

Working Paper

January 2015

Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future

*Forthcoming in 65 Case Western Reserve Law Review (2015)*¹

Susan E. Dudley, Director²

Abstract

This article examines efforts by the three branches of federal government to oversee regulatory policy and procedures. It begins with a review of efforts over the last century to establish appropriate checks and balances on regulations issued by the executive branch, and then evaluates current regulatory reforms that would hold the executive branch, the legislative branch, and the judicial branch more accountable for regulations and their outcomes.

¹ Based on presentation at Case Western Law Review symposium, “Executive Discretion and the Administrative State,” November 14, 2014.

² Susan E. Dudley is director of the GW Regulatory Studies Center and research professor in the Trachtenberg School of Public Policy and Public Administration. She can be reached at sdudley@gwu.edu.

Contents

I.	Evolution of executive discretion regarding regulatory policy and practice in the United States	4
A.	Early regulatory agencies and the delegation of legislative authority	4
B.	Procedural Reform and the Administrative Procedure Act	5
C.	Removal of Economic Regulation	7
D.	Growth in health, safety, and environmental regulation	8
E.	Executive controls on regulation	8
F.	Congressional efforts at regulatory reform	11
II.	Executive Branch Oversight of Regulation	14
A.	President Obama’s Initiatives	14
B.	113 th Congress proposals for executive branch controls	15
1.	Enhanced regulatory impact analysis	15
2.	Amendments to the APA	18
3.	Subject significant guidance documents to regulatory review and notice requirements	19
4.	Incentives to reexamine existing regulations	19
III.	Legislative Branch Oversight of Regulation	21
A.	The REINS Act	21
B.	Create a Congressional regulatory oversight body	22
IV.	Judicial Branch Oversight of Regulation	23
A.	Changes to the standard by which courts review regulations	24
B.	Judicial review of regulatory impact analysis	24
C.	Judicial review of statutory requirements	25
V.	Conclusion	26

Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future

Draft for CWRU Law Symposium

Executive Discretion and the Administrative State

November 14, 2014

Susan E. Dudley, Director, the George Washington University Regulatory Studies Center
Research Professor, Trachtenberg School of Public Policy and Public Administration
The George Washington University, sdudley@gwu.edu

In the more than 125 years since Congress created the first regulatory body,³ the number of regulatory agencies and the scope and reach of the regulations they issue has increased significantly. In 2014, there are over 70 federal agencies, employing almost 300,000 people to write and implement regulation.⁴ Every year, they issue tens of thousands of new regulations,⁵ which now occupy over 175,000 pages of regulatory code.⁶ For over a century, concerns over the accountability of what some have called the “fourth branch” of government have led all three branches of government to take steps to exercise checks and balances on the development and enforcement of regulations.⁷

This article examines efforts by the three branches of federal government to oversee regulatory policy and procedures. It begins with a review of efforts over the last century to establish appropriate checks and balances on regulations issued by the executive branch, and then evaluates current regulatory reforms that would hold the executive branch, the legislative branch, and the judicial branch more accountable for regulations and their outcomes.

³ The Interstate Commerce Act established the Interstate Commerce Commission in 1887 to regulate railroad rates <http://www.ourdocuments.gov/doc.php?flash=true&doc=49&page=pdf>

⁴ Susan Dudley & Melinda Warren, 2015 REGULATORS’ BUDGET: ECONOMIC FORMS OF REGULATION ON THE RISE. The George Washington University Regulatory Studies Center and the Weidenbaum Center on the Economy, Government, and Public Policy. (2014) available at <http://regulatorystudies.columbian.gwu.edu/node/224>. Note that “agencies that primarily perform taxation, entitlement, procurement, subsidy, and credit functions are excluded from this report,” so these figures exclude staff developing and administering regulations in the Internal Revenue Service, the Centers for Medicaid and Medicare Services, etc.

⁵ Office of the Federal Register. FEDERAL REGISTER PAGES PUBLISHED 1936 – 2013 (2014) available at: <https://www.federalregister.gov/learn/tutorials>

⁶ Office of the Federal Register. CODE OF FEDERAL REGULATIONS, PAGE BREAKDOWN - 1975 THROUGH 2013. (2014) available at: <https://www.federalregister.gov/learn/tutorials>

⁷ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

I. Evolution of executive discretion regarding regulatory policy and practice in the United States

We begin with a review of the evolution of regulatory policy in the United States, from the establishment of the first regulatory agencies in the late 19th century, to the passage of the Administrative Procedure Act (APA) of 1946, to the economic deregulation of the 1970s and '80s, to the growth in health, safety, and environmental regulations since then, which has led to increased emphasis on executive branch oversight, congressional reforms, and judicial review.

A. Early regulatory agencies and the delegation of legislative authority

Congress established the Interstate Commerce Commission, the first regulatory agency, in 1887 to regulate railroad rates. The ICC was an independent, bipartisan commission of seven members, which reached decisions through an adjudicatory approach. Over the next several decades, this model served as the basis for subsequent regulatory commissions, including the Federal Trade Commission (FTC) (1914), the Water Power Commission (1920) (later the Federal Power Commission), and the Federal Radio Commission (1927) (later the Federal Communications Commission or FCC). Congress also created other agencies to regulate commercial and financial systems, including the Federal Reserve Board (1913), the Tariff Commission (1916), the Packers and Stockyards Administration (1916), and the Commodities Exchange Authority (1922).⁸ Most of these early agencies were established as independent regulatory commissions outside of executive departments,⁹ and were structured to be more independent of presidential control.¹⁰ Their members could only be dismissed “for good cause” (“inefficiency, neglect of duty, or malfeasance in office”)¹¹ in contrast to political appointees in executive departments, who serve “at the pleasure of the president,”¹² and can be fired for any reason.

During this period, courts interpreted the separation of powers implicit in Articles 1 through 3 of the U.S. Constitution as prohibiting the delegation of legislative powers to the executive. While early cases held that limited delegation was permissible as long as the executive branch was merely “filling up the details,”¹³ the Supreme Court expressed in 1892, “that Congress cannot

⁸ Office of Management and Budget, Report to Congress on the Costs and Benefits of Federal Regulation, September 30, 1997 http://www.whitehouse.gov/omb/inforeg_rcongress/

⁹ The Packers and Stockyards Administration was established within the Department of Agriculture. <http://archive.gipsa.usda.gov/pubs/psact.pdf>

¹⁰ Bressman-Thompson, *The Future of Agency Independence*, VANDERBILT LAW REVIEW, Vol. 63:3:599 (2010)

¹¹ 295 U.S. 602 (1935)

¹² 272 U.S. 52 (1926)

¹³ *Wayman v. Southard*, 23 U.S. (10 Wheat) 1 (1825)

delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”¹⁴

By 1928, however, the Supreme Court softened its strict interpretation of the non-delegation doctrine in a decision that found that a congressional delegation of power was constitutional because the statute included an “intelligible principle” to guide executive action.¹⁵

In the 1930s, President Franklin Delano Roosevelt’s New Deal brought an increase in the number of government regulatory agencies, including the Food and Drug Administration (FDA) (1931), the Federal Home Loan Bank Board (1932), the Federal Deposit Insurance Corporation (FDIC) (1933), the Commodity Credit Corporation (1933), the Farm Credit Administration (1933), the Securities and Exchange Commission (SEC) (1934), and the National Labor Relations Board (NLRB) (1935).¹⁶ The jurisdiction of other agencies, including the ICC, the FCC, and the FDA expanded during this period.¹⁷ The Fair Labor Standards Act of 1938 created a new agency in the Department of Labor (now called the Employment Standards Administration).¹⁸

The sweeping powers of these new regulatory agencies led to concerns over the constitutionality of congressional delegation to a “fourth branch” of government.¹⁹ In 1935, the Supreme Court weighed in with a ruling that the National Industrial Recovery Act (NIRA) was unconstitutional because it provided the President (and private industry associations) “virtually unfettered” decision making power.²⁰

