Testimony of

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Before the:

House of Representatives Judiciary Committee
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
2226 Rayburn House Office Building.
Washington, D.C. 20510-0250

Assessing the Obama Years:
OIRA and Regulatory Impacts on Jobs, Wages and Economic Recovery
Wednesday July 6, 2016, 3:00 p.m.

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The Competitive Enterprise Institute (CEI) is a non-profit public policy research organization dedicated to advancing individual liberty and free enterprise with an emphasis on regulatory policy. I appreciate the opportunity to discuss issues surrounding agency guidance, and I thank the Chairman, Ranking Member and Members of the Subcommittee.[1]

Introduction:
Improving OIRA's Important Role in Managing the Federal Regulatory Enterprise

When policymakers neglect federal regulation, they ignore arguably the greatest element of governmental influence in the United States' economy and perhaps in society itself. As a policy concern, regulation merits attention like the $18 trillion national debt receives, since both spending and regulation redirect societal resources.

In that context, this testimony looks at OIRA's (the Office of Management and Budget's Office of Information and Regulatory Affairs) recent role in regulatory oversight in a positive light, but urges enhancement. Many may have noticed there's still no sign of the 2016 White House *Report to Congress* on regulatory costs and benefits.[2] But the concern is not solely with OIRA or the administration; Congressional Republicans have acknowledged neglecting their own role in regulatory oversight, as June's House Task Forces addressing Article I and delegation issues made clear.[3]

A current ethos of extending regulatory agency and executive branch power became epitomized in President Barack Obama's February 2013 State of the Union Address. Capping weeks of the White House's touting of a "pen and phone" (Rucker 2014) strategy to further expand federal economic, environmental and social regulation and intervention (White House, 25 February 2014), the president promised that, "[I]if Congress won't act soon…, I will. I will direct my cabinet to come up with executive actions we can take, now and in the future (Marks 2013)."

While the 114th Congress objected to such aspirations, it faced "the year of the veto (Sink and Wong 2015)." The president promised vetoes on regulatory reforms like the REINS Act and Regulatory Accountability Act, and followed through on a veto of the Keystone XL pipeline (White House, 2 February 2015) in contrast to America's onetime ethos of rapid, churning infrastructure growth (Gordon 2004). Still, policymakers and OIRA could use the limited tools at their disposal to create a body of information that can make economic liberalization possible in more favorable circumstances.

While the Constitution has not come to the rescue, we are not without options. In light of Congress' over-delegation of power to federal agencies, this testimony briefly reviews the formal oversight procedures that ostensibly exist for the thousands of regulations issuing annually. Next we not that central oversight of regulation sports theoretical inconsistencies and gaps and presents the data demonstrating that federal regulatory review has fallen short and is far from comprehensive. While central review hasn't worked, we posit why, just possibly, it could. Given the reality that code or administrative agency law is here to stay for the time being—this testimony offers disclosure-based "low-hanging fruit" reform proposals for an administration and/or OIRA, while remaining cognizant of central review's shortcomings. The aim of these proposals is to (1) help legitimize Congress' case for regulatory liberalization and enable a

revival of some semblance of constitutional order in the spirit of the task force reports; and to (2) facilitate future liberty-minded executive branches' deployment of the "pen and phone" in *defense* of liberty. An alternate take on "Energy in the Executive" (*Federalist Papers* No. 70, 1788) would be a welcome contrast to its usage in undermining institutions of limited government and destabilizing core values of classical liberal society.

Regulatory Overreach?

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

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

One doesn't have to dig to find exasperation. Home Depot co-founder Bernie Marcus told *Investor's Business Daily* that (Merline 2011):

> *Having built a small business into a big one, I can tell you that today the impediments that the government imposes are impossible to deal with. Home Depot would never have succeeded if we'd tried to start it today. Every day you see rules and regulations from a group of Washington bureaucrats who know nothing about running a business. And I mean every day. It's become stifling.*

What sorts of impediments? Here's a short list of recent ones.

- The Department of Health and Human Services and the Internal Revenue Service are transforming America's traditional medical system via the Patient Protection and Affordable Care Act;
- Financial regulations such as the Sarbanes-Oxley and Dodd-Frank laws foster the very "too big to fail" entities cited as the reason to intervene in the first place, create instability and damage the poor's access to banking services;
- Communications regulation such as the Federal Communications Commission (FCC) aggressive "net neutrality" rules (U.S. FCC 2015) threatens free speech and network infrastructure investment even though the rationales for establishing an FCC no longer exist (Cox and Crews 2005).
- Energy regulation and green extremism disrupt access to land and resources, aggravating energy poverty and even food shortages (Action Aid and Competitive Enterprise Institute 2011);
- The homeland security culture has wrought a cabinet department, invasive airport

security, general surveillance and an as yet incalculable impact on civil liberties;

- Antitrust agencies disrupt competition in the name of protecting it despite the modern technological era's rapid pace of "creative destruction" compared to the "smokestack monopoly" era that allegedly justified antitrust regulation;
- The Department of Justice's "Operation Chokepoint" threatens to harass small entities out of business in pursuit of federal control over a financial industry segment—without congressional approval or even the normal public comment process (Murray 2014).
- The expansion of federal agency "guidance documents."[4]

Such examples scale down to the Consumer Product Safety Commission's proposed window blinds regulation (U.S. CPSC, 2013) to FDA's regulation of a serving size of breath mints (U.S. FDA, 2014) and its recent inquiry into hand sanitizers.

What is the impact of all this? Those doing the regulating see no problem whatsoever, and groups like Public Citizen deny any impact of regulation on the economy and jobs,[5] and other pundits deny any linkage.[6] Previewing his 2014 State of the Union Address, President Obama said … "2014 was the fastest year for job growth since the 1990s. Unemployment fell faster than any year since 1984 (Cited in Davis 2015)." Then, referring to the economy and well-being, Obama asserted in his 2015 State of the Union Address that "tonight, we turn the page" (White House, 20 January 2015).

Others continue seeing things differently. Growth emerging from a painfully low baseline is hardly turning over a new leaf. Unemployment is "down" in part because statistics omit those who've given up the job hunt. Job growth that did occur has been attributed to an end to unemployment benefits (Brennan 2015). An astounding 92 million Americans are not working (CBS/Associated Press 2014), positioning labor force participation at a 36 year low, with nearly 12 million having dropped out during the Obama administration (Meyer 2014). New banks aren't opening.[7] Data point to high debt per capita, and to the highest part-time and temporary-job creation rates in contrast to full time career positions.[8] A popular blog laments the "slow death of American entrepreneurship" (Casselman 2014) Headlines tell painful tales, like *Investor's Business Daily* in 2015 reporting on businesses dying faster than they're being created, a circumstance the *Washington Post* had noted in 2014 (Ingraham). Likewise a Brookings study on small business formation noted declining rates, as did a *Wall Street Journal* report on reduced business ownership rates among the young (Simon and Barr 2015). One recruiter detailed to the *Wall Street Journal* how regulations undermine employment (Moore 2013), while other commenters point to an inverse correlation between regulation and innovation (Kritikos 2014). Industry anecdotes parallel the general statistics; In food service, regulations are driving restaurants out of business and even sending them abroad (Little 2013).

One can recognize that small business may not be the hyped "backbone" of the entire economy (rather, new businesses appear to be: Dearie and Geduldig 2013). Still, regulations are a "hidden tax" for them and their larger brethren. While obscured in prices for most of us, if you're a businessperson, you've found them. It's an awakening mirroring the college graduate encountering his first docked paycheck, wondering, "Who's this guy FICA?"

Congress has blamed overreach and its consequences on the president and agencies, but as noted the recent House Task Forces on regulatory and Article I issues, Congress has acknowledged it delegated that power inappropriately. The over-delegation phenomenon of unelected and unaccountable agency personnel doing the lawmaking was detailed in David Schoenbrod's *Power Without Responsibility* (1993). In *Is Administrative Law Unlawful?* Philip Hamburger sees the modern administration state as a reemergence of the absolute power practiced by pre-modern kings (2014). In *Imprimis*, Hamburger describes the return of monarchical prerogative—the very condition our Constitution was drafted to eliminate (November 2014):

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

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It is in *this* environment in which OIRA operates, one in which courts also tend to defer to agencies' "expertise" (R. J. May 2010), and Ivy League scholar in the *Washington Post* ponders dispensing with Congress altogether in favor of a president that both makes and executes laws.[9] Justice Clarence Thomas questioned the roots of this deference (*Perez v. Mortgage Bankers Association*, 2015. 19):

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

The combination of that progressive victory, delegation, inertia, and a ratchet effect that expands and never unwinds government power (Higgs 1987) dictates that the Constitution is not coming to the rescue in the short term. For all intents and purposes, code law has won, and is here to stay for the time being, until reinstatement of congressional accountability to voters for what the bureaucracy does becomes palatable (Crews 2013). Congress enabled this bureaucratic and presidential hubris, and only Congress can fully reverse "regulation without representation" (Schoenbrod and Taylor 2003).

Here, however, we shall be optimistic and shall look at the (limited) good OIRA's administrative oversight can do, with an eye toward building a foundation for future liberalization and re-establishment of democratic accountability. There is no silver bullet by which OIRA can come to the rescue. As William A. Niskanen made clear in *Market Liberalism* (1992, 114):

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

So while OIRA process reforms are not enough, it can help us assure that the regulatory state endures at minimum the disclosure, transparency and accountability demanded of taxing and spending.

Now that we've gotten "what the Constitution says" off our chest, given the likely limitations of this hearing, we can next confront the regulated nation we live in and address constraints that prevent America's traditional tools from doing much about it. But this is not a pessimistic survey; we will highlighting incremental reforms addressing regulatory overreach that an energized OIRA could implement, if not unilaterally, then with an engaged president.

> *Joyfully to the breeze royal Odysseus spread his sail, and with his rudder skillfully he steered.*
>
> —Homer
> *The Odyssey*

What Constraints Apply to the Administrative/Regulatory State?

Legislatures rarely control spending, let alone the tentacles of the regulatory enterprises they endorsed over decades through both design and apathy. As lawmaking disengaged from the legislature and perched at unelected, unaccountable bureaucracies, economic, environmental and social interventions escalated. In terms of output level, there were 114 public laws passed by Congress and signed by the president in 2015 (U.S. GPO); meanwhile agencies, implementing laws passed earlier and by earlier Congresses, issued 3,410 rules and regulations—a multiple of 30 rules for every law I like to call the "Unconstitutionality Index."

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

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

The CRA gives Congress a window of 60 legislative days in which to review a major rule and, if desired, pass a "resolution of disapproval" rejecting the rule. The CRA, in spirit, is one of the more important recent affirmations of the separation of powers. But despite the issuance of

thousands of rules since passage, including many dozens of major ones, only one rule has been rejected: a Labor Department rule on workplace repetitive-motion injuries in early 2001.

Such concerns were recognized early, and upgrades to CRA to require an affirmative approval of major agency regulations before they are effective are required. Congress did not do this with Republican control of both Houses and the presidency, and now Obama promises a veto should they pass such legislation. Meanwhile the CRA itself is further undermined now given that final rules are no longer properly submitted to the Government Accountability Office and to Congress as required under the law (Copeland 2014). That is an indispensable step since Congress needs the reports to introduce a formal disapproval resolution.

So the Constitution has not come to the rescue, and alas, nor has Congress, so for the moment, we are largely "stuck" with what the executive branch review of regulations embodied at OIRA. The basis of the modern regulatory process is the post-New Deal Administrative Procedure Act (APA) of 1946 (P.L. 79-404) which set up the process of public advance notice of rulemakings and provided the opportunity for the public to provide input and comment before a final rule is published in the *Federal Register* subject to a 30-day period before it becomes effective. The *Federal Register* is the daily depository of all these proposed and final federal rules and regulations, such as the 3,410 rules of 2015. While the APA established formal rulemaking processes with quasi-judicial proceedings for significant regulations, these are rarely used. Instead, APA's "informal rulemaking" procedure of notice and comment ("Section 553" rulemaking) is most common (Carey 2014, 2). But there is wiggle room even for that. As noted in at 2014 survey from the Congressional Research Service, "The APA specifically authorizes any federal agency to dispense with its requirements for notice and comment if the agency for good cause finds that the use of traditional procedures would be 'impracticable, unnecessary, or contrary to the public interest' (Carey 2014, 2)."

