting can improve congressional oversight and counter agency overreach. But as night follows day, agencies threatened with an impending budget cut or a transfer of allowance to another agency will argue that cutting their budget will cost lives. So ensuring that Congress curbs an agency's regulatory authority when the facts warrant it is a big problem. Is it insurmountable? Perhaps not.

Just as federal spending continues up to the end of a fiscal year, under a regulatory budget, no one will be surprised when agencies regulate until their budget is exhausted, at which point they all appeal for more. When you don't budget you overspend even as an individual, let alone as a collective with no restraint. A barrage of such grievances could lead policy makers to increase the universal regulatory budget ceiling rather than strip an agency of a portion of its budget and transfer the authority elsewhere or lower the overall budget. The risk that the overall regulatory budget will spiral perpetually upward is significant and worrisome. As the recent government-shutdown episodes show, Congress has a tough time with cutbacks when placed in the media spotlight, a situation made worse by the lack of a robust defense of free enterprise and the vital role of markets in regulatory discipline that is all too prevalent inside the Beltway.

Where agencies can demonstrate they can produce greater outcomes within the budget constraint compared to rival agencies, Congress should transfer to them the relevant authority. There will remain a risk, however, that agencies and ideological advocacy groups will place constant pressure on Congress to increase the overall budget. Still, unlike today, Congress will have to explicitly *approve* such budget increases.

PRINCIPLES AND FRAMEWORK: ANTECEDENTS TO A WORKABLE REGULATORY BUDGET

Constructive legislative reforms must appreciate political failure. Regulatory reform, whatever the tools chosen, should eliminate the institutional ability of politicians and regulators to gain by masking regulatory costs or inappropriately transferring costs to political losers, as regulations that benefit large companies at the expense of small ones can do.

Implementing a regulatory budget that protects society from the budget's own hazards presents a considerable challenge, so keeping budgeting in perspective is the most important step at the outset. A regulatory budget is one of many procedural tools that could be used to address regulation, but it can be most effective only in the context of a government already constitutionally limited. A regulatory budget could anchor an assortment of other procedural reforms, as well as be improved by them. Sunsetting requirements and regulatory freezes (moratoria) are examples of complementary reforms. Strengthening the independent review function at OMBs Office of Information and Regulatory Affairs is another, especially since OMB may be one of the enforcers.

Improper manipulation of regulatory budgeting is a significant threat while the regulatory state is as pervasive as it is now. That is why regulatory budgeting must be placed in context: the cornerstone of reform is not regulatory budgeting or any other process reform as such, but should instead be the limitation of excessive government power, restrictions on delegation, restorations of individual rights, and replacing preemptive regulation in favor of competitive disciplines. Such are essential for keeping government in check, and are more foundational than a comprehensive regulatory budget that attempts the massive undertaking of setting a budget for the entire regulated economy.

In the meantime, limited regulatory budgeting ventures can be appropriate. Several specific steps that can help promote a workable budget(s) are described below. These include: an incremental budget; collecting key non-dollar statistics that would assist policymakers in comprehending the scope of the regulatory state; freezing regulatory costs and establishing a regulatory reduction commission; establishing full congressional accountability for regulations by limiting Congress's delegation of legislative power to agencies; distinguishing between economic and environmental regulation; and controlling indirect costs.

Establish an Incremental Budget Rather than a Total Budget

The alternative to an overall regulatory cap across all agencies is to work incrementally to establish a budget for each new law and for each piece of reauthorized regulation. The advantage of the approach is its building on existing legislation and its avoidance of most of the potential dangers that a careless regulatory budget could create. This avoids initially setting up a complicated parallel budgeting process and bureaucracy at the Office of Management and Budget, allowing experimentation.

In the early stages, Congress should be cautious about attempting to set an *overall* enforceable budget, although broad information-only collection attempts like those outlined in Rep. Bliley's bill can be appropriate. There are wide ranges of regulatory cost estimates, and no way now to with certitude say what the level of a total budget should be, especially before taking more important steps to harness regulatory activity and shrink government. The potential ill effects of regulatory budgeting are most likely to emerge if Congress attempts a grand-scale budget without conducting at least a trial run first and loses control of the implementation through poor compromises, or without defining where scale-backs are to occur. Plus, one way to be certain the regulatory budget stumbles is to attempt to bite off more than can be chewed.

An incremental budget would make the most sense early on. The downside of an incremental budget is that the opportunity cost tradeoffs across agencies won't materialize until substantial time has passed, which is one of the main features of a fully functioning approach. Significant numbers of "budget-constrained" regulations would need to have accumulated, enough to constitute a significant portion of each agency's regulatory portfolio, before serious tradeoffs could be made. While learning though, the existing regulatory burden should be reduced to lessen the scope and expectations of a budget. With these steps, the existing burden can be better understood as a comprehensive cost budget evolves.