B. Procedural Reform and the Administrative Procedure Act

Concern that agency “power was not sufficiently safeguarded and sometimes was put to arbitrary and biased use”²¹ led both Congress and the Executive Branch to conduct extensive reviews of

¹⁴ Field v. Clark, 143 U.S. 649 (1892)

¹⁵ J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928)

¹⁶ Office of Management and Budget, Report to Congress on the Costs and Benefits of Federal Regulation, September 30, 1997 http://www.whitehouse.gov/omb/inforeg_rcongress/ (Hereafter, “OMB 1997”)

¹⁷ OMB 1997

¹⁸ OMB 1997

¹⁹ Angel Mareno, *Presidential Coordination of the Independent Regulatory Process*, Admin. L.J. Am. U. 461 1994-1995

²⁰ Schechter Poultry Corp. v. United States, 39 295 U.S. 495 (1935)

²¹ *Wong Yang Sung v. McGrath*, 339 U.S. 33, 37 (1950) (citing Elihu Root, *Public Service by the Bar*, 41 A.B.A. Rep. 355, 368 (1916); Charles Evan Hughes, *Some Aspects of the Development of American Law*, 39 N.Y.B.A. Rep. 266, 269 (1916); George Sutherland, *Private Rights and Government Control*, 42 A.B.A. Rep. 197, 205 (1917); *Address of President Guthrie*, 46 N.Y.B.A. Rep. 169, 186 (1923)).

agency conduct.²² Years of debate culminated in the passage of the Administrative Procedure Act (APA) in 1946.

According to one researcher, the APA reflected a “fierce compromise”:

The battle over the APA helped to resolve the conflict between bureaucratic efficiency and the rule of law, and permitted the continued growth of government regulation. The APA expressed the nation’s decision to permit extensive government, but to avoid dictatorship and central planning.²³

The APA established procedures an agency must follow to promulgate binding rules and regulations within the area delegated to it by statute. As long as executive branch agencies act within the rulemaking authority delegated to them by Congress, and follow the procedures in the APA, recent courts have not found it unconstitutional for them to write and enforce regulations.

While some constitutional scholars still debate the question of delegation,²⁴ recent Supreme Court cases have not overturned legislation or regulation on non-delegation grounds. In 1989, the Supreme Court opined:

In our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.²⁵

Congress has supplemented the APA through legislation tailored to specific programs, and passed government-wide procedural laws (e.g., the Freedom of Information Act of 1966, and the Government in the Sunshine Act of 1976).²⁶ However, the APA has guided executive branch rulemaking without significant amendment for over 65 years, and is one of the most important pieces of legislation ever enacted.²⁷

²² Prepared Statement of Jeffrey A. Rosen, Hearing on *The APA at 65 – Is Reform Needed to Create Jobs, Promote Economic Growth and Reduce Costs?* Subcommittee on Courts, Commercial and Administrative Law, Committee on the Judiciary, U.S. House of Representatives, February 28, 2011

²³ George Shepard, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*. 90 Nw. U. L. Rev. 1557 (1996)

²⁴ See, for example, David Schoenbrod, *Delegation and Democracy: A Reply to My Critics* Cardozo L. Rev. 20 (1998-1999) 731, and Paul Craig Roberts, *How the Law Was Lost*, Cardozo L. Rev. 20 Cardozo L. Rev. (1998-1999) 853.

²⁵ *Mistretta v. U.S.* 1989 18 U.S.C. 355. See also *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 472 (2001).

²⁶ Jeffrey Lubbers, *A Guide to Federal Agency Rulemaking*, 5th Ed (ABA 2012)

²⁷ *Id.*, Rosen testimony

C. Removal of Economic Regulation

The regulatory agencies formed during the New Deal and earlier generally issued “economic regulations.” That is, they regulated a broad array of activities within particular industries using economic controls such as price ceilings or floors, quantity restrictions, and service parameters.²⁸ Economic regulation is often justified by concerns of “market power,” or “natural monopoly”—where a market can be served at lowest cost with a single supplier.²⁹

Though established as independent commissions to avoid political influence,³⁰ observers began to be concerned that these agencies were “captured” by the industries they regulated. By the early 1970s, scholarship in the fields of economics, antitrust, and law generally supported the idea that regulation of private sector prices, entry, and exit tended to keep prices higher than necessary, to the benefit of regulated industries, and at the expense of consumers.³¹ Policy entrepreneurs in the Ford, Carter, and Reagan Administrations, in Congress, and at think tanks were able to link this knowledge to the problem of inflation by showing that eliminating economic regulations and fostering competition would lead to reduced prices.³² Bipartisan efforts across all three branches of government eventually led to the abolition of whole agencies such as the Civil Aeronautics Board and the ICC, and removal of unnecessary regulation in several previously-regulated industries, with resulting improvements in innovation and consumer welfare.³³

The transportation and telecommunications deregulation that took place in the 1970s and 1980s is generally regarded as a success, having lowered consumer prices and increased choices. Deregulation and consumer choice have aligned service quality with customer preferences. Competitive markets have generated real gains—and not just reallocated benefits—for consumers and society as a whole, and markets have evolved in beneficial ways that were not anticipated prior to deregulation.³⁴

²⁸ Murray Weidenbaum, *BUSINESS AND GOVERNMENT IN THE GLOBAL MARKETPLACE*, 7th ed. Pearson Prentice Hall, 2004.

²⁹ Viscusi, Vernon & Harrington, *ECONOMICS OF REGULATION AND ANTITRUST*, 3rd ed, the MIT Press, 2001.

³⁰ See *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 625 (1935) (noting that Congress created the Federal Trade Commission as an independent agency because “it was essential that the commission should not be open to the suspicion of partisan direction.”)

³¹ George Stigler, *The Economic Theory of Regulation*, *Bell Journal of Economics*, 1971:3.

³² Susan E. Dudley, *Alfred Kahn 1917-2010*, *REGULATION* Vol. 34, No. 1 (Spring 2011), available at <http://www.cato.org/pubs/regulation/regv34n1/regv34n1-2.pdf>.

³³ Derthick, Martha; Quirk, Paul J. (1985). *The Politics of Deregulation*. Washington, DC: Brookings Institution Press.

³⁴ Clifford Winston, *U.S. Industry Adjustment to Economic Deregulation*, *Journal of Economic Perspectives*, Volume 12, Number 3(Summer 1998), Pages 89-110

D. Growth in health, safety, and environmental regulation

At the same time that economic forms of regulation were declining, a new type of regulation began to emerge, aimed at protecting consumers, environmental quality, and workplace safety. Many of these new regulatory agencies were established as part of the executive branch, either in departments, such as the newly formed Department of Transportation (DOT) (1967), or as standalone agencies, such as the Environmental Protection Agency (EPA) (formed in 1970). Unlike the economic regulatory agencies created earlier, these new agencies had the power to regulate across industry boundaries and affect industrial processes, product designs, and by-products.³⁵

Safety regulatory agencies established within the DOT included the Federal Highway Administration (established in 1966 to set highway and truck safety standards), the Federal Railroad Administration (established in 1966 to issue rail safety standards), and the National Highway Traffic Safety Administration (established in 1970 to set passenger vehicle standards).³⁶

Congress expanded the newly created EPA's authorities through the Clean Air Act (1970), the Clean Water Act (1972), the Safe Drinking Water Act (1974), the Toxic Substances Control Act (1976), and the Resource Conservation and Recovery Act (1976).³⁷

Congress also created the Occupational Safety and Health Administration (1970) as part of the Department of Labor (DOL) and expanded mine safety and health regulation. Other labor-related regulations were authorized through the Pension Benefit Guaranty Corporation and the Pension and Welfare Administration, established in 1974 to administer and regulate pension plan insurance systems.³⁸ Congress also established several independent regulatory agencies during this period, including the National Credit Union Administration (1970), the Consumer Product Safety Commission (1972), the Nuclear Regulatory Commission (1973), and the Federal Energy Regulatory Commission (1977).³⁹

E. Executive controls on regulation

Concerns over the burden of these new regulations and other reporting requirements led President Carter (building on efforts of Presidents Nixon and Ford before him) to create

³⁵ Murray Weidenbaum, *BUSINESS AND GOVERNMENT IN THE GLOBAL MARKETPLACE*, 7th ed. Pearson Prentice Hall, 2004.