During the late 1970s and early 1980s, concern over regulations' economic impacts bred inquiries and reforms meant to reinvigorate the economy while stemming that era's inflationary pressures (Hopkins 1976). The mood was rethinking government regulations, in contrast to today's compulsion to expand them. Alongside cost concerns, agency tendencies to overstate or selectively express benefits was recognized. Prominent regulatory liberalizations began in the 1970s, and included certain trucking, rail, and airline deregulatory moves, partial financial services reforms, relaxed antitrust enforcement and paperwork reduction (Firey 2011). The regulatory review story began with President Nixon, was elaborated extensively by President Ford, and embraced more fully by President Carter. This involved the White House Office of Management and Budget (OMB) acting as central reviewer of important agency regulations.

A significant advance was the Reagan Administration's formalization of more activist central regulatory review at the OIRA within OMB.

Created by the Paperwork Reduction Act of 1980, OIRA first concentrated on reducing the private sector's federal paperwork burdens. Later, OIRA's authority was expanded by President Reagan's February 17, 1981 Executive Order 12291 to encompass (theoretically) a larger portion of the regulatory process by requiring that any new major executive agency regulation's benefits outweigh costs where not prohibited by statute (independent agencies were exempt), and to review agencies rules and analyses. Earlier administrations' regulatory review efforts such as ones conducted by the Council on Wage and Price Stability, the Council of Economic Advisers

and the interagency Regulatory Analysis Review Group, lacked extensive enforcement powers (DeMuth 1980). These earlier bodies could seek regulatory cost analysis if not statutorily prohibited, but could not enforce net-benefit requirements; agencies could still reject reviewers' counsel and appeals to the president were possible, but rare (DeMuth 1980). Net benefit analysis has insurmountable problems of its own in this writer's view ("The Costs of Benefits" in Crews 2013; and Crews, *Forbes* 7 July 2013), but the *intent* was significant in the prevailing context of consciously addressing regulation. The early and mid-1980s saw declining costs and flows in regulation particularly economic regulation in contrast to social and environmental (Hopkins 1992).

Over the years, OIRA review—and that at the first President Bush's Council on Competitiveness tasked to screen regulations (Bloomberg Business 1991)—faced political opposition, narrow scope of authority (Bolton, Potter and Thrower 2014) and limited resources (Dudley 2011). On September 30, 1993, President Bill Clinton's replacement of Reagan's E.O. 12291 with his own E.O. 12866 "Regulatory Planning and Review" reduced OIRA's authority. The Clinton approach retained the central regulatory review structure but "reaffirm[ed] the primacy of Federal agencies in the regulatory decision-making process" (*Federal Register*, Vol. 58, No. 190, October 4, 1993), weakening the "central" in central review. The new order also changed the Reagan criterion that benefits "outweigh" costs to a weaker stipulation that benefits "justify" costs. But the order did retain requirements for agencies to 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," and for OIRA to review those. As with E.O. 12291, independent agencies remained exempt.

President Obama's own January 18, 2011 E.O. 13565 on review and reform ("Improving Regulation and Regulatory Review") carried on the Clinton order and articulated a pledge to address unwarranted regulation (*Federal Register*, Vol. 76, No. 14, January 21, 2011). The president achieved a few billion dollars in savings, even wisecracking in the 2013 State of the Union Address about a rule that had categorized spilled milk as an "oil" (White House 2012). Suffice it to say that such trivialities are not the source of the regulatory excess and economic stagnation that concern many; the few billion dollars cut via executive order have been swamped by rules otherwise issued.

Independent agencies, while they are subject to APA notice-and-comment are not subject to enforceable regulatory review. Still President Obama addressed them in his July 11, 2011 E.O. 13579 ("Regulation and Independent Regulatory Agencies") with a call to fall into line on disclosure (*Federal Register*, Vol. 76, No. 135, July 14, 2011). A president cannot change congressional directives with respect to independent agencies, but can use the pen and phone bully pulpit to, if not to restrain agencies, *to not encourage their excesses*.

In all, four of President Obama's executive orders address over-regulation and rollbacks and the role of central reviewers at OIRA (All available on OMB's "Regulatory Matters" site, https://www.whitehouse.gov/omb/inforeg_regmatters#eo13610). Yet expansion of government into economic, social and environmental realms has been the administration's emphasis, not review-generated cutbacks. Quite the contrary; the situation today is that expansions in which many agencies engage are supported and encouraged by the administration such as President

Obama's call on FCC "to take up the strongest possible rules to protect net neutrality" (White House, 10 November 2014).

So despite Obama's executive orders ostensibly shining a light on regulatory overreach and encouraging a tough OIRA, that's not what has transpired.

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

The Limits of OIRA's Central Regulatory Review

The central review we just described doesn't work well enough.

Rent-seeking

For one thing, it is not quite accurate, as OMB has proclaimed, that "businesses generally are not in favor of regulation" (U.S. OMB 1997)." Business not only generally favors regulation, but often sought regulation in the first place (Stigler 1971), so a sliver of the premise of OIRA regulatory reviews may be suspect terrain at the very outset. Taxes obviously transfer wealth and affect profits, but, regulations do likewise; pollution controls, accounting requirements, privacy mandates and the like do not impact every firm equally. They create artificial entry barriers and hobble competition, they benefit some producers while punishing others. This aggravates cronyism and fosters attempts at regulatory capture. Consumers enjoying falling prices and growing output were not up on their hind legs demanding the Interstate Commerce Commission, or the state regulation of utilities (Geddes 1992), or the antitrust laws, or regulation of Uber: these were and are sought by political elites and producers protecting profits and eliminating competition. And what were once small businesses, when they get big, may look more favorably upon rent-seeking and score-settling (Tollison 1982).

Regulation benefits regulatory advocates and pressure groups and, obviously, the regulator. Thus, regulations have a constituency that favors command-and-control rules over market processes, quite distinct from the social welfare rationales that dominate the rhetoric of the entire policy realm and central review itself. This creates legislation and derivative rules for "review" that shouldn't exist in the first place.

Also important: Just as *economic* regulatory agencies are captured by special interests, much of what is considered *social* or *health/safety* or environmental regulation may be bad for consumers as well (Crandall 1992). Even when regulation "works," the overall or societal benefits of can be outweighed by costs; also the social calculus approach to net benefits can ignore wealth transfers, regulatory takings and due process.

Executive review presumably recognizes institutionally that agencies and departments do not benefit from *curtailing* operations, from *not* regulating. Conversely, they gain immensely—in budget allocation, staffing, and political and career status—the more extensive the regulatory empires they oversee. Turf-building assures agencies will sometimes not care all that much about anything more than cosmetic benefit-cost concerns, enough to create the appearance of a need to regulate (mints, blinds, menus, energy choices). However, unlike private actors, bureaus suffer no repercussions when their interventions prove scientifically, socially or economically wasteful and harmful. Output for bureaus is not directly measurable, but must be inferred from the level of activity, creating a slippage in the ability to closely monitor agency effectiveness (Niskanen 1971). Unlike profit-making firms, unaccountable bureaus can disregard minimizing the costs of their "product" (regulations) since others (private sector entities and their customers) bear the impact of their actions.

The executive branch regulatory review regime now in place was intended to be a step toward regulating regulation. However, if one presumes rent seekers capture the regulatory process, then it's no leap to suspect they also captured or capture the regulatory review process. There may be rent-seeking and rent-avoidance motivations at play. The more cynical view is that presidents established regulatory review for the purpose of monitoring their appointees to make certain that promises of public or private goods made to "essentials" and "influentials" are satisfied and are delivered with lower cost burdens (Bueno de Mesquita, Smith, Siverson and Morrow 2003). There may be something to the argument.

"Regulatory Dark Matter" that OIRA misses

Even if APA notice and comment were to excel, and OIRA review of rules to be well functioning, it only a partially adequate safeguard since the already incomplete discipline of rulemaking—which provides OIRA the subject matter to review in the first place—downplays agency guidance documents ("non-legislative" rules), memoranda, notices and bulletins with legal effect that I've taken to calling "regulatory dark matter."[10] These and other "non-rules" can be ways of avoiding not just the constitutional lawmaking process, but may skirt the publication notice-and-comment requirements of the Administrative Procedure Act and federal Office of Management and Budget (OMB) review (Mercatus Institute symposium, 2014).

Guidance documents are a way of getting around central control, since the APA's requirement of publishing a notice of proposed rulemaking doesn't apply to "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," in addition to the "good cause" exemption for legislative rules noted earlier (P.L. 79-404. Section 553). Like agency notice-and-comment rules, sometimes guidance is upheld by courts, sometimes not, when it does more than merely interpret (Whisner 2013). My partial inventory finds 580 pieces of acknowledged "significant guidance" in play, but there are many tens of thousands of guidances in existence[11]

President Obama's waivers of Patient Protection and Affordable Care Act elements were among the most prominent recently. Alongside these notable executive and independent agency guidance documents include:

- ***Housing and Urban Development*** guidance decreeing landlord and home seller denial of those with criminal records a potential violation of the Fair Housing Act;[12]

- The ***Environmental Protection Agency's*** (EPA's) Clean Water Act interpretive guidance on "Waters of the United States."[13] This directive took the step of soliciting notice and comment per the APA, though with significant controversy over manufactured endorsement;[14]

- The ***Securities and Exchange Commission's*** interpretive "Commission Guidance Regarding Disclosure Related to Climate Change," on disclosing potential disruption from "significant physical effects of climate change" on "a registrant's operations and results," and disclosing international community actions that "can have a material impact on companies that report with the Commission."[15] The guidance observes that "Many companies are providing information to their peers and to the public about their carbon footprints and their efforts to reduce them" that hints at where matters are headed as likely emphasis moves from actions affecting a company to how a company allegedly affects others.

- ***Commodity Futures Trading Commission*** "Staff Advisory" guidance on international financial transactions between overseas party "arranged, negotiated or executed" by a U.S. based individual,[16] that was delayed several times (indicating it perhaps should be a commented-upon rule, instead) and said to jeopardize thousands of jobs by potentially sending them offshore.[17]

- A flow of ***Education Department*** guidance, at the rate of one issuance per business day, imposing new mandates on colleges and schools without going through the notice-and-comment process required by the APA.[18] According to the bipartisan Senate-appointed Task Force on Federal Regulation of Higher Education, "In 2012 alone, the [Education] Department released approximately 270 'Dear Colleague' letters and other electronic announcements."[19] "Recalibrating regulation of colleges and universities. Exceedingly high-profile, controversial recent guidance has included:

    - Guidance (a 2011 "Dear Colleague") to colleges and universities on sexual assault and harassment.[20] Noteworthy is that the civil rights laws' applicability to the institutions, not the students, but altered by guidance.[21]
    - Guidance letter (a 2010 "Dear Colleague") on bullying and harassment.[22]
    - Guidance (a 2016 "Dear Colleague") co-produced with the ***Department of Justice's Civil Rights Division*** requiring inclusion of "gender identity" in the definition of "sex" and requiring schools to allow transgender students to choose which bathroom or locker room to use.[23]
    - 2016 Policy Statement from the Education Department and the ***Department of Health and Human Services*** "preventing and severely limiting expulsion and suspension practices in early childhood settings"[24] without basis in law or notice and comment.[25]

- The ***U.S. Department of Agriculture's Forest Service's*** "Notice of Final Directive" permanent Ecosystem Restoration policy to replace Interim Directive, "Ecological Restoration and Resilience Policy," in Forest Service Manual (FSM) 2020, providing broad guidance for restoring ecosystems.[26]

- ***Department of Homeland Security*** guidance to retailers on spotting home-grown terrorists.[27] As DHS Secretary Jeh Johnson put it, "To address the home-grown terrorist who may be lurking in our midst, we must also emphasize the need for help from the public. 'If You See Something, Say Something' is more than a slogan. For example, last week we sent a private sector advisory identifying for retail businesses a long list of materials that could be used as explosive precursors, and the types of suspicious behavior that a retailer should look for from someone who buys a lot of these materials."[28]

- The ***Department of Labor Wage and Hour Division's*** blog post and "Administrative Interpretation No. 2015-1" informing the public that most independent contractors are now employees.[29]

- The ***Department of Labor Wage and Hour Division's*** "Administrative Interpretation No. 2016-1" asserting a WHD-defined possibility of "joint employment" under the Fair Labor Standards Act on case-by-case basis in horizontal and vertical contracting situations "to ensure that all responsible employers are aware of their obligations."[30] With this interpretation, the DoL "will hold more employers liable for wage violations against employees they do not directly employ. The enforcement effort will focus on the construction, hospitality, janitorial, staffing agencies, and warehousing and logistics"[31] and potentially "penalize any industry that utilizes contractors and labor suppliers."[32]

- Three ***Department of Labor*** guidance documents regarding the Process Safety Management (PSM) standards for hazardous chemicals have been highlighted by Sen. James Lankford (R-Oklahoma) as bringing a range of manufacturers and retailers within the scope of regulation without the opportunity for public comment.[33] A letter to the Labor Department noted: "These three guidance documents are expected to dramatically expand the universe of regulated parties, create extreme logistical and financial burdens on regulated parties, and convert flexible recommended practices into mandatory requirements—all without the opportunity for public comment. We therefore ask that OSHA immediately withdraw these memoranda." Subject matter of the three guidance documents concerned engineering practices, retail exemptions, and chemical concentrations subject to PSM.

