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# NATIONAL AFFAIRS

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## Policy Reforms for an Accountable Administrative State

ADAM. J. WHITE

OREN CASS

KEVIN R. KOSAR

U N L E A S H I N G  
O P P O R T U N I T Y

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Administrative State

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*Contributors:*

Adam J. White, Oren Cass, Kevin R. Kosar

*Editors:*

Yuval Levin and Emily MacLean

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# Executive Summary

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THE MODERN ADMINISTRATIVE STATE reflects a profound failure of republican self-governance. Today's federal agencies wield immense power and broad discretion, with too little accountability to the people, and too little regard for the rule of law.

But this is not a failure of the agencies themselves. Rather, it is the collective failure of our federal government's three branches. The legislative, executive, and judicial branches have chosen to cede such power and discretion to the administrative state; they have eschewed the use of their own constitutional powers to direct, channel, and restrain its energy and will.

Administrative agencies are not inherently bad—quite the contrary. Among the many deficiencies of American's first national government that our Constitution remedied was an utter lack of administrative capacity. To that end, the Constitution established the executive branch and alluded to “Departments” that would administer law and federal policy. When properly limited and guided by the three branches of government, our administrative agencies have played a crucial role in constitutional government.

Today's administrative state is something starkly different. After two centuries of growth and change, federal agencies have become the government's predominant lawmakers and policymakers. And in recent years, agencies have sought to unilaterally govern the most significant issues of our time, stretching statutes beyond the breaking point to assert control over the nation's economy, the Internet, and even the exercise of religion. They do it in lieu of Congress—or in defiance of it.

But just as all three branches of government are responsible for the administrative state's overgrowth, so must all three play a role in its reform. To that end, this report's chapters urge the following reforms:

- Congress must reassert itself as “the First Branch” in our constitutional government, by reawakening its members to the need for active governance of the administrative state, and by developing the institutional tools necessary to effectively constrain and oversee the agencies.
- The President must manage the administrative state much more energetically and effectively. He must take actual responsibility for his agencies’ regulations. To that end, the President and Congress must strengthen the White House’s Office of Information and Regulatory Affairs (OIRA) to reflect its actual role as the headquarters of the administrative state. The White House should manage the agencies’ planning process more effectively, by holding each agency to a “regulatory budget” and by carrying out its own regulatory oversight role much more systematically and transparently. Finally, the White House must improve the information and methodologies upon which the administrative state relies, by setting consistent standards across all agencies, and by actively supporting better and more diverse economic research.
- Finally, with respect to judicial review and agency process, Congress must reform administrative law to reflect administrative reality. But, crucially, Congress must reform judicial review and agency process together, not separately, by re-calibrating judicial review to create the incentives for better agency processes. To that end, Congress should not abolish “judicial deference,” because judicial review is not an end in and of itself; it is a means toward the greater end of good governance. So Congress should structure judicial review—including judicial deference—in a way that spurs agencies to comply with heightened procedural requirements instead of evading them.

These proposals are not anti-government, or even anti-regulatory. In both substance and motive, they are recommendations for making government work better—with more transparency, more accountability, and greater effectiveness. They attempt to align the agencies’

incentives with the public's, in terms of both republican self-government and the rule of law.

In all of this, the answer will not be found exclusively in a single branch of government, let alone in a single methodology. The administrative state's reform requires more than just more aggressive judges, or more exacting cost-benefit analyses. It requires, in Publius's words, "republican remedies" to the diseases most incident to administrative government.

*\* In drafting these chapters, the authors benefitted immensely from the counsel of Andrew Grossman (BakerHostetler and Cato Institute), Melanie Marlowe (Hudson Institute), and Patrick McLaughlin (Mercatus Center), as well the advice of scholars and other experts whom Matthew Spalding hosted for a day-long workshop at Hillsdale College's Kirby Center in Washington, D.C.*





# Republican Remedies for the Administrative State

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*Adam J. White*

RESEARCH FELLOW, HOOVER INSTITUTION

THE MODERN ADMINISTRATIVE STATE reflects a fundamental failure of republican self-governance. Over the course of decades, the federal government's three constitutional branches ceded ever more power to administrative agencies. Their legacy is a nation governed disproportionately, even predominantly, by the agencies. To remedy this will require a concerted recommitment to republican governance by all three branches: by Congress, by the President, and by the Judiciary. And, most of all, by the people themselves.

To that end, the essays in this book propose reforms by the Congress, the president, and the judiciary—sometimes independently, sometimes in conjunction with one another. In our time, as in James Madison's, reform requires a “republican remedy.”<sup>1</sup>

## A CRISIS OF GOVERNANCE

The roots of these essays lie in a conference convened a year ago by Matthew Spalding, at Hillsdale College's Kirby Center, blocks away from the U.S. Capitol. Spalding generously welcomed a variety of scholars, policymakers, and private practitioners to debate and analyze the modern administrative state from a variety of perspectives.

The forum itself challenged participants to raise their sights, for in the Kirby Center's lecture hall hangs an inspiring portrait: *The Signing of the American Constitution*, by Sam Knecht.<sup>2</sup> But Spalding took care to emphasize the breadth and depth of the problem at hand.

We often think of the “administrative state” as a political-science abstraction—a theoretical problem to be solved through better legal theory. “In reality,” he explained, “our nation suffers from a long

developing crisis of governance, with causes that run deep and baleful ramifications that reach just as far. The modern administrative state is a new form of regime, a substitute for actual republican self-governance.”

“The administrative state” is often meant to refer narrowly to the federal government’s so-called “fourth branch,” the federal agencies. But rightly understood, “the administrative state” encompasses something far more comprehensive: namely, our current state of federal governance, which is dominated by agencies’ regulatory actions, undertaken purportedly pursuant to open-ended statutes. The agencies accomplish this largely—though not completely—at the direction of the president and his White House, with too little or too ineffectual oversight by Congress, and with disconcertingly deferential judicial review by federal courts.

In so doing, the federal agencies deform republican government and not just at the national level, but at the state level, too. They accomplish this in at least two ways. First, federal agencies’ regulations “preempt” broad swaths of policymaking that would otherwise be undertaken by the states themselves, to such a degree that federal administrative law has become “the home of a new federalism,” displacing Congress and the Supreme Court as the traditional calibrator of federalism.<sup>3</sup> Second, nominally “cooperative” federalism programs, such as the Clean Air Act administered by the EPA, too often replace “cooperation” with co-option or effective commandeering, forcing states’ hands.

Simply put, today the nation’s most significant policy choices and value judgments are made by regulators, not by Congress. To be clear, this trend toward administrative supremacy did not begin in 2009; it can be traced back a century or more. But in the Obama administration we saw its apotheosis.

President Obama arrived in office with Democratic majorities in both houses of Congress. And he had campaigned for office with a rhetoric of legislative collaboration, criticizing the Bush administration’s own use of executive power. “The biggest problems that we’re facing right now have to do with George Bush trying to bring more and more power into the executive branch and not go through Congress at all,” he had told a Pennsylvania audience in early 2008. “And that’s what I intend to reverse when I become president of the United States of America.”<sup>4</sup> He went even further, in elaborating such themes in his second book, where he wrote that governance requires compromise produced by what he called “genuine” bipartisanship. “Genuine

bipartisanship,” he stressed, “assumes an honest process of give-and-take” in service of a common goal, and “[t]his in turn assumes that the majority will be constrained...to negotiate in good faith.” He contrasted this with negotiations in which the majority party “begin[s] every negotiation by asking for 100 percent of what it wants, go[es] on to concede 10 percent, and then accuse[s] any member of the minority party who fails to support this ‘compromise’ of being ‘obstructionist.’”<sup>5</sup>

As a legislator, then-Senator Obama no doubt spoke and wrote those words in good faith. But President Obama governed much differently. On many significant issues, such as energy and environmental policy, his administration and his co-partisans in Congress engaged in only perfunctory legislative negotiations before moving energetically to purely regulatory solutions, attempting to implement programs that Congress—even a Congress controlled by his own party—did not authorize.<sup>6</sup> On the highly contentious question of reforming our immigration laws, he eschewed the legislative process and instead simply declared a policy of widespread non-enforcement, memorialized in memoranda issued by the Justice Department and Department of Homeland Security; “I just took an action to change the law,” he said.<sup>7</sup>

On other occasions, nominally “independent” agencies executed the administration’s stated policies on matters ranging from labor law to nuclear energy, while the administration purported to disclaim responsibility for the National Labor Relations Board’s battles with Boeing, or the Nuclear Regulatory Commission’s efforts to shut down the decades-old Yucca Mountain nuclear-waste repository program.<sup>8</sup> Later in his administration, as the Federal Communications Commission was formulating its “Open Internet Order,” achieving the administration’s longstanding goal of imposing so-called “net neutrality” regulations on broadband Internet service providers, President Obama disclaimed credit for having prevailed upon the FCC to adopt his plan, saying in public that “[t]he FCC is an independent agency, and ultimately this decision is theirs alone.”<sup>9</sup>

Even his two signature legislative achievements—the Affordable Care Act and the Dodd-Frank financial reforms—largely avoided defining the substance of new laws governing health care and finance, and instead focused on creating new regulatory frameworks that would allow new regulatory agencies to set policy, often with unprecedented statutory insulation against Congress and future presidents.