³⁶ OMB 1997

³⁷ OMB 1997

³⁸ OMB 1997

³⁹ OMB 1997

procedures for analyzing the impact of new regulations and minimizing their burdens.⁴⁰ They also led to the passage of two significant pieces of legislation in 1980. The Regulatory Flexibility Act (RFA) required agencies to analyze the impact of their regulatory actions on small entities and consider effective alternatives that minimize small entity impacts.⁴¹ The Paperwork Reduction Act (PRA)⁴² established the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) to review and approve all new reporting requirements with an eye toward minimizing burdens associated with the government's collection of information.

When President Reagan took office in 1981, he continued to pare back economic regulations, and, through Executive Order 12291, gave the newly created OIRA a role in reviewing draft regulations to ensure their benefits exceeded their costs.⁴³ Executive Order 12498,⁴⁴ issued in 1985, established a Regulatory Program of the most significant upcoming regulations, published annually to “improve the management of regulatory activity within the Executive branch,” and “provide the public and the congress with a greater opportunity to learn about and evaluate ... regulatory priorities and procedures.”⁴⁵ Each subsequent president has continued and expanded OIRA's central regulatory oversight role,⁴⁶ if not its budget.⁴⁷

President George H. W. Bush continued to operate under President Reagan's executive orders, and when President Clinton took office in 1993, he replaced them with E.O. 12866,⁴⁸ which remains in effect today. E.O. 12866 retained OIRA's review of significant new regulations⁴⁹ and reinforced the philosophy that regulations should be based on an analysis of the costs and benefits of all available alternatives, and that agencies should select regulatory approaches that maximize net benefits to society unless otherwise constrained by law.⁵⁰ President George W. Bush and President Obama have continued these policies and procedures. President Obama's

⁴⁰ President Carter's E.O. 12044 required agency heads to determine the need for a regulation, evaluate the direct and indirect effects of alternatives, and choose the least burdensome. Exec. Order No. 12044, 43 Fed. Reg. 12661 (Mar. 24, 1978).

⁴¹ P.L. 96-354

⁴² Pub. L. No. 96-511, 94 Stat. 2812 (Dec. 11, 1980)

⁴³ Executive Order 12291 <http://www.archives.gov/federal-register/codification/executive-order/12291.html>

⁴⁴ Executive Order 12498 <http://www.archives.gov/federal-register/codification/executive-order/12498.html>

⁴⁵ Executive Office of the President, Office of Management and Budget, REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT, April 1, 1986 – March 31, 1987.

⁴⁶ Dudley “Observations on OIRA's Thirtieth Anniversary,” ALR, Vol. 63, 2011

⁴⁷ See Kathryn Vesey, *OIRA Celebrates 30th Anniversary*, The George Washington University Regulatory Studies Center, Regulatory Policy Commentary. June 28, 2011, available at http://www.regulatorystudies.gwu.edu/images/pdf/20110628_oira_staffing.pdf

⁴⁸ Exec. Order No. 12866, 3 C.F.R. 638 (1993).

⁴⁹ Exec. Order 12866 limited OIRA review to “significant” regulations, but left the designation of significant to OIRA. *Id.* at 641–42, 645–46.

⁵⁰ *See id.* at 638–40 (stating the regulatory philosophy and principles that federal agencies should keep in mind when promulgating regulations).

recent reforms are discussed in the next section. In addition, over the last three decades, OIRA has issued several bulletins and memoranda elaborating on these executive orders, including OMB Circular A-4 providing agency guidance on preparing regulatory impact analysis,⁵¹ bulletins articulating good practices for guidance documents,⁵² data quality,⁵³ and peer review,⁵⁴ principles for risk analysis,⁵⁵ and others.⁵⁶ The table below lists the executive orders that have guided regulatory development and presidential oversight since 1978.

Executive Orders on Regulatory Analysis and Oversight⁵⁷

Executive Order	Title	Administration	Date Signed
EO 12044	“Improving Government Regulations” (revoked by EO 12291)	Carter	March 23, 1978
EO 12174	“Paperwork” (revoked by EO 12291)	Carter	November 30, 1979
EO 12291	“Federal Regulation” (revoked by EO 12866)	Reagan	February 17, 1981
EO 12498	“Regulatory Planning Process” (revoked by EO 12866)	Reagan	January 4, 1985
EO 12866	“Regulatory Planning and Review” (amended by EO 13258)	Clinton	September 30, 1993
EO 13258	“Amending Executive Order 12866 on Regulatory Planning and Review” (revoked by EO 13497)	G. W. Bush	February 26, 2002
EO 13422	“Further Amendment to Executive Order 12866 on Regulatory Planning and Review” (revoked by EO 13497)	G. W. Bush	January 18, 2007
EO 13497	“Revocation of Certain Executive Orders Concerning Regulatory Planning and Review”	Obama	January 30, 2009
EO 13563	“Improving Regulation and Regulatory Review”	Obama	January 18, 2011
EO 13579	“Regulation and Independent Regulatory Agencies”	Obama	July 11, 2011
E.O. 13610	Identifying and Reducing Regulatory Burdens	Obama	May 10, 2012

⁵¹ OMB Circular A-4, at http://www.whitehouse.gov/omb/circulars_a004_a-4.

⁵² Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3440 (Jan. 25, 2007).

⁵³ Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452 (Feb. 22, 2002).

⁵⁴ OMB Memo. M-05-03, at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-03.pdf>.

⁵⁵ OMB Memo. M-07-24, at <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/fy2007/m07-24.pdf>

⁵⁶ OIRA’s website http://www.whitehouse.gov/omb/inforeg_regpol_agency_review/ provides links to guidance to regulatory departments and agencies for developing and reviewing regulations.

⁵⁷ www.RegulatoryStudies.gwu.edu

While these executive branch efforts have done little to slow the growth in new regulation,⁵⁸ they have focused attention on understanding the effects of regulations, and some argue they have resulted in “smarter regulation” that produces more benefits than costs.⁵⁹

F. Congressional efforts at regulatory reform

Political scientists agree that Congress has “an ‘awesome arsenal’ of weapons”⁶⁰ to control agencies’ actions, including “legislation, appropriations, hearings, investigations, personal interventions and ‘friendly advice’ that is ignored at an executive’s peril.”⁶¹ James Q. Wilson used an analogy to explain the two main ways Congress exercises control over federal agencies. One is through authorizing legislation, which he characterized as “architectural; the life of an agency is constrained by its need to live within a certain space, move along prescribed corridors, and operate specified appliances.”⁶² The other is like “fire fighting; when an alarm goes off signaling that an agency might be violating some congressional interest, members of Congress rush in to put out the fire.”⁶³ Until the Supreme Court struck it down in 1983,⁶⁴ Congress used its architectural powers to insert “legislative veto” provisions in over 200 statutes, allowing one or both houses or their relevant committees to disapprove, without the President’s signature, an agency’s exercise of delegated authority.⁶⁵

Despite these powers, the legislative branch has been less active than the executive branch in exerting concerted oversight over the regulatory process.⁶⁶ In 1995, a Republican majority took control of both houses of Congress, having run on a platform that included regulatory reform. By this time, the social regulations (addressing health, safety, and environmental issues) that had begun in the 1970s were the focus of concern. In contrast to the consensus on economic regulations, academics and policy makers did not generally support outright deregulation, but rather reforms to make regulations less burdensome and more cost-beneficial. The 104th Congress’s ambitious agenda included efforts to codify regulatory impact analysis procedures similar to those required through executive order, to require compensation for regulatory actions

⁵⁸ The GW Regulatory Studies Center maintains various statistics on regulatory activity, including pages of regulatory code, on-budget costs and personnel at regulatory agencies, numbers of regulations, etc. <http://regulatorystudies.columbian.gwu.edu/reg-stats>

⁵⁹ See, for example, John D. Graham, Paul R. Noe, and Elizabeth L. Branch, *Managing the Regulatory State: The Experience of the Bush Administration*, Fordham L. Rev 33(2005), and Cass Sunstein, *Smarter Regulation: Remarks from Cass Sunstein*, AdLawRev 63 (2011)

⁶⁰ James Q. Wilson, *Bureaucracy*, Basic Books 1989. P.236, citing Herbert Kaufman, *The Administrative Behavior of Federal Bureau chiefs* (Washington, DC, Brookings Institution, 1981), 164.