- In addition to Department of Labor guidance, greater use by the ***National Labor Relations Board*** of memoranda that affect non-union employers.[34]

- The ***Equal Employment Opportunity Commission*** has issued a series of guidance documents on pregnancy discrimination and accommodation in the workplace, credit checks on potential employees, and criminal background checks.[35]

- Guidance from the ***Consumer Financial Protection Bureau*** in the form of a "Bulletin" on "Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act" limits the ability of automobile dealers to offer discounts to customers allegedly in the name of credit fairness and eliminating racial bias ("When such disparities exist within an indirect auto lender's portfolio, lenders may be liable under the legal doctrines of both disparate treatment and disparate impact").[36] Given the size of the auto lending marketplace this is clearly an economically significant measure that at the very least required a rulemaking rather than guidance, as well as concerns that even the CFPB recognized internally that it was overestimating bias[37] led to bipartisan House of Representatives passage of H.R. 1737 the "Reforming CFPB Indirect Auto Financing Guidance Act" (a Senate version S. 2663 awaits action) to revoke the guidance.[38] The bill would force CFPB "to withdraw the flawed guidance that attempts to eliminate a dealer's ability to discount auto financing for consumers. The bill also requires the minimal safeguards the agency failed to follow, such as public participation and transparency."[39]

- A claim in the German press, repeated by Reuters, that the ***Environmental Protection Agency***, in response to automaker Volkswagen's deploying "defeat device" software to circumvent EPA emissions standards for nitrogen oxides,[40] is influencing that company to build electric cars and electric car charging stations in the United States.[41] One concern for policymakers is to decide how to talk about and treat judgments as regulatory matters, and to recognize when such decrees, penalties aside, will have the effect of improperly influencing the market trajectory of an entire sector.

- The ***Council on Environmental Quality's*** Revised Draft Guidance for Greenhouse Gas Emissions and Climate Change Impacts[42] that makes the National Environmental Policy Act a global warming instrument, particularly through federal land management decisions. The guidance is under seemingly perpetual review, but "describes how Federal departments and agencies should consider the effects of greenhouse gas emissions and climate change in their NEPA reviews," holding that "agencies should consider both the potential effects of a proposed action on climate change, as indicated by its estimated greenhouse gas emissions, and the implications of climate change for the environmental effects of a proposed action," and expanding upon 2010 draft guidance, "applies to all proposed Federal agency actions, including land and resource management actions." Elizabeth Lake on the site Law360 assets that the new draft "appears to push federal agencies to use NEPA to take a more activist stance in reducing GHG emissions":[43]

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

- The ***Department of Transportation's Federal Aviation Administration*** June 2016 final rule on drones, "Operation and Certification of Small Unmanned Aircraft Systems,"[44] is highly restrictive,[45] requiring line-of-sight and no night-time operations among much else, ignoring the ability of technological and contractual solutions to address risk, and

refusing to stand down to local law enforcement solutions. But it also contains declarations from the agency regarding case-by-case waivers, as well as a large quantity of forthcoming guidance, much of which would seem to be economically significant, on issues like: industry best practices; risk assessment; potential guidance on external load operations; guidance associated with not dropping objects in ways that damage persons or property; advisories on training and direction to air traffic control facilities; preflight checks for safe operation; vehicle conditions for safe operations; and guidance "on topics such as aeromedical factors and visual scanning techniques."

- Prior to the guidance-heralding final rule, there had been a ***Federal Aviation Administration*** rule interpretation on drones via a "Notice of Policy"[46] that temporarily outlawed commercial activity in violation of the APA, before a reversal by the National Transportation Safety Board.[47]

Something must be done; it would be advisable for OIRA to take on a greater role, since it does already review some indeterminate number of "Notices" via indeterminate standards.[48] No one has done systematic study of the total quantity of agency guidance but guidance document volume dwarfs that of rulemaking, which is not surprising when no one can even say with authority how many agencies exist.[49] A 1992 *Duke Law Journal* article noted that "Federal Aviation Administration rules are two inches thick while corresponding guidance totals forty feet; similarly, IRS rules consume a foot of space while supporting guidance documents total over twenty feet" (Strauss 1992) It is hard to argue against the proposition that "the body of guidance documents (or nonlegislative rules) is growing, both in volume and in importance" (Whisner 2013, 394).

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

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

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

But on the other hand…

Data we shall cover next support those skeptical of central review's effectiveness and bear out that just a small part of regulatory output is reviewed and that escaping scrutiny is, if not easy, not difficult either. It will seem that the review process has not been driven by a public interest theory, and that it has not fared well. An as yet unarticulated theory of rent seeking, the reality that independent agency rules are not reviewed, and that it is easy to escape review are enough to explain the botched process we'll see next.

Yet there might be something salvageable in a "public interest" theory of regulatory review. Here, I will note that officials of limited government persuasion have headed OIRA, many of them well-acquainted with the special interest theory of regulation. There are grave problems with central review; perhaps the institution can be changed so that the "public interest" is better served; additionally, we might influence the kind of information agencies create until such time as reforms instituting congressional accountability ripen.

Tough centralized review of regulations has been argued to help empower consumers and citizens, relative to the rent-seeking and capture that typically prevails. Without central regulatory review, costs of influencing laws are high since policy formation is dispersed among numerous agencies and lawmakers. Producer groups whose members are often more concentrated (crony types, not infrequently), hold a relative advantage in securing favorable policy since lower organization costs enable them to prevail at the expense of those less favorably positioned. For scattered consumers, political organization costs are higher and tendencies to free-ride on the efforts of others can dominate even when ire is raised, derailing the ability to push back on over-regulation or to even recognize it (The seminal discussion on free-riding and group behavior is Olson 1965). Regulation therefore grows over time because it costs consumers more to organize and prevent having a dollar taken away than it costs for them to simply accept the loss. Consumers become the put-upon "suppliers" in the equation of "demanders and suppliers of wealth transfers" (McCormick and Tollson 1982).

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

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

In many ways, we needs get better at measuring the unmeasured. So let's look where OIRA central review stands now.

What the Numbers Say about OIRA's Central Review of Regulation

The central review process is incomplete In March 2016, the White House Office of Management and Budget finally released the *2015 Draft Report to Congress on the Benefits and Costs of Federal Regulations*.[50] The Draft 2016 report is overdue. These annual reports show the results of OMB's reviews of a subset of the thousands of proposed and final rules issued annually by executive agencies (not independent agencies, some of which are highly influential). Notices, guidance documents, memoranda and bulletins get no scrutiny here and rarely anywhere else.

When they draw attention to these reports at all, administrations stress "net-benefits" of the regulatory enterprise as a whole (Sunstein 2012). So in the new report, the administration says its fiscal year 2014 (October 1, 2013– September 30, 2014; so note that we are coming up on two years of absent information about rule costs and benefits), executive agency major rules generated benefits of up to $23 billion annually, while costing only $3 billion to $4.4 billion annually in 2010 dollars. For the decade 2004 to 2014, costs were pegged at between $38 billion and $45 billion, in 2010 dollars.

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

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

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

Only 13 rules in the 2015 Draft had both cost *and* benefit analysis performed, out of 54 executive agency major rules that OMB reviewed. OMB listed another 3 rules with dollar costs assigned, without accompanying benefit estimates. There were a few hundred non-quantified "significant" rules OMB looked at, and hundreds more it did not review (indeed over 3,000 rules and regulations are finalized each calendar year).

The "subject to OMB review" clause in the italicized quote above is a critical qualifier. Plenty gets left out, like non-major rule impacts, as well as the aforementioned guidance documents, memoranda and other notices. Ominously, independent agencies' thousands of rules get no OMB review, not even the many rules stemming from high-impact laws like the Dodd–Frank Wall Street Reform and Consumer Protection Act. Indeed, the non-reviewed character of most rules small and large, such as controversial independent agency rules like the Federal Communications Commission's ongoing net neutrality proposals to impose utility-style regulation on the Internet detract from the annual report's authority as a comprehensive survey of the compliance burdens and economic impact.

In instances like the independent Consumer Financial Protection Bureau created by Dodd-Frank, the concern goes well beyond lack of regulatory review (Murray 2014): There exists a fundamental lack of accountability, either executive or legislative or judicial, since the President cannot remove the director, and since Congress does not fund the self-financing agency. Congress lacks even the necessary "power of the purse" to ensure even an appearance of accountability to voters (Murray 2014).

Thirty-five other major rules implemented transfer programs; such "budget rules" are officially considered transfers rather than regulations. Paying little regard to these may be appropriate in a limited government context, but not anymore as the federal government dominates ever more economic and social activity like retirement and medical insurance.

Over the years, some 10 percent of all rules have been reviewed whether or not costs and benefits enter into the picture. In the 2015 *Benefits and Costs* report, OMB (U.S. OMB 2015, 7) tells us that:

> *From fiscal year 2004 through FY 2013, Federal agencies published 37,022 final rules in the Federal Register. OMB reviewed 3,040 of these final rules under Executive Orders 12866 and 13563.*
> *From fiscal year 2005 (FY 2005) through FY 2014, Federal agencies published 36,457 final rules in the Federal Register. OMB reviewed 2,851 of these final rules under Executive Orders 12866 and 13563. Of these OMB-reviewed rules, 549 are considered major rules, primarily as a result of their anticipated impact on the economy.*

As noted, for FY 2014, OMB reviewed 54 major rules and a few hundred significant ones, 16 of which had a cost estimate. For context, 3,554 rules were finalized by 60 federal departments, agencies and commissions during the calendar year.

OMB's once-common recognition that costs "could easily be a factor of ten or more larger than the sum of the costs...reported," (U.S. OMB 2002, 37) was a more helpful stance, since, as the nearby chart "Major Executive Agency Rules Reviewed by OMB, 2001-Present" shows, of several thousand agency rules issued, and the several hundred reviewed annually by OMB, only a handful of executive agency rules (and no independent agency rules) feature cost analysis alone, let alone the cost-benefit analysis that could justify common administration claims of net-benefits for the entire regulatory enterprise. Cost-benefit analysis may be something of a myth.

