The Federal Office of No

Enhancing the Executive Branch Role in Challenging Federal Regulation

Comments of the Competitive Enterprise Institute On
The Office of Management and Budget's

2014 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act

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…But if Congress won't act soon to protect future generations, I will. I will direct my cabinet to come up with executive actions we can take, now and in the future.[1]

—President Barack Obama
February 2013

I am not a friend to a very energetic government. It is always oppressive.
—Thomas Jefferson to James Madison, December 20, 1787.

1. Introduction: Can Executive Power Expand Liberty?

President Barack Obama's 2014 State of the Union Address capped many weeks during which he and his staffers touted a "pen and phone" strategy.[2] As the opening quote indicates, the president promised on numerous occasions to use his office to facilitate federal government action in critical segments of economic and social life such as health care, financial services, infrastructure, the environment, scientific research and manufacturing.[3]

The release of the Office of Management and Budget's (OMB) *2014 Draft Report to Congress on the Benefits and Costs of Federal Regulations* offers an opportunity to reaffirm the usefulness of muscular regulatory review of federal agency regulations, in an environment in which the executive branch instead champions significant federal involvement in economic and social matters.

The United States is recognized as a limited representative republic with certain defined powers, administered by separate governmental branches that offset one another. Over decades the nation has transformed into an administrative state wherein unelected officials rather than Congress make increasing numbers of laws, and interpret their meanings as well. There were 72 laws passed by Congress in 2013; meanwhile agencies issued 3,659 rules and regulations (a multiple of 51). Federal Register public notice and comment for these thousands of rules and regulations (established by the Administrative Procedure Act) is only a partially adequate safeguard since even the limited discipline of APA rulemaking disregards regulatory dark matter like agency guidance documents, memoranda, notices and bulletins in the Federal Register that have legal effect but little or no oversight.[4] (Examples of guidance include Environmental Protection Agency (EPA) Clean Water Act jurisdictional guidance on "Waters of the United States,"[5] the Federal Trade Commission's guidance on disclosure of paid search engine results,[6] and waivers of the Patient Protection and Affordable Care Act.)

In the first instance it was inappropriate for Congress to delegate such sweeping powers to bureaus. To the extent overregulation exists, Congress enabled it, and only Congress can fully reverse it (or alternatively a convention of the states could). As it stands, executive branch overreach alarms those across the left/right political spectrum. This is illustrated in reactions ranging from a House Republican lawsuit against the president to Georgetown law professor Jonathan Turley's testimony to the House Judiciary Committee that "We are in the midst of a constitutional crisis with sweeping implications for our system of government."[7]

The executive branch today and in the future should subject regulations and interventions to greater scrutiny and transparency, and go beyond that by paying heightened attention to impacts

of Executive Orders, guidance documents, memoranda, bulletins and other "non-rules" that skirt notice-and-comment and the central review mechanisms currently stationed at the federal Office of Management and Budget (OMB).[8] Even the notice and comment the Administrative Procedure Act does successfully enable is insufficient; final rules increasingly are not properly submitted to the Government Accountability Office and to Congress as required under the Congressional Review Act (CRA).[9] That submission is necessary should Congress choose to introduce a formal Resolution of Disapproval of an agency rule under the CRA, so its neglect counts as a significant lapse.

Modern rulemakings expand into new realms as oversight's scope fails to modernize. The Department of Health and Human Services is transforming America's unique, traditional health insurance system; antitrust agencies disrupt competition in the name of protecting it even in the modern technological era as opposed to the smokestack monopoly era that allegedly justified it; communications regulation threatens free speech and network infrastructure even though the justifications for establishing Federal Communications Commission no longer exist; energy regulation combined with resource agencies' collusion with green extremists disrupts access to land and resources and creates energy poverty and even food shortages. Financial regulations foster the "too big to fail" entities that proponents cited as the reason to intervene in the first place, create instability and hurt the poor's access to banking services. If the Department of Justice's "Operation Chokepoint" drives small entities out of lending,[10] the government will control a financial industry segment without congressional approval and perhaps without even the normal notice and comment process.

Congress and the executive branch should preserve citizens' governance of their own affairs without excessive regulation. There is a range of regulatory reforms Congress should enact for existing and future regulation,[11] however those are not at issue at hand. If the executive branch can "ignore" Congress to enable new initiatives, one can likewise envision a pen and phone deployed to expand liberty. What might an executive and the executive branch legitimately do to reduce Washington's influence?

The modern conceit is that untethered regulation and rulemaking always works. It does not; bureaucracy and the administrative state can impede economic efficiency and undermine health, safety and environmental progress. Healthy government requires vigilant legislative and executive institutions and mindsets that seek reasons *not* to impose yet another rule or decree, because there are downsides to coercive intervention that need underlining. Imagine, in this and future administrations, an "Office of No," both figuratively and literally, to present official dissents from the always-more-government conclusion that agencies reach in response to most health, safety, environmental and economic concerns. The public has a right to know the big picture ways federal agencies have harmed and harm that which they oversee, and how those negatives may propagate beyond the agency and throughout the economy and society.

2. Federal Review of Regulations

The 2014 Draft Report to Congress on the Benefits and Costs of Federal Regulations

The OMB released the *2014 Draft Report to Congress on the Benefits and Costs of Federal Regulations* in June 2014. Of thousands of proposed and final rules issued annually, the federal OMB reviews a subset. But notices, guidance documents, memoranda and bulletins get little scrutiny anywhere.

If it draws attention to the report at all, the administration will say its fiscal year 2013 (October 1, 2012– September 30, 2013), executive agency major rules had benefits of up to $81.4 billion annually, while costing just $2.4 billion to $3.0 billion annually in 2010 dollars.[12]

Still, each year, Democratic and Republican administrations emphasize this "net benefit" item whenever characterizing the regulatory enterprise.[13]

Today's doctrine holds that this subset of such major or "economically significant" rules (those anticipated to have a $100 million economic impact) account for the bulk of regulatory costs. The OMB holds that:[14]

> *[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 cost-benefit breakdowns incorporate only benefits and costs of "major" rules that agencies or OMB have expressed in quantitative, monetary terms, omitting numerous categories and cost levels of rules altogether.

In the 2014 Draft, only seven rules had both cost *and* benefit analysis performed out of the 54 executive agency major rules OMB reviewed and the thousands of other rules it did not review. OMB listed another 11 rules with dollar costs assigned, without any accompanying benefit estimates.[15]

Therefore the "subject to OMB review" clause in the above quote is therefore an important qualifier. Plenty gets left out, like non-major rule impacts and independent agencies' compliance costs, as well as the aforementioned guidance documents, memoranda and other notices. Indeed the non-reviewed character of most rules small and large, such as controversial independent agency rules like the Federal Communications Commission's net neutrality proposal, cast doubt on the annual benefits and costs report's authority as a comprehensive picture of the administrative state's compliance burdens and universal impact.

No other cost tallies beyond these eighteen exist in OMB's report. Independent agencies' thousands of rules get no OMB review, even including high-impact laws like the Dodd–Frank Wall Street Reform and Consumer Protection Act. In the case of the independent Consumer Financial Protection Bureau created by Dodd-Frank, the concern goes beyond lack of OMB regulatory review[16]: There is a lack of fundamental executive oversight exists since the President

cannot remove the director; there is a lack of legislative oversight since Congress does not fund the self-financing agency, so it does not have the necessary "power of the purse" influence to control it; finally there is limited judicial review.

Thirty other major rules implemented transfer programs;[17] such "budget rules" are officially considered transfers rather than regulations. This is certainly plausible in a limited government context, but becomes inappropriate as government controls ever more economic and social activity. When government assumes responsibility for aspects of Americans' lives—say retirement medical insurance—subsequent generations tend to stop treating it as a regulatory cost or as a surrender of their liberties and choices.

Of the remaining 17 major rules OMB examined, agencies provided partial or no benefit and no cost estimates.

Overall, OMB reviewed 54 major rules, and a few hundred significant ones in calendar year 2013, 18 of which had a cost estimate. For context, as noted, during calendar year 2013, 3,659 rules were finalized by over 60 federal departments, agencies and commissions.

"The Funnel of Gov"

OMB's once-common recognition that costs "could easily be a factor of ten or more larger than the sum of the costs...reported,"[18] was helpful, since *measured* major, significant or economically significant rules at any given time are a small fraction of the total number of rules in the pipeline or finalized. The subset with both benefit and cost calculations is a considerably smaller proportion.

In the 2014 Draft Benefits and Costs report, OMB tells us that:[19]

> *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.*

OMB reviews significant rules, not just economically significant or major rules, which is appropriate. Still, fewer than 10 percent of all rules are reviewed whether or not costs and benefits enter into the picture.

The nearby chart, *The Funnel of Gov—On the Depth of Regulatory Cost Review, 2001-Present*, shows that, of several thousand rules agencies issue, a relative handful get cost analysis, let alone cost-benefit analysis.