⁶¹ James Q. Wilson, *Bureaucracy*, Basic Books 1989,.236.

⁶² Wilson, 236

⁶³ Wilson, 236

⁶⁴ 462 U.S. 919 (1983)

⁶⁵ Wilson, 243

⁶⁶ Kagan 2257-2258, noting that Congress used its veto powers rarely.

that reduced the value of property rights, to cap the costs of new regulations through a regulatory budget, and to give Congress more control and accountability over the content of new regulations.⁶⁷

These efforts at comprehensive regulatory reform legislation in the 104th Congress failed to win a majority of votes, but some targeted efforts became law, including:

- The Unfunded Mandates Reform Act (UMRA) of 1995, which required executive branch agencies to estimate and try to minimize burdens on state, local, and tribal governments, and private entities,
- The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, which reinforced RFA requirements for small business impact analyses and provided for judicial review of agencies' determinations as to whether regulations would have "a significant economic impact on a substantial number of small entities,"
- The Congressional Review Act (CRA) of 1996, contained in SBREFA and passed in response to the loss of the legislative veto, which required agencies to submit final regulations with supporting documentation to both houses of Congress, and established expedited procedures by which Congress could overturn regulations within a specified time using a Joint Resolution of Disapproval,
- 1995 Amendments to the Paperwork Reduction Act, which reauthorized OIRA and required further reductions in paperwork burdens, and
- Title II, Section 645, of the 1996 Omnibus Consolidated Appropriations Act, which directed OMB to submit a report to Congress estimating the costs and benefits of major regulations, and offer recommendations for reform. The 1999 Regulatory Right to Know Act made permanent this requirement for OMB to report to Congress annually.⁶⁸

These efforts have had mixed results. Agencies generally meet UMRA requirements with reference to regulatory impact analyses prepared pursuant to Executive Order 12866, but rarely do more.⁶⁹ While pursuant to SBREFA, courts have overturned regulations that fail to consider

⁶⁷ Susan E. Dudley, *Prospects for Regulatory Reform in 2011*, 20 Engage (2011) available at http://www.fed-soc.org/doclib/20110603_DudleyEngage12.1.pdf

⁶⁸ The 104th Congress also passed amendments to the Safe Drinking Water Act, directing the Environmental Protection Agency to set standards based on a balancing of costs and benefits. Safe Drinking Water Act Amendments of 1996, Pub. L. No. 104-182, 110 Stat. 1613 (1996).

⁶⁹ See testimony of Susan Dudley and other witnesses before the House Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, Committee on Oversight and Government Reform, February 15, 2011, available at

impacts on small business,⁷⁰ agencies have successfully defended regulations that ignore the RFA requirements if the regulation's effects on small entities are considered to be "indirect."⁷¹

Congress has used the CRA to enact a resolution of disapproval only once, overturning an OSHA regulation addressing ergonomics in the workplace.⁷² Though resolutions of disapproval require only a simple majority in Congress (and several have passed one house), they face the threat of presidential veto, which would require a two-thirds majority to override. The conditions surrounding the ergonomics regulation were likely key to its disapproval. It was a "midnight regulation," issued amid much controversy at the end of the Clinton Administration. The resolution disapproving the rule came at the beginning of the Bush Administration (which did not support the rule), eliminating the veto threat. Although it has only nullified one action using the CRA, Congress has introduced dozens of resolutions of disapproval,⁷³ and in some instances, the threat of passage of a resolution of disapproval may have compelled agencies to modify regulatory actions.⁷⁴

Pursuant to the Regulatory Right to Know Act, OMB does report annually to Congress on the costs and benefits of major regulations,⁷⁵ but a 2001 Congressional Research Service report observed that OMB's reports, "have been incomplete, and its benefits estimates have been questioned."⁷⁶ The General Accounting Office⁷⁷ and others⁷⁸ have noted that it is difficult for OMB to report objectively on estimates of regulatory benefits and costs.

http://oversight.house.gov/index.php?option=com_content&view=article&id=1129:qunfunded-mandates-and-regulatory-overreachq&catid=14:subcommittee-on-technology

⁷⁰ Northwest Mining Association v. Babbitt, 5 F.Supp. 2nd 9 (D.D.C. 1998), and Southern Fishing Association vs. Daley, 995 F.Supp. 1411 (M.D. Fla. 1998).

⁷¹ American Trucking Assns v. EPA 175 F.3d 1027, 1043 (D.C. Cir 1999) Jeffrey J. Polich, *Judicial Review and the Small Business Regulatory Enforcement Fairness Act: An Early Examination of When and Where Judges Are Using Their Newly Granted Power over Federal Regulatory Agencies*, 41 Wm. & Mary L. Rev. 1425 (2000).

⁷² Richard S. Beth, Disapproval of Regulations by Congress, Congressional Research Service (2011). Available at http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270E%2C*P_%3D%22P%20%20%0A. Susan E. Dudley testimony <http://judiciary.house.gov/hearings/pdf/Dudley02282011.pdf>

⁷³ http://www.gao.gov/legal/congressact/cra_faq.html.

⁷⁴ Steven J. Balla, "Legislative Organization and Congressional Review of Agency Regulations," *Journal of Law, Economics, and Organization*, Vol. 16, No. 2 (Fall 2000), pp. 424-448.

⁷⁵ These reports are available here: http://www.whitehouse.gov/omb/inforeg_regpol_reports_congress/

⁷⁶ Rogelio Garcia, Cong. Research Serv., IB95035, Federal Regulatory Reform: An Overview (2001), available at <http://www.thecre.com/pdf/2002-crs.pdf>.

⁷⁷ U.S. Gen. Accounting Office, GAO/GGD-99-59, Analysis of OMB's Reports on the Costs and Benefits of Federal Regulation (1999), available at <http://www.gao.gov/archive/1999/gg99059.pdf>.

⁷⁸ Susan E. Dudley, *Perpetuating Puffery: An Analysis of the Composition of OMB's Reported Benefits of Regulation*, *Business Economics* (2012) 47, 165-176. doi:10.1057/be.2012.14.

II. Executive Branch Oversight of Regulation

A. President Obama's Initiatives

Like presidents before him, President Obama has reinforced and expanded the principles and practices of regulatory analysis and executive oversight. He retained OIRA, and its staff of fewer than fifty career civil servants who operate within the Executive Office of the President, reviewing regulations to ensure they are consistent with the President's priorities, and coordinating interagency review to avoid redundancy and conflict.⁷⁹ With its mission to ensure that regulations' benefits justify their costs, OIRA plays an important role. It is institutionally more interested in impacts on society broadly and less susceptible to special interest pressures than line agencies,⁸⁰ and provides what President Obama has called "a dispassionate and analytical 'second opinion' on agency actions."⁸¹

On January 18, 2011, the President published an op-ed in the *Wall Street Journal*⁸² outlining his approach to regulation and issued a new executive order. Executive Order 13563⁸³ on "Improving Regulation and Regulatory Review" reaffirmed the principles and practices that have been in effect since 1981.⁸⁴ It reinforced President Clinton's Executive Order 12866 and stressed the importance of conducting sound analysis of likely regulatory impacts, of providing public opportunities to engage in the process of developing new regulations, and of designing less-burdensome, more flexible approaches to achieve regulatory goals. It also required agencies to develop plans for periodically reviewing regulations already on the books, with an eye toward streamlining, repealing, or expanding them to make them more effective and less burdensome.