Major Executive Agency Rules Reviewed by OMB

Year	Rules with both costs and benefits	Rules with costs only	Grand total, rules with costs	Federal Register final rules
2001	14	13	27	4,132
2002	3	0	3	4,167
2003	6	4	10	4,148
2004	11	7	18	4,101
2005	13	2	15	3,943
2006	7	1	8	3,718
2007	12	4	16	3,995
2008	13	6	19	3,830
2009	16	12	28	3,503
2010	18	8	26	3,573
2011	13	6	19	3,807
2012	14	9	23	3,708
2013	7	11	18	3,659
2014	**13**	**3**	**16**	**3,554**
2015	**Absent**			
TOTALS	**160**	**86**	**246**	**53,838**

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

As a percentage of the annual flow of final rules in the *Federal Register,* the proportion of costed rules averaged around 35 percent of the few hundred designated "major" over the decade; but the proportion of *all* rules with any cost analysis at all has averaged less than a percent (0.46 percent). The percentage of all rules with a cost assessment has never reached one percent (the highest was .8 percent in 2009). Benefits, which the federal government declares justifies the modern regulatory state, fare even worse.

A Reform Agenda: Can an OIRA "Pen and Phone" Advance Liberty?

"If you ever get annoyed, look at me, I'm self-employed; I love to work at nothin' all day.
—Bachman-Turner Overdrive
"Takin' Care of Business"

To the extent ill-founded, overlapping and unclear regulations (and tax policy) dominate, businesses cannot plan, hiring becomes an insupportable risk (businesses will not hire if they know they cannot fire thanks to labor law) and citizens suffer. In the competitive marketplace, it takes a lot of bad ideas to generate a winner; overregulation and its close ally *uncertainty* cut down on breakthroughs, slowing growth. A Vanguard study on the uncertainty created by regulations and fiscal, trade and debt policy matters estimated $261 billion in such costs just since 2011 (McNabb 2013). On the other side of the coin, uncertainty can sometimes be better than the certainty of bad regulation.[51]

Moreover, policymakers and regulators fail to recognize that, while businesses want to "create jobs" as a matter of good citizenship, that goodwill does not change the reality that jobs are a cost, a *liability*. The modern environment makes business more risk averse (Casselman 2013). One British businessman addressing French employment regulations allegedly observed:

> *… [W]hen I am 100 percent utterly and completely certain that it is an absolute certainty that it is an absolute necessity that I need to recruit a new employee, I go to bed, sleep well and hope that the feeling has gone away by the morning.*

If businesses are "punished" for hiring, or cannot predict regulations coming their way, it is little wonder that they don't expand. We've already noted consequences, such as business startups hitting a record low (Reuters 2012). Like poverty, unemployment doesn't have causes; both are the default state of mankind: only *wealth* has causes (Noted in Crews 2011). The threat of regulation can induce companies to behave in reactive ways, distorting markets and creating economic inefficiency, compounding stagnation. Perhaps most ominous is that over half of existing firms wouldn't do it again given today's anti-business climate of uncertainty (Gehrke 2012).

Wynn Resorts CEO Steve Wynn called Washington (Seeking Alpha Transcripts 2011):

> *...the greatest wet blanket to business, and progress and job creation in my lifetime. And I can prove it and I could spend the next 3 hours giving you examples of all of us in this market place that are frightened to death about all the new regulations, our healthcare costs escalate, regulations coming from left and right.*

People like Wynn and our British businessman are hardly alone. *The Atlantic* conducted a Silicon Valley poll finding government to be a key innovation barrier (Gillespie 2014), while Gallup polling found record numbers pointing a finger at big government (Jones 2013). Regulatory liberalization that reduces uncertainty that increases the returns to risk-taking is the yet-to-be-deployed stimulus package. The problem, at this particular moment, is that Congress can get no traction with a liberalization agenda in the "year of the veto."

The president has already promised to veto Regulatory Accountability Act (Executive Office of the President 2015), the 114th Congress' signature regulatory reform bill that passed the second week of the new session in January 2015. The Regulatory Accountability Act of 2015 (H.R. 185) would codify some provisions contained in the executive orders we have discussed so far, making them enforceable, as well as allow formal semi-judicial proceedings for major rules and address guidance documents.

Similarly, the prior 113th Congress' passage of the ALERRT Act of 2014 (Achieving Less Excess in Regulation and Requiring Transparency, H.R. 2804), which also would in part codify existing executive orders, was met with presidential disregard (elements of this disclosure-oriented legislation will be described later). In both the 112th and 113th Congresses, the House passed the REINS Act (Regulations from the Executive In Need of Scrutiny, H.E. 367) to require an expedited congressional vote on all major or significant rules before they are effective (See Adler 2013). Note that this would change the presumption we saw in the Congressional

Accountability Act. That act's "resolution of disapproval" would become a positive affirmation—a major advance in accountability for regulations. REINS passed the 114th Congress, but the president had promised to veto it in the prior session.

Congress needs to broaden the REINS objection to any controversial rule, whether or not tied to a cost estimate that deems it a major rule. Furthermore, in the era of regulatory dark matter, the requirement for congressional approval should extend further to guidance documents and other agency decrees. At the moment the point is moot since an Obama veto is assured, but the debate needs to occur.

Another important congressional reforms in the "wish list" category would include changing statutory language that induces some agencies to disregard economic concerns in evaluating their regulations (See Manheim 2009). Ultimately only Congress can compare questionable rules to the benefits that could be gained if the compliance costs went elsewhere. Therefore, Congress should also explore allocating regulatory cost authority among agencies in a "regulatory budget," while distinguishing between categories like economic, health/safety, and environmental regulations (Crews 1998). A "budget" would create incentives promoting other supervisory mechanisms like central review, cost analysis and sunsets, and inspire agencies to "compete" with one another in terms of lives they save or some other regulatory benefit rather than think within their own box.

Unfortunately, all the legislative accountability reforms just covered are unlikely to become law. Perhaps the most promising option for bipartisan, cross-branch, and bicameral cooperation is a "regulatory improvement commission" contained in the Regulatory Improvement Act of 2013 (Stemberg 2013). This body would initiate review, similar to the military base closure and realignment commission, of the entire existing regulatory apparatus as distinct from the one-by-one appraisal that characterizes OMB review. The commission would select a bundle of rules for rollback with expedited congressional vote.
Certainly, today's policy climate is quite different from the 1990s, when Republicans proposed outright elimination of agencies like the Department of Energy (Competitive Enterprise Institute 1994). While major actions may not happen in the 114th Congress, it may have been possible to develop "veto-override-proof" steps that lay important groundwork for a more favorable future reform environment. Congress can at least begin making regulatory realities more apparent, even in the current atmosphere that precludes fundamental reforms.

Meanwhile, as the presidential elections approach, policy scholars may ponder what the executive's "pen and phone" can do to reduce rather than increase government influence in the economy. If the answer is some good things can be done within the rule of law, then OIRA will likely play a part. We knew from our Constitution's framers and we know now from the modern pen and phone era that, for better or worse, an energetic executive's hands are far from tied. Alexander Hamilton sought a king (Papers of Alexander Hamilton 1962), but settled for vigorously defending "Energy in the Executive." And to be sure, an "energetic" liberalization attitude prevailed in the executive branch during past presidencies and resulted in the creation of the executive branch review and oversight process itself. Given that such "pen and phone" power exists, it can be used to reduce government's scope and expand the private sphere (especially if Congress codifies the reforms).

The optimistic spirit of the following recommendations hopes that areas of bipartisan agreement between the executive and legislative branches in divided government can be found. We know from reforms in the 1990's that not everyone wants to go to the mat maintaining a regulatory state that harms their constituents. Recommendations below, which could be carried out by a president through OIRA if not by OIRA itself, will produce information about the state of regulation that can help enable legislative reform in a more favorable climate.

Enforce, strengthen and codify existing executive orders on regulation

Earlier we noted the series of executive orders over recent decades meant to address the flow of regulation. For starters, Congress should insist that existing executive orders on cost analysis and review—to limit government—should be strictly applied (perhaps through appropriations), strengthened, and ultimately codified (as would be done via the aforementioned House-passed ALERRT Act), and further, extended to independent agency rules, guidance documents and other agency proclamations. OIRA would play a major role.

Implement a regulatory moratorium

It's lost to the mists, but upon entering office, President Obama's chief of staff announced a regulatory freeze as part of a first 100 days initiative (Associated Press 2009). The march of rulemaking wasn't appreciably reduced, but no permanent reduction followed a 90-day moratorium implemented by President George H. W. Bush either, who had directed agencies to look for rules to waive. Each generated just a few billions in savings (Sunstein 2011). Moreover, many rules implement statutory requirements and are exempt from executive waiver, although recently with respect to the Patient Protection and Affordable Care Act, waivers applied via bulletin, memo and press release by the Internal Revenue Service (Graham and Broughel 2014). With the Bush moratorium, agencies were being asked to describe what they did badly—a task at odds with self-interest and bureaucratic turf building. Furthermore, Bush's three-month campaign was considerably less time than needed to examine the fruits generated by an intense, thorough audit.

Obama's unilateral waivers notwithstanding, getting regulations off the books requires the same laborious public notice and comment procedures of a new rule. "Going back and reviewing stuff is as hard as drafting regulations," said one Environmental Protection Agency representative during the Bush effort (Quoted in Davis 1992).

Still, a new effort should build upon the best of the Bush and Obama moratoria, and lawfully freeze regulation for a lengthier, more thorough audit, publish reports on the data generated, seek public comment on which rules should go and so forth. Creativity will produce useful information to support more substantive reforms—such as stipulating that for every new rule, one within or outside the agency should be eliminated. This latter would amount to a status quo "regulatory budget" or freeze for the duration of the review.

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

More money and staff could enhance OIRA's executive order review function, or that of some subsequent body (See Dudley 2011 on expanding OIRA resources). Where political circumstances prevent that, the administration and Congress might shift personnel and funds to concentrate on key agencies (or some subset). However, since OIRA already grants special attention to major rules, and since a handful of agencies usually account for most major rules, OIRA already concentrates its resources for the most part, so this is a limited, even naïve, option. Additional analytical help can and does come from employees borrowed from federal agencies and departments. A moratorium could help the process of regrouping.

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

It must be emphasized that *it is not enough for economists reviewing agency output to focus on Regulatory Impact Analyses*. Only a few get prepared and reviewed. The flow, the rising costs and the limited scrutiny that even major rules get indicates that the ignored costs of "minor" rules may actually be very large. Recall that non-major rules and independent agency rules make up the regulatory bulk. Still a rough 80/20 rule should apply such that, while costs can be masked behind the number of rules, a relative handful account for the bulk of impending regulatory burdens. Economists can get better at concentrating efforts on that few if there is presidential encouragement, and bipartisan support, of their role and acknowledgement of their importance.

Systematize review, sunsetting, revision and repeal of regulations

Short of the moratorium advocated above, and in keeping with the spirit of executive orders and retrospective reviews that agencies allegedly conduct already,[52] more aggressive periodic rule review by OMB and agencies would be valuable. Congress occasionally considers regulatory sunsetting; the president too could, in pen and phone fashion, require agency-generated regulatory requirements to expire or sunset within a given period of time unless they are re-proposed with public notice and comment.

This task requires an executive who agrees with the observation that regulations sometimes go too far, who recognizes that allowing even good rules to mount inappropriately is counterproductive (Mandel and Carew 2013). While sunsets or rule phase-outs may be disregarded without legislative backup, formal reporting on deadlines and extensions and non-extensions and disclosing ratios of what gets contained and what gets discarded helps quantify whether streamlining or supervision really happens. If the answer turns out to be no, we have automatically generated the record capable of prompting Congress to do so. Here are a few criteria by which agencies should routinely evaluate outstanding rules:

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

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

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

OMB Reports to Congress do make several worthwhile recommendations for regulatory improvement, including (U.S. OMB 2013, 5):

> *[F]acilitating public participation and fostering transparency by using plain language; making objective, evidence-based assessment of costs and benefits an integral part of the regulatory decision-making process; using retrospective review to inform decisions about specific rules and, more broadly, about the appropriate interpretation of impact analyses that feature incomplete quantification; and, finally, aligning agency priorities across all levels of internal hierarchy.*

These are useful steps. However, besides reviewing the limited implementation of certain parts of E.O. 13563, including "regulatory look back, reducing paperwork burdens, simplifying government communications, and promoting long-run economic growth and job creation via international regulatory cooperation" (U.S. OMB 2013), little about aggressively reducing existing regulation appears in OIRA reports. Agency RIAs and the entire executive branch review process should reflect a higher burden of proof regarding rules' value. Where agency analyses under the various executive orders appear not to justify a rule, OIRA should be more forthright about saying so, and it should challenge non-major rules as well.