In pressing his administrative agencies to carry out his policies, President Obama persistently argued that legislative friction justified avoiding the legislature altogether. “I want to work with Congress to create jobs and opportunity for more Americans,” he said in a characteristic 2014 radio address. “But where Congress won’t act, I will.”<sup>10</sup>

Or, as he famously explained at 2014’s first Cabinet meeting:

I’ve got a pen and I’ve got a phone—and I can use that pen to sign executive orders and take executive actions and administrative actions that move the ball forward in helping to make sure our kids are getting the best education possible and making sure that our businesses are getting the kind of support and help they need to grow and advance to make sure that people are getting the skills that they need to get those jobs that our businesses are creating.

And I’ve got a phone that allows me to convene Americans from every walk of life—non-profits, businesses, the private sector, universities—to try to bring more and more Americans together around what I think is a unifying theme: making sure that this is a country where if you work hard, you can make it.<sup>11</sup>

But the gulf between Senator Obama’s paeans to democratic compromise and President Obama’s pen-and-phone unilateralism does not prove that he never truly believed his own pre-presidential words. Indeed, to assume that Senator Obama was being untruthful only distracts us from the more important and discomfiting point.

That is, when we take all his statements as genuine, we are confronted with the modern administrative state’s corrosive effect: Even a president who arrives in office committed in good faith to the institutions of republican government and a spirit of “genuine bipartisanship” can be seduced by the administrative state’s promise of efficient, uncompromising power.

Again, President Obama was hardly the first president to eschew the friction of republican governance for the ease of administrative supremacy. But his experience, following that of his predecessors, illustrates the administrative state’s destructive gravitational pull on our politics. Presidents frustrated by the friction of democracy turn ever more easily to administrative governance. His co-partisans in Congress, connected more firmly to their party than their place in the House and

Senate,<sup>12</sup> support him in eschewing legislation.<sup>13</sup> And his opponents in Congress, recognizing that the president lacks incentives to fully engage the legislative process, see all the less reason to approach the debate with compromise in mind.

Seeing the feedback loop that continuously reinforces the administrative state, it calls to mind another of Madison's insights. Our administrative state has come to resemble Madison's vision of legislatures at their very worst: The modern administrative state "is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."<sup>14</sup> The solution, in our time as in Madison's, is a commitment to republican government—the separation of powers, and checks and balances.

#### THE ADMINISTRATIVE STATE: PAST AND PRESENT

The history of America's administrative state has been written time and time again, most recently by Christopher DeMuth and before that by many others.<sup>15</sup> The Constitution was written to remedy the many failings of America's first national government, and among them was the absence of an executive branch capable of administering Congress's laws—what James Q. Wilson called "the Founders' depressing experience with chaotic and inefficient management under the Continental Congress and the Articles of Confederation."<sup>16</sup>

Over the course subsequent decades, however, Congress delegated ever more responsibility to the executive branch and then to administrative agencies. First, it was merely the responsibility to decide factual questions having policy implications;<sup>17</sup> then, the power to "fill up the details" of a statutory scheme.<sup>18</sup> The 20<sup>th</sup> century witnessed ever-broader delegations of power by Congress to agencies, first resisted by the Supreme Court and then finally accepted by it.<sup>19</sup> The trend only accelerated in the 20<sup>th</sup> century's latter half and into the 21<sup>st</sup>, with agencies such as the Environmental Protection Agency and the Consumer Financial Protection Bureau.<sup>20</sup> At the same time, agencies were structured with increasingly innovative forms of independence, while (as described in "Reforming Administrative Law to Reflect Administrative Reality," p. 51) their legal interpretations received increasing deference from courts.<sup>21</sup>

And agencies have grown ever more aggressive and innovative in imposing policy without going through public rulemakings or agency adjudications, two types of agency policymaking that qualify as "final

agency action” and thus are susceptible to judicial review. Instead, agencies rely increasingly on “guidance” documents which purport to be “non-binding,” but which (as the agencies know) nevertheless spur the regulated parties to change their conduct out of fear of agency punishment. Similarly, agencies vested with effectively open-ended power by Congress can often impose their policies not through action but rather through *inaction*, by simply refusing to enforce laws already on the books, such as federal immigration laws. In both of these respects, and others, the administrative state is increasingly a passive-aggressive administrative state, enforcing its will even while protesting otherwise.

Today, it is difficult to meaningfully describe the size of our administrative state, let alone quantify it, without resorting to figures that beggar description. One might count the number of “significant rules”—*i.e.*, rules costing the public \$100 million annually—sent by agencies to the White House for cost-benefit review, or the total number of final rules published in the *Federal Register*, regardless of size. (In 2015, agencies produced 415 significant rules and 3,410 final rules.<sup>22</sup>) Or you could simply count the number of pages in the *Federal Register* setting forth final rules. (In 2015, 24,694 pages.)

The George Washington University Regulatory Studies Center collects myriad statistics along these lines.<sup>23</sup> Other organizations, too, have attempted more sophisticated estimates. For example, the Heritage Foundation’s annual “Red Tape Rising” report concluded that the Obama administration’s rulemaking activity in 2015 “increased annual regulatory costs by more than \$22 billion, bringing the total annual costs of Obama administration rules to an astonishing \$100 billion-plus in just seven years.”<sup>24</sup> The Competitive Enterprise Institute’s annual “Ten Thousand Commandments” report concluded that “regulatory compliance and economic impacts” of federal regulation amounts to “\$1.885 trillion annually.”<sup>25</sup> And the American Action Forum’s “600 Major Regulations” report concluded that the Obama administration has imposed 600 major regulations with a total public cost of at least \$743 billion.<sup>26</sup>

And to the extent that such studies rely on data or estimates produced by the agencies themselves, one must be wary the regulators’ habit of underestimating the costs of their rules, or exaggerating the benefits—as former OIRA Administrator Susan Dudley and others have observed.<sup>27</sup> And the “independent” agencies, which are not subject to the overarching

cost-benefit requirements that the White House imposes upon “executive” agencies, are even less rigorous in their analyses.<sup>28</sup>

The Mercatus Center at George Mason University is now attempting even more sophisticated and nuanced quantifications of the economic impacts of federal regulation, applying its RegData analytical model to economic data, and concludes that regulatory growth cost our economy \$4 trillion between 1980 and 2012.<sup>29</sup>

Whatever one’s preferred metric, no one can plausibly dispute the diagnosis of our modern administrative state offered by Chief Justice John Roberts in a 2013 opinion: “The administrative state wields vast power and touches almost every aspect of daily life. The Framers could hardly have envisioned today’s vast and varied federal bureaucracy and the authority administrative agencies now hold over our economic, social, and political activities. The administrative state with its reams of regulations would leave them rubbing their eyes.”<sup>30</sup>

#### RESTORING REPUBLICAN SELF-GOVERNANCE

In his seminal 1938 lectures on “The Administrative Process,” New Dealer James Landis celebrated the burgeoning administrative state as a triumph of modern governance over antiquated American constitutionalism, “spring[ing] from the inadequacy of a simple tripartite form of government to deal with modern problems.”<sup>31</sup>

Dean Landis’s triumphalism and optimism were misplaced. While the modern administrative state might sometimes “deal with” problems of public policy in a narrow sense, it has raised a host of other problems — problems of public policy, but also, more profoundly, problems of our capacity to govern ourselves. As Niall Ferguson writes in *The Great Degeneration* (2012), “excessively complex regulation is the disease of which it pretends to be the cure.”

But in attempting to truly cure the disease, we must not mistake the symptoms for the underlying sickness. The administrative state is itself a symptom our failure of self-governance. Our three branches for federal government were responsible for it, by freely allowing — sometimes affirmatively encouraging — the shift from republican governance to administrative supremacy.

To adapt John Hart Ely’s diagnosis of the similar shift in war powers, “[i]t is common to style this shift a usurpation, but that oversimplifies to the point of misstatement.” While proponents of administrative



power, including more than a few Presidents, “generally wanted it that way,” the fact remains that “Congress (and the courts) ceded the ground without a fight. In fact, and this is much of the message of this book, the legislative surrender was a self-interested one: Accountability is pretty frightening stuff.”<sup>32</sup>

Fault for our modern administrative state lies not with the administrators who aggrandized power to themselves, but rather with the other three branches, and with the people themselves.

By the same token, responsibility for solving these problems lies ultimately with the people, acting through all three branches of government. The following chapters attempt to chart a path to reform.