President Obama ventured further than previous presidents in issuing E.O. 13579 in July 2011, encouraging independent regulatory agencies to comply with E.O. 13563 requirements "concerning public participation, integration and innovation, flexible approaches, and science," to the extent permitted by law. E.O. 13579 also said that these agencies "should consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or

⁷⁹ http://www.whitehouse.gov/omb/inforeg_administrator

⁸⁰ Susan E. Dudley, *Regulatory Reform: Lessons Learned, Challenges Ahead*, REGULATION, Vol. 32, Number 2, Summer 2009, available at <http://www.cato.org/pubs/regulation/regv32n2/v32n2-1.pdf>

⁸¹ Memorandum of January 30, 2009—Regulatory Review, 74 Fed. Reg. 5977 (Jan. 30, 2009), available at http://www.reginfo.gov/public/jsp/EO/fedRegReview/POTUS_Memo_on_Regulatory_Review.pdf.

⁸² Barack Obama, Op-Ed., *Toward a 21st-Century Regulatory System*, WALL ST. J., Jan. 18, 2011, available at http://online.wsj.com/article/SB10001424052748703396604576088272112103698.html?mod=WSJ_hp_LEFTT_opStories#articleTabs%3Darticle.

⁸³ Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

⁸⁴ Press Release, The White House, Fact Sheet: The President's Regulatory Strategy (Jan. 18, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/01/18/fact-sheet-presidents-regulatory-strategy>.

excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned,” and make such information public.⁸⁵

E.O. 13610, issued in May 2012, focused on “Identifying and Reducing Regulatory Burdens.” It directed agencies to engage the public in their retrospective review of existing regulations, prioritize reviews that would produce significant quantifiable savings, and report regularly to OIRA on the progress of their initiatives.⁸⁶

B. 113th Congress proposals for executive branch controls

The 113th Congress considered various regulatory reform proposals designed to give the executive branch more responsibility for ensuring new regulations meet procedural and analytical requirements.⁸⁷ None of these were enacted into law, but the concepts behind them may serve as the foundation for future initiatives.

1. Enhanced regulatory impact analysis

Several bills focused on codifying requirements for regulatory impact analysis of proposed regulations.⁸⁸ As discussed above, presidents of both parties over the last 30 years have issued executive orders articulating nearly identical regulatory analysis principles to guide regulatory decisions, and at least since 1980, there have been attempts to codify these executive requirements in statute.⁸⁹

Though the creation of a statutory obligation for meeting these regulatory impact analysis standards is probably not necessary to ensure future presidents continue to endorse them, codifying the requirements could have several advantages. First, such legislation would lend Congressional support to the nonpartisan principles and the philosophy that before issuing regulations agencies should identify a compelling public need, evaluate the likely effects of alternative regulatory approaches, and select the alternative that provides the greatest net benefit

⁸⁵ Executive Order 13579. <http://www.whitehouse.gov/the-press-office/2011/07/11/executive-order-regulation-and-independent-regulatory-agencies>

⁸⁶ Executive Order 13610. <http://www.whitehouse.gov/the-press-office/2012/05/10/executive-order-identifying-and-reducing-regulatory-burdens>

⁸⁷ The GW Regulatory Studies Center tracks regulatory reform bills. <http://regulatorystudies.columbian.gwu.edu/regulatory-reform-bills-113th-congress>

⁸⁸ For example, S. 786, “Restoring Honesty for Our Economy,” (<http://thomas.loc.gov/cgi-bin/bdquery/z?d113:s.786>;) and S. 2099, “Sound Regulation Act of 2014” (<http://thomas.loc.gov/cgi-bin/bdquery/z?d113:SN02099>;) would place more emphasis on the benefit-cost analysis developed to support regulations.

⁸⁹ Chairman of the Council of Econ. Advisers, 1980 Economic Report of the President, at 125 (1980), *available at* http://fraser.stlouisfed.org/publications/ERP/page/4569/download/46077/4569_ERP.pdf.

to Americans.⁹⁰ The Sound Regulation Act, (H.R.3863 and S.2099) and the Jumpstarting Opportunities with Bold Solutions Act (JOBS) Act (H.R. 4304) would have required federal agencies to identify “the nature and significance of the market failure, regulatory failure, or other problem that necessitates regulatory action and why other alternatives, such as market forces or state or local regulations, could not address the problem better than federal regulation,” and develop “at least three regulatory options, in addition to not regulating, that the agency estimates will provide the greatest benefits for the least cost in meeting the regulatory objective,” among other analytical steps.⁹¹

Second, legislation could apply these requirements to independent agencies (which Administrations have been reluctant to do through executive order for fear of stirring up debate over the relationship between independent agencies and the President). For example, Independent Agency Regulatory Analysis Act (S.1173) would have subjected independent regulatory agencies to the executive analytical requirements applicable to other agencies,⁹² and several bills would have imposed analytical requirements on specific independent agencies, such as the FCC,⁹³ and the independent financial regulatory agencies.⁹⁴ The former OIRA administrators of both parties gathered at the 30th Anniversary conference hosted by the GW Regulatory Studies Center and the *Administrative Law Review* agreed on the importance of engaging independent regulatory agencies in regulatory analysis and oversight.⁹⁵

Third, Congress could make compliance with them judicially reviewable (discussed more in section IV below).

Additionally, some bills emphasize certain features that members have found lacking in existing regulatory analyses requirements. For example, the small business community has been frustrated that courts have interpreted the RFA’s requirements to assess economic impact as

⁹⁰ Section 1(a) of Executive Order 12866 states the regulatory philosophy as follows: “Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.”

⁹¹ <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:HR03863>:

⁹² <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:s.1173>:

⁹³ H.R. 3675, H.R. 2649, and S. 1989 <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:s.1989>:

⁹⁴ H.R. 1062 <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:h.r.1062>, and S. 450

⁹⁵ ALR Vol 63 symposium issue. Information and videos from the conference are available at www.RegulatoryStudies.gwu.edu.

applying only to direct compliance costs. They argue that agencies should consider reasonably foreseeable indirect economic impacts on small entities, such as increases in input prices (e.g., electricity, natural gas, or transportation) or state-level regulations issued pursuant to federal rules. This latter issue is particularly important for environmental regulations, where the “duty of regulating is passed on to the states without any corresponding analysis or requirements for states to consider less burdensome alternatives for small business.”⁹⁶ The Regulatory Flexibility Improvements Act (H.R.2542) would have amended the RFA to include “any indirect economic effect on small entities that is reasonably foreseeable.”⁹⁷

The analytical requirements of Title II of UMRA are similar to those in Executive Order 12866. They both ask executive branch agencies to “assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector,” and “select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule.” But UMRA’s coverage is much more limited than that of the Executive Order,⁹⁸ so that, according to a CRS report, 72 percent of the economically significant rules covered by the Executive Order are not covered by UMRA.⁹⁹ This limited coverage is compounded by the fact that UMRA’s requirements for analyzing the effects of proposed regulations are largely informational, and judicial review does not impose meaningful consequences for noncompliance. A bill introduced in the 113th Congress, H.R. 899, provides more detailed criteria to federal agencies for assessing unfunded mandates and expand consultation, among other things.¹⁰⁰ To make the executive branch more accountable for the goals of UMRA, Congress could provide OMB oversight authority beyond certifying and reporting on agencies’ actions.¹⁰¹

⁹⁶ *Hearing on Legislation to Improve the Regulatory Flexibility Act Before the H. Comm. on Small Business*, 110th Cong. (2007) (testimony of Thomas Sullivan, Chief Counsel for Advocacy, Small Business Administration), available at http://archive.sba.gov/advo/laws/test07_1206.html.