Compile "Pre-Budgetary" Disclosures and Measurements

Rare is the agency that admits the benefits of its rules do not justify the costs. Current agency and Office of Management and Budget reporting showcase agencies' own cost-benefit analyses of their own regulations. We need more objective, accessible, easier-to-gather, and informative cost and numerical data to supplement that.

The difficulties of calculating regulatory costs for a broad-based budget will mean that a workable one will take considerable time to implement and to generate useful data. During the transition, Congress should take advantage of the significant amount of *non-cost* information that does exist, but which is not currently assembled intelligibly in one location. Congress should require that this data be published officially and concisely. The tables to follow depict easily compiled data that should be published annually—by program, agency, and grand total—in the *Economic Report of the President* or as a chapter in the federal budget itself, or elsewhere. This material would be of immense value to scholars and other observers of the regulatory process. A beneficial side effect of such data is that it will reveal to what extent Congress itself is responsible for the regulatory burden.

Improved annual reporting that emphasizes cost disclosure and statistics about the history, current scope and trajectory of the regulatory enterprise—much like the budget itself does for spending and receipts—may in turn help spur congressional regulatory accountability. Taxes are high, but at least one can open the federal budget to see precisely where outlays and the deficit stand. Regulations escape even that rudimentary visibility.

Disclosing a wider range of costs is fairer to the public, more consistent with instilling greater accountability in the regulatory system, and conforms also with President Obama's campaign promises regarding regard to transparency and open government.[63] Greater disclosure is not particularly difficult or burdensome, especially if agencies are required to focus on regulatory costs rather than benefits.

Congress should first go after the low-hanging fruit. It should strive to make regulatory trends transparent by requiring that summary regulatory data—classified by type of regulation and by agency—be published in the annual federal budget, the *Economic Report of the President*, a stand-alone document, or some other accessible venue.

Meanwhile, for health and safety regulations, Congress can require OMB to recommend revisions to or elimination of outdated or wasteful regulatory programs, and add to knowledge by comparing lives saved by agency for regulations in the health and safety category. (Data exist on deaths and sickness which puts bounds on agency claims of the good they do and inform where compliance resources do the most good.[64]) Agencies cannot take such broad perspectives alone.

Previously, information such as numbers of proposed and final rules, and major and minor rules was collected and published in an annual *Regulatory Program of the United States Government*, in a lengthy appendix titled "Annual Report on Executive Order 12291." This report, discontinued in 1993, specified what actions OMB took on proposed and final rules it reviewed per that order, along with the preceding 10 years' data. It provided considerable detail on specific regulations that were sent back to agencies for reconsideration, and listed, such as, for example:

- Rules withdrawn;
- Comparisons of the most active rule-producing agencies; and
- Analysis of numbers of pages and types of documents in the *Federal Register*.

The *Regulatory Program* ended when the Clinton administration replaced EO 12291 with EO 12866, a directive intended "to reaffirm the primacy of Federal agencies in the regulatory decision-making process."[65] But in a limited way, what the budget is to fiscal policy, the *Regulatory Program* was to regulatory policy. It helped portray the off-budget scope of government, if not in terms of actual regulatory costs, at least in terms of trends in numbers of rules at the agencies. A further breakdown of the *Regulatory Program*'s contents is as follows:

- Tables and pie charts depicting the total number of OMB reviews of regulations, by agency, presented in number, and as a percentage of the total.
- Number of expensive "major" ($100 million-plus) and non-major rules, by agency.
- A chart comparing the major and non-major rules from current and previous years.
- A brief description of all major proposed and final rules.
- The 20 most active rule-producing agencies, by number of rules reviewed, with history.
- A chart on types of actions taken on rules reviewed by OMB. "Total Reviews" were broken down as follows:
    - "Found consistent [with executive order principles] without change;"
    - "Found consistent with change;"
    - "Withdrawn by agency;"
    - "Returned for reconsideration;"
    - "Returned because sent to OMB improperly;"
    - "Suspended;"
    - "Emergency;" and
    - "Statutory or judicial deadline."

- Detail on the actions taken on rules reviewed.
- Average review time for new rules taken by OMB.
- A listing of rules exempted from review procedures.
- Numbers of *Federal Register* pages for the current and prior years.
- Analysis of aggregate pages published in the *Federal Register*, including total pages, average pages per month, percentage change year to year, and percentage changes over time.
- A breakdown of overall proposed and final rule documents in the *Federal Register*.
- Analysis of aggregate final rule documents published in the *Federal Register* by number and percentage. These were broken down into "New requirement," "Revision to existing requirement," "Elimination of existing requirement," and "Other."
- Number of final rule documents by agency.