# Reasserting Congress in Regulatory Policy

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*Kevin R. Kosar*

SENIOR FELLOW & GOVERNANCE PROJECT DIRECTOR,  
R STREET INSTITUTE

CONGRESS IS ‘THE FIRST BRANCH,’ and the Constitution assigns to it alone the power to legislate. In the eyes of the founders, the legislative branch was to predominate—all policy, all taxes, and all agencies would be its creatures. Fearing the legislature would, as James Madison put it, draw “all power into its impetuous vortex,” the founders enumerated the permissible subjects for legislation, and split the branch into two chambers.<sup>33</sup> Frequent elections were required in order to keep elected officials in tune with the demands of a diverse public.

Meanwhile, Article II posits the executive as a modest figure whose responsibilities mostly focus upon foreign affairs. The chief executive could veto unwise legislation, but had no authority to introduce legislation or require Congress to consider it. In a system of limited government, the president was to “take care that the laws be faithfully executed.” The founders designed the U.S. president to be very unlike the kings of the old world.

It is a remarkable and troubling development, then, to find modern presidents effectively “legislating” as a matter of course, and more frequently than Congress.<sup>34</sup> In recent years, Congress has enacted approximately 50 statutes annually on significant subject matter; the executive branch proposes 2,700 new regulations and finalizes another 4,000 rules each year.<sup>35</sup> Congress, then, has ceded much of its essential power to the executive branch, which exerts itself on nearly every aspect of life imaginable.

Restoring legislative power to Congress necessitates curbing the executive branch’s nearly untrammelled power to make law via

regulations. It also means strengthening Congress's capacity and the incentives to reassert its constitutional role in lawmaking.

#### THE ABSENTEE CONGRESS

Today, Congress currently plays at best a peripheral and reactive role in regulatory policy. The reasons for this are many, but three are especially pertinent to this report's consideration: inherent executive advantages, the immensity of the federal government, and Congress's limited incentives.

The executive branch by its nature can act with greater dispatch than the legislature. Alexander Hamilton characterized this quality as energy: "The ingredients which constitute energy in the Executive are, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers."<sup>36</sup>

These terms concisely describe the administrative state, which is a machine that runs of its own accord. Agencies can propose, revise, and finalize regulations at their own initiative. Congress has no formal role in the rulemaking process.

And, as Hamilton recognized elsewhere, the president and agencies have what today we would call a "first mover" advantage over Congress: "The Legislature is free to perform its own duties according to its own sense of them—though the Executive in the exercise of its constitutional powers, may establish an *antecedent state of things* which ought to weigh in the legislative decisions."<sup>37</sup> Thus, while Congress is still deliberating, an agency can simply act—and thus change the status quo against which Congress legislates (or chooses not to legislate).

Agencies can act much more quickly than Congress because they are unitary actors. They take public comment, but agencies need not navigate vast and complex pluralistic politics as legislators do. The case of net neutrality is instructive on this count. In 2015, the FCC enacted its "net-neutrality" regulations, which span 300 pages. Three FCC commissioners voted for them, two voted against them; the bare three-commissioner majority sufficed to impose these rules on the nation. Congress, on the other hand, has 535 members, and effectively a supermajority vote threshold in its high chamber.<sup>38</sup> And the president may veto any legislation passed by both chambers. It struggled to reach agreement on its own net-neutrality legislation, which remains stymied.

The effects of the sheer immensity of the federal government today, which has an annual budget of \$3.9 trillion, should not be understated.

In 1900, before the rise of the administrative state, the federal government had eight departments, with 230,000 employees, 135,000 of whom worked for the Post Office Department. Congressional policymaking and oversight concentrated on appropriations, private relief bills, and infrastructure and lands-related issues.

Now there are 4.1 million civilian and active military employees toiling in approximately 120 executive agencies and another 60 “independent” agencies, each of which may propose regulations and issue policy guidance and other “regulatory dark matter” that has the effect of law.<sup>39</sup>

James Madison warned of the perils of big government. The “extension of the federal powers to every subject falling within the idea of the ‘general welfare’” would have ill effects, and, inevitably, “[o]ne consequence must be, to enlarge the sphere of discretion allotted to the magistrate.” Basic mathematics and finite congressional capacity were the reasons: “In proportion as the objects of legislative care might be multiplied...the time allotted for each would be diminished.”<sup>40</sup> The nature of writing legislation that could attend to the differing circumstances of the nation’s varying and far-flung communities also had a consequence:

The difficulty of providing uniform and particular regulations for all [would] be increased. From these sources would necessarily ensue a greater latitude to the agency of that department which is always in existence, and which could best mould regulations of a general nature so as to suit them to the diversity of particular situations.<sup>41</sup>

The titanic size of government makes oversight of the executive branch and the regulations it issues immensely challenging, even if legislators have the time, resources, and desire to do so.

For the most part, they do not, however, which brings us to the matter of incentives. Most members of Congress spend little time in Washington, D.C. They jet in on Tuesday and are gone by Friday. Some quality oversight does get done, but much of legislators’ time in town is spent introducing symbolic legislation, voting on bills pushed by chamber leaders, and participating in hearings designed to attract media attention. One survey found members of the House spend only a third of their time in Washington on policymaking.<sup>42</sup> More and more

legislators' congressional staff work in state and district offices — not on Capitol Hill — and are devoted to constituent service and public-relations activities — not policymaking and oversight.<sup>43</sup>

Not too many decades ago, close observers of Capitol Hill differentiated between congressmen who were workhorses and those who were show horses. Purebred workhorses are rare today; most legislators today are hybrids, who are unlikely to spend their valuable time reading the *Federal Register* and asking agencies difficult questions about regulations.<sup>44</sup>

We have, to quote Senator Mike Lee, an “absentee Congress.” This is not because today’s legislators are bad people; rather, the incentives encourage them to neglect their constitutional and institutional duties.<sup>45</sup> Congressmen individually can benefit by delegating away policy responsibility. If an agency does the job well, the legislator can claim credit; if it performs badly, the elected official can earn praise and votes by publicly denouncing the bureaucrats, threatening to clean house, and acting to help any aggrieved constituents.<sup>46</sup>

Additionally, party control of the two chambers has vacillated during the past three decades at a rate unseen since the 19<sup>th</sup> century,<sup>47</sup> and congressmen fear primary challenges, like the one that toppled House Majority Leader Eric Cantor in 2014. The 24-hour-a-day news cycle and the Internet together pose a relentless public-relations challenge for legislators. In short, if an elected official does not devote considerable time to defining himself in the media and Internet, someone else will — in far less glowing terms. This is why congressmen return to their home districts and states so often. They need to raise money, press the flesh, and do all they can to reduce the odds that they or their party will lose the next election. This new context also explains why legislators devote staff and effort to managing their Twitter, YouTube, and other social-media channels, taking time and attention away from governing.

Unintentionally and increasingly, then, America has morphed into the expert-led, executive state imagined by John Stuart Mill in his 1861 treatise *Considerations on Representative Government*. Civil servants devise policy, and the legislature serves mostly as a pressure valve for *vox populi*.

Instead of the function of governing, for which it is radically unfit, the proper office of a representative assembly is to watch

and control the government; to throw the light of publicity on its acts; to compel a full exposition and justification of all of them which any one considers questionable; to [censure] them if found condemnable, and, if the men who compose the government abuse their trust, or fulfill it in a manner which conflicts with the deliberate sense of the nation, to expel them from office, and either expressly or virtually appoint their successors. This is surely ample power, and security enough for the liberty of the nation.

This is not the way it is supposed to be, nor does it need to be so. Congress can reassert itself as a force in regulatory policy, given the right incentives and institutional reforms, and it can bolster its own power.

#### REASSERTING CONGRESS IN REGULATORY POLICY

To be clear, Congress is mostly responsible for the current state of affairs. As the Supreme Court once observed, “an agency literally has no power to act...unless and until Congress confers power upon it.”<sup>48</sup> Thus, Congress enacts the statutes that create agencies and assign to them broad realms of regulatory authority. Congress typically funds these agencies with dollars from the Treasury or authorizes agencies to fund themselves via fees and taxes.

What Congress has done, however, Congress can undo. The Constitution still vests Congress with the legislative power. Reining in the regulatory state can be achieved through the reassertion of the First Branch’s powers to authorize, appropriate, and oversee the executive branch. But this will not happen unless the majority leader, the speaker of the house, and other top legislators make legislative ascendancy a priority. And individual legislators must see the advantage in performing the duties the Constitution assigns. As Madison explained:

[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.<sup>49</sup>

Therefore, the first thing that needs to happen in order to reassert Congress in regulatory policy, is a reawakening of congressional interest in regulation. Congressional leaders should encourage their members to see the advantages of paying attention to regulations. The public's regard for the federal government is very low — fewer than 40% of Americans are confident it can handle domestic problems.<sup>50</sup> John Q. Public also trusts state government more. When Gallup asked, “Which theory of government do you favor: concentration of power in the state government or concentration of power in the federal government?” some 55% of respondents chose the former, and 37% picked the latter. More than three-quarters of Republicans favored more state power.<sup>51</sup> Clearly, there is room to improve the public's view of the competence of the federal government.