⁹⁷ <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:h.r.2542>:

⁹⁸ See Susan E. Dudley, prepared statement Hearing on “Unfunded Mandates and Regulatory Overreach,” Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, Committee on Oversight and Government Reform, U.S. House of Representatives, February 15, 2011. “Section 4 of the Act lists seven exemptions (including, for example, for regulations that enforce constitutional rights of individuals, provide conditions for federal assistance, or are necessary for national security). UMRA’s title II provisions also do not apply to regulations issued by independent agencies, rules for which no proposal was issued, or rules implementing statutes that prohibit consideration of costs. Further, mandates are defined as “direct costs,” or amounts governmental or private sector entities “will be required to spend in order to comply with the Federal private sector mandate,” in contrast to the more encompassing term, “effects on the economy,” used in Executive Order 12866.”

⁹⁹ US CONG RESEARCH SERVICE, UNFUNDED MANDATES REFORM ACT: HISTORY, IMPACT, AND ISSUES, Robert Jay Dilger and Richard S. Beth, 7-5700, R40957. (August 2010), available at:

http://assets.opencrs.com/rpts/R40957_20100813.pdf

¹⁰⁰ <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:hr899>:

¹⁰¹ Id, Dudley UMRA testimony 2011

2. Amendments to the APA

The bicameral Regulatory Accountability Act (RAA), first introduced in the 112th Congress, would amend the Administrative Procedure Act.¹⁰² It was one of the more comprehensive legislative proposals introduced in the 113th Congress, and encompassed analytical as well as procedural changes, codifying and extending some of the requirements in presidential executive orders.

The RAA would classify regulations into three categories: “high impact” rules, with estimated effects of \$1 billion or more in a year, “major” rules, defined (as in the CRA) as having impacts of \$100 million or more in a year, and “other” rules. It would also cover guidance documents, which are exempt from APA notice and comment procedures, and classify them as “major,” and “other.” Depending on their classification, rules and guidance documents would be subject to procedures beyond the notice and comment procedures currently embodied in the APA. Some of the key changes are summarized here.

- High impact and major regulations would begin with an advanced notice of proposed rulemaking (ANPRM), through which agencies would share and gather information before they develop an approach to address the identified problem through proposed rulemaking.¹⁰³
- High impact regulations would also be subject to a public hearing (akin to more adjudicatory procedures conducted under the “formal rulemaking” requirements), where rules of evidence apply, and parties may both subpoena and cross-examine witnesses. Decisions must address each of the findings presented and be supported by “substantial evidence.”¹⁰⁴
- All final rules would include a plan for review at least every 10 years, to “determine whether, based upon evidence, there remains a need for the rule, whether the rule is in fact achieving statutory objectives, whether the rule’s benefits continue to justify its costs, and whether the rule can be modified or rescinded to reduce costs while continuing to achieve statutory objectives.”¹⁰⁵
- The RAA would require the heads of agencies to certify that they have complied with the Information Quality Act (IQA), which attempts to ensure the “quality, objectivity, utility,

¹⁰² S.1029 <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:s:01029:>, and H.R. 2122 <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:H.R.2122:>

¹⁰³ RAA Sec. 3(c)

¹⁰⁴ RAA Sec.3(e), (g)

¹⁰⁵ RAA Sec. 3((f)(4)(G)

and integrity” of information disseminated to the public, and provides procedures by which affected parties can petition agencies to correct information that does not meet those standards.¹⁰⁶

As noted in the previous section, the Sound Regulation Act of 2014 would also have amended the APA to include both procedural and analytical steps when developing regulations.

3. Subject significant guidance documents to regulatory review and notice requirements

Various authorities have raised concerns that agency guidance practices are sometimes used to circumvent rulemaking procedures, and recommended that they should be more transparent, consistent and accountable.¹⁰⁷ To address that concern, the RAA and the Clearing Unnecessary Regulatory Burdens (CURB) Act (S. 1730) would have applied regulatory analysis requirements to guidance documents that have the effect of regulation.¹⁰⁸ CURB would codify OMB’s 2007 Good Guidance Practices Bulletin to ensure that significant guidance documents are subject to OIRA regulatory review as well as public notice and comment requirements. The Closing Regulatory Loopholes Act of 2013 (S. 320) would have required congressional approval of guidance documents.¹⁰⁹

4. Incentives to reexamine existing regulations

Most legislative and executive branch reforms have focused on analyzing and improving new regulations, and agencies seldom look back to evaluate the cumulative effects of regulations or whether existing regulations are having their intended effects. Section 610 of the RFA provides for periodic review of regulations for their impact on small businesses, but researchers have found that most agencies “comply with the letter of the law for only a small percentage of their rules, and they rarely take action beyond publishing a brief notice in the *Federal Register*.”¹¹⁰ The Regulatory Improvement Act (S. 1390) would have created a legislative commission to recommend regulations for modification and repeal by Congress.¹¹¹ Title VI of H.R. 4304 called for a “periodic review and termination of regulations,”¹¹² and would have relied on sunset provisions and petition procedures to identify rules for review.

¹⁰⁶ RAA Sec.3(f)(4)(F)

¹⁰⁷ Office of Management and Budget Bulletin No. 07-07, “Final Bulletin for Agency Good Guidance Practices.” Footnote 2. Available at: <http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-07.pdf>

¹⁰⁸ <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:s:1730>:

¹⁰⁹ <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:s:320>:

¹¹⁰ Michael See, Willful Blindness: Federal Agencies’ Failure to Comply With the Regulatory Flexibility Act’s Periodic Review Requirement—And Current Proposals to Invigorate the Act, 33 FORDHAM URB. L.J. 1199 (2006), available at <http://law2.fordham.edu/publications/articles/400flspub16875.pdf>.

¹¹¹ <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:SN01390:@@D&summ2=m&>

¹¹² <https://www.govtrack.us/congress/bills/113/hr4304/text>

Congress has considered using budgeting concepts to alter regulatory agencies' incentives to issue new regulations and examine the effectiveness of existing regulations.¹¹³ In 1980, President Carter's *Economic Report of the President* discussed proposals "to develop a 'regulatory budget,' similar to the expenditure budget, as a framework for looking at the total financial burden imposed by regulations, for setting some limits to this burden, and for making tradeoffs within those limits." The Report noted analytical problems with developing a regulatory budget, but concluded that "tools like the regulatory budget may have to be developed" if governments are to "recognize that regulation to meet social goals competes for scarce resources with other national objectives," and set priorities to achieve the "greatest social benefits."¹¹⁴

The National Regulatory Budget Act (S.2153 and H.R. 5184) would establish an independent executive office responsible for reporting annually to Congress on the costs of existing regulations and the costs of proposed new regulations. Congress would use these data to establish binding regulatory caps for each executive regulatory agency.¹¹⁵

The United Kingdom has adopted a "one-in-two-out" approach to regulation which shares similarities with a regulatory budget in that "departments have to remove or modify existing regulation(s) to the value of £2 of savings for every pound of cost imposed,"¹¹⁶ and members of the U.S. Senate are considering similar legislation currently under development.¹¹⁷ A "regulatory paygo" "would require federal agencies to identify and eliminate one existing regulation for each new regulation they want to add."¹¹⁸ Regulatory agencies, with oversight from OIRA and either the Congressional Budget Office (CBO) or the GAO, would be required to eliminate one outdated or duplicative regulation before issuing a new regulation of the same approximate economic impact.

Unlike a regulatory budget, agencies would only have to estimate costs for regulations being introduced (which they should already do) or offsetting regulations they propose to remove. While still subject to analytical challenges, a regulatory paygo has the potential to impose some needed discipline on regulatory agencies, and to generate a constructive debate on the real

¹¹³ See statement of Senator Portman before Homeland Security and Government Affairs Committee, June 23, 2011, available at <http://www.hsgac.senate.gov/hearings/federal-regulation-a-review-of-legislative-proposals-part-i>.