OIRA could recommend modifications to entire regulatory programs based on plain common sense, regardless of executive orders. OIRA might note costs of presumably beneficial regulations, and compare those benefits to superior advantages available elsewhere (hiring policemen or firemen, dividing or painting highways).

In other words, OIRA has the experience and know-how to create a benefit "yardstick" to objectively critique high cost, low benefit rules (which can help inform the "Transparency Report Card" we will cover shortly). The president can continue pressing agencies about rule reductions, and demand that they rank regulations and show that their least effective rules are superior to another agency's rules. Findings should be published.

Again, the president's leadership role can legitimize the task of eliminating rules, of rolling government back from the places it should not be.

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

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

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

The current $100 million threshold translates into written, quantified and reviewed analysis for a handful of rules. More rules would be brought within that umbrella simply by lowering the bar to $50 million or $25 million. Doing so will not automatically improve how RIA cost and (especially) benefit tallies are performed. In fact, if net benefit analysis rather than cost analysis persists, RIA exploitation for dubious net benefits will continue. Further, some agencies may strategically adapt behavior to the likelihood of review, and present major rules larger than truly intended in order to negotiate and give the appearance of compromise (DeMuth 1980, 21), but expanding their sphere of influence.

Such behaviors can be confronted; 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. Far fewer rules should escape cost analysis and subsequent reconsideration and review.

Scrutinize all agency decrees that affect the public, not just "rules"

To what extent to agency guidance documents get review? With tens of thousands of agency proclamations annually, it does not suffice for executive agency "significant" or "major" rules to receive OMB review. Nor is it enough any longer to include independent agencies. "Regulatory dark matter" is gaining ground on the readily observable.

Today, non-legislative rules and proclamations like presidential and agency memos, guidance documents, bulletins and press releases may enact policy directly or indirectly, or even by veiled threat (Brito 2014). Interpretations may be articulated by agencies, and regulated parties pressured to comply without an actual formal regulation or understanding of costs. The EPA Clean Water Act jurisdictional guidance on "Waters of the United States" is a prominent example we noted earlier. To address this loophole, former OIRA director John Graham and

James Broughel propose options such as reinstating a George W. Bush requirement to prepare analysis for significant guidance documents, explicitly labeling guidance documents as nonbinding, and requiring notice and comment for significant guidance documents (Graham and Broughel 2014). There are a range of other reforms that should be applied as well.[53]

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

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

Policymaking ought not to have descended to this level. All potentially significant decrees by agencies need scrutiny, not just "rules." It is the case that agencies will attempt to strategically adapt to the new scrutiny (Shapiro 2014). But a highly engaged executive, and Congress, can draw attention to and definitively address quasi- or semi-regulatory activity. OIRA does conduct some indeterminate amount of review of "notices." It could do more.

Require rule publication in the Unified Agenda of Federal Regulations

There are rules, and then there are rules. Agencies are supposed to alert the public to their priorities in the semi-annual "Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions" (the Agenda). It normally appears in the *Federal Register* each fall and, minus the Regulatory Plan, each spring. The Agenda is intended to give researchers a sense of the flow in the regulatory pipeline as it details rules recently completed, plus those anticipated within the upcoming 12 months by federal departments, agencies, and commissions. But there is a whopper of a disclaimer, as the *Federal Register* has noted (7 December 2009, 64133):

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

An executive order, and legislation, should command that agencies *do* confine their regulatory activities to those appearing in the Agenda. OIRA could indicate for rules whether or not the agency had prioritized them before.

Tally federal regulations that accumulate as business sectors grow

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

> *Even though you make payroll every Friday,*
> *You don't have a guaranteed paycheck.*

You're a small business owner, and you eat what you kill.

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

Federal Workplace Regulation Affecting Growing Businesses

1 EMPLOYEE

- Fair Labor Standards Act (overtime and minimum wage [27 percent minimum wage increase since 1990])
- Social Security matching and deposits
- Medicare, Federal Insurance Contributions Act (FICA)
- Military Selective Service Act (allowing 90 days leave for reservists, rehiring of discharged veterans)
- Equal Pay Act (no sex discrimination in wages)
- Immigration Reform Act (eligibility that must be documented)
- Federal Unemployment Tax Act (unemployment compensation)
- Employee Retirement Income Security Act (standards for pension and benefit plans)
- Occupational Safety and Health Act
- Polygraph Protection Act

4 EMPLOYEES: ALL THE ABOVE, PLUS

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

15 EMPLOYEES: ALL THE ABOVE, PLUS

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

20 EMPLOYEES: ALL THE ABOVE, PLUS

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

25 EMPLOYEES: ALL THE ABOVE, PLUS

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

50 EMPLOYEES: ALL THE ABOVE, PLUS

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

100 EMPLOYEES: ALL THE ABOVE, PLUS

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

By executive order or statute, or merely OIRA initiative, the federal government should build upon this by revealing how federal regulations (not just laws) now accumulate *in specific sectors*, supplementing the thick Code of Federal Regulations. This will give some idea of impacts in particular industries and economic subdivisions, which can help guide reforms and liberalization.

OIRA should compile an annual Regulatory Transparency Report Card

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

Improving annual public disclosure for regulatory output and trends is one realm in which the president can unambiguously undertake initiatives on his own without statutory regulatory reform or congressionally stipulated transparency reporting.

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

Significant but valuable *non-cost* information should also be published. Agencies and OMB could assemble quantitative and non-quantitative data into charts and historical tables, enabling cross-agency comparisons. Presenting ratios of rules with, *and without*, benefit calculations helps reveal whether or not the regulatory enterprise can be deemed as doing the good it claims. The "Funnel of Gov" presented earlier in part aims at this conceptualization.

What follows is a sample of what should be officially summarized and published annually by program, agency and grand total, and with historical tables (Crews, "The Other National Debt Crisis," 2011).

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

- Tallies of economically significant, major, and non-major rules by department, agency, and commission.
- Numbers and percentages of rules impacting small business.
- Depictions of sectoral regulatory accumulation.
- Numbers and percentages of regulations that contain numerical cost estimates.
- Tallies of existing cost estimates, including subtotals by agency and grand total.
- Numbers and percentages *lacking* cost estimates, with explanations for absence of cost estimates.
- *Federal Register* analysis, including numbers of pages and proposed and final rule breakdowns by agency.
- Number of major rules reported on by the GAO in its database of reports on regulations.
- Rankings of most active executive and independent rule-making agencies.
- Identification of rules that are deregulatory rather than regulatory.
- Allegedly "non-regulatory" rules that affect internal agency procedures alone (important as federal government expansion into new realms of activity displaces the private sector).
- Number of rules new to the Unified Agenda; number that are carry-overs from previous years.
- Numbers and percentages of rules facing statutory or judicial deadlines that limit executive branch options to address them.
- Rules for which weighing costs and benefits is statutorily prohibited.
- Percentages of rules reviewed by the OMB and action taken. (echoing the "Funnel of Gov" presented earlier).

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

Regular highlight reporting accompanied by the affirmation of a presidential cheerleader would reaffirm the importance of disclosure and, in the process, expose to what extent Congress itself causes regulatory excess. Congress over-delegated power to agencies, and Congress imposed the statutory deadlines that can undermine regulatory analysis. Disclosure from OIRA will help shift the narrative back to congressional accountability for what agencies do, which is a proper stance.

Designate multiple classes of major rules in transparency reporting

Above, we advocated lowering cost thresholds for regulatory review. For decades, regulations have been loosely divided into those that are major or economically significant (over $100 million in annual impacts) and those that are not. But this gives only a rough idea of minimum costs. For example, given the definition an economically significant rule, we can infer that the 200 major rules in the 2014 year-end *Unified Agenda*, when fully implemented someday, will have economic impacts of around $20 billion annually (100 million times 200 rules), minus any rules among that 200 that reduce costs (Crews, "Big Sexy," 24 November 2014).

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

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

This particular itemization is merely one option for presenting numbers within each category, and was incorporated in the "Restoring Tax and Regulatory Certainty to Small Businesses Act" (S. 3572) and the ALERRT Act (H.R. 2804), but the executive branch could facilitate such reporting on its own. For example, some cost estimates of the EPA New Source Performance Standards rule figure about $738 million annually (U.S. EPA 2001). Appreciating when EPA is imposing "Category 2" rules and the like would be more helpful shorthand than knowing about economically significance. This could be especially useful as Congress explores formal hearing requirements for mega rules, such as the House passed in January 2015 as part of the Regulatory Accountability Act.

Report separately On Economic, Health & Safety, and Environmental regulations

While economic regulation had lost favor in the 1980s compared to environmental or health and safety rules, there has been a resurgence of it in banking, energy, telecommunications and other realms. Alas, these are often the domain of independent agencies not subject to central OIRA review.

This is ironic since the origins of executive branch regulatory review were driven in part by the recognition that economic regulation worked against the public interest. Such views were

sustained by OMB's onetime willingness to adopt the premise that some economic regulation "produces negligible benefits (U.S. OMB 1997)."

Indeed, whether the proposition is "fine-tuning" of the macro economy, or direct government management of an specific industry's output and prices (such as agricultural quotas or electricity generation prices) or entry into an industry (such as trucking), coercive economic interference lacks legitimacy. The reality of governmental failure and acknowledgement of cronyism in economic concerns is more evolved now, as is (among some, but too few) an appreciation of the impossibility of central economic planning and calculation (von Mises 1920). Economic regulations can no longer be presumed rooted in the public interest; the more defensible default assumption is that they serve the regulated and their captured bureaus.

However today, an engaged executive's and even Congress' ability to address economic regulation as opposed to health and safety rules is undermined by that lack of oversight of independent agency rules that increasingly govern. In presenting itself as authoritative on aggregate regulatory net benefits, the annual OIRA *Report to Congress* conceals more than it reveals in this regard.

Since the role of health and safety regulation differ so from economic regulation, separate presentation everywhere—in the *Report to Congress*, in any Regulatory Transparency Report or elsewhere—are important from the standpoint of comparing relative merits of regulations. Conceptual differences render meaningless any comparison of, for example, purported economic benefits from an energy regulation with lives saved by a safety regulation, so such categories of costs should be presented and analyzed separately and congressional accountability for outcomes established.
With executive buy-in, to the extent that analyses such as the OIRA *Report to Congress* and other investigations help in delegitimizing economic regulation, such realms can be freed from government purview altogether (a utopian thought, as aggressions as recent as net neutrality clearly attest). But with that new rationality we would leave Congress and OIRA with the "lesser" task of documenting and controlling costs of environmental, health, and safety regulations. Then where health and safety rules reveal that they too have private interest underpinnings or are detrimental to the public, a motivated executive can urge their rollback as well. Isolating categories for analysis is a first step toward enabling this greater oversight.

<u>Improve "transfer" cost assessments</u>

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. But that does not make it appropriate not to actively disclose and question them, or to fail to anticipate their entailing future costs or having displacement or deadweight effects. Similarly, it is important not to lump service-related paperwork in the same

category with the tax compliance burden and other involuntary, non-service-related process costs such as workplace reporting requirements. All these are hardly minimal and should be tallied and reduced where possible.

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

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

Acknowledge and minimize indirect costs of regulations

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

Compliance-focused regulatory cost estimates may inadvertently or purposely omit indirect costs. That uncertainty requires that indirect costs be guarded against and minimized, since some have argued that indirect costs of regulation could even exceed the magnitude of direct costs (Laffer and Bord 1992, 18), and since OIRA itself occasionally has acknowledged that regulatory costs could be many times the amount it presents annually attaching to major rules (U.S. OMB 2002, 37).