Current congressional leaders have demonstrated some understanding of the political appeal of engaging regulatory policy. They held votes to pass through both chambers five Congressional Review Act (CRA) joint disapproval resolutions to block regulations.<sup>52</sup> President Barack Obama vetoed them all, but the effort highlighted the glaring policy differences between the regulators and the critical members of Congress.<sup>53</sup>

But leadership should do more to help legislators see that their interest in pleasing constituents can be served by engaging regulatory policy. This is true whether a member is a Democrat or a Republican, a liberal or a conservative. Active oversight of regulatory policy is a means for a congressman to represent the interests of his constituents. A new regulation on hunting and fishing in Alaska, for example, will be of interest to Alaska's congressional delegation.<sup>54</sup> Similarly, a proposed rule that affects civil fines against mining companies will be of interest to legislators from states where mines operate and mineworkers live.<sup>55</sup> Any member with a policy interest of a national scope — say, housing policy — might want to understand why a new fee is charged on a Section 108 loan guarantee.<sup>56</sup>

Leadership in both chambers could foment interest among members by making regulation a regular subject of communication. Leadership staff might be tasked to spend a modest amount of time each week reviewing the *Federal Register* for new and finalized rules and sending out “regulation alerts” to all members and committees, regardless of party. This process would not require much effort. The *Federal Register*'s website posts final and proposed rules daily.<sup>57</sup> Its interface tags

regulations by issuing agencies and policy areas, and allows anyone easily to extract and share the most recent proposed and final regulations.

Crowd-sourcing of regulatory oversight by individual members, however, is not enough to tip the balance between the branches. Congress needs to adopt policies that directly curb the executive branch's ability to regulate wantonly. Three policies hold great promise for establishing institutional controls on regulation.

First, Congress should adopt legislation to lessen the regulatory aggregation that has expanded the *Code of Federal Regulations* to more than 175,000 pages, a 30-mile long paper path. Including rulemaking sunsets in new legislation would be one way to slow the growth. Sunset requirements would force agencies to re-promulgate and re-justify rules after a period of time (say 10 years).

Agencies are supposed to conduct regulatory look-backs; to date, these reviews have been woefully ineffective at culling the current corpus of regulation. Stronger measures are needed. Congress should create a bipartisan commission akin to the Base Realignment and Closure (BRAC) commission. It would identify unworthy regulations based upon transparent criteria, and submit the list of regulations to Congress in one piece of legislation for a single up-or-down vote. The House of Representatives approved legislation to do just this in early 2016 by passing the Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2016, or the SCRUB Act.<sup>58</sup> The legislation would establish a nine-member commission of individuals appointed by the president and approved by the Senate. The commission would have five-years to identify regulations that have been in effect 15 years or more and which are ineffective or duplicative or excessively costly. The president, congressmen, federal employees, and the public all would be permitted to submit regulations to the commission for review. The commission would vote to decide which regulations would be repealed, then compile the regulations for repeal into a final report. Congress would be obliged to consider the report under expedited procedures, similar to those used for the Congressional Review Act and BRAC. If the joint resolution passes and is signed by the president, agencies would have 60 days to abolish the rules.

Second, Congress should establish a policy that would require congressional approval of the most significant regulations before they take effect. Such a policy should be limited to regulations that have substantial,



tangible costs to the public or the private sector. Congress has considered regulatory-approval legislation intermittently over the past 20 years. The Regulations from the Executive In Need of Scrutiny Act (REINS) was first introduced in 2009, and versions of the bill were passed by the House in 2011, 2013, and 2015. REINS bills have varied in their particulars, but their essence has been to flip the regulatory toggle to disallow proposed rules. Before an agency could implement a major rule, defined as one whose effects on the economy would be greater than \$100 million, Congress must approve the rule. Both chambers would have expedited procedures to pass a congressional resolution of approval within a set deadline, defined as 70 days in the most recent iteration of the bill. If Congress fails to act, the regulation does not take effect. If the rule deals with the enforcement of criminal laws, national security or an international trade agreement, the president would be allowed to authorize implementation of the rule for 90 days. Absent subsequent congressional approval, the regulation would cease to have effect.

Contrary to the contention of some critics, legislative pre-review of regulations is not a radical notion. Many states require some level of legislative review of regulations before they may take effect. Connecticut, for example, has a Legislative Regulation Review Committee that approves regulations before they take effect. A REINS-type congressional review of proposed major rules, additionally, would not constitute a unicameral legislative veto of the sort struck down in *Immigration and Naturalization Service v. Chadha*.<sup>59</sup> More profoundly, legislative pre-review does not offend the separation of powers. Law professor Jonathan Adler writes:

The Constitution's separation of powers among the three coordinate branches was designed as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." The Court has consistently sought to block Congress from interfering "with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II." But...Congress is not prevented from limiting or constraining the exercise of power it delegates to the executive branch....Unconstitutional aggrandizement occurs when the legislature seeks to seize executive powers for itself, not when it places limits on rulemaking authority created by prior legislative

grants. Federal agencies have no authority to promulgate regulations beyond that which has been given by Congress — and what Congress has given, it may take back. That Congress may restrain the exercise of such authority, whether by adopting rules for the exercise of regulatory authority (as under the Administrative Procedure Act or the Congressional Review Act) or limiting the scope of such authority, is perfectly acceptable, so long as other constitutional requirements (such as bicameralism and presentment) are satisfied. As the REINS Act does in fact satisfy such requirements, there is no constitutional problem. The REINS Act does not curtail inherent executive power so much as it places limits on the legislative-like power delegated by Congress.<sup>60</sup>

Enacting such a policy would shift some legislative authority back to Congress. It would allow the executive branch to continue to propose rules, but it would force the legislature to shoulder the responsibility for them. Regulations would be enacted as laws. REINS-type legislation would have the additional benefit of forcing regulatory oversight back onto Congress's legislative calendar. And agencies, as economist James Gattuso observed, would have to think more closely about the major rules they propose to be sure “they are exercising their delegated powers in a way consistent with the intent of Congress.”<sup>61</sup> Some democratic responsibility for law-making would be restored. Article I, notably, does declare Congress has the power “to make rules for the government and regulation of the land and naval forces.”<sup>62</sup>

Third, absent executive action, Congress should direct the executive branch to adopt a regulatory budget. Regulatory budgeting has been discussed on Capitol Hill for decades,<sup>63</sup> and is used in Canada both at the national and provincial level, and in some European nations.<sup>64</sup> During the 114<sup>th</sup> Congress, bills were introduced in both chambers to establish a federal regulatory budget.<sup>65</sup>

Regulatory budgeting employs traditional budget concepts to manage regulatory costs. It requires government agencies to price their regulatory expenditures. As such, it treats regulatory costs the same as fiscal spending or tax expenditures and therefore subject to congressional expansion or reduction.

Under a regulatory budget, the executive branch would not be free to regulate as much as it likes. Instead, Congress would establish a total

annual regulatory expenditure amount, and then apportion that sum across the government to various departments and agencies, who must regulate within their respective regulatory budgets. Regulatory budgeting creates scarcity and pricing where they previously did not exist, and thus forces tradeoffs and efficiency. When agencies fear a proposed regulation may bust its regulatory expenditure cap, it must find a way to make the rule less costly or trim another rule's burden. Regulatory budgeting brings an additional benefit—it requires the adoption of a government-wide methodology for pricing the costs and benefits of regulations. No longer could agencies devise their own methodologies that tend to produce results they favor. The methodology could be set by law, or its basic components could be enumerated in statute and then finalized by an agency, perhaps the Government Accountability Office or the Congressional Budget Office, or a new Congressional Regulatory Office (discussed below).<sup>66</sup>

#### STRENGTHENING OVERSIGHT

For Congress to have a fighting chance against the regulatory state, it must reclaim its spending authority and invest in itself.

The power of the purse is a great oversight tool. As James Madison wrote in *Federalist 58*, “[t]his power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people.” Through authorization statutes, appropriations laws and reports, and oversight, Congress can direct how agencies spend funds. Or, it can simply prohibit agencies from spending funds on particular activities. The Department of the Interior FY2017 funding bill, for example, forbids the expenditure of funds to implement the controversial Waters of the U.S. rule.<sup>67</sup> Appropriations limitations on agencies’ authority to spend on administrative overhead expenses are an age-old tool for curbing agency workforce size.

Unfortunately, bit by bit, Congress has ceded much control of government funding. It has delegated to agencies the authority to collect revenues through the imposition of fees and taxes: the Universal Service Administrative Company taxes telephony providers and spends the income to widen telephony and Internet access; the Consumer Financial Protection Bureau lives off funds transferred from the Federal Reserve to regulate the financial-service industry. Some federal agencies impose fines, which they sometimes have paid to private organizations.