The Funnel of Gov

On the Depth of Regulatory Cost Review 2001-Present

	Major Executive Agency Rules Reviewed by OMB						Total OMB	Federal	Costed Rules	Costed Rules as
	Both costs & benefits	**Rules w/ Costs Only**	**Grand Total, rules w/ costs**	**Costs Absent**	**Total Rules**	**“Bud get” Rules**	**Major Rule Reviews**	**Register Final Rules**	**as % of Major Rule Flow**	**as % of Finalized * Rule Flow**
2001 (OMB 2002, Table 7, p. 38)	14	13	27	7	34	53	87	4,132	31.03%	0.65%
2002 (OMB 2003, Table 1, p. 6)	3	0	3	3	6	25	31	4,167	9.68%	0.07%
2003 (OMB 2004, Table 1, p. 7)	6	4	10	4	14	25	39	4,148	25.64%	0.24%
2004 (OMB 2005, Table 1-3, p. 12)	11	7	18	8	26	19	45	4,101	40.00%	0.44%
2005 (OMB 2006, Table 1-3, p. 7)	13	2	15	6	21	24	45	3,943	33.33%	0.38%
2006 (OMB 2007, Table 1-3, p. 8)	7	1	8	2	10	18	28	3,718	28.57%	0.22%
2007 (OMB 2008, Table 1-3, p. 10)	12	4	16	2	18	22	40	3,995	40.00%	0.40%
2008 (OMB 2009, Table 1-3, p. 14)	13	6	19	2	21	21	42	3,830	45.24%	0.50%
2009 (OMB 2010, Table 1-3, p. 20)	16	12	28	5	33	33	66	3,503	42.42%	0.80%
2010 (OMB 2011, Table 1-4, p. 23)	18	8	26	8	34	32	66	3,573	39.39%	0.73%
2011 (OMB 2012, Table 1-5,6)	13	6	19	5	24	30	54	3807	35.19%	0.50%
2012 (OMB 2013, Table 1-5,6)	14	9	23	2	25	22	47	3708	48.94%	0.62%
2013 (OMB Draft 2014)	**7**	**11**	**18**	**6**	**24**	**30**	**54**	**3659**	**33.33%**	**0.49%**
TOTALS	**147**	**83**	**230**	**60**	**290**	**354**	**644**	**50,284**	**35.71%**	**0.46%**
Benefits Percentages									22.83%	0.29%

Taken as a percentage of the annual flow of final rules in the *Federal Register,* the proportion of rules designated “major” with cost analysis averaged around 36 percent over the decade; but the proportion of *all* rules with any cost analysis at all has averaged just .46 percent. Regarded another way, in any given year, the percentage of all rules that have cost analysis has never

reached one percent; the highest was .8 percent. Benefits, that which the federal government declares justifies the modern regulatory state, fare even more poorly.

Even more fundamentally, most categories of costs get ignored altogether; these unmeasured costs include:[20]

- The loss of liberty.
- Most economic regulatory impacts and consequences of government intervention.
- The unacknowledged elimination of genuine economic, social, environmental and safety benefits by over-regulation.
- The costs of poor regulatory control processes.
- Most instances of the job costs of regulations.

3. Once Upon A Time: When Executive Branch Regulatory Review Had Steam

One may recall a time when the executive branch temperament was more explicitly one of questioning government regulations rather than expanding them.

During the late 1970s and early 1980s, concern over the economic impacts of federal regulations spawned analyses and ultimately reforms meant to reinvigorate the national economy while stemming that era's inflationary pressures.[21]

Prominent among emergent deregulatory initiatives were certain trucking, rail, and airline deregulatory moves, partial financial services deregulation, relaxed enforcement of federal antitrust laws, and restraints on federal paperwork. A significant innovation was formalization of activist central regulatory review. The responsibility was given to the Office of Information and Regulatory Affairs (OIRA) at the OMB during the Reagan Administration.

Created by the Paperwork Reduction Act of 1980, OIRA first concentrated on reducing private sector federal paperwork burdens. Subsequently, OMB's oversight authority—and OIRA's—was expanded by President Reagan's 1981 Executive Order 12291 to encompass (theoretically) a greater portion of the regulatory process.[22]

That expanded management role required that OIRA ensure that the benefits of any new major executive regulation outweighed its costs where not prohibited by statute (independent agencies were exempt). OIRA embodied a notable advance: earlier efforts at regulatory review, such as those 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.

These earlier bodies could require regulatory cost analysis where not statutorily prohibited, but they could not enforce net-benefit requirements for regulation; agencies ultimately could reject the reviewers' counsel and proceed with their rule. (Reviewer appeals to the president were possible, but rare and less than satisfactory.[23]) Net benefit analysis has considerable insurmountable problems of its own,[24] but the *intent* was significant at the time, in the prevailing

context of a conscious effort to address what was deemed overregulation.

More than half the decade of the 1980s saw a decline in regulatory costs and in the amount of regulation in the economy, partly as a result of these assorted regulatory reforms.[25] Economic regulation in particular showed some restraint, social and environmental less so.[26]

The review efforts at OIRA (and those at the first President Bush's Council on Competitiveness) over the years became periodically handicapped by political opposition, narrow scope of authority and limited resources.[27]

Once-declining economic regulation is mounting again since government action has increased in areas like communications (net neutrality) homeland security (creation of a cabinet department), financial regulation (the Sarbanes-Oxley and Dodd-Frank laws) and health care (via the Patient Protection and Affordable Care Act). Resources at OIRA matter, but can be undermined anytime a pro-regulation philosophy dominates, especially given OIRA's reduced scope of authority since the Reagan executive order E.O. 12291 was replaced by President Bill Clinton's EO 12866. Clinton's order retained central regulatory oversight but "reaffirm[ed] the primacy of Federal agencies in the regulatory decision-making process;" the new order also changed the Reagan criterion that benefits "outweigh" costs to a weaker stipulation that benefits "justify" costs.[28]

Disdain for the OIRA and the old Council on Competitiveness involvement may not simply signify dislike for strong executive regulatory review and "veto" power. Some simply do want larger government as a philosophical matter, and so congressional regulatory constraints themselves remain incomplete. In the 113th Congress, House passage of regulatory reforms such as the ALERRT Act (Achieving Less Excess in Regulation and Requiring Transparency)[29] and the REINS Act (Regulations from the Executive In Need of Scrutiny)[30] have not been met with Senate action. And the president opposes them.

Harnessing regulation requires questioning bureaucratic power, and enough humility to appreciate that central federal regulation is usually not what the nation needs. Reforms created through the cooperation of both the legislative and executive branches would be most effective, but those are not an option at the moment apart from the possibility of a Regulatory Review Commission in the SCRUB Act (Searching for and Cutting Regulations that are Unnecessarily Burdensome),[31] which boasts bipartisan sponsorship.

Given that no laws from Congress addressing regulatory bureaucracy are forthcoming, one might identify expansions of the existing presidential and OMB regulatory review apparatus as a counterweight to the prevailing "pen" and "phone" communicating the opposite philosophy. A liberalization attitude prevailed in the executive branch during past presidencies, and resulted in the creation of the review process itself; that disposition can reemerge to improve executive branch oversight. Even apart from the thinness of cost analysis and review, there are ample reasons for getting better at saying "no."

4. The Case for Getting Better at Saying No

Cronyism and Regulatory Capture

We know costs of regulations get largely ignored, but other concerns undermine trust in regulation. Cronyism and regulatory capture, unfortunately, ensure that regulatory "benefits" can be substantial for certain well-positioned parties in nearly any regulatory undertaking. That is not the same as saying a regulation is beneficial to the public.

Regulations can benefit some groups of producers, regulatory advocates and pressure groups at the expense of competitors, consumers and the public. Some might argue regulations *usually* and *deliberately* do these things. The phenomena of regulatory capture and cronyism occur to varying degrees in regulatory proposals that promote command-and-control rules where more viable market-conscious alternatives exist[32] and in economic, social and environmental regulatory pursuits generally. Regulations can benefit the rent-seeker and the regulator since rules can eliminate weaker competitors, thereby securing higher prices and greater market share for the winners.

When it comes to improving health and safety and economic efficiency, regulation is not always a public interest phenomenon despite its acceptance and prevalence. Even when regulation "works," the overall or societal benefits of individual programs can be outweighed by costs; moreover the "social calculus" approach to net benefits also can ignore involuntary wealth transfers, regulatory takings and due process. Finally the damage possibly inflicted when regulation replaces or undermines the improvements in well-being that might otherwise have been achieved in the absence of regulation rarely gets attention: Privacy, financial stability, food safety, cybersecurity, economic efficiency and countless other good things all require market and social pressures to improve—a process which ill-considered regulations undermine.

Executive branch regulatory review, particularly under E.O. 12291, was a step toward control over some such overreaches to better safeguard consumer and citizen interests.