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

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

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

Formalize "Do Not Regulate" reporting and offices

Some have called for an independent congressional office of regulatory analysis resembling the Congressional Budget Office (U.S. House of Representatives Report 105-441, 1998). This would go beyond more resources for OIRA or agency economics. There are scenarios in which the independent office could be a good idea, such as if the entity were formally chartered with an anti-regulatory "bias" to offset the pro-regulatory bias prevailing in the entire rest of the federal government including its independent agencies. Some formal entity could highlight the desirability of market-oriented alternatives over command options for every regulation, and continually present the case for eliminating existing rules and create plans for elimination of regulatory agencies themselves. A much stronger version of OIRA or a body that replaces it, in conjunction with agency law and economics personnel of laissez-faire persuasion, could bolster this "Bureau of No" role.

Conclusion: OIRA and regulatory liberalization

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

Despite semi-formal central review by OIRA of economic, environmental, and health and safety regulations and their accompanying paperwork since the late 1970's and the 1980s, a significant and escalating regulatory burden is apparent.

- Costs of regulation and realms subject to regulation have grown, while benefits remain ambiguous.
- Entire sectors of society experience regulation from independent agencies that get little scrutiny.
- *Federal Register* page counts occupy record heights.

- Economically significant and major rules reviewed annually have increased notably over the past decade.
- “Regulatory dark matter” outside the normal notice and comment procedure lacks adequate scrutiny.

It is no longer enough just to cut federal spending and balance the budget. This testimony has stressed the need to offset the march of bureaucracy and regulation and proposed ideas for doing that through OIRA, particularly since the current reality assures us that the Constitution isn’t coming to the rescue in the near term. There is much about which to be optimistic; the ideas that created the American experiment in the first place remain “discovered,” available in the public domain. One might say, there’ll always be an America—somewhere. To keep it here, we need merely the rocks off of America’s economic lawn. Given today’s economy, there should be bipartisan momentum for economic and regulatory reform, some animated new constituency for limited government.

The regulatory process, therefore, itself needs more regulation. The executive and legislative branches may not agree on congressional reassertion of its authority with respect to making of law and regulation. While it would be preferable for Congress engage by implementing the Regulatory Improvement Act, the REINS Act and other measures that directly limit agency authority, those face veto threat and must await change. Still, many recommendations presented here can be implemented by executive action or by OIRA, by the same pens and phones now used to expand the state. However it happens, the new normal needs to be one that ensures that, if an expensive or burdensome regulation is enacted, elected representatives are on record for or against, and accountable to voters.

The federal regulatory enterprise increasingly affects many, and changes are likely one way or another. With conventional options to restore liberties and elevate the rule of law exhausted or ignored, the states themselves may address federal government expansion by taking rightful powers back from Congress and the executive branch. The Constitution’s Article V does provide for the states to call a convention to amend the Constitution and restore balance of power, and several states are pursuing that option (For example Brown 2014). One proposal with respect to over-regulation specifically is the “Regulation Freedom Amendment” that would empower two-thirds of the states to force Congress to propose said amendment. The amendment would stipulate that in any given instance, a quarter of the members of either the House or the Senate could require Congress to vote on a significant federal regulation, very much like the REINS Act legislation would do (Buhler 2013). Such as step can be avoided by reconsidering the regulatory state via recommendations presented here. The modern statesman’s primary task is to double GDP, rather than to double spending or regulatory burdens, no matter the political party.

References

Action Aid and Competitive Enterprise Institute. 2011. Information Quality Act Request for Correction Regarding Impacts of Biofuel Mandates on Global Hunger and Mortality, filing submitted to U.S. Environmental Protection Agency Information Quality Guidelines Staff. October 13. Statement at http://cei.org/news-releases/actionaid-usa-cei-target-ethanol-fuel-programs-epa-filing; petition at http://cei.org/sites/default/files/Data%20Quality%20Request%20Oct%20%2013.pdf

Adler, Jonathan H. 2013. "Placing 'REINS' on Regulations: Assessing the Proposed REINS Act," New York University *Journal of Legislation and Public Policy* 1. Case Legal Studies Research Paper No. 2012-33. Available at SSRN: http://ssrn.com/abstract=2167074.

Associated Press. 2009. "Obama Orders Halt to Pending Regulations for Review," January 20. http://www.foxnews.com/politics/2009/01/20/obama-orders-halt-pending-regulations-review/.

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

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.

Brennan, Patrick. 2015. "Study: 2014's Employment Boom Almost Entirely Due to the Expiration of Unemployment Benefits Obama Wanted to Renew," *National Review Online*. January 26. http://www.nationalreview.com//corner/397174/study-2014s-employment-boom-almost-entirely-due-expiration-unemployment-benefits-obama.

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.

Brown, Keri. 2014. "NC Leaders Push Momentum for Constitutional Convention, National Public Radio, October 28. http://wfdd.org/post/nc-leaders-push-momentum-constitutional-convention.

Buchanan, James M. 1969. *Cost and Choice: An Inquiry in Economic Theory*, University of Chicago Press: Chicago and London. p. 42-43.

Bueno de Mesquita, Bruce and Alastair Smith, Randolph M. Siverson and James D. Morrow. 2003. *The Logic of Political Survival*, MIT Press: Boston. http://www.amazon.com/Logic-Political-Survival-Bruce-Mesquita/dp/0262025469/ref=tmm_hrd_swatch_0?_encoding=UTF8&sr=1-2&qid=1426273835.

Buhler, Roman. 2013. "Indiana Can Rein in Federal Regulators," *Indiana Policy Review*. December 5. http://inpolicy.org/2013/12/op-ed-indiana-can-rein-in-federal-regulators/.

Carey, Maeve P. 2014. "Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register," Congressional Research Service, November 26. http://fas.org/sgp/crs/misc/R43056.pdf.

Casselman, Ben. 2013. "Risk-Averse Culture Infects U.S. Workers, Entrepreneurs," *Wall Street Journal*, June 2. http://online.wsj.com/news/articles/SB10001424127887324031404578481162903760052?mg=reno64-wsj.

Casselman. Ben. 2014. "The Slow Death of American Entrepreneurship," FiveThirtyEight Economics. May 15. http://fivethirtyeight.com/features/the-slow-death-of-american-entrepreneurship/.

CBS/Associated Press. 2014. "Report: More Than 92 Million Americans Remain Out Of Labor Force," May 2. http://washington.cbslocal.com/2014/05/02/report-more-than-92-million-americans-remain-out-of-labor-force/.

CNN Wire Staff. 2010. "Kahn, the Architect of Airline Deregulation, Dies at 93," CNN, December 28. http://www.cnn.com/2010/BUSINESS/12/28/obit.kahn/.

Competitive Enterprise Institute. 1994. *Soft Targets for Elimination at Energy, Interior, & EPA*. December. https://cei.org/sites/default/files/Dec%201994%20-%20Marlo%20Lewis%20-%20Energy%20-%20Dirty%20Dozen.pdf.

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.

Cox, Braden and Clyde Wayne Crews Jr. 2005. "Communications Without Commissions: A National Plan for Reforming Telecom Regulation," Competitive Enterprise Institute. *Issue Analysis 2005 No. 9*. October. http://www.scribd.com/doc/135189382/Wayne-Crews-Comments-of-Competitive-Enterprise-Institute-in-FCC-Future-of-Media-Proceeding-GN-Docket-No-10-25.

Crandall, Robert. 1992. *Why is the Cost of Environmental Regulation So High?* Center for the Study of American Business, Policy Study Number 110, February.

Crews Jr., Clyde Wayne. 1998. "Promise and Peril: Implementing a Regulatory Budget," *Policy Sciences*, Volume 31, Issue 4, December. Pp. 343-369. http://link.springer.com/article/10.1023%2FA%3A1004483131309.

Crews Jr., Clyde Wayne. 2011. "The Other National Debt Crisis: How and Why Congress Must Quantify Federal Regulation," *Competitive Enterprise Institute Issue Analysis 2001 No. 4*, October. http://cei.org/sites/default/files/Wayne%20Crews%20-%20The%20Other%20National%20Debt%20Crisis.pdf.

Crews Jr., Clyde Wayne. 2011. "Nice Talk. When's the Jobs Speech?" *Forbes*, September 8 http://www.forbes.com/sites/waynecrews/2011/09/08/nice-talk-whens-the-jobs-speech/.

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/.

Crews Jr., Clyde Wayne. 2013. Boosting Regulatory Transparency: Comments of the Competitive Enterprise Institute On The Office of Management and Budget's 2013 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act. Document ID: OMB_FRDOC_0001-0118. July 31. https://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/comments/comments_of_wayne_crews_competitive_enterprise_institute_on_2013_draft_report_to_congress_on_the_benefits_and_costs_of_federal_regulation.pdf.

Crews Jr., Clyde Wayne. 2014. "Big Sexy Holiday Fun With The 2014 Unified Agenda Of Federal Regulations," *Forbes*, November 24. https://cei.org/content/big-sexy-holiday-fun-2014-unified-agenda-federal-regulations.

Davis, Bob. 1992. "Bush Preparing Program for Agencies to Weed Out Federal Rules Periodically," *Wall Street Journal*, September 4. (Quote by Linda Fisher, who oversaw EPA pesticide regulation during the first Bush administration.)

Davis, Susan. 2015. "State of the Union: 7 Things to Watch," *USA Today*, January 19. http://www.usatoday.com/story/news/politics/2015/01/18/obama-sotu-preview/21958115/ .

govDearie, John and Courtney Geduldig. 2013. *Where the Jobs Are: Entrepreneurship and the Soul of the American Economy*. John Wiley & Sons, Inc.: Hoboken, New Jersey. See also John Tamny, "Sorry Class Warriors: Small Businesses are Not the Backbone of the U.S. Economy, *Forbes*, October 6, 2013. http://www.forbes.com/sites/johntamny/2013/10/06/sorry-class-warriors-small-businesses-are-not-the-backbone-of-the-u-s-economy/

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/.

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.

Dudley, Susan E. 2011. 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. https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley_HSGAC_20110718.pdf.

Executive Office of the President. 2015. Office of Management and Budget, Statement of Administration Policy, H.R. 185 - Regulatory Accountability Act of 2015. January 12. https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr185r_20150112.pdf.

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

Federalist Papers. 1788. No. 70, The Executive Department Further Considered, From the New York Packet, March 18, 1788. Yale Law School Lilllian Goldman Law Library. http://avalon.law.yale.edu/18th_century/fed70.asp.

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.

Ford, Paul Leicester. 1892. *Essays on the Constitution of the United States Published During Its Discussion by the People, 1787-1788*. Brooklyn, N.Y., Historical Printing Club. The Project Gutenberg EBook of Essays on the Constitution of the United States. http://www.gutenberg.org/files/31891/31891-h/31891-h.html.

Geddes, R. Richard. 1992. “A Historical Perspective on Electric Utility Deregulation,” *Regulation*. Winter. pp. 75-82.

Gehrke, Joel. 2012. "55 Percent of Small Business Owners Would Not Start Company Today, Blame Obama," *Washington Examiner*, September 26. http://www.washingtonexaminer.com/55-percent-of-small-business-owners-would-not-start-company-today-blame-obama/article/2509069.

Gillespie, Nick. 2014. "What is the Biggest Barrier to Innovation in US? Government, Government, and Government," *Reason Hit & Run*, November 12. http://reason.com/blog/2014/11/12/what-is-the-biggest-barrier-to-innovatio.;

Gordon, John Steele. 2004. *An Empire of Wealth: The Epic History of American Economic Power*, Harper: New York.

Graham, John D. and James W. Broughel. 2014. “Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act, Mercatus Center White Paper, pp. 40-41. http://www.harvard-jlpp.com/wp-content/uploads/2010/01/Graham_Broughel_final.pdf.

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/

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.

Meyer, Ali. 2014. "Labor Force Participation Remains at 36-Year Low," CNSNews. December 5. http://www.cnsnews.com/news/article/ali-meyer/labor-force-participation-remains-36-year-low-0.

Higgs, Robert. 1987. *Crisis and Leviathan: Critical Episodes in the Growth of American Government*, Oxford University Press: Oxford. http://www.amazon.com/Crisis-Leviathan-Critical-Government-Institute/dp/019505900X.