Possibly worse, Congress has lost control of the budget *process*. Since the enactment of the Congressional Budget and Impoundment Control Act in 1974, Congress has adopted a budget resolution on time only six times. It misses the annual April 15 deadline by an average of nearly 40 days. Congress virtually never passes all 12 appropriations bills before the end of the fiscal year. Instead, chamber leaders rush through omnibus spending bills and continuing resolutions whose contents are unknown to many if not most legislators.<sup>68</sup>

Empowering agencies to fund themselves and funding the government via omnibus legislation diminishes Congress's opportunities to conduct oversight. Both these recent practices need to be rolled back. Agencies, with rare exceptions,<sup>69</sup> should come to Congress for annual appropriations. And Congress should revise the budget process to enable it to pass spending bills as separate pieces of legislation. Yuval Levin writes:

Congress should...break up the appropriations process from its 12 large pieces (which have lately been consolidated into one) into many smaller appropriations measures taken up year-round. This would give the legislature more real say over funding choices, rather than just a kind of reverse veto power. Congress should also prohibit any fee-funding of federal agencies, let alone the preposterous practice of having such agencies funded by the Federal Reserve. The consolidated structure and decision-making of the executive branch should not be countered by consolidating Congress' own work (which has often been the instinct of reformers in the past) but rather mitigated by breaking up the budget process into a form that plays better to Congress' innate strengths.<sup>70</sup>

Presently, Congress has very little incentive to appropriate, to say nothing of budget, in an orderly, timely fashion, especially given how difficult it is to do under the present baroque congressional budget process. To encourage legislators to spend more time on appropriations, the budget process should be simplified and made more expeditious.

The process should be revised to require the enactment of a multi-year budget resolution negotiated upfront by a bicameral budget committee. This resolution would cap total annual federal spending and apportion it amongst policy areas. The new budget process also would

carry the stick of mandatory automatic continuing resolutions — with a 1% across-the-board cut — in the event an appropriation expires or the budget resolution expires. Together, these policies would free up time and provide a spur to pass spending bills in a timely fashion. In order to more firmly connect the interest of the legislators to oversight, the appropriations subcommittees should be made committees, and doubled in number and assigned narrower jurisdictions. These new mini-appropriations committees would be empowered to report their spending bills directly to their chambers' floors for prompt votes without amendment.<sup>71</sup> (Presently, subcommittees hand off their recommendations to the full appropriations committees, where their work may be revised or sit for months.)

Under this revised budget process, there would be time and an incentive for oversight. No longer would two chambers try to enact a one-year spending resolution and move 12 big spending bills between January and September each year. Congress instead would have small groups of legislators with greater ownership of the spending in their jurisdictions. Individual members who wanted to affect policy (spending, of course, is policy) would have to do so through subcommittee participation.

Congress's great strength is its connection to the diverse public and its various local wants and needs. All regulations are local, and the people's representatives are most likely to be both mindful and interested in the effects of regulation. But with the breakdown of regular order, legislators have few chances to exert the power of the purse or any other legislative oversight.

A growing executive branch and a shrinking legislative branch is a recipe for unaccountable, uncontrolled government. Certainly, reducing the size of government would make overseeing it easier, but even if Congress cut the executive branch by half it would still be too big to oversee.

This leads to the question of congressional capacity generally. Plainly, the 535 members of Congress could not keep up with the great flow of regulations, even if leadership forced members to work more days (which it should).<sup>72</sup> Congress needs more staff who can help them conduct oversight. Federal spending today is 10 times larger than it was in 1975, yet the House and Senate employ fewer staff members than they did then. Of the 16,000 congressional employees, half work outside Washington and devote themselves mostly to constituents' personal

issues (for example, mail not being delivered). A significant percentage of the 8,000 Capitol Hill staffers have less than three years of experience, leaving them ill-equipped to comprehend let alone do anything about the regulations being proposed each week.<sup>73</sup>

Congress currently spends \$4.5 billion, just 0.1% of annual federal spending, on the legislative branch, which includes itself, the Congressional Budget Office, the Government Accountability Office, and the Congressional Research Service. Congress must invest in itself. Providing its committees with more oversight staff would help. So too would reversing the cuts to the manpower of the legislative-branch support agencies. The CRS, which aids Congress in all aspects of law-making and oversight, has seen its headcount shrink by a fifth since the late 1970s. GAO has 40% fewer staff than it had 40 years ago. The more full-time civil servants that Congress tasks to conduct oversight, the more oversight there will be.

To contend with the administrative state, Congress should establish a Congressional Regulation Office.<sup>74</sup> This new legislative support agency could be modeled on the CBO, which has a couple hundred employees and a generally admirable track record for performing nonpartisan budget analysis. The CBO issues 80 to 90 reports per year and scores the costs of 500 pieces of legislation. A Congressional Regulatory Office that had the same output would be immensely helpful to Congress.

Like the CBO, the CRO could serve as a go-to resource for legislators or staff who need help. Additionally, the CRO could perform cost-benefit analyses of agencies' significant rules, in order to provide a disinterested check on agencies' self-interested math. The CRO's assessment of a proposed regulation, like CBO's bill scores, could be posted online and delivered to the committee of jurisdiction. Doing these things would increase the political salience of agency rulemaking, thereby fostering congressional oversight and encouraging policy entrepreneurs in the legislature to take up the subject. A CRO cost-benefit analysis should also be automatically submitted as public comment to the rule, which would oblige an agency response and possibly a recalibration of the rule.

The CRO also could conduct periodic retrospective analyses informed by real data rather than forward-looking estimates. Agencies sometimes perform "look-back" assessments, but they are modest in number (certainly compared to the massive corpus of standing

regulation) and produce only nominal changes. This is unsurprising, since each agency is passing judgment on its own work. CRO reports would regularly goad Congress to examine how the rules produced by existing laws are performing, such that they could work to revise those statutes that have yielded problematic results.

The work of the CRO might be made even more potent were it wired into new oversight processes. CRO analyses could play a central role in the workings of a regulatory budget, for example, or its cost estimates could trigger review if a proposed rule qualifies under the REINS Act.

Congress could adopt new legislative procedures (which require no presidential signature) that permit any member of Congress to introduce a bill to either abolish or sunset an existing regulation if the regulation has an egregious CRO benefit-cost score. This type of bill might be considered under expedited procedures, which greatly enhances its chance of passage by both chambers.

In all, the CRO would provide Congress with a desperately needed Madisonian counterforce to the executive branch's regulators.

#### CONCLUSION

There are, as shown above, various means for reasserting Congress in regulatory policy. None of these reforms would cost the taxpayer much, and they would pay for themselves by stopping a single major rule per year.

Congress has the power to redress the immense imbalance between it and the executive branch. The Constitution grants it the power to make law, appropriate funds, and decide the rules for its own operation. Congress can reclaim the lawmaking authority that has ebbed away, and restore a great deal of democratic accountability and legitimacy to our federal regulatory system.

# Modern Management for the Administrative State

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*Oren Cass*

SENIOR FELLOW, MANHATTAN INSTITUTE

NOTWITHSTANDING THE RECENT “bossless workplace” fad,<sup>75</sup> an organization generally needs a clear hierarchy with established lines of control and accountability to function effectively. A representative, deliberative body like the U.S. Congress has no such structure—the objectives and actions of its members are subject only to approval or rebuke at the ballot box. That arrangement has many benefits in promoting democratic governance and protecting against the dangers of consolidated power. But it also has severe limitations with respect to efficiency and effectiveness.

The administrative state represents a response to those limitations, and its legal justifications rest heavily on its purported technocratic and managerial excellence. But because of the ad hoc and legally ambiguous manner in which it emerged, it is also the arm of the federal government whose hierarchy and management is least well defined. The president, as head of the executive branch, is the only constitutional officer who might plausibly assert the prerogatives of control. But the U.S. Constitution barely alludes to an administrative state and grants the president no enumerated authority over domestic affairs except to nominate department heads, request their written reports, and “take Care that the Laws be faithfully executed.”<sup>76</sup> His actions must rest on those provisions, his general possession of “the executive power” of the United States, or authority inferred from the Constitution’s other structures.

Presidential oversight has thus evolved haphazardly through an administrative common law of congressional acquiescence, judicial rulings, and executive orders. As early as 1789, James Madison argued on the floor of the House of Representatives that the president *must*



have the power to not only appoint but also remove cabinet officers, because “if any power whatsoever is in its nature executive it is the power of appointing, overseeing, and controlling those who execute the laws.”<sup>77</sup> As recently as October 2016, the D.C. Circuit struck down provisions of the 2010 Dodd-Frank Act that sought to insulate the Consumer Financial Protection Bureau from those very same powers.<sup>78</sup>

Of course, if one’s goal for the administrative state is to divorce the bureaucracy from the democratic process and clear the field for whatever regulatory action it deems appropriate, haphazard oversight might be desirable. But if the goal is an administrative state that strikes an effective *balance* between democracy and bureaucracy — that produces not just copious but also cost-effective regulation, that pursues an agenda consistent with the broader priorities of the government, and that remains legally and politically accountable to the republican structures of power established by the Constitution — then someone must be in charge. And that someone must be the president.