Getting a clearly defined picture of the off-budget scope of government is a prerequisite for controlling regulatory compliance costs and addressing the job impacts that agencies seem reluctant to acknowledge. The policy aim of disclosure would be to compel an environment where Congress is forced to bear the responsibility for regulatory outcomes and to demonstrate that regulatory benefits outweigh costs—rather than pass those decisions on to resistant and unaccountable agencies.

Without consistent summary information about regulatory trends and costs, the ability to debate reform measures and implement and supplement budgeting is undermined. A considerable amount and variety of regulatory data already exist that can be assembled intelligibly in order to enable analysis. As soon as possible, Congress should revive and expand the data incorporated in the *Regulatory Program* as part of a more comprehensive annual *Regulatory Report Card*. The information would provide valuable input to researchers, scholars, policy makers, and the public, while fostering pressures for congressional accountability.

A *Regulatory Report Card* would provide a range of relevant regulatory information without bogging down in the distracting net benefit analyses, which are emphasized by OMB in its annual reports on regulation.[66] Those analyses are largely based on agency self-reporting, which mars their usefulness and the scope of congressional reaction to them.

The *Report Card* should also tabulate and publish the proportion of each agency's significant rulemakings that *lack* cost estimates. Knowing not only where agency cost estimates exist, but also where they do not, would help highlight the best and worst agency efforts at cost disclosure, inform congressional oversight and budgeting initiation or maintenance, and reveal whether or not the overall regulatory enterprise can be said to do more good than harm. Years of accumulated reporting will help uncover agency attempts to circumvent regulatory disclosure, such as through any proliferation of rules with cost estimates that come in just below the threshold that would tag a rule as economically significant or major. The *Regulatory Report Card* should include:

<u>Regulatory Report Card (to inform regulatory budgeting)</u>
(Divided into economic, health/safety, environment, labor, homeland security & paperwork)

...with 5-year historical tables...

- Tallies of "economically significant" rules and minor rules by department, agency, and commission.
- Numbers and percentages of rules impacting small business.[67]
- Depictions of how regulations accumulate as a small business grows.
- Numbers and percentages of regulations that contain numerical cost estimates.
- Tallies of existing cost estimates, including subtotals by agency and grand total.
- Numbers and percentages lacking cost estimates, with a short explanation for the lack of cost estimates.
- Analysis of the *Federal Register*, including number 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.
- Ranking of most active rule-making agencies.
- Identification of rules that are deregulatory rather than regulatory.
- Rules that affect internal agency procedures alone.
- Number of rules new to the *Unified Agenda*; number that are carry-overs from previous years.[68]
- Numbers and percentages of rules facing statutory or judicial deadlines that limit executive branch ability to restrain them.
- Rules for which weighing costs and benefits is statutorily prohibited.
- Percentages of rules reviewed by the OMB and action taken.

These items would isolate certain easily available but now dispersed specifics about regulatory policy that Congress could use in its regulatory liberalization and budgeting efforts. Requiring this information to be published annually would acknowledge and validate its status as an important components of regulatory control and the budgetary process. Additionally, a chapter on the overall state of regulation on the macro-economy and any summary of regulatory impacts on specific industries and small businesses would be useful, as would descriptions of perverse regulatory effects.

A formal step in the disclosure campaign could also entail the establishment by Congress of an Office of Regulatory Analysis to examine rules in detail (an example of which has been proposed by Rep. Don Young (R-AK) [69]), a parallel to the way Congress today routinely turns to the Congressional Budget Office for fiscal and budgetary analysis.[70]

Implement a Regulatory Cost Freeze and a Regulatory Reduction Commission

While non-cost data are being collected and while incremental regulatory budgeting efforts proceed to enable a sturdier budget, the aggregate regulatory state should be met head-on with a combination of measures. Cost freezes, or requirements that any new agency regulation be offset by the elimination of some existing regulation of roughly equivalent cost, an option already noted above, is one ingredient.

Meanwhile, Congress could target and reduce that "frozen" regulatory burden with a device like a formal Regulatory Reduction Commission—an idea first proposed by Senator Phil Gramm.[71] Like the military Base Closure and Realignment Commission, a Regulatory Reduction Commission would hold hearings, assemble a package of regulations to eliminate, and then send the entire package to Congress for a vote, with no amendments permitted. Any Commission recommendation that did not require legislation would also be implemented by the President. The filtering process of hearings combined with bundling of disparate regulations cutting across interest group lines could make Commission recommendations difficult to oppose. The Commissions effort would be aided by the availability of quasi-budgetary data. A version has been implemented in the Netherlands. As a Commission reduces the level of regulation in the economy it might become more palatable to consider an overall budget, but policymakers need a credible grasp of the regulatory burden.