¹¹⁴ Chairman of the Council of Econ. Advisers, 1980 Economic Report of the President [hereinafter 1980 Economic Report], at 125 (1980), available at http://fraser.stlouisfed.org/publications/ERP/page/4569/download/46077/4569_ERP.pdf.

¹¹⁵ <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:s2153>:

¹¹⁶ <https://www.gov.uk/government/policies/reducing-the-impact-of-regulation-on-business/supporting-pages/operating-a-one-in-two-out-rule-for-business-regulation>

¹¹⁷ See statement of Senator Mark Warner before Homeland Security and Government Affairs Committee, June 23, 2011, available at <http://www.hsgac.senate.gov/hearings/federal-regulation-a-review-of-legislative-proposals-part-i>.

¹¹⁸ Mark Warner, *To Revive the Economy, Pull Back the Red Tape*, WASH. POST, Dec. 13, 2010, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/12/12/AR2010121202639_pf.html.

impacts of regulations. By focusing on the costs of regulations and allowing agencies to set priorities and make tradeoffs among regulatory programs, it might remove some of the contentiousness surrounding benefit-cost analysis. Congress would probably need to establish regulatory burden baselines in new authorizing legislation, unless they expect those costs to be offset with existing regulations.¹¹⁹

III. Legislative Branch Oversight of Regulation

As noted above, Congress has not taken full advantage of its “awesome arsenal of weapons”¹²⁰ for controlling agencies actions.¹²¹ Members do use oversight hearings and occasionally use appropriations to limit agencies’ ability to develop or enforce regulations,¹²² but as Justice Elena Kagan has noted, “the complaint-driven nature of congressional oversight, especially in combination with its reliance on committees, [] pushes toward the ad hoc rather than the systematic consideration of administrative policy.”¹²³ Recent Congresses have introduced legislation that would strengthen the legislative branch’s own ability to control regulation. One approach would require a Congressional vote before major new regulations can become effective (the REINS Act, and another would establish a Congressional office to review and evaluate regulations.

A. The REINS Act

The Regulations from the Executive In Need of Scrutiny (REINS) Act, which has been introduced in each of the last three Congresses, and passed the House of Representatives in the 113th Congress (H.R. 367),¹²⁴ is designed to “increase accountability for and transparency in the federal regulatory process.”¹²⁵ It is patterned after the 1996 CRA, providing expedited procedures for evaluating and voting on major regulations, but it would change the default outcome. Rather than requiring Congress to enact a “joint resolution of disapproval” to prevent a rule from going into effect, no major rule could go into effect until Congress enacted an affirmative “joint resolution of approval.”

¹¹⁹ Dudley, HSGAC testimony

http://oversight.house.gov/index.php?option=com_content&view=article&id=1129:qunfunded-mandates-and-regulatory-overreach&catid=14:subcommittee-on-technology

¹²⁰ James Q. Wilson, *Bureaucracy*, Basic Books 1989, 164.

¹²¹ Kagan 2257-2258.

¹²² Curtis Copeland, *Congressional Influence on Rulemaking and Regulation Through Appropriations Restrictions*, Congressional Research Service. RL 34354 August 2008. <http://fas.org/sgp/crs/misc/RL34354.pdf>

¹²³ Kagan 2260.

¹²⁴ It was also introduced in the Senate (S. 15).

¹²⁵ Regulations from the Executive in Need of Scrutiny Act, H.R. 367, 113th Cong. § 2 (2013). <http://thomas.loc.gov/cgi-bin/query/D?c113:1:./temp/~c113M2obkh::>

This would be a significant change to the current regulatory procedures, and would likely change the incentives and behavior of legislators, regulators, and affected parties in positive and negative ways.¹²⁶ Opponents argue that current procedures, where Congress delegates regulatory decision-making to agencies, are “consistent with the Framers’ intention,”¹²⁷ and provide sufficient regulatory constraint on executive agencies through (1) authorizing legislation, (2) the APA public comment process, (3) executive branch review and oversight, (4) the threat of a resolution of disapproval under the CRA, and (5) judicial review.¹²⁸ They also argue that expert agencies are in a better position to make complex regulatory decisions than political officials.¹²⁹

Others defend the constitutionality of the Act,¹³⁰ and see it as way to “force Members to take responsibility for the laws they pass, and to force Administrations to be accountable for the laws they create through regulation.”¹³¹ Many federal regulations being promulgated today depend on legislation passed decades ago by different congresses focused on different concerns. The REINS Act would ensure that major regulations based on authority delegated years ago could only be adopted with consent from the current Congress.¹³²

B. Create a Congressional regulatory oversight body

The President’s Council on Jobs and Competitiveness encouraged Congress to consider a congressional staff, modeled on the CBO or GAO, to review agencies’ regulatory analysis, and the cumulative effects of existing regulations.¹³³

The Truth in Regulating Act of 2000¹³⁴ required the GAO independently to evaluate agencies’ regulatory impact analyses supporting final regulations, but this requirement was contingent

¹²⁶ For a discussion of these incentives, see Dudley Engage 2011 (id)*

¹²⁷ Posting of Sidney Shapiro to CPRBlog, <http://www.progressivereform.org/CPRBlog.cfm?idBlog=84F5CF0B-E804-F8D1-7197786456C5DC4F> (Jan. 14, 2011).

¹²⁸ The REINS Act: Promoting Jobs and Expanding Freedom by Reducing Needless Regulations: Hearing on H.R. 10 Before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary, 112th Cong. (2011) (statement of Sally Katzen), available at <http://judiciary.house.gov/hearings/pdf/Katzen01242011.pdf>.

¹²⁹ Sidney Shapiro, Ctr. for Progressive Reform, CPR Backgrounder: The REINS Act: The Conservative Push to Undercut Regulatory Protections for Health, Safety, and the Environment (2011), available at http://www.progressivereform.org/articles/CPR_Reins_Act_Backgrounder.pdf.

¹³⁰ Adler, *supra* note 31; *Hearing, supra* note 29 (statement of Jonathan H. Adler, Professor of Law and Director of the Center for Business Law and Regulation, Case Western Reserve University School of Law), available at <http://judiciary.house.gov/hearings/pdf/Adler01242011.pdf>; *id.* (statement of David McIntosh, Member of Congress, retired), available at <http://judiciary.house.gov/hearings/pdf/McIntosh01242011.pdf>.

¹³¹ Editorial, *The Congressional Accountability Act*, WALL ST. J., Jan. 14, 2011, available at <http://online.wsj.com/article/SB10001424052970203525404576049703586223080.html>.

¹³² Jonathan Adler, The Federalist Soc’y for Regulatory & Pub. Policy Studies, The Regulations from the Executive in Need of Scrutiny (REINS) Act, http://www.fed-soc.org/publications/pubID.2074/pub_detail.asp (2011).

¹³³ President’s Council on Jobs and Competitiveness, ROADMAP TO RENEWAL, 2011 Year End Report. Available at http://files.jobs-council.com/files/2012/01/JobsCouncil_2011YearEndReport1.pdf

upon the GAO receiving yearly appropriations of \$5,200,000. These funds have never been appropriated.