Stronger Executive Branch Regulatory Review Helps Empower Consumers and Citizens

Without defending benefit-cost analysis as always the proper approach to governance, formal centralized review of regulations by OMB or an entity with a similar (preferably stronger) mandate can help ensure that rule benefits exceed costs. Under the Reagan and first Bush administrations, centralized review represented the primary procedural check against uneconomic or inequitable regulatory interloping. The Clinton strategy, as noted, retained central regulatory oversight but replaced E.O. 12291 with EO 12866, a directive intended "to reaffirm the primacy of Federal agencies in the regulatory decision-making process,"[33] thereby weakening the "central" in central review.

Executive review may be regarded as an institutional recognition of the reality that agencies and departments do not benefit from *not* regulating. They gain, immensely—in terms of budget allocations, staffing, and political and career status—by the vastness of the regulatory empires

they oversee, not by curtailing operations.[34] Agencies experience no pressure to regulate solely as a last resort after all appeals to private action have failed. Such appeals do not happen, as every instance from net neutrality to breath mint serving sizes to school lunch mandates underscores a federal government disinclined to leave any human endeavor alone.

Foremost in today's context is that executive branch regulatory review cannot work well when the philosophy of the executive is that government, not private individuals, should dominate finance, health care, energy policy, manufacturing and other spheres of human action. Barack Obama's repeated pledges to go around elected lawmakers attests to this; despite the formalization of a central review process, executive branch review cannot function optimally in the current circumstances.

Review, however poorly done, at least once reflected an executive branch more appreciative of the reality that the threat of the regulatory state is the same as the alleged menace of market failure: Costs can be externalized or foisted upon others, and resources can be consumed beyond a "socially optimal" level. Externalization of costs is arguably a greater threat with respect to agency behavior than for private actors since bureaus suffer no repercussions when some regulatory intervention proves scientifically, socially or economically irrational. Unlike profit-making firms, bureaus face no economic incentive to minimize the costs of their "product" (regulations) since others, typically private sector businesses and the consumers who buy their products, are obliged to absorb the impact of their actions. Review can help counter that.

Agency turf-building is a source of regulatory excess and the tendency to ignore anything other than cosmetic benefit-cost concerns, which argues for strong central review. Studies have also concluded that congressional influence too is a determinant of agency conduct and regulatory outcomes, often to the advantage of favored interests at the expense of the broader economy.[35] "An iron rule in Washington," journalist Jonathan Rauch told readers many years ago, "is that regulators regulate and legislators legislate unless somebody stops them."[36]

How, specifically, does review benefit consumers? Theoretically, regulatory agencies and legislators maximize their support by balancing desires of competing interest groups, whether these are producer groups, consumer groups or some combination.[37] In a regime without central regulatory review, costs of influencing laws are high since policy formation is scattered 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 dispersed consumers, political organization costs are higher and tendencies to free-ride on the efforts of others can dominate,[38] derailing the ability to push back on regulation or to even recognize it.

Regulatory excesses therefore grow because it can cost consumers more to organize and prevent having a dollar taken away than it costs for them to simply accept the loss. Consumers thereby become the "suppliers" of regulatory transfers.[39] Regulations, we learn, transfer wealth just as taxes and pork barrel spending do.

Centralized regulatory review may come to the “rescue” by helping level the playing field for consumer groups who are otherwise 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 an hodgepodge of them. Meanwhile, lobbying costs for concentrated groups rise, but their expected benefits are likely to be little influenced or even reduced (since they would have taken most of the pie anyway without central review).[40] The policy outcome is that “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.”[41] In that sense, expanding review to include independent agencies could further expand the public good.

However, since regulatory outcomes are prone to manipulation by congresses and executives that can short-circuit review, regulatory review’s response to consumers in its present form is limited. To the extent Congress requires unnecessarily rapid statutory deadlines for new regulations, prohibits benefit-cost analysis of rules, creates loopholes that prevent the review of federal paperwork, or frontally adopts rules that benefit special interests, aggressive regulatory review becomes as improbable as it does under a “pen and phone” executive.

Rooted in executive order rather than statute, central regulatory review is helpless in the face of statutorily driven mandates in normal circumstances. Although today, ironically, the executive branch delays law like certain congressionally mandated Obamacare provisions as it chooses.

The upshot is that strong executive branch regulatory review can greatly benefit the public and consumers by restraining costly agency rulemakings created apart from or beyond statutory authority. But executive review mechanisms can block neither legislators nor presidents who act to circumvent such oversight. Still, laying groundwork for improving central review is vital, and options for enhancing it will be explored here.

5. On Congressional Regulatory Reforms

Since economic and social benefit calculations for most rules do not exist, assumption of moral high ground by those imposing rules is not always justified. Therefore, to the extent we must take the administrative regulatory state as a given, and since we have established that review can improve the lot of citizens relative to agencies and the advantaged, review and other regulatory oversight institutions can and should be improved.

While the emphasis here is executive branch options, congressional regulatory reform is ultimately needed to prioritize disclosure of and accountability for regulatory impacts; but congressional action that secures a presidential signature is improbable in the current political environment. The primary vehicle for improving regulatory oversight that transcends political party at the moment seems to be the aforementioned bipartisan SCRUB Act’s Retrospective Regulatory Review Commission. This body would initiate review of the entire existing body of regulations, as opposed to the one-by-one of the review of new rules that characterizes OMB review. As noted, the House of Representatives has passed the REINS Act and the ALERRT

Act, but these will not pass the Senate and the president would veto them regardless. (The president may be required to veto them repeatedly and publicly in the 114th Congress if political circumstances change and Senate passage of similar bills is secured.) Other options for Congress to reform regulation and improve disclosure and accountability abound but for the time being seem unlikely.[42]

Meaningful executive or legislative regulatory improvements should appreciate the *redistributive* and sometimes abusive and costly features of regulation. Such reforms should recognize that political and governmental failure is a more pertinent concern than market failure. The government's solution to some perceived problem may have unintended—or as is more likely in modern health, financial, investment and other intervention, *intended*—consequences worse than the alleged market failure or imperfection thought correctable by regulation. Indeed, after the publication of Friedrich Hayek's *The Road to Serfdom* and the knowledge that regulatory bureaus cannot respond to rapidly needed changes in fields like health care provision, and that full government control ensues from the attempt, intervention deserves more than ordinary skepticism.

Modern reforms also should re-emphasize the institution of property rights assignment in the preservation of resources and the elimination of externalities. It is no surprise that property rights are treated with disdain in the regulatory apparatus, from electricity and Internet infrastructure to environmental amenities, since their incorporation dispenses with the role of regulatory price and entry controls while enhancing wealth, well-being and safety outside the central authority.

Imagining for the moment that congressional reforms were possible, we may note how different approaches to regulations past and regulations future are warranted.

How Congress can address the existing body of regulations

- Create a bipartisan Regulatory Reduction Commission to assemble annual packages of rules to eliminate via expedited vote.
- Sunset and phase out existing and newly created rules: While sunsets and phaseouts of rules may be disregarded, formal reporting on numbers of rules that expire and disclosing the ratio of illegally continued rules helps quantify the phenomenon of regulatory excess.

How Congress can address future regulations

- Require a congressional vote on all major or significant rules before they are effective as the REINS Act would do. Today an agency may neglect to quantify a rule's costs and escape the "major" or "economically significant" classification. This is why the REINS concept must be broadened to allow Congress to object to any controversial rule, whether or not tied to a cost estimate. In the era of regulatory dark matter, the requirement for congressional approval should extend ever further, to guidance documents and other agency decrees.
- Codify the various executive orders' requirements on cost analysis and extend requirements to independent agency rules (These are elements of the ALERRT Act) and guidance

documents and other agency proclamations.

- Adopt a one-in, one out procedure: For every new rule, another within an agency or elsewhere should be eliminated. This would amount to a status quo regulatory budget or freeze.
- Establish an annual Regulatory Transparency Report Card detailing agency regulatory output in digest form, incorporating the current year's data plus historical tables.
- Implement a regulatory budget: Congress should explore allocating regulatory cost authority among agencies, and distinguish between categories like economic, health/safety, and environmental regulations. Optimally, a binding regulatory cost budget would create incentives promoting many of the more incremental reforms like cost analysis and sunsets. A budget would tend to decentralize the review process, yet would likely preserve a coordinating and cost-monitoring role for central reviewers like OIRA.
- Formalize "Do Not Regulate" reporting and perhaps offices: Some have called for an independent congressional office of regulatory analysis resembling the Congressional Budget Office. There are scenarios in which that could be a good idea, such as if the entity were chartered with an anti-regulatory "bias" to offset the pro-regulatory bias in the 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.

Realism regarding regulatory shortcomings is needed. In the present context, with Congress out of the picture and incapable of implementing the reforms just listed, the question becomes what could the *executive's* "pen and phone" do to reduce rather than increase government influence in the economy, and to enhance regulatory review. While perhaps no more likely now than legislation, executive options will be viable in future administrations.