This view has often been associated with conservative efforts beginning with President Ronald Reagan to slow the machinery of government and reduce the extent of regulation. But “presidential control of administration, in critical respects, expanded dramatically during the [President Bill] Clinton years,” observed Elena Kagan, the then-recently departed deputy director of Clinton’s domestic policy council, “disproving the assumption some scholars have made, primarily on the basis of that earlier [Reagan-era] experience, that presidential supervision of administration inherently cuts in a deregulatory direction.”<sup>79</sup> She continued:

[A]ccountability and effectiveness [are] the principal values that all models of administration must attempt to further. I aver that in comparison with other forms of control, the new presidentialization of administration renders the bureaucratic sphere more transparent and responsive to the public, while also better promoting important kinds of regulatory competence and dynamism.<sup>80</sup>

Recent presidential administrations have made only fitful progress in this direction. Sometimes political and legal obstacles have prevented assertion of firm control. In other cases, the president has found

convenient the ambiguity of roundabout or behind-the-scenes influence. Throughout, agencies have resisted efforts at supervision.

The result is a strange bargain struck amongst the branches, in which Congress and the courts have allowed enormous authority and latitude to congeal within the administrative state on the assumption that its strength will be diluted and its exercise impaired by the unmanageability of the apparatus. That is no way to run a government. Nor is the equilibrium, subject to ever-greater abuse by the president, stable in the long run (as some people comfortable with the Obama-era “pen and phone” model<sup>81</sup> of the presidency discovered when faced with the prospect of a Trump administration).

If there is to be an administrative state, it should be managed by a White House that establishes processes and standards, controls budgets and timelines, directs activities, and must provide final authorization for formal action. But the net effect should not be an aggrandizement of the presidency; rather, as discussed elsewhere in this report, reforms in the other branches are necessary to account for this more energized office and to cabin its reach. The end goal should be an executive branch with narrowed scope of authority but greater capacity to use effectively the authority granted.

#### MODERN PRESIDENTIAL ADMINISTRATION AND THE EMERGENCE OF OIRA

George Washington “imposed his will through a consistent style of broad consultation, independent judgment, and continuous oversight,” reports Professor Jerry Mashaw.<sup>82</sup> Still, most accounts of presidential administration begin in the Nixon administration, which imported specialists in cost-benefit analysis from the Army Corps of Engineers to establish the “Quality of Life Review” program.<sup>83</sup> Under QLR, agencies were required to submit to the Office of Management and Budget a schedule of planned regulatory actions “pertaining to environmental quality, consumer protection, and occupational and public health and safety” and then to provide information, including an analysis of costs and benefits, at least 30 days prior to each action.<sup>84</sup>

President Carter replaced QLR with his own Office of Regulatory and Information Policy<sup>85</sup> and engaged in several high-profile battles with his Environmental Protection Agency in particular. EPA Administrator Douglas Costle warned White House economic advisors Alfred Kahn

and Charles Schultze that their requests for additional economic analyses of pending regulations were “inappropriate . . . counterproductive, contrary to the intent of Congress and not in the public interest.”<sup>86</sup> During congressional hearings on the issue, Senator Edmund Muskie complained to the *Washington Post* that “it’s not Schultze’s business to write the laws” and that the White House was influencing regulations “off in a corner, ad hoc, without the safeguards of exposure to public opinion.”<sup>87</sup>

The White House, for its part, announced that EPA officials “should be aware that their resignations will be gladly accepted at the earliest opportunity and should not be hesitant at all in offering them.”<sup>88</sup> In a news conference several months after the hearings, President Carter lamented: “Before I became President I realized and was warned that dealing with the Federal bureaucracy would be one of the worst problems I would have to face. It’s been even worse than I had anticipated.”<sup>89</sup>

President Reagan, swept into office on an explicitly deregulatory agenda, consolidated and extended these nascent efforts and effected a genuine “sea change”<sup>90</sup> in White House oversight. Executive Order 12,291<sup>91</sup> introduced the framework that persists to this day, in which agencies must submit significant regulatory actions for review by the Office of Information and Regulatory Affairs at OMB (which in turn resides within the Executive Office of the President). This order was modified and, in significant respects, expanded by President Clinton’s Executive Order 12,866.<sup>92</sup> Presidents George W. Bush and Obama have made further revisions, but 12,866 remains the law of the administrative land.<sup>93</sup>

Order 12,866 begins by outlining a series of broad principles to which an agency should adhere, such as clearly defining problems it seeks to address, reviewing alternative approaches, assessing costs and benefits and acting only where the latter justifies the former, and taking consideration of “incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.” The order assigns to OMB (and OIRA therein) the role of reviewing regulations for consistency with law and with “the President’s priorities,” providing guidance on methodologies and procedures that affect multiple agencies, and assisting in regulatory planning. It designates the vice president as the president’s principal advisor, responsible for coordinating the development of recommendations on regulatory policy, planning, and review.

The heart of the order is its processes for setting regulatory agendas and reviewing proposed regulations. The agenda process begins with an annual meeting of agency heads convened by the vice president to “seek a common understanding of priorities and to coordinate regulatory priorities” for the coming year. Each agency must provide to OIRA an agenda of all regulations it intends to pursue, and, for each of the “most significant regulatory actions,” it must also provide a regulatory plan that includes a statement of objectives and legal basis, preliminary estimates of costs and benefits, and an expected timeline for action. OIRA circulates these agendas and plans amongst agencies for purposes of coordination and publishes them each October in a “Unified Regulatory Agenda.”

The review process begins with the agency’s agenda submission, which OIRA may modify by moving actions into or out of the “significant” category—only those actions designated as “significant” are subject to subsequent review. Agencies must submit to OIRA draft text for significant actions along with detailed cost-benefit analyses and allow OIRA 90 days for review (with exceptions for shorter or longer reviews). OIRA may then “return” an action to the agency “for further consideration of some or all of its provisions,” specifying in writing the provisions of the order that provide the basis for such return; an agency head may in turn inform OIRA in writing if he disagrees with these bases. The president, or the vice president acting on his behalf, has final authority to resolve any conflict that OIRA and the agency cannot resolve themselves.

Debate about presidential oversight—and its evolution across administrations—has focused on two issues, one substantive and one legal. The substantive question concerns the propriety and effectiveness of cost-benefit analysis as a lens through which to evaluate regulation. (For more on this issue, see the discussion of cost-benefit analysis below.) The legal question concerns the president’s authority to influence or direct agency action and has been central to the form oversight has taken and the obstacles it faces. Many statutes, after all, delegate authority to a secretary or administrator, not to the president or his own staff. *Ex ante*, can the president direct an agency how to act? *Ex post*, can he veto agency actions he dislikes? As a last resort, can he fire disobedient subordinates?

Most formal analysis and litigation has centered on this last issue: the power of removal. From debates in the first Congress to the impeachment of President Andrew Johnson, the president’s power to

remove executive-branch officials was sporadically contested until the Supreme Court's holding in *Myers v. United States* (1926) that Congress may not interfere with that prerogative.<sup>94</sup> Subsequent holdings have limited the power to “purely executive officers” (allowing Congress to establish independent agencies like the Federal Trade, Election, and Communications Commissions)<sup>95</sup> and then specifically to situations where its loss would “interfere impermissibly with [the president’s] constitutional obligation to ensure the faithful execution of the laws” (allowing Congress to establish an independent counsel accountable only to the Attorney General).<sup>96</sup>

Regardless, a well-established removal power has not translated to clarity over the extent to which the president may review, let alone direct, agency action. Mirroring the removal-based distinction between traditional and “independent” agencies, executive orders have presumed authority to review actions of the former but tread carefully on asserting any influence over the latter. Order 12,866 excludes independent agencies from its review processes but includes them in its agenda-setting processes.<sup>97</sup> (The constitutional question of whether the White House *can* subject independent agencies to oversight or control is beyond the scope of this report; to the extent it *can*, the recommendations below assume it *should*.)