S.1472, the “Strengthening Congressional Oversight of Regulatory actions for Efficiency Act” would have created an office within the Congressional Budget Office with responsibility for assessing the impact of federal rules and regulations.¹³⁵

A non-executive branch agency responsible for reviewing regulations would have several benefits.¹³⁶ Most importantly, it would serve as an independent check on the analysis and decisions of regulatory agencies and OMB. A 1999 GAO report evaluating OMB’s annual reports to Congress on the benefits and costs of regulation observed,

It is politically difficult for OMB to provide an independent assessment and analysis of the administration’s own estimates in a public report to Congress. If Congress wants an independent assessment of executive agencies’ regulatory costs and benefits, it may have to look outside of the executive branch or outside of the federal government.¹³⁷

While a Congressional office would not have the same authority OMB exercises to affect agency draft regulations, it would be able to devote resources to areas OMB cannot, such as examining the effects of regulations issued by independent regulatory agencies. Just as the CBO provides independent estimates of the on-budget costs of legislation and federal programs, a Congressional regulatory office could provide Congress and the public independent analysis regarding the likely off-budget effects of legislation and regulation. This would be particularly important if Congress enacts some of the other procedural changes being discussed, such as the REINS Act or a Regulatory Paygo.¹³⁸

IV. Judicial Branch Oversight of Regulation

Under the APA, after a regulatory agency issues a final rule, an affected party may challenge it in court. Reviewing courts may reverse or remand the rule to the agency for reconsideration on

¹³⁴ P.L. 106-312, 114 Stat. 1248-1250 (2000).

¹³⁵ <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:SN01472:@@D&summ2=m&>

¹³⁶ See Testimony of Robert W. Hahn and Robert E. Litan before the House Government Reform Committee, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, March 2003, *available at*: http://www.brookings.edu/testimony/1999/04_righttoknow_litan.aspx

¹³⁷ U.S. Gen. Accounting Office, GAO/GGD-99-59, Analysis of OMB’s Reports on the Costs and Benefits of Federal Regulation (1999), *available at* <http://www.gao.gov/archive/1999/gg99059.pdf>.

¹³⁸ Susan Dudley, “Congress Needs its own Regulatory Oversight Office,” Penn RegBlog, <http://www.law.upenn.edu/blogs/regblog/2011/08/congress-needs-its-own-regulatory-review-office.html> (2011)

constitutional grounds, on procedural grounds (whether the agency followed the procedures specified in the APA), or on the basis of the agency’s interpretation of the authorizing statute.

A. Changes to the standard by which courts review regulations

The courts review regulations issued through informal rulemaking procedures under the “arbitrary and capricious” standard of review,¹³⁹ while regulations issued under formal rulemaking procedures are subject to a “substantial evidence” standard.¹⁴⁰ The substantial evidence standard directs a reviewing court to set aside an agency action unless the record provides “such relevant evidence as a reasonable person would accept as adequate to support a conclusion.”¹⁴¹ It is arguably a more exacting standard than “arbitrary and capricious,” which grants considerable deference to agency expertise. Substituting a substantial evidence test could motivate agencies to develop and provide better scientific and technical data and analysis in support of regulations.¹⁴² Some argue that the substantial evidence test used as part of an informal (or even hybrid) regulatory proceeding would differ very little from an arbitrary and capricious test, however.¹⁴³ The RAA would subject major and high impact final regulations to the substantial evidence standard of review.¹⁴⁴

B. Judicial review of regulatory impact analysis

Presidential executive orders governing regulatory impact analysis have stated that their requirements are not enforceable by law,¹⁴⁵ however several bills introduced in the 113th Congress would change that.¹⁴⁶ Judicial review could be valuable, not because the courts have a particular expertise in regulatory analysis, but because agencies tend to take more seriously

¹³⁹ 5 U.S.C. § 706(2)(A).

¹⁴⁰ 5 U.S.C. § 706(2)(E).

¹⁴¹ *Mareno v. Apfel*, 1999 U.S. Dist. LEXIS 8575 (S.D. Ala. Apr. 8, 1999) (“more than a scintilla but less than preponderance”).

¹⁴² EE Bachrach, *Case for a Substantial Evidence Amendment to the Informal Rulemaking Provision of the Federal Food, Drug, and Cosmetic Act*, 55 *Food & Drug L.J.* 293 (2000). See also Rosen testimony*

¹⁴³ *Ass’n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677 (D.C. Cir. 1984) (Scalia, J., writing for the majority) (“In review of rules of general applicability made after ‘notice and comment’ rule-making, [substantial evidence and arbitrary or capricious] criteria converge into a test of reasonableness.”), available at <http://openjurist.org/745/f2d/677/association-v-board>. Matthew J. McGrath, *Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review During Informal Rulemaking*, 54 *GEO. WASH. L. REV.* 541 (1986).

¹⁴⁴ RAA Sec. 6-8

¹⁴⁵ See EO 12866 Sec. 11. “*Judicial Review*. Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.”

¹⁴⁶ For a summary of bills, see Curtis W. Copeland, *Regulatory Reform Legislation in the 112th Congress* Congressional Research Service (2011)

aspects of their mission that are subject to litigation. Like executive and Congressional oversight, judicial oversight would likely make regulatory agencies more accountable for better decisions based on better analysis.¹⁴⁷

Courts have overturned several regulations of the Securities and Exchange Commission as being arbitrary and capricious and in violation of the APA, finding that compliance with the Commission's statutory criteria demanded a more rigorous analysis of benefits and costs to evaluate the rule's effects on efficiency, competition, and capital formation.¹⁴⁸

C. Judicial review of statutory requirements

Congress has considered legislative amendments that would provide for judicial review of statutory requirements, such as those encompassed in the Information Quality Act, the Regulatory Flexibility Act, and the Unfunded Mandates Reform Act. For example, the IQA does not explicitly provide for judicial review of agency denials of requests for correction, and to date, courts have chosen not to try cases that have been brought.¹⁴⁹ The RAA would have required the heads of agencies to certify that they have complied with the IQA, and subject compliance with the IQA to judicial review. Responding to concerns noted above, the Regulatory Flexibility Improvement Act (H.R. 2542) would have provided for judicial review of final agency actions.¹⁵⁰

Congress also considered legislation (such as H.R. 899) that would make compliance with UMRA requirements judicially reviewable under the APA, so that an agency's failure to justify not selecting the "least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule," could be grounds for staying, enjoining, invalidating or otherwise affecting such agency rule.

¹⁴⁷ SED HSGAC

¹⁴⁸ For a discussion of recent cases, see Jane Luxton, *An Uncomfortable Wake-Up Call For Dodd-Frank Regulators*, *Futures & Derivatives Law Report* (Vol. 32, Issue 1) available at: http://www.pepperlaw.com/publications_update.aspx?ArticleKey=2296

¹⁴⁹ For different perspectives on this issue, see James W. Conrad, Jr., *The Information Quality Act—Antiregulatory Costs of Mythic Proportions?*, 12 KAN. J. L. & PUB. POL'Y 521 (2003), available at <http://www.law.ku.edu/publications/journal/pdf/v12n3/conrad.pdf>; Sidney A. Shapiro, RENA STEINZOR & MARGARET CLUNE, CTR. FOR PROGRESSIVE REFORM, OSSIFYING OSSIFICATION: WHY THE INFORMATION QUALITY ACT SHOULD NOT PROVIDE FOR JUDICIAL REVIEW (2006), available at http://www.progressivereform.org/articles/CPR_IQA_601.pdf.

¹⁵⁰ <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:HR02542:@@D&summ2=m&>

V. Conclusion

All three branches of government have responsibility under the Constitution for ensuring accountable regulation, providing checks and balances against each other. Over the last century, they have experimented with approaches to improving the outcomes of administrative laws by controlling the procedures and principles by which regulations are generated. With concern over regulatory impacts rising, proposals for regulatory reform are gaining traction in the executive, legislative, and judiciary branches of government. The 114th Congress is likely to consider legislation to reform the procedures by which regulations are issued, clarify the decision criteria agencies use to develop regulations, and take responsibility for the content of individual regulations promulgated pursuant to statutes. While none of the legislation considered by the 113th Congress passed, the bills considered there may have laid the groundwork for reforms in 2015. Like the bipartisan, inter-branch regulatory reform efforts of the 1970s and 1980s, which brought about unexpected innovation, higher quality and lower prices in previously regulated industries, reforms today could spur economic growth and improve the welfare of American families, workers and entrepreneurs.