6. How Central Review Can Be Improved Via Executive Initiatives

The current executive branch appears disinclined to regard new federal government initiatives as needing restraint. President Barack Obama, despite several of his own executive orders on regulatory reform, is unlikely to deploy his pen and phone and personal vigor to implement or promote reforms like those just listed.

The executive branch obviously cannot go as far as Congress can in changing the operations of the regulatory state, and a president can carry out only a fraction of the reforms just noted (after all, too much executive unilateralism is the controversy at issue in the first place). Still, *some* capacity for a culture of "No" can be nurtured, if not by the current president, then by a future executive. Although the recommendations to follow are no more likely to happen now under the current administration than the congressional reforms, groundwork can be laid. Future executive orders under presidents less inclined toward "going it alone" can demand greater regulatory scrutiny than now prevails, and can work within the executive branch where not prohibited, and

of course with Congress, to achieve systematic elimination of ineffective, outdated and harmful rules.

Alternatively, with conventional options to restore the scope of liberty and elevate the rule of law exhausted or ignored, the states themselves can seize power back from Congress and the executive branch. One proposal for that is the Regulation Freedom Amendment movement that would empower two-thirds of the states to collectively force Congress to propose said amendment. The text of 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 (much like the REINS Act legislation would do).[43]

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,[44] but settled for vigorously defending "Energy in the Executive."[45]

The purpose here is not to claim that such power is a good thing, but to point out ways that, given that such power exists, there are ways it can appropriately and constitutionally be used to reduce government's scope and expand the private sphere. While legislative strictures still will (rightly) apply, what follows are ways that an executive inclined toward enhancing regulatory review at OMB could deploy a pen and phone for the public good.

The president should implement a regulatory reprieve or moratorium

Some might recall that, upon entering office, Obama's chief of staff froze regulations as part of the first 100 days initiative.[46]

Neither that effort nor past regulatory moratoria—such as a 90-day moratorium implemented by the first President George H. W. Bush that directed agencies to look for rules to waive—appreciably or permanently reduced the forward march of federal regulation. There were savings of perhaps a few tens of billions in the Bush case, and a few billion in Obama's.[47] Many rules implement statutory requirements and are exempt from any executive waiver (although with respect to the Patient Protection and Affordable Care Act, waivers applied via bulletin, memo and press release by the Internal Revenue Service[48]).

Another problem with the Bush moratorium was that agencies were being asked to describe what they did badly—a task at odds with self-interest and the iron laws of bureaucratic turf building. Furthermore, agencies were conducting a three-month campaign, considerably less time than would be needed to examine the fruits generated by an intense, thorough audit.

Because we have replaced a constitutional republic and rule by law with an administrative state,[49] regulatory pruning is a massive project that will require a more sustained program than anything yet attempted. Obama's unilateral waivers notwithstanding, getting regulations off the books requires following the same laborious public notice and comment procedures required 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.[50]

An executive should take the best of the Bush and Obama moratoria, build upon them, and freeze regulation for a longer time where lawful to allow a more thorough audit, publish reports on the data generated, seek public comment on which rules should go and so forth. Creativity can go a long way in terms of producing useful information that enables further substantive reforms.

The president should enforce and strengthen existing executive orders on regulation

Regulatory review as conducted by recent administrations has been unequal to the task of rolling back the regulatory enterprise, which is unsurprising since review is not explicitly tasked with getting rid of harmful or perverse regulation. Whatever the merits of any particular rule, the central fact about the regulatory apparatus is that most regulations take effect without having been aggressively reviewed or justified and with little or no knowledge about benefits.

Executive orders can expand governmental power, as with Harry Truman's attempt to seize control of America's steel mills[51] and Franklin Delano Roosevelt's confiscation of gold.[52] These were "pen" and "phone" executive orders; yet so too (minus the phone) was the Emancipation Proclamation to free slaves in the rebellious states.

As noted, key executive orders on regulatory restraint were President Bill Clinton's 1993 E.O. 12866,[53] and the one that first formalized central regulatory review at the Office of Management and Budget, Ronald Reagan's E.O. 12291 in 1981.[54] Clinton's order did retreat from the heavier OMB oversight of the Reagan order in that it sought, as noted earlier, "to reaffirm the primacy of Federal agencies in the regulatory decision-making process."[55]

President Obama's own E.O. 13565 on review and reform ("Improving Regulation and Regulatory Review") was a pledge to roll back regulation.[56] Obama achieved a few billion dollars in savings, even highlighting in the 2013 State of the Union Address a rule that had categorized spilled milk as an "oil," wisecracking about how silly it was.[57] Suffice it to say that such trivialities are not the source of regulatory overreach and economic stagnation; the few billion dollars cut have been swamped by rules otherwise issued. Still, in all, four of Obama's executive orders directly address over-regulation and rollbacks.[58] Despite that worthwhile nod toward regulatory reform, expansion of government into economic, social and environmental realms has been the administration's emphasis rather than liberalization.

Independent agencies aren't subject to enforceable regulatory review, but President Obama did address them in E.O. 13579 ("Regulation and Independent Regulatory Agencies") with a call to fall into line on disclosure. 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*. The problem today is that the expansions in which many agencies engage are supported and encouraged by the administration.

So despite Obama's executive orders ostensibly shining a light on regulatory excess, walking the executive order walk likely awaits a different executive. But like the original E.O. 12291, the *potential* for executive orders to boost oversight and review is very high when the motivation

exists. Getting aggressive on the current orders can have huge, authoritative impacts.

The president should boost Office of Information and Regulatory Affairs resources and free market law and economics staff at agencies

Clearly increased dollars and staff could enhance thoroughness of OIRA review or that of some subsequent review body.[59] Where political circumstances prevent increasing the resources devoted to regulatory review, OIRA management might shift personnel and funds to concentrate on key agencies (or some subset) given the form of regulation being expanded. 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 help can and does come from employees borrowed from federal agencies and departments.

Alternatively, economists at agencies whose job it is to assess benefits and costs of regulations and prepare Regulatory Impact Analyses could be increased by moving economics divisions or personnel out of less active agencies. The president or the head of OIRA 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 better than Washington agencies do. This emphasis would increase the scrutiny afforded to regulations.[60] Agency economists, deployed where they would be objectively more useful in critiquing 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 however that *it is not enough for economists to focus on Regulatory Impact Analyses*. Only a few get prepared. 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 from the "Funnel of Gov" chart that non-major rules and independent agency rules make up the regulatory bulk. Still a rough 80/20 rule should apply to agencies' profligacy 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, and presidential encouragement of their role and acknowledgement of their importance would help.

The president should schedule ongoing reviews of regulations

Short of the moratorium advocated above, and in keeping with the spirit of executive orders and retrospective reviews that agencies conduct already, instituting some form of authoritative periodic rule review by OMB and agencies would be valuable. This task requires an executive who agrees with the observation that regulations sometimes go too far, and who recognizes that allowing even good ones to mount inappropriately can be counterproductive. It is straightforward to itemize criteria by which agencies should routinely evaluate outstanding rules. Here are only a few:

- Are current reporting requirements really furthering needed knowledge regarding health and safety, or economic efficiency? Are the data that regulated entities are required to report being used at all?
- Which rules can be eliminated or relaxed without becoming bogged down in scientific disputes over risk assessment? Which rules are just silly?
- Does the rule justify the health cost tradeoffs it imposes (such as the health costs of advertising restrictions on some needed drug)?

Such questions can help isolate burdensome or counterproductive rules (or create the record capable of inducing Congress to do so, since agencies cannot alter statutory mandates on their own). The problems of agency self-policing will persist so the importance of an engaged executive is difficult to overstate.

The president also could 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, by the issuing agency.

The president should reduce dollar thresholds that trigger preparation of Regulatory Impact Analyses

Costs of presumably minor rules can easily be downplayed since explicit analysis is not required and review is accordingly non-existent or less rigorous. The Federal Communications Commission's expensive and game-changing open Internet (net neutrality) order was not regarded as significant, for example.[61]

Along with reinstating a regulatory moratorium and devising criteria for a mandatory periodic review and stressing executive order-driven review, the president may also reduce the number 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 analysis for a relative handful of rules. More rules would be brought within that review umbrella simply by lowering the threshold to $50 million or $25 million. Lowering the trigger will not automatically improve the manner in which costs and especially benefits are currently tallied in RIAs. Indeed, if net benefit analysis rather than cost analysis persists, the federal government could continue to exploit RIAs to claim dubious net benefits.

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."[62] In other words, a substantial number of "minor" rules may have exceeded the threshold but were understated just enough by agencies to evade scrutiny.

Also, some aggressive agencies may strategically adapt their behavior to the likelihood of review, and present major rules *larger* than what they would actually be willing to accept in

order to preserve room for negotiation and give the appearance of compromise.[63]

Such behavior can be dealt with; 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. This option should be employed with vigor. In the future, far fewer rules should escape cost analysis.