Revive Congressional Accountability

Regulatory budgeting would help establish in a limited sense the principle that Congress bears ultimate responsibility for regulations, since the budget would feature caps explicitly set by Congress. That still is not enough. Congressional delegation of power to federal agencies should be appropriately limited with or without a regulatory budget. Whether or not within a budgeting framework, significant agency regulations should be turned into bills requiring passage by both Houses of Congress and a presidential signature. That procedure sharply limits over-delegation and autonomy of agencies. Congress might still regulate poorly under a budget with limited delegation of power; but the key difference is that voters then would have one answerable party with whom to settle the score at election time. With congressional accountability, major actions undertaken by agencies will by definition have been explicitly endorsed by Congress and would contain fingerprints galore. Out-of-control agencies actually camouflage an out of control Congress, and limiting delegation would capitalize on that fact.

Employ Separate Budgets for Economic and Social/Environmental Regulation

The weakest excuse for government interference in the economy is that of economic intervention. This seems to be the case whether the issue at hand is grand-design government intervention—such as "fine-tuning" of the macro economy—or whether the issue is direct government management of an specific industry's output (such as agricultural quotas) or of entry into an industry (such as the trucking industry). The public choice branch of economic theory has gone to great lengths to demonstrate that regulation often works in the interests of the regulated parties themselves, rather than that of the public. Regulatory outcomes typically conform to the interpretation that regulation is secured by the regulated parties for their own benefit.

Since the role of health and safety regulation is so utterly different from economic regulation, separate budgets make sense from the standpoint of comparing relative merits of regulations as the scope of budgeting grows. (Such conceptual distinctions would not be immediately necessary for incremental budgets that set caps on a case-by-case basis.) There are obvious conceptual differences that render meaningless comparisons of, for example, economic benefits a trade regulation with lives saved by a safety regulation. The two types of benefits allegedly achieved are on the one hand of the economic variety, and on the other of a health and safety variety. There is little basis for comparing the two, let alone trading such regulations off against one another. To the extent that budgeting helps discredit economic regulation, such regulation can be removed from the budget and from the purview of government altogether (alas, still a utopian thought), leaving Congress the reduced task of controlling and reducing environmental, health, and safety regulations. As many health and safety rules reveal their true private interest origins, they too can be removed from the budgeting process.

Controlling Indirect Costs: Limit Product Bans and Control Standards

A case can be made that, just as a fiscal budget accounts for direct dollar outlays alone rather than the indirect employment and output effects of taxes, a regulatory budget should be direct-compliance-cost based. Direct regulatory costs are difficult enough to assess without attempting to include indirect costs—such as higher prices and unemployment—in a budget. Moreover, if indirect costs are included in a budget, it is likely that *benefits* will also be included. Julius Allen of the Congressional Research Service argues that calculating indirect costs to the private sector "would require estimates on the benefits of a regulation, in order to arrive at net (versus gross) cost of regulation."[72] As already noted, benefits are impossible to assess objectively, partly evidenced by the fact that agencies either cannot or will not provide quantitative benefit assessments. One of a budget's selling advantages relative to cost-benefit analysis is that it would leave benefits out of regulators assessments entirely, placing responsibility on Congress.

Yet some recognition of indirect costs imposed by regulations is necessary. Although these costs are the most difficult to measure, they may sometimes exceed direct costs. Recognizing those in a reasonable way represents the most critical challenge in regulatory budgeting. Ignoring indirect costs would lead to massive understatements of regulatory costs. Worsening this problem is the fact that there is no general agreement on the dividing line between direct and indirect costs. Although costs are subjective and substantially indirect, regulators using cost-benefit analysis have generally attempted to proxy them with mere engineering costs. And even direct engineering cost estimates are plagued by the impact of external changes in technology and shifts in market demand.

If Congress were to settle on a rule that allows regulators to overlook entire categories of regulatory costs, then regulations will tend toward that very type. Imagine a regulatory budget were established that addressed only direct costs of regulations—such as direct compliance costs of controlling an emission. If outright input or product bans are regarded as indirect costs for budgeting purposes, and therefore not counted, most environmental regulation could be expected to entail a ban rather than controls so that regulators would avoid exhausting their budgets.[73] The incentives set up would be disastrous. Part of the answer to the indirect costs dilemma, therefore, is to forbid just those types of regulatory activities—such as product bans—most likely to produce indirect costs.