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.

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

Ingraham, Christopher. 2014. "U.S. Businesses are Being Destroyed Faster Than They're Being Created," *Washington Post*. May 5. http://www.washingtonpost.com/blogs/wonkblog/wp/2014/05/05/u-s-businesses-are-being-destroyed-faster-than-theyre-being-created/?hpid=z5

Jones, Jeffrey M. 2013. "Record High in U.S. Say Big Government Greatest Threat," Gallup, December 18. http://www.gallup.com/poll/166535/record-high-say-big-government-greatest-threat.aspx.

Kritikos, Alexander S. 2014. "Entpreneurs and Their Impact on Jobs and Economic Growth," IZA World of Labor. May. http://wol.iza.org/articles/entrepreneurs-and-their-impact-on-jobs-and-economic-growth.

Laffer III., William G. and Nancy Bord. 1992. "George Bush's Hidden Tax: The Explosion in Regulation," *Heritage Foundation Backgrounder No. 905*, Washington, D.C., July 10, p. 18

Leef, George. 2014. "Could Compact For America's Constitutional Amendment Stop The Federal Juggernaut?," *Forbes*, December 16. http://www.forbes.com/sites/georgeleef/2014/12/16/could-compact-for-americas-constitutional-amendment-stop-the-federal-juggernaut/.

Little, Katie. 2013. "Fast Food CEO: How Government Regulation is Driving Us Abroad," CNBC, December 31. http://www.cnbc.com/id/101302181.

Mandel, Michael and Diana G. Carew. 2013. "Regulatory Improvement Commission: A Politically-Viable Approach to U.S. Regulatory Reform, Progressive Policy Institute Policy Memo. May. 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.

Manheim, Frank T. 2009. *The Conflict over Environmental Regulations in the United States: Origins, Outcomes, and Comparisons with the EU and other Regions*. New York, Springer.

Marks, Josh. 2013. "Obama: If Congress Doesn't Act on Climate Change, 'I Will'," *The National Memo*, February 13. http://www.nationalmemo.com/obama-if-congress-doesnt-act-on-climate-change-i-will/.

May, Randolph J. 2010. "Defining Deference Down, Again: Independent Agencies, Chevron Deference, and Fox," *Administrative Law Review*, Vol. 62, No. 2, p. 433, Spring. Available at SSRN: http://ssrn.com/abstract=1624662.

McCormick Robert E. and Robert D. Tollison. 1982. *Politicians, Legislation, and the Economy: An Inquiry into the Interest Group Theory of Government*. Boston: Martinus Nijhoff.

McNabb, Bill. 2013. "Uncertainty is the Enemy of Recovery," *Wall Street Journal*, April 28. http://online.wsj.com/news/articles/SB10001424127887323789704578443431277889520#printMode.

Mendelson, Nina A. and Wiener, Jonathan B. 2014. "Responding to Agency Avoidance of OIRA," *Harvard Journal of Law and Public Policy*, Vol. 37, No. 2, April 20. U of Michigan Public Law Research Paper No. 415. Available at SSRN: http://ssrn.com/abstract=2463491.

Mercatus Institute. 2014. Media Advisory: Mercatus Releases Five Academic Articles in *Harvard Journal of Law and Public Policy*," May 23. http://mercatus.org/expert_commentary/mercatus-releases-five-academic-articles-harvard-journal-law-and-public-policy.

Merline, John. 2011. "Home Depot Co-Founder: Obama Is Choking Recovery," *Investor's Business Daily*. July 20. http://www.investors.com/NewsAndAnalysis/Article/578920/201107201835/Marcus-Home-Truths-On-Jobs.aspx.

Miller III, James C. and William F. Shughart II and Robert D. Tollison. 1984. "A Note on Centralized Regulatory Review," *Public Choice*. Vol. 43. p. 83.

Moore, Stephen. 2013. "Bob Funk: Where the Jobes Are—and How to Get One," *Wall Street Journal*. September 20. http://online.wsj.com/news/articles/SB10001424127887324492604579087044033601178.

Mueller, Dennis C. 1989. *Public Choice II*. Cambridge: Cambridge University Press. p. 245.

Murray, Iain. 2014. "Obamaloans: How Obama plans to use Dodd-Frank to take over the financial industry," National Review.com, January 15. http://www.nationalreview.com/article/368499/obamaloans-iain-murray.

Murray, Iain. 2014. "Lawmaker Excluded from CFPB Meeting, Unable to Hold Executive to Account," *National Review Online*. March 20. http://www.nationalreview.com/corner/373839/lawmaker-excluded-cfpb-meeting-unable-hold-executive-account-iain-murray. See also Iain Murray, "The Worst Federal Agency," *National Review Online*. April 24, 2014. http://www.nationalreview.com/article/376433/worst-federal-agency-iain-murray.

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.

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

Niskanen Jr., William A. 1992. "Reduce Federal Regulation," *Market Liberalism*, Cato Institute: Washington, D.C.

Nou, Jennifer. 2013. "Agency Self-Insulation Under Presidential Review," *Harvard Law Review*, Vol. 126, No. 7. May. http://harvardlawreview.org/wp-content/uploads/pdfs/vol126_nou.pdf.

Office of Sen. Rand Paul. 2015. Press Release, "Sen. Paul and Rep. Young Introduce REINS Act," January 22. http://www.paul.senate.gov/?p=press_release&id=1274.

Olson, Mancur. 1965. *The Logic of Collective Action*. Cambridge: Harvard University Press.

Olson, Walter. 2001. "Overlawyered & Overgoverned," Reason.com, March. http://reason.com/archives/2001/03/01/overlawyered-overgoverned/print.

Oreskovic, Alexei. 2013. "U.S. Regulator Tells Web Search Firms To Label Ads Better," *Reuters*, Jun 25. http://www.reuters.com/article/2013/06/26/us-internet-search-idUSBRE95P01O20130626

The Papers of Alexander Hamilton .1962. Volume 9. New York: Columbia University Press. http://en.wikipedia.org/wiki/Elective_monarchy#cite_note-The_Papers_of_Alexander_Hamilton.2C_Volume_9-3.

Perez v. Mortgage Bankers Association, Supreme Court of the United States, 2015 (Thomas concurring in judgment), p. 19, note 6. http://www.supremecourt.gov/opinions/14pdf/13-1041_0861.pdf. Thomas referenced the book A. Link, *Woodrow Wilson and the Progressive Era 1910–1917*, p. 1 (1954).

Raso, Connor. 2010. "Do Agencies Use Guidance Documents to Avoid Presidential Control?" Gellhorn-Sargentich Law Student Essay Competition, Yale Law School, Class of 2010 http://www.americanbar.org/content/dam/aba/migrated/adminlaw/awardsprogram/Connor_Raso_GS_Essay_Winner.authcheckdam.pdf.

Reuters. 2012. "U.S. Business Startups Rate at Record Low" May 2. http://www.reuters.com/article/2012/05/02/us-usa-economy-businesses-idUSBRE84113G20120502.

Rogowsky, Robert A. 1989. "Sub Rosa Regulation: The Iceberg beneath the Surface," pp. 209-222; in Roger E. Meiners and Bruce Yandle, *Regulation and the Reagan Era: Politics, Bureaucracy and the Public Interest*, Homes & Meier: New York.

Rucker, Philip. 2014. "Obama's 7 State of the Union talking points. No. 6: 'The Pen and Phone' strategy," *Washington Post*, January 27. http://www.washingtonpost.com/blogs/the-fix/wp/2014/01/27/obamas-7-state-of-the-union-talking-points-no-6-the-pen-and-phone-strategy/.

Schoenbrod, David S. 1993. *Power Without Responsibility: How Congress Abuses the People through Delegation*. New Haven: Yale University Press. http://yalepress.yale.edu/book.asp?isbn=9780300065183.

Schoenbrod, David S., and Jerry Taylor, 2003. "The Delegation of Legislative Powers," in *Cato Handbook for Congress: Policy Recommendations for the 108th Congress*, ed. Edward H. Crane and David Boaz. Washington, DC: Cato Institute, pp. 77–85, http://www.cato.org/pubs/handbook/hb108/hb108-8.pdf.

Seeking Alpha Transcripts. 2011. "Wynn Resorts' CEO Discusses Q2 2011 Results - Earnings Call Transcript," July 18. http://seekingalpha.com/article/279999-wynn-resorts-ceo-discusses-q2-2011-results-earnings-call-transcript?part=qanda.

Shapiro, Stuart. 2014. "Agency Oversight as 'Whac-A-Mole': The Challenge of Restricting Agency Use of Nonlegislative Rules," *Harvard Journal of Law & Public Policy*, Vol. 37. No. 2. pp. 523-552. http://www.harvard-jlpp.com/wp-content/uploads/2014/05/37_2_523_Shapiro.pdf.

Simon, Ruth and Caelainn Barr. 2015. "Endangered Species: Young U.S. Entrepreneurs," *Wall Street Journal*, January 2. http://www.wsj.com/articles/endangered-species-young-u-s-entrepreneurs-1420246116.

Sink, Justin and Scott Wong. 2015. "Veto Battles Set to Begin," *The Hill*, January 12. http://thehill.com/homenews/administration/229116-veto-battles-set-to-begin; see also Gregory Korte, "Obama Veto Threats at Record Pace to Begin New Congress," *USA Today*, January 27, 2015. http://www.usatoday.com/story/news/politics/2015/01/27/obama-veto-threats-january-pace/22357299/.

Smith, Sam. 2012. "Alcohol Industry Blames Flat Sales In MD. On 9% Tax," *MarylandReporter.com*. November 15. http://marylandreporter.com/2012/11/15/alcohol-industry-blames-flat-sales-in-md-on-9-tax/.

Stemberg, Thomas. 2013. "A New Law to Liberate American Businesses," *Wall Street Journal*, August 21. http://online.wsj.com/article/SB10001424127887324653004578651852012786828.html?mod=WSJ_Opinion_LEADTop.

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

Strauss, Peter L. 1992. "The Rulemaking Continuum," *Duke Law Journal*, 1463, 1469 (as cited by Raso 2010).

Sunstein, Cass. 2011 “Washington Is Eliminating Red Tape,” *Wall Street Journal*, August 23. http://online.wsj.com/news/articles/SB10001424053111903596904576518652783101190.

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.

Traynor, Ben. 2013. “Roosevelt’s Gold Confiscation: Could It Happen Again?” *The Telegraph*, April 3. http://www.telegraph.co.uk/finance/personalfinance/investing/gold/9968494/Roosevelts-gold-confiscation-could-it-happen-again.html

Tollison, Robert D.. 1982. “Rent Seeking: A Survey,” *Kyklos*. Vol. 35. pp. 575-602.

Turley, Jonathan. 2014. Written Statement, “Enforcing the President’s Constitutional Duty to Faithfully Execute the Laws,” Committee on the Judiciary, United States House of Representatives, February 26. http://jonathanturley.files.wordpress.com/2014/02/turley-enforcement-testimony.pdf.

U.S. Bureau of Labor Statistics. 2014. “Consumer Expenditures—2013,” Economic News Release, September 9. http://www.bls.gov/news.release/cesan.nr0.htm. For the BLS, “Consumer units include families, single persons living alone or sharing a household with others but who are financially independent, or two or more persons living together who share expenses.” For each “unit,” average annual expenditures were $51,442 according to the BLS. The BLS also provided additional information on these figures by email and the following document: “Average Annual Expenditures and Characteristics of All Consumer Units, Consumer Expenditure Survey, 2006–2011,” http://www.bls.gov/cex/2011/standard/multiyr.pdf. Find the 2012 version at http://www.bls.gov/cex/2012/standard/multiyr.pdf.

U.S. Consumer Product Safety Commission. 2013. Window Blind Cords Voluntary Standards Activities. June 7. http://www.cpsc.gov/en/Regulations-Laws--Standards/Voluntary-Standards/Window-Blind-Cords/. See also Ernest Istook, "Consumers Pay the Tab as Feds Take on the Window Blind Menace," *Washington Times*, January 21, 2015. http://www.washingtontimes.com/news/2015/jan/21/ernest-istook-window-blind-safety-could-cost-consu/

U.S. Environmental Protection Agency. 2011. New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants, RIN: 2060-AP76. Fall. http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201110&RIN=2060-AP76.