The president should issue an executive order to allow for review of all agency issuances, not just rules

With tens of thousands of agency proclamations annually, it does not suffice for executive agency "significant" or "major" rules to be reviewed by OMB, nor is it enough to bring independent agencies into the fold. Otherwise, regulatory "dark matter" can gain ground on what can be easily observed.

Today, "undocumented regulation" like presidential and agency memos, guidance documents, bulletins and press releases may enact policy directly or indirectly, or even by veiled threat.[64] Decisions may be rendered by agencies, and regulated parties pressured to comply without formal regulation or thorough understanding of costs. Examples include, as noted in the introduction, the EPA Clean Water Act jurisdictional guidance on "Waters of the United States,"[65] and the Federal Trade Commission's "Guidance" on disclosure of paid search engine results.[66] To address this phenomenon, former OIRA director John Graham and James Broughel propose options like reinstating a George W. Bush requirement to prepare impact analysis for significant guidance documents, explicitly labeling guidance documents as nonbinding, and requiring notice and comment for significant guidance documents.[67]

As noted in a July 2012 U.S. House Committee on Oversight and Government Reform publication:[68]

> *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 significant and potentially significant decrees by agencies need scrutiny, not just those called "rules." A highly engaged executive can draw attention to the expansion of quasi-regulatory activity and document it such that it can be definitively addressed.

The president should issue an executive order requiring rule publication in the Unified Agenda of Federal Regulations

Agencies are supposed to publish their priorities in the semi-annual Unified Agenda of Federal Deregulatory and Regulatory Actions to alert the public. But there is a whopper of a disclaimer,

as the Federal Register has noted:[69]

> *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 should command that agencies *do* confine their regulatory activities to those appearing in the Agenda; if not in great detail, then at minimum rules should be listed there for public disclosure.

The president should critique agency benefit claims and block gratuitous actions

Until OMB and agencies focus on cost calculations exclusively, the executive and OMB need to adopt the appropriate attitude toward agency benefit claims.

The presumption underlying regulatory activism is that deeply embedded market imperfection is rampant and the norm, but is easily remedied by objective political and administrative agency decision-making in the form of thousands of rules. Indeed, the very basis of the administrative regulatory enterprise is the unsupported belief that government actors are non-self-interested, that political "markets" yield fairer outcomes than what can be achieved in the private sphere.

Indeed, the faith in top down, planned administration is pervasive. OMB remarked in its earliest *Benefits and Costs* report that "It is…difficult to imagine a world without health, safety and environmental regulation. Could a civil society even exist without regulation?"[70] That is not the choice; the question is what institutional framework is more appropriate to advancing health, safety and efficiency. The political framework is the default, but the true choice is between political versus competitive/social disciplines of excesses or misbehaviors. One may not properly invoke market failure as justification to regulate without recognizing potential offsetting political and bureaucratic failure. Much environmental regulation is "necessary," for example, because of the failure to define property or use rights over resources and amenities in the first place. Such regulation may be *perpetuating government failure* rather than remedying market failure.

The question is not whether an economic order requires "regulation" or planning to secure public benefits. Rather, the question is: Who will do that planning?[71] It would be helpful for the president and OMB to more readily acknowledge the ease with which regulation can do more harm than good, to create not benefits but costs. But by placing the burden of proof on those who would remove or not issue a rule rather than on those who would impose it in the first place, our regulatory regime recommends few rollbacks.

We've noted that the 1970s and 80s brought a phase of economic liberalization in rail, air and telecommunications upon realization that regulation serves special interests, and often does more harm than good. For example price regulation has not been shown to work for consumers, but to instead increase prices.[72]

In this regard, it is not even the case that, as OMB once put it, that "businesses generally are not

in favor of regulation."[73] Business not only generally favors regulation, but often sought regulation in the first place. Consumers did not ask for the Interstate Commerce Commission, or for the state regulation of utilities, or for the antitrust laws: these were secured by politically elite bodies that sought and succeeded at protecting profits and eliminating competition.[74] If economic regulatory agencies are subject to capture by special interest groups (and many of these agencies are the independent bodies whose decrees OMB does not review at all), it is no great leap to conclude that much of what is considered social or health and safety regulation may likewise be something else entirely, and a bad, perhaps even unsafe, deal for consumers. Since regulation so profoundly affects profits, "social" or "safety" regulations are not exempt from rent-seeker exploitation.

For example, food labeling restrictions that limit health claims benefit established food producers, those that already enjoy positive reputations. Upstart companies forced not to compete on the basis of health characteristics and claims may emphasize features like convenience, microwaveability and taste.[75] As a result of "regulation," the health characteristics of newly introduced food products can decline—the opposite of regulation's alleged intent but an outcome aligned with the interests of established companies. Butter producers portrayed margarine as unsafe and dirty at the dawn of the margarine industry.[76] Abuse of "environmental" regulations to protect profits are well documented.[77] Here are just a few reasons the president and executive branch reviewers should challenge agency benefit claims:

- Agencies have incentives to overstate benefits (the flip side of the incentive of businesses to overstate costs.
- Agencies selectively express benefits: for example, structurally safer cars may induce some to drive more recklessly, placing *others* at risk.
- Benefits of a regulation are rarely compared with benefits that could be secured in another agency. Resources available to address safety concerns are not infinite.
- Benefits are rarely compared with the benefits of leaving resources in the hands of the public; they may waste them—or they may buy fire extinguishers, safer cars, health care or insurance.
- Regulations are lower bounds: once in compliance, there may be no competitive edge gained by a firm that exceeds a particular rule's requirements. In this way, alleged regulatory "benefits" can impose costs by removing safety, health, privacy or other values from their proper status as competitive features that private actors seek to advance.

The executive branch and OMB should occasionally acknowledge the non-existence of benefits, and recognize that environmental and social regulation is subject to the same political failure and regulatory pork barreling that afflicts economic regulation. Agency pursuit of benefits has costs of its own, particularly when agencies interfere with the normal escalation in health and safety characteristics driven by competitive processes and consumer and social demands. It is a policy rather than scientific decision to require that risks be expressed by agencies as best estimates rather than worst-case assumptions that selfishly exaggerate benefits of an agency's own decrees. Emphasizing worst cases conceals probable risks in favor of less likely ones. Sometimes greater benefits accrue from leaving resources with states, localities and citizens to allocate toward what

they regard as beneficial, and an executive inclined toward saying no can acknowledge that.

The president should compile an annual Regulatory Transparency Report Card

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

It would be immensely valuable to more effectively summarize regulatory data provided by the agencies. Such information 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 stand-alone document. Previously, 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 titled "Annual Report on Executive Order 12291." This report, discontinued in 1993, specified what actions OMB took on proposed and final rules it reviewed per that order, along with the preceding 10 years' data. It provided substantive detail on specific regulations that were sent back to agencies for reconsideration,

The *Regulatory Program* ended when the Clinton administration replaced EO 12291 with EO 12866 as part of the aforementioned reaffirmation of agency primacy.[78]

Significant but valuable *non-cost* information not currently assembled could also be published. Agencies and OMB could assemble quantitative and non-quantitative data into charts and historical tables. Trends could enable cross-agency comparisons over time. Such data can reveal a lot. For example, presenting the percentages of rules with, *and without*, benefit calculations would expose whether or not agencies can genuinely say the regulatory enterprise is doing more harm than good. The "Funnel of Gov" presented earlier in part aims at this conceptualization.

Here is a sampling of data that should be officially summarized and published annually by program, agency and grand total.[79]

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 how regulations accumulate as a business grows.
- Numbers and percentages of regulations that contain numerical cost estimates.
- Tallies of existing cost estimates, including subtotals by agency and grand total.
- Numbers and percentages *lacking* cost estimates, with reasons 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.
- Rules said to affect internal agency procedures alone.
- 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. (This could resemble the "Funnel of Gov" presented earlier).

A congressional corollary can be envisioned with respect to all the executive branch recommendations presented here, and some of these elements were incorporated 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.[80] Some provisions also appeared in 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).[81]

Again, this information disclosure enhancement could be spearheaded by the executive branch even without congressional legislation. Regular highlight reporting accompanied by the affirmation of a presidential cheerleader would newly certify the importance of disclosure and, in the process, reveal to what extent Congress is responsible for the regulatory burden. Congress over-delegated power to agencies; Congress imposed many of the statutory deadlines that make vigorous regulatory analysis difficult. Greater disclosure may help shift future debate away from regulatory reform back to congressional accountability for what agencies do, which is a more helpful formulation as well as the proper focus.

The president should designate multiple classes of major rules in transparency reporting

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 191 major rules in the 2013 year-end *Unified Agenda*, when fully implemented someday, will have economic impacts of around $19 billion annually (100 million times 191 rules), minus any rules among that 191 that reduce costs.