Eliminating outright regulatory methods that generate indirect costs is more consistent with an approach to regulatory reform that stresses rolling back government power. A banning bias will emerge if bans are regarded as imposing only indirect costs. Therefore, outright product and input bans should be avoided unless safety is dire consideration. Prohibiting agencies from banning products or inputs, except in the most extreme circumstances, would eliminate a significant loophole in a compliance-cost-based regulatory budgeting. Where product or substance bans are necessary, congressional approval could be required.

Where indirect costs are included in a budget, Congress should at least:

(1) set performance standards rather than control standards for regulation so that high-cost direct compliance costs are not locked in;
(2) set a loose and preliminary "indirect cost" budget on top of the direct cost budget for each new mandate, monitor closely as "true" costs are fleshed out in the rulemaking process, and formally approve any increases, and;
(3) remain vigilant against agencies offsetting costs with benefits.

These steps will provide incentives for agencies to request cheaper alternative regulatory approaches which would achieve the same regulatory end. The burden would fall to the agency to prove that its alternative is better or the least costly, inclusive of indirect costs.

While pitfalls in harnessing indirect costs undoubtedly exist, establishing a limited budget can help policymakers grasp costs in rough magnitudes despite their subjectivity. Once again the key contribution of a budget is not accuracy, but accountability and convergence. There may be ways of forcing out "true" costs and ensuring that costs are not systematically understated despite machinations by agencies and regulated parties. Ultimately, however, the only way to control the regulatory state is to limit governmental power, not simply to better measure the extent of that power. However the latter can help encourage the former.

Conclusion

Although regulatory trends over the past few years seem to point upward, there is still little formal scorekeeping for regulations. Controls such as regulatory review and even presidential moratoria have been tried, with spotty success. Regulatory burdens increase while benefits grow more ambiguous, signifying a regulatory system that itself needs to be better regulated. Since the information we can glean is more qualitative than quantitative in nature, early improvements in regulatory information could substantially improve regulatory control even if the additional data is primarily qualitative in nature. Further steps, more fundamental in their recognition of the recent regimes failures and therefore far more politically contentious, call for coping with the legislative realities that prevent the making of rational regulatory policy. Regulatory reform, as opposed to tinkering, will require reassessing power shared by agencies and legislators, a concern that featured highly in the House of Representatives Task Forces on Article 1 and regulatory reform released in June 2016. With or without a quantitative budget, effective regulatory reforms must ultimately come through institutional changes that tightly specify the purpose and reach of delegated regulatory power. Though potential implementation problems abound, an incremental regulatory budget is one tool that can help cement greater control over the regulatory state. And once that control is established, a budget can help ensure that the regulatory state remains under control.

ENDNOTES

[1] This testimony is based in part on Clyde Wayne Crews Jr., "Toward a Federal Regulatory Budget: The Pitfalls in Quantifying Regulatory Costs and How to Avoid Them," *CEI Onpoint*, No. 217. June 28, 2016. https://cei.org/sites/default/files/Wayne%20Crews%20-%20Toward%20a%20Federal%20Regulatory%20Budget.pdf.; Crews, "The Other National Debt Crisis: How and Why Congress Must Quantify Federal Regulation," *Competitive Enterprise Institute Issue Analysis 2001 No. 4*, October 2011. http://cei.org/sites/default/files/Wayne%20Crews%20-%20The%20Other%20National%20Debt%20Crisis.pdf, and also Crews, "Promise and Peril: Implementing a Regulatory Budget," *Policy Sciences*, Vol. 31, Issue 4, December. pp. 343-369, http://link.springer.com/article/10.1023%2FA%3A1004483131309.

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[25]William Niskanen, "Reduce Federal Regulation," *Market Liberalism*, Cato Institute, 1992, pp. 114.

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[32] Nick Malyshev, "A Primer on Regulatory Budgets," OECD Journal on Budgeting, Vol. 2010, No. 3. 2010. http://www.oecd.org/gov/budgeting/48170563.pdf.

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[39] Laura Jones, "Ottawa's Red-Tape Cutting Law Gets Royal Assent," *Financial Post*, April 24, 2015. http://linkis.com/financialpost.com/NiOKu.

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March/April 1980, pp. 44-46.
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rules, actions completed during the previous few months, and anticipated longer-term rulemakings. The Agenda functions as a cross-sectional snapshot of rules moving through the pipeline. Therefore, the rules it contains may often carry over at the same stage from one year to the next, or they may reappear in subsequent Agendas at different stages. The Agenda's rules primarily affect the private sector, but many also affect state and local governments and the federal government itself.

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