U.S. Environmental Protection Agency. 2014. Definition of ‘Waters of the United States’ Under the Clean Water Act; Proposed Rule. *Federal Register*, Vol. 79, No. 76. April 21. http://www.gpo.gov/fdsys/pkg/FR-2014-04-21/pdf/2014-07142.pdf.

U.S. Federal Communications Commission. 2015. In the Matter of Protecting and Promoting the Open Internet (GN Docket No. 14-28) Report and Order on Remand, Declaratory Ruling, and Order. Adopted February 26, 2015. Released March 12, 2015. http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-24A1.pdf.

U.S. Food and Drug Administration. 2014. Proposed Rule, Food Labeling: Serving Sizes of Foods That Can Reasonably Be Consumed at One-Eating Occasion; Dual-Column Labeling; Updating, Modifying, and Establishing Certain Reference Amounts Customarily Consumed; Serving Size for Breath Mints; and Technical Amendments. March 3. https://www.federalregister.gov/articles/2014/03/03/2014-04385/food-labeling-serving-sizes-of-foods-that-can-reasonably-be-consumed-at-one-eating-occasion. See also Ernest Istook, "Finally! After 17 Years, FDA About to Act on Breath Mint Label Regulation," Washington Times. August 6, 2014. http://www.washingtontimes.com/news/2014/aug/6/istook-finally-after-17-years-fda-about-to-act-on-/?page=all.

U.S Government Accountability Office website, “Congressional Review Act Resources,” http://www.gao.gov/legal/congress.html.

U.S. Government Printing Office, Public and Private Laws. http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=PLAW; See also A Summary of the Record of

the 113th Congress (2012–2013) of the United States, http://www.congress-summary.com/C-113th-Congress/Laws_Passed_113th_Congress_Seq.html.

U.S. House of Representatives. 1998. Report 105-441, Congressional Office of Regulatory Analysis Creation Act. June 3. http://www.gpo.gov/fdsys/pkg/CRPT-105hrpt441/pdf/CRPT-105hrpt441-pt2.pdf.
U.S. House of Representatives. 2011. Committee on Oversight and Government Reform, Staff Report, "Broken Government: How the Administrative State has Broken President Obama's Promise of Regulatory Reform. 112th Congress. September 14. p. 7. http://oversight.house.gov/wp-content/uploads/2012/01/9.13.11_Broken_Government_Report1.pdf.

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. https://www.whitehouse.gov/omb/inforeg_chap2 and http://georgewbush-whitehouse.archives.gov/omb/inforeg/chap2.html

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.

U.S. Office of Management and Budget. 2013. *2013 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*. p.5. https://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/draft_2013_cost_benefit_report.pdf.

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.

U.S. Office of Management and Budget. 2014. *Information Collection Budget of the United States Government*, Office of Information and Regulatory Affairs. http://www.whitehouse.gov/sites/default/files/omb/inforeg/icb/icb_2014.pdf.

U.S. Office of Management and Budget. 2015. *Historical Tables*, Table 2.1, "Receipts by Source: 1934–2019," http://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/hist02z1.xls. This spreadsheet is regularly found at http://www.whitehouse.gov/omb/budget/Historicals.

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.

Walsh, Deirdre and Dana Bash. 2014. "Boehner: House GOP Files Obamacare Lawsuit," *CNN.com*, November 21. http://www.cnn.com/2014/11/21/politics/house-gop-sue-the-president-over-obamacare/.

Whisner, Mary. 2014. "Some Guidance About Federal Agencies and Guidance," University of Washington School of Law Research Paper. *Law Library Journal*, Vol. 105, No. 3. Summer/August 14pp. 385-94. Available at SSRN: http://ssrn.com/abstract=2310315

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.

White House, 2014. Media Advisory: President Obama Announces Two New Public-Private Manufacturing Innovation Institutes and Launches the First of Four New Manufacturing Innovation Institute Competitions. February 25. http://www.whitehouse.gov/the-press-office/2014/02/25/president-obama-announces-two-new-public-private-manufacturing-innovatio.

White House. 2014. Net Neutrality: President Obama's Plan for a Free and Open Internet. https://www.whitehouse.gov/net-neutrality.

White House. 2015. Office of the Press Secretary, Remarks by the President in State of the Union Address, January 20. https://www.whitehouse.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015.

White House. 2015. Office of the Press Secretary, Veto Message to the Senate: S. 1, Keystone XL Pipeline Approval Act. February 24. https://www.whitehouse.gov/the-press-office/2015/02/24/veto-message-senate-s-1-keystone-xl-pipeline-approval-act.

Endnotes

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

[2] These reports are archived on the White House website at https://www.whitehouse.gov/omb/inforeg_regpol_reports_congress/.

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

[4] http://www.hsgac.senate.gov/hearings/examining-the-use-of-agency-regulatory-guidance-part-ii.

[5] http://www.judiciary.senate.gov/imo/media/doc/10-06-15%20Narang%20Testimony.pdf.

[6] http://www.huffingtonpost.com/2011/11/17/deregulation-job-growth_n_1099579.html.

[7] https://cei.org/blog/administrations-regulatory-uncertainty.

[8] http://www.huffingtonpost.com/2011/11/17/deregulation-job-growth_n_1099579.html.

[9] https://www.google.com/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=vermuele%20imagine%20no%20congress.

[10] Clyde Wayne Crews Jr., "Mapping Washington's Lawlessness: A Preliminary Inventory of 'Regulatory Dark Matter'," *Issue Analysis 2015 No. 6*, Competitive Enterprise Institute, December 2015. https://cei.org/sites/default/files/Wayne%20Crews%20-%20Mapping%20Washington%27s%20Lawlessness.pdf; also available on SSRN Social Science Research Network. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733378.

[11] Crews, Regulatory Dark Matter, 2015. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733378.

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

[13] Environmental Protection Agency, "Documents Related to the Clean Water Rule," http://www2.epa.gov/cleanwaterrule/documents-related-clean-water-rule. See also Daren Bakst, "What You Need to Know about the EPA/Crops Water Rule: It's a Power Grab and an Attack on Property Rights," *Backgrounder* No. 3012, Heritage Foundation, April 29, 2015, "http://www.heritage.org/research/reports/2015/04/what-you-need-to-know-about-the-epacorps-water-rule-its-a-power-grab-and-an-attack-on-property-rights.

[14] William Yeatman, "Understanding the EPA's Power Grab through the 'Waters of the U.S. Rule,'" CEI Blog, June 1, 2015, https://cei.org/blog/understanding-epa%E2%80%99s-power-grab-through-%E2%80%9Cwaters-us-rule%E2%80%9D.

[15] Securities and Exchange Commission, Commission Guidance Regarding Disclosure Related to Climate Change, February 8, 2010. https://www.sec.gov/rules/interp/2010/33-9106.pdf. In opinion coverage, see John Berlau, "Energy Bill Greens Financial Agencies," *Daily Caller*, February 5, 2016. http://dailycaller.com/2016/02/05/energy-bill-greens-financial-agencies/.

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

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

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

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

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

[21] Hans Bader, "OCR's Evasive Letter to Sen. Lankford about Colleges and Title IX," Competitive Enterprise Institute Blog, February 22, 2016. https://cei.org/blog/ocrs-evasive-letter-sen-lankford-about-colleges-and-title-ix.

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

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

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

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

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

[27] For media coverage, see Stephen Dinan, "DHS Asks Stores to Watch Customers Behavior for Terrorist Signs," Washington Times, September 10,2014. http://www.washingtontimes.com/news/2014/sep/10/dhs-will-ask-stores-watch-customers-buying-habits/.

[28] Written testimony of DHS Secretary Jeh Johnson for a House Committee on Homeland Security hearing. "Worldwide Threats to the Homeland," September 17, 2014. https://www.dhs.gov/news/2014/09/17/written-testimony-dhs-secretary-jeh-johnson-house-committee-homeland-security..

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

[30] U.S. Department of Labor, Wage and Hour Division, Administrator's Interpretation No. 2016-1, Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act. January 20, 2016. https://www.dol.gov/whd/flsa/Joint_Employment_AI.pdf.

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

[32] Ibid.

[33] Press Release, Lankford, Senators Challenge Department of Labor Regulatory Actions: Senator Lankford Leads Letter to Question OSHA Use of Guidance Document Instead of Public Rule-Making Process. September 29, 2015. https://www.lankford.senate.gov/newsroom/press-releases/lankford-senators-challenge-department-of-labor-regulatory-actions.

[34] Sean Higgins, "Comrades in Arms," *Washington Examiner*, May 18, 2015, http://www.washingtonexaminer.com/comrades-in-arms/article/2564545.

[35] National Federation of Independent Business, *The Fourth Branch & Underground Regulations*, September 2015. http://www.nfib.com/pdfs/fourth-branch-underground-regulations-nfib.pdf.

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

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

[38] John, Irwin, "U.S. House passes bill revoking CFPB auto lending guidance," *Automotive News*, November 18, 2015. http://www.autonews.com/article/20151118/FINANCE_AND_INSURANCE/151119809/u.s.-house-passes-bill-revoking-cfpb-auto-lending-guidance.
[39] "Bipartisan CFPB Transparency Bill Passes House Overwhelmingly," National Automobile Dealers Association, November 18, 2015. https://www.nada.org/CustomTemplates/DetailPressRelease.aspx?id=21474842886.
[40] U.S. Environmental Protection Agency, "Volkswagen Light Duty Diesel Vehicle Violations for Model Years 2009-2016," https://www.epa.gov/vw.
[41] "EPA asks Volkswagen to make electric cars in U.S.: Welt am Sonntag," Reuters, February 21, 2016. http://www.reuters.com/article/us-volkswagen-emissions-usa-idUSKCN0VU0JA.
[42] White House Council on Environmental Quality, Revised Draft Guidance for Greenhouse Gas Emissions and Climate Change Impacts, https://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/ghg-guidance.
[43] Elizabeth A. Lake, "No Consensus On CEQ Draft Guidance For NEPA Reviews," Law360, May 22, 2015. http://www.law360.com/articles/658194/no-consensus-on-ceq-draft-guidance-for-nepa-reviews.
[44] Department of Transportation, Federal Aviation Administration, Office of the Secretary of Transportation (RIN 2120–AJ60), Operation and Certification of Small Unmanned Aircraft Systems, June 2016. http://www.faa.gov/uas/media/RIN_2120-AJ60_Clean_Signed.pdf.
[45] Marc Scribner, "FAA's Long-Delayed Drone Certification and Operations Rule Disappoints," Competitive Enterprise Institute Blog, June 21, 2016. https://cei.org/blog/faas-long-delayed-drone-certification-and-operations-rule-disappoints.
[46] Department of Transportation, Federal Aviation Administration, "Unmanned Aircraft Operations in the National Airspace System," *Federal Register*, Vol. 72, No. 29, February 13, 2007, http://www.gpo.gov/fdsys/pkg/FR-2007-02-13/html/E7-2402.htm.
[47] Marc Scribner, "Commercial Drones Face Sky-High Regulatory Barriers," CEI Blog, July 11, 2014, https://cei.org/content/commercial-drones-face-sky-high-regulatory-barriers.
[48] Crews, Regulatory Dark Matter, 2015. p. 29. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733378
[49] https://cei.org/blog/nobody-knows-how-many-federal-agencies-exist.
[50] https://www.whitehouse.gov/omb/inforeg_regpol_reports_congress/.
[51] http://www.wsj.com/articles/SB10001424052702304259304576375950266610760.
[52] Detailed at https://www.federalregister.gov/blog/learn/regulatory-improvement/retrospective-review-documents.
[53] https://cei.org/sites/default/files/Wayne%20Crews%20-%20Why%20Congress%20Must%20End%20Regulation%20by%20Guidance%20Document.pdf.