A Regulatory Transparency Report like that recommended previously should obviously include the number of economically significant (or major) rules, but this designation should be expanded to disclose more than a minimum level of costs. OMB could develop guidelines recommending that agencies separate economically significant rules into separate categories representing increasing costs for presentation in the Regulatory Transparency Report. The following chart offers one suggested breakdown:

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 breakdown 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 this reporting on its own. Knowing only that a rule is or is not economically significant reveals too little. For example, some cost estimates of the EPA New Source Performance Standards rule figure about $738 million annually.[82] Appreciating that EPA is imposing a "Category 2" rule and the like would be more useful shorthand than knowing the rule is economically significant.

The president should separately report on Economic, Health & Safety, and Environmental regulations

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), the weakest rationale for government interference in the economy is that of economic intervention. Other regulations are just as detrimental, but appreciation of governmental failure in economic concerns is more evolved.

Even assuming virtuous motives, economic interventions fail (as do others) owing to the impossibility of central economic planning and calculation.[83] Regulations cannot automatically be presumed rooted in the public interest; they may instead be serving the regulated and their captured bureaus.

While economic regulation lost favor compared to environmental or health and safety rules, there has been a resurgence of it in banking, energy, telecommunications and infrastructure. But an engaged executive's ability to address economic regulation as opposed to health and safety rules is undermined by the lack of oversight of the independent agency rules that increasingly govern. 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 willingness to adopt the premise that some economic regulation "produces negligible benefits."[84]

OMB distinguishes between economic, environmental and social regulation in its annual reports, and performs a commendable job in citing research on both sides, some claiming regulation imposes net costs, others net benefits.[85]

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 with an eye toward reforming both in appropriate ways.

With executive affirmation, to the extent that analyses such as the OMB Benefits and Costs Report and other executive branch investigations help discredit economic regulation, such rules can be removed from the purview of government altogether (a utopian thought), leaving Congress and OMB the "lesser" task of documenting and controlling costs of environmental, health, and safety regulations. 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. But isolating categories for analysis of regulations is a first step toward enabling this greater oversight.

The president should improve "transfer" cost assessments

Paralleling the distinction between "economic" and "social" regulation, process rulings like leasing requirements for federal lands and revenue collection standards and service-oriented administrative paperwork—such as that for business loans, passports and obtaining government benefits already appear separately in OMB reports, and in some cases the Information Collection Budget.[86]

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 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.

OMB has begun recognizing that these transfers "may impose real costs on society," may "cause people to change behavior," and result in "deadweight losses."[87] OMB expressed that it "will consider incorporating any such (cost-benefit) estimates into future Reports."[88] 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. This becomes more of a concern as quasi-regulation grows, and is an appropriate focus of the executive branch.

The president should minimize indirect costs of regulations

Compliance-focused regulatory cost estimates may inadvertently or purposely omit indirect costs. In its Reports to Congress, OMB allows that "many regulations affect economic growth indirectly through their effects on intermediate factors,"[89] but is non-committal on whether the net effects are positive or negative.

That uncertainty requires that indirect costs be guarded against and minimized, especially since some have argued that indirect costs of regulation could even exceed the magnitude of direct costs,[90] and since OMB itself occasionally has acknowledged that regulatory costs could be many times the amount it presents annually attaching to major rules.

Fairness and accountability in government require acknowledging indirect costs. Without addressing indirect effects, officials will underestimate 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) 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 falsely appear to avoid imposing high regulatory costs.

Recognizing and levelheadedly incorporating indirect cost presents serious challenges, but if the executive branch urges an emphasis of cost over benefit assessments, manpower and resources are freed to better assess indirect regulatory costs. Indeed, if the burden of compliance itself is held to be not overly onerous for the regulated party, then the federal government cannot credibly object that forcing it to more fully assess costs of compliance is too cumbersome.

In other words, if indirect costs are too difficult or policymakers to compute, then government cannot credibly argue that compliance is feasible and fair.

Dealing with indirect costs (and economically significant rules) will ultimately require congressional approval of final agency rules, because complete cost assessments and quantification are impossible for third parties who are mere mortals,[91] no matter which government agency they work for, and someone must be directly accountable. Only with congressional approval of regulations can the matter of addressing indirect costs ultimately be resolved. This points to an important principle; the aim of annual regulatory accounting is 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 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.

The president should recommend rules for revision or repeal

This report has stressed the need for more explicit official dissent, for a literal or figurative "Office of No" in the federal government to offset the march of bureaucracy and self-interested regulation. All the recommendations presented so far can help contribute to an atmosphere in which the president himself explicitly recommends rule rollbacks in the normal course of governance.

The president should encourage agencies to go beyond their modest implementations of Executive Order 13563's call for agencies to develop and execute plans to: [92]

> *[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.*

Agency RIAs and the entire executive branch review process should reflect a higher burden of proof regarding rules' value. OMB's annual report is overly reluctant to aggressively recommend legacy regulations to eliminate. If agency analyses under the various executive orders appear not to justify a rule, then OMB should be more forthright about saying so, and it should challenge non-major rules besides.

Nor should OMB shy away from making recommendations about modifying entire regulatory programs based on plain common sense, regardless of executive orders. OMB might note costs of presumably beneficial regulations, and compare those benefits to superior advantages available by hiring policemen or firemen, or by painting lines down the centers of rural blacktop roads.

OMB has the experience and know-how to create a benefit "yardstick" to anchor the Transparency Report and other analysis and objectively critique high cost, low benefit rules. Additionally, the president can continue to press agencies on rules to cut, and can force them to rank their regulations and demonstrate that their least effective rules are superior to another agency's rules. The rankings emerging from such questionnaires could be presented in the Transparency Report.

In this spirit, the OMB Reports to Congress do make several worthwhile recommendations for regulatory improvement, including: [93]

> *[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 going forward. 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,"[94] little about aggressively reducing existing regulation appears.

Again, the president's leadership role can legitimize the task eliminating rules, of rolling government back from the places it should not be; the pen and phone can help expand liberty, not primarily expand the federal state.

7. **Conclusion**

Federal history since 1980 reveals a significant and escalating regulatory burden despite semi-formal central review of economic, environmental, and health and safety regulations and their accompanying paperwork.

- Costs of regulation and realms subject to regulation have grown, while benefits are ambiguous or absent.
- 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, and final rule documents, though they had been declining in the late 1990s and 2000s, reflect increased regulatory activity.
- Regulation outside the normal notice and comment procedure is more of a concern.

The regulatory process itself needs more regulation. Improving management of the regulatory enterprise demands changes both internal and external to the executive branch's review functions. A healthy economy and healthy regulatory regime will require Congress and the agencies to restrain the urge to regulate recklessly or even merely needlessly. The executive pen and phone can never fully address the expansion of the federal government; Congress will have to enact regulatory liberalization. The executive can play a role in championing reform and can achieve much, but if Congress does not at some point address the expansion of the federal regulatory enterprise, ultimately the states may.

The encroachment of the regulatory state requires a similarly influential push back. A series of supervisory reforms one might characterize as the "Office of No" have been suggested here, and can help reverse the tendency toward greater federal oversight in so many areas of human endeavor. The thrust of the current administration, however, is to use pen and phone to expand regulation rather than seek ways to roll it back. But rollbacks can improve economic and social outcomes. Solutions are obvious; their implementation may await other pens and other phones.