Congress took strong issue with the review power of President Nixon’s QLR, subjecting it to “intensive hearings” and “severe criticism”; Senator Muskie threatened to slash the budget of President Carter’s review team.<sup>98</sup> When the Reagan administration issued Order 12,291, it was accompanied by an opinion from the Office of Legal Counsel laden with caveats:

This power of consultation would not, however, include authority to reject an agency’s ultimate judgment, delegated to it by law, that potential benefits outweigh costs, that priorities under the statute compel a particular course of action, or that adequate information is available to justify regulation. As to these matters, the role of the Director and the Task Force is advisory and consultative.<sup>99</sup>

The order itself acknowledged the delicacy by stipulating that OIRA would impose requirements and agencies must comply with such requirements only “to the extent permitted by law.” Order 12,866

adopted this formulation and further specified that “[n]othing in this order shall be construed as displacing the agencies’ authority or responsibilities, as authorized by law.”<sup>100</sup>

By contrast, an opinion issued the same year as Reagan’s order by the Court of Appeals for the D.C. Circuit, upholding oversight activities conducted in the Carter administration, suggested the scope of authority might extend much further:

The authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking.<sup>101</sup>

But the limits of that authority have never been tested in court nor challenged formally by Congress. One critical innovation of Clinton’s Order 12,866 is its assertion of presidential authority to mediate and resolve disputes between agencies and OIRA, which would imply that by siding with OIRA the president could force an agency to take action it opposed.<sup>102</sup> That authority was “never really used within the OMB process,” according to Kagan,<sup>103</sup> but “[a]s a theoretical matter . . . the conflict resolution provision of the Clinton executive order constituted a striking assertion of executive authority.”<sup>104</sup>

Outside the OIRA context, however, President Clinton made frequent use of directives instructing agencies on what actions to pursue. Kagan viewed this “powerful mechanism for steering the administrative state toward Clinton’s policy objectives”<sup>105</sup> as one of the primary innovations of the Clinton administration, but also acknowledged that “[t]he courts never have recognized the legal power of the President to direct even removable officials as to the exercise of their delegated authority.”<sup>106</sup> Agencies followed the directives, so no legal issues arose. The George W. Bush administration and then especially the Obama administration have proceeded in much the same manner.<sup>107</sup> It remains an open question what would happen — inside or outside the OIRA review process — if an agency refused to obey.<sup>108</sup>

#### THE OIRA QUAGMIRE

The gradual advancement of presidential control, through a no-man’s-land of legal ambiguity, may have been the only plausible course.

“Congressional preferences at the time tended to be highly skeptical of the regulatory-review regime,” noted Professor Michael Livermore:

Indeed, funding for OIRA’s entire regulatory-review operation was cut temporarily by Congress, because of fears of presidential overreach. Only after the OIRA Administrator was made subject to Senate confirmation was funding restored. . . . President Reagan also faced agency resistance to the imposition of regulatory review. Political scientists describe a “cycle of accommodation” between new presidential administrations and the existing federal bureaucracy in which “initial suspicion and hostility” on the part of incoming political appointees is gradually replaced by a relationship of “mutual respect and trust.” This road is not always smooth.<sup>109</sup>

But rather than an efficient and accountable method of administration, organization design guided by legal gamesmanship has produced a quagmire. To the extent a president is satisfied with agency behavior, OIRA provides a rubber stamp and a gloss of objective technocratic assessment to the promotion of a politically determined agenda. If he is dissatisfied, it offers him only convoluted and notoriously bureaucratic responses, which have the counterproductive effect of encouraging further agency chicanery.

Because OIRA purportedly limits itself to “review,” “oversight,” “supervision,” and “consultation,” it relies on procedural responses to ill-advised regulatory proposals. It stalls their progress, requests additional information, or sends them back for reconsideration. It has relied on absurd sources of leverage like the legal requirement that OMB must approve agency information-gathering efforts to “get at a lot of rules.”<sup>110</sup> Conversely, the Department of Justice has advised White House staff to avoid public involvement in agency action altogether, lest it negatively affect subsequent litigation.<sup>111</sup>

Fear of over-centralization — or at least its perception — has also led to severe understaffing at OIRA, which had approximately 80 professional staff at the time President Reagan issued Order 12,291 but only about 40 as of 2012.<sup>112</sup> Its annual budget during that period fell from \$9.3 million to \$6.8 million (in constant 2005 dollars) — amounting now to roughly one in every \$7,000 spent by federal agencies on

regulatory activity.<sup>113</sup> EPA alone has more than twice as many environmental economists as OIRA has total personnel.<sup>114</sup>

Unsurprisingly, agencies have found it worth their while to resist OIRA's influence. So-called "OIRA avoidance"<sup>115</sup> can take many forms, including: underestimating the cost of rules or breaking rules into multiple parts to make them appear less significant; acting via guidance documents instead of formal rulemakings; producing intentionally opaque analysis; or timing submissions to ensure inadequate opportunity for review.<sup>116</sup> Suffice to say, none of these behaviors furthers the causes of good government, efficient administration, or high-quality regulation.

The attempts to increase formality and quantification in regulatory processes have also redounded to the benefit of agencies, as asymmetries in information and expertise developed in their favor. Cost-benefit analysis, for instance, is supposed to equip OIRA with a tool to assess the wisdom of proposed regulation and check agency excesses. But it is the agencies, not OIRA, that have built the staff and developed the methodology used in their analysis.<sup>117</sup> In addition to its superior in-house capacity, EPA also utilizes external consultants to support the vast majority of its largest analyses<sup>118</sup> and relies heavily on hundreds of third-party research papers of which it is often the primary sponsor.<sup>119</sup> Those consultants will tend to buttress the conclusions EPA prefers. The leading topic of economics research funded by EPA is how to assign monetary values to the environmental benefits it claims to achieve.<sup>120</sup>

Former Obama EPA official Lisa Heinzerling has criticized the claim that agencies "avoid" OIRA, but not because she believes they act at all times in good faith. Rather, her experience with the Obama-era OIRA was that:

The distribution of decision-making authority is ad hoc and chaotic rather than predictable and ordered; the rules reviewed are mostly not economically significant but rather, in many cases, are merely of special interest to OIRA staffers; rules fail OIRA review for a variety of reasons, some extra-legal and some simply mysterious; there are no longer any meaningful deadlines for OIRA review; and OIRA does not follow—or allow agencies to follow—most of the transparency requirements of the relevant executive order.<sup>121</sup>

Resistance is futile not because OIRA functions too well to fool, but because it is too unpredictable to strategize against. OIRA, in Heinzerling's



view, ignores the dictates of relevant executive orders and follows a “common law” that “manages to muddy the seemingly simple question: who runs EPA? Long gone, it appears, is the carefully articulated power structure of EO 12,866, with its process for elevating issues and for deciding them once elevated. In its place, a free-for-all of regulatory power has emerged, with no one clearly in charge.”<sup>122</sup> Such behavior is a foreseeable result of living too long in administrative law’s Wild West.

The contortions, counter-contortions, and general lawlessness all derive from a single source: ambiguity about whether the president has the legal authority to direct agency action. Presidents have been hesitant to claim the authority and agencies have been hesitant to challenge it, both for fear of ensuing political crises and of losing power if the question were ultimately decided against them. Yet the debate is almost entirely academic.

What would it mean to have a constitutionally cognizable power of “direction”? The president could issue a directive and, if disobeyed, could respond by removing the delinquent official. Alternatively, he might seek to deprive that official and his department of subsequent resources through the OMB’s budget process.<sup>123</sup> But if those are the only remedies (what other could exist?), then they are the only powers that matter. And they are ones that the president already possesses.<sup>124</sup>

This is precisely the model operating in formally hierarchical corporate structures, which presidential administrations incorrectly assume they cannot emulate without an explicit power of direction. No boss holds a legal power of “direction” over a subordinate: the recourse for disobedience is not a judicial order to compel action; it is a pay cut or demotion or firing. If the CEO is dissatisfied with product design, he cannot “direct” better design; he can put someone else in charge. In the administrative-law context, scholars will often emphasize the political cost associated with removal. But private-sector firings come with very real political costs—with other employees, customers, vendors, and partners—as well as very real financial and operational costs. *How do I get these people to do what I want them to do* is at the top of every manager’s mind every day. That does not prevent management systems from operating against the background presumption of directive authority that accompanies the concrete power of removal.

Administration of the executive branch should begin from the same premise. The president and his staff should be firmly in control and

have the resources required to exercise that control. Conflicts will surely arise, necessitating compromises and removals. But a baseline assertion of directive authority is critical not only to addressing the maddening inefficiencies of the present system, but also to restoring accountability to the administrative state.

EFFECTIVE MANAGEMENT OF THE ADMINISTRATIVE STATE

A president committed to reform should aim both to achieve substantive improvements in management of the administrative state and to entrench those reforms against successors who might reverse course. Actions by other branches could meaningfully reinforce such commitment mechanisms—for instance, Congress could pass legislation requiring presidential approval of new regulations (for more on congressional actions, see “Reasserting Congress in Regulatory Policy,” p. 19) and courts could modify their doctrines of deference and scrutiny to afford more leeway to regulation where the president has played a central role<sup>125</sup> (for more on judicial actions, see “Reforming Administrative Law to Reflect Administrative Reality,” p. 51). But for the proposals described here, no such support is necessary. The reforms we propose fall into three categories: organization structure and decision-making authority, centralized planning processes, and information and methodologies.