Endnotes

[1]Josh Marks, "Obama: If Congress Doesn't Act on Climate Change, 'I Will'," The National Memo, February 13th, 2013. http://www.nationalmemo.com/obama-if-congress-doesnt-act-on-climate-change-i-will/.
[2] See Philip Rucker, "Obama's 7 State of the Union talking points. No. 6: 'The Pen and Phone' strategy," *Washington Post*, January 27, 2014. 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/.
[3] Media Advisory, The White House, "President Obama Announces Two New Public-Private Manufacturing Innovation Institutes and Launches the First of Four New Manufacturing Innovation Institute Competitions," February 25, 2014. http://www.whitehouse.gov/the-press-office/2014/02/25/president-obama-announces-two-new-public-private-manufacturing-innovatio.
[4] See for example, Clyde Wayne Crews Jr., "Despotism-Lite? The Obama Administration's Rule By Memo," *Forbes.com*. July 1, 2014. http://www.forbes.com/sites/waynecrews/2014/07/01/despotism-lite-the-obama-administrations-rule-by-memo/.
[5] Clean Water Act Definition of "Waters of the United States," Environmental Protection Agency. http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm.
[6] Alexei Oreskovic, "U.S. Regulator Tells Web Search Firms To Label Ads Better," *Reuters*, Jun 25, 2013. http://www.reuters.com/article/2013/06/26/us-internet-search-idUSBRE95P01O20130626
[7] Written Statement of Jonathan Turley, Shapiro Professor of Public Interest Law, George Washington University, "Enforcing the President's Constitutional Duty to Faithfully Execute the Laws," Committee on the Judiciary, United States House of Representatives, February 26, 2014. http://jonathanturley.files.wordpress.com/2014/02/turley-enforcement-testimony.pdf.
[8] One recent exploration of "ways federal regulatory agencies circumvent formal procedures during the rulemaking process" appears as a series of five studies published by Mercatus Center scholars. For links to all of them, see Media Advisory "Mercatus Releases Five Academic Articles in *Harvard Journal of Law and Public Policy*," May 23, 2014. http://mercatus.org/expert_commentary/mercatus-releases-five-academic-articles-harvard-journal-law-and-public-policy.
[9] Curtis W. Copeland, "Congressional Review Act: Many Recent Final Rules Were Not Submitted to GAO and Congress," July 15, 2014. White Paper. http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2014/07/25/National-Politics/Advance/Graphics/CRA%20Report%200725.pdf.
[10] Iain Murray, "Obamaloans: How Obama plans to use Dodd-Frank to take over the financial industry," National Review.com, January 15, 2014. http://www.nationalreview.com/article/368499/obamaloans-iain-murray.
[11] See analysis in Clyde Wayne Crews Jr, "Boosting Regulatory Transparency: Comments of the Competitive Enterprise Institute OnThe 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, 2013. http://www.scribd.com/doc/157252365/Comments-of-Wayne-Crews-Competitive-Enterprise-Institute-on-2013-Draft-Report-to-Congress-on-the-Benefits-and-Costs-of-Federal-Regulation.
[12] Office of Management and Budget, *2014 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, 2014, Table 1-4: Total Annual Benefits and Costs of Major Rules by Fiscal Year," October 1, 2003–September 30, 2013 (billions of 2001 or 2010 dollars)," pp. 20-21, http://www.whitehouse.gov/sites/default/files/omb/inforeg/2014_cb/draft_2014_cost_benefit_report-updated.pdf.
[13] For example see Cass Sunstein, "Why Regulations are Good—Again," *Chicago Tribune*. May 19, 2012. http://articles.chicagotribune.com/2012-03-19/opinion/ct-oped-0319-regs-20120319_1_regulation-baseball-scouts-requirements.
[14] OMB, 2014 Draft Report, p. 22.
[15] OMB 2014, Table 1-6(b): Major Rules Reviewed with Partial Estimates of Annual Benefits or Costs, October 1, 2012 - September 30, 2013, (billions of 2001 or 2010 dollars), pp. 26-28.
[16] Iain Murray, "Lawmaker Excluded from CFPB Meeting, Unable to Hold Executive to Account," National Review Online. March 20, 2014. 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.
[17] OMB 2014, Table 1-7(a) Major Rules Implementing or Adjusting Federal Budgetary Programs, October 1, 2012 - September 30, 2013, pp. 28-29.
[18] Office of Management and Budget, 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.
[19] *2014 Draft Report*, p. 8
[20]See the chapter "Unfathomed, Unmeasured Omissions," in Clyde Wayne Crews Jr., *Tip of the Costberg: On the Invalidity of All Cost of Regulation Estimates and the Need to Compile Them Anyway*, working paper, Competitive Enterprise Institute, 2014. http://www.scribd.com/doc/103172296/Tip-of-the-Costberg-On-the-Invalidity-of-All-Cost-of-Regulation-Estimates-and-the-Need-to-Compile-Them-Anyway.
[21] See Thomas D. Hopkins, 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, 1976. http://www.thecre.com/pdf/Ford_HopkinsReport.PDF.
[22] Executive Order 12291, "Federal Regulation," February 17, 1981. http://www.archives.gov/federal-register/codification/executive-order/12291.html.
23 Chris DeMuth, "Constraining Regulatory Costs, Part One: The White House Review Programs," *Regulation*, January/February 1980, pp. 16 and 20.
[24] See "The Costs of Benefits" in Crews, Comments to OMB, July 31, 2013; and Clyde Wayne Crews Jr., "Federal Regulation: The Costs of Benefits," Forbes.com. July 7, 2013. http://www.forbes.com/sites/waynecrews/2013/01/07/federal-regulation-the-costs-of-benefits/.
[25] Hopkins, 1976. Also see Thomas D. Hopkins, "The Costs of Federal Regulation," *Journal of Regulation and Social Costs*. Volume 2, Number 1, March 1992.
[26] Thomas D. Hopkins, 1992.
[27] For example see Alex Bolton, Rachel Augustine Ptter and Sharece Thrower, "How Politics and Organizational Capacity Influence OIRA Rule Review," White Paper, May 2, 2014. http://www.lsa.umich.edu/UMICH/polisci/Home/Events/Thrower,%20Presidential%20Oversight%20and%20Regulatory%20Delay.pdf. On limited resources, see also Prepared Statement of Susan E. Dudley, Director, GW Regulatory Studies Center Trachtenberg School of Public Policy and Public Administration; Hearing on Federal Regulation: A Review of Legislative Proposals, Part II, Before the Homeland Security and Governmental Affairs Committee, United States Senate, July 20, 2011. https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley_HSGAC_20110718.pdf.
[28] Executive Order 12866, "Regulatory. Planning and Review," September 30, 1993, http://www.archives.gov/federal-register/executive-orders/pdf/12866.pdf.
[29] H.R.2804, Achieving Less Excess in Regulation and Requiring Transparency Act of 2014 (ALERRT Act), 113th Congress (2013-2014). https://beta.congress.gov/bill/113th-congress/house-bill/2804.
[30] H.R.367, Regulations From the Executive in Need of Scrutiny Act of 2013 (REINS Act) 113th Congress (2013-2014). https://beta.congress.gov/bill/113th-congress/house-bill/367.
[31] H.R.4874, Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2014 (SCRUB Act), 113th Congress (2013-2014). https://beta.congress.gov/bill/113th-congress/house-bill/4874?q=%7B%22search%22%3A%5B%22scrub+act%22%5D%7D.
32. For a highly accessible early overview, see Robert Crandall, *Why is the Cost of Environmental Regulation So High?* Center for the Study of American Business, Policy Study Number 110, February 1992.
[33] Executive Order 12866, "Regulatory. Planning and Review," September 30, 1993, http://www.archives.gov/federal-register/executive-orders/pdf/12866.pdf.
34. Output for bureaus is not directly measurable, but must be inferred from the level of activity. This creates a slippage in the ability to closely monitor agency effectiveness. See William A. Niskanen, Jr. *Bureaucracy and Representative Government*. Chicago: Aldine-Atherton, 1971.
35. A prominent empirical study of Federal Trade Commission antitrust rulings finds considerable support for the hypothesis of systematic congressional influence (in this case congressional oversight committees) over that

agency's decisions. Barry Weingast and Mark Moran, "Bureaucratic Decision Making or Congressional Control? Policymaking by the Federal Trade Commission," *Journal of Political Economy*. 1983, Vol. 91, No. 5, pp. 765-800. See also Roger Faith, Donald Leavens, and Robert Tollison, "Antitrust Pork Barrel," *Journal of Law and Economics*. October 1982, Vol. 15, pp. 329-342.
36. Jonathan Rauch, "The Regulatory President," *National Journal*. November 30, 1991, p. 2903.
37. The theoretical groundwork for later empirical studies was most completely presented in Sam Peltzman, "Toward a More General Theory of Regulation," *Journal of Law and Economics*, August 1976, Volume 19, pp. 211-240.
38. For the seminal discussion on group behavior and free-riding see Mancur Olson, *The Logic of Collective Action* (Cambridge: Harvard University Press, 1965).
39. For development of the idea of "demanders and suppliers of wealth transfers" and extensive empirical tests using the 50 states as experimental "laboratories," see Robert E. McCormick and Robert D. Tollison, *Politicians, Legislation, and the Economy: An Inquiry into the Interest Group Theory of Government* (Boston: Martinus Nijhoff, 1982).
40. James C. Miller III, William F. Shughart II, and Robert D. Tollison, "A Note on Centralized Regulatory Review," *Public Choice*. 1984, 43, p. 83.
41. Dennis C. Mueller, *Public Choice II* (Cambridge: Cambridge University Press, 1989), p. 245.
[42] See Crews, Comment to OMB, 2013, and Clyde Wayne Crews Jr., "The Other National Debt Crisis: How and Why Congress Must Quantify Federal Regulation," *Competitive Enterprise Institute Issue Analysis 2001 No. 4*, October 2011. http://cei.org/sites/default/files/Wayne%20Crews%20-%20The%20Other%20National%20Debt%20Crisis.pdf.
[43] For example see Roman Buhler, "Indiana Can Rein in Federal Regulators," *Indiana Policy Review*. December 5, 2013. http://inpolicy.org/2013/12/op-ed-indiana-can-rein-in-federal-regulators/.
[44] Wikipedia reference to Alexander Hamilton, *The Papers of Alexander Hamilton*, Volume 9. New York: Columbia University Press. ISBN 0-231-08903-1. 1962. (http://en.wikipedia.org/wiki/Elective_monarchy#cite_note-The_Papers_of_Alexander_Hamilton.2C_Volume_9-3)
[45] The Federalist Papers: 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.
[46] "Obama Orders Halt to Pending Regulations for Review," Associated Press. January 20, 2009.
http://www.foxnews.com/politics/2009/01/20/obama-orders-halt-pending-regulations-review/.
[47] Cass Sunstein, "Washington Is Eliminating Red Tape," *Wall Street Journal*, August 23, 2011.
http://online.wsj.com/news/articles/SB10001424053111903596904576518652783101190.
[48] John D. Graham and James W. Broughel, "Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act, Mercatus Center White Paper, pp. 40-41. 2014. http://www.harvard-jlpp.com/wp-content/uploads/2010/01/Graham_Broughel_final.pdf.
[49] See Philip Hamburger, *Is Administrative Law Unlawful?* Chicago: University of Chicago Press. 2014. 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/
50. Quote by Linda Fisher, who oversaw EPA pesticide regulation during the first Bush administration. Bob Davis, "Bush Preparing Program for Agencies to Weed Out Federal Rules Periodically," *Wall Street Journal*, September 4, 1992.
[51] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 1952.
http://supreme.justia.com/cases/federal/us/343/579/case.html.
[52] Ben Traynor, "Roosevelt's Gold Confiscation: Could It Happen Again?" *The Telegraph*, April 3, 2013.
http://www.telegraph.co.uk/finance/personalfinance/investing/gold/9968494/Roosevelts-gold-confiscation-could-it-happen-again.html
[53] Executive Order 12866, "Regulatory Planning and Review," September 30, 1993.
http://www.archives.gov/federal-register/executive-orders/pdf/12866.pdf.

[54] Executive Order 12291, "Federal Regulation," February 17, 1981. http://www.archives.gov/federal-register/codification/executive-order/12291.html.
[55] Executive Order 12866, "Regulatory Planning and Review," September 30, 1993. http://www.archives.gov/federal-register/executive-orders/pdf/12866.pdf.
[56] Executive Order 13563, Improving Regulation and Regulatory Review, January 18, 2011. http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf.
[57] White House, 2012 State Of The Union Address, January 25, 2012. http://www.whitehouse.gov/photos-and-video/video/2012/01/25/2012-state-union-address-enhanced-version#transcript.
[58] These orders are E.O. 13563 (Improving Regulation and Regulatory Review), 13579 (Regulation and Independent Regulatory Agencies), 13609 (Promoting International Regulatory Cooperation) and 13610 (Identifying and Reducing Regulatory Burdens). All are available at http://www.whitehouse.gov/omb/inforeg_regmatters#eo13610.
[59] On expanding OIRA resources, see Susan Dudley, 2011.
60. Economics divisions within regulatory agencies sometimes are barely more popular than the economists at OIRA. An economics staffer at the Department of Health and Human Services known to this author reported that exasperated regulation writers within HHS sometimes ask if *she* works for OIRA.
[61] Federal Communications Commission, Preserving the Open Internet, Federal Register, Vol. 76, No. 185, September 23, 2011. http://www.gpo.gov/fdsys/pkg/FR-2011-09-23/pdf/2011-24259.pdf
62. Chris DeMuth, January/February 1980, p. 21.
63. Hopkins, 1981, p. v. See also Chris DeMuth (p. 21), who voices the same concern.
[64] See for example Jerry Brito, "'Agency Threats' and the Rule of Law: An Offer You Can't Refuse," Mercatus Center White Paper, 2014. http://www.harvard-jlpp.com/wp-content/uploads/2014/05/37_2_553_Brito.pdf.
[65] Clean Water Act Definition of "Waters of the United States," Environmental Protection Agency. http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm.
[66] Alexei Oreskovic, "U.S. Regulator Tells Web Search Firms To Label Ads Better," *Reuters*, Jun 25, 2013. http://www.reuters.com/article/2013/06/26/us-internet-search-idUSBRE95P01O20130626
[67] John D. Graham and James W. Broughel. 2014.
[68] U.S. House of Representatives, Committee on Oversight and Government Reform, Staff Report, Broken Government: How the Administrative State has Broken President Obama's Promise of Regulatory 112th Congress, September 14, 2011. p. 7. http://oversight.house.gov/wp-content/uploads/2012/01/9.13.11_Broken_Government_Report1.pdf.
[69] Federal Register, December 7, 2009, p. 64133.
[70]Office of Management and Budget, *Report to Congress on the Costs and Benefits of Federal Regulations*, Chapter II. Estimates of the Total Annual Costs and Benefits. http://www.whitehouse.gov/omb/inforeg_chap2
[71] See F. A. Hayek, "The New Confusion About 'Planning'" Chapter 14 in *New Studies in Philosophy, Politics, Economics and the History of Ideas*, University of Chicago Press: Chicago. 1978. pp. 232-246.
[72]*The Antitrust Modernization Commission: Proposed Issues for Reform*, Comment by the Competitive Enterprise Institute, Submitted to the Antitrust Modernization Commission, September 30, 2004. http://www.scribd.com/doc/134547591/Wayne-Crews-The-Antitrust-Modernization-Commission-Proposed-Issues-for-Reform-Comment-by-the-Competitive-Enterprise-Institute-September-30-2004
[73]Office of Management and Budget, *Report to Congress on the Costs and Benefits of Federal Regulations*, Chapter II. Estimates of the Total Annual Costs and Benefits. http://georgewbush-whitehouse.archives.gov/omb/inforeg/chap2.html
[74] See, for example, R. Richard Geddes, "A Historical Perspective on Electric Utility Deregulation," *Regulation*, Winter 1992, pp. 75-82.
[75]See for example Clyde Wayne Crews Jr., Comments of Citizens for a Sound Economy Foundation on the Regulatory Impact Analysis of the Food and Drug Administration's Proposed Rules to Amend the Food Labeling Regulations as published in 56 FR 60856 Wednesday, November 27, 1991. Dockets Management Branch (HFA-305), February 25, 1992. http://www.scribd.com/doc/157045504/Wayne-Crews-Comments-to-FDA-on-Food-Labeling-Citizens-for-a-Sound-Economy-1991.

[76] Celia Bergoffen, "Margarine Wars," *Audacity: The Magazine of Business Experience*, Summer 1995, Vol. 3/No. 4, pp. 52-61.
[77] See Jonathan H. Adler, "Rent Seeking Behind the Green Curtain," *Regulation*, 1996, Number 4, pp. 26-34.
[78] Executive Order 12866, "Regulatory. Planning and Review," September 30, 1993, http://www.archives.gov/federal-register/executive-orders/pdf/12866.pdf.
[79] Clyde Wayne Crews Jr., "The Other National Debt Crisis: How and Why Congress Must Quantify Federal Regulation," *Competitive Enterprise Institute Issue Analysis 2001 No. 4*, October 2011. http://www.scribd.com/doc/67314631/Wayne-Crews-The-Other-National-Debt-Crisis
[80] Sec. 213, "Regulatory Transparency Reporting," S. 3572, the "Restoring Tax and Regulatory Certainty to Small Businesses Act" http://www.govtrack.us/congress/bills/112/s3572/text
[81] H.R.2804, Achieving Less Excess in Regulation and Requiring Transparency Act of 2014 (ALERRT Act), 113th Congress (2013-2014). https://beta.congress.gov/bill/113th-congress/house-bill/2804.
[82] Environmental Protection Agency, New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants, RIN: 2060-AP76, Fall 2011. http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201110&RIN=2060-AP76.
[83] Ludwig von Mises, *Economic Calculation in the Socialist Commonwealth*, Mises Institute: Auburn Alabama. 1920 (2012 Edition) http://library.mises.org/books/Ludwig%20von%20Mises/Economic%20Calculation%20in%20the%20Socialist%20Commonwealth_Vol_2.pdf.
[84] *Draft Report 1997*, p. 21
[85] *Draft Report 2012,* p. 39
[86] Office of Management and Budget, Office of Information and Regulatory Affairs, Information Collection Budget of the United States Government, 2012. http://www.whitehouse.gov/sites/default/files/omb/inforeg/icb/icb_2012.pdf.
[87] *Draft Report 2013, p. 22*
[88] *Ibid.*
[89] For example see *Draft Report 2013, p. 48*
[90] William G. Laffer III and Nancy Bord, *George Bush's Hidden Tax: The Explosion in Regulation*, Heritage Foundation Backgrounder No. 905, Washington, D.C., July 10, 1992, p. 18
[91] This is unfortunately not the place to elaborate, so instead see James M. Buchanan, *Cost and Choice: An Inquiry in Economic Theory*, University of Chicago Press: Chicago and London, 1969, p. 42 43.
[92] Improving Regulation and Regulatory Review, Executive Order 13563. January 18, 2011. http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf
[93] *Draft Report* 2013, p. 5
[94] *Ibid*