The critical first step in improving presidential administration, necessary to subsequent reforms, is a clear assertion of presidential control. The president should formally establish that authority in his executive order governing review of regulatory action and, in particular, should require that all agency actions with force of law to be published in the Federal Register receive his signature first. This step has the substantive effect of eliminating the ambiguity surrounding the executive-branch hierarchy. It also serves as a commitment mechanism because a future president would be unlikely to take the formal legal step of disavowing responsibility for approving the actions of his own administration.

Signing every new regulation would undoubtedly consume significant time (though likely more so for White House staff required to review and summarize each item than for the president himself), but this is hardly a disadvantage of the process. Insofar as it is the legal obligation of every individual and organization in the nation to comply with not only each new edict but also the entire mass of pre-existing ones, it hardly seems unfair to require the politically accountable

supervisor of the regulatory apparatus at least to study each incremental addition as it emerges. A claim that “we cannot keep up with the rate of new regulation our agencies are issuing!” induces little sympathy. Increased awareness within the White House policymaking staff of the sheer volume and complexity of regulatory activity should also have a salutary effect on their own calculations regarding the costs and benefits of new initiatives.

Any conflicts that might arise between a congressional or judicial command to regulate by a certain date and a president’s refusal to approve such regulation would be similar in character to conflicts that might arise today between those other branches and officials within an agency. Where it is administration policy to reject the command, elevating the conflict to one between Congress or court and the president is desirable, both because the fight is a “fairer” one and because it will focus attention on the most politically accountable actors. An agency official unwilling to stand by the president in such a conflict would of course have the option to resign, a consideration which in turn might influence the president’s willingness to trigger an inter-branch confrontation.

OIRA should be expanded dramatically, as befits its actual role as the headquarters of the administrative state.\* Its resources should be of sufficient *quantity* to keep abreast of actions occurring across all federal agencies and conduct the management functions described below and of sufficient *quality* to hold its own against specialists within those agencies. While this would be expensive relative to OIRA’s current budgetary footprint, its cost would remain minuscule relative to the overall cost of federal regulation and relative to the benefit that even occasional and marginal improvements in that regulation would bring.

Importantly, OIRA should be funded *by the agencies* and in proportion to the volume of regulation they produce. For instance, if agencies were required to allocate to OIRA operating funds equal to 3% of the

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\* Congress would ideally leave OIRA to play its originally intended role as a coordinator of information flows, while establishing a separate office within the Executive Office of the President — perhaps to play the role of both the current Domestic Policy Council and the current OIRA. But the ideal organization of EOP, and congressional versus presidential responsibility for establishing it, is well beyond the scope of this report.

cost of the regulations they publish, OIRA's budget would increase approximately 30 fold,<sup>126</sup> while agencies would see their budgets for regulatory activity reduced in aggregate by half of 1%.<sup>127</sup> This tradeoff should significantly increase the overall quality and net benefits of federal regulation, even with marginally fewer resources left to the disposal of each agency.

A funding structure tied directly to the cost of proposed regulations would also create a strong incentive for OIRA to focus intently on regulatory costs. Agency personnel understandably prefer to emphasize the benefits of proposed regulations and have invested considerable resources in equipping themselves to make those benefits appear as large as possible. An effective regulatory process requires the counterbalance of another key actor giving comparable attention to the cost side of the equation.

The president has significant latitude to shift necessary resources from the agencies into OIRA through his own budget proposals and through the flexibility inherent in congressional appropriations. Even in the face of direct obstruction by Congress, a White House could approximate the desired allocation by commandeering and directing resources within the agencies themselves or seconding those resources into OIRA. Unlike in situations when a president improperly substitutes his own legislative preferences for those of the Congress, the executive is at least a co-equal branch when the issue is what organizational structure will best ensure that the laws are faithfully executed.

Ideally, though, efforts to significantly strengthen OIRA would be welcomed by Congress in the context of broader reforms to the administrative state that enhance the latter's budgeting and regulatory-oversight powers. The goal, as noted above, should not be a net aggrandizement of the president's power. Rather, Congress should ultimately have greater control over the parameters within which the president's administration operates, while the president should have greater control over his administration's operation within those parameters.

Next, reformers should institute centralized planning processes, focusing first on a regulatory budget. The concept of holding the federal government to a "regulatory budget," limiting the cost of regulations just as the fiscal budget limits expenditures from the Treasury, dates at least to the Carter administration and was highlighted by President Carter in his 1980 Economic Report of the President.<sup>128</sup> Jeff

Rosen provides a comprehensive assessment of current options for such a process in the spring 2016 issue of *National Affairs*.<sup>129</sup> But while most proposals assume that Congress would establish the process and legislate the budgets, Congress already struggles to perform its fundamental fiscal-budgeting duty. Further, a president committed to pursuing regulation in excess of a congressionally-set “budget” would find no shortage of mechanisms for circumventing the attempt at control.

The better promise for a regulatory budget lies in its use as a tool of presidential administration, in a context where the president has asserted the authority necessary to hold agencies to their regulatory appropriation. In a centrally governed administrative state, a regulatory budget would be a critical tool for communicating the policy priorities and expectations of the president to the agencies, setting *ex ante* limits on their agendas and forcing them to conduct their own exercises in prioritization before moving forward with new proposals. A regulatory budget would also give an agency a strong, ongoing incentive to conduct retroactive reviews of existing regulations that might identify opportunities to reduce cost, thereby increasing scope for new action. By contrast, such reviews, when they are required under the current regulatory-oversight regime, represent for an agency a thankless chore of acknowledging past shortcomings. (Unsurprisingly, such reviews have tended to achieve little.<sup>130</sup>) A properly staffed OIRA would have the resources both to conduct the budgeting process and to monitor ongoing compliance.

Once established by a president committed to effective management of and constraints on the administrative state, a regulatory-budgeting process would be difficult to unwind. This is because the process has value not just as a tool of administration but also as one of transparency and accountability. A regulatory budget would assign concrete values to the costs each agency imposes on the nation and the trend in those costs over time. A positive budget for a given agency in a given year would indicate an affirmative decision to increase regulation in that area; a default value of zero would indicate an intention to maintain the status quo and a requirement that the agency find regulations to remove for every new one it might seek to impose; a negative budget would indicate an intention to reduce regulatory burdens. One could envision a proposed regulatory budget becoming a presidential platform staple just as tax and spending plans are today. It is much harder to envision, against this backdrop, a president announcing his intention

to simply stop keeping track or setting goals. While Congress is ill-suited to act first in this area, it might eventually codify in legislation an already-proven process, further entrenching the practice and asserting its own role in directing the rate of rulemaking.

Regulatory reformers should also institute a tiered review system. Section 4 of Order 12,866 specifies the “planning mechanism” overseen by OIRA, including an annual planning meeting to coordinate regulatory efforts across agencies and the creation by each agency of a “regulatory plan,” highlighting the significant regulatory actions it expects to take that year.<sup>131</sup> Only those actions deemed “significant” are then subject to OIRA review.<sup>132</sup> Whether one credits the concerns that agencies actively seek avoid OIRA review or Heinzerling’s experience that OIRA defines its jurisdiction arbitrarily, the result is one set of planned regulations “in” the review process and another set “out” of it. That decision should not be binary, nor necessarily tied to a faux-objective standard of significance.

For instance, the most important or politically sensitive actions — regardless of expected cost — might fall into an “intensive” category that requires regular engagement from both OIRA and the White House. Other actions might require only progress reports on a pre-established timeline. Some could be deemed “pre-approved” and require no further involvement. Where appropriate, actions should have not only milestones in the development process but also targeted results that are evaluated after enactment. OIRA, not the agency, should dictate the mechanisms for managing the rulemaking process and, upon review of an agency’s agenda, choose which mechanism is most appropriate to a given action.

For regulatory reforms to be effective, they must also include improvements to the information and methodologies used by the agencies, starting with cost-benefit-analysis standards. OMB maintains a document called “Circular A-4,” which “is designed to assist analysts in the regulatory agencies by defining good regulatory analysis ... and standardizing the way benefits and costs of Federal regulatory actions are measured and reported.”<sup>133</sup> But while the document provides detailed (and generally very good) guidance on best practices for conducting cost-benefit analysis, the only guideline it offers for acceptable inputs to an analysis is a recommended range of discount rates.

Yet many cost-benefit analyses require a standard set of inputs and should be guided by a common set of assumptions. Perhaps best known

is the concept of the “value of a statistical life,” used to calculate a monetary “benefit” for a life “saved.”<sup>134</sup> Estimates for this value can range by an order of magnitude, and, despite its self-interest in choosing the highest possible value, the EPA has become the *de facto* standard setter for the U.S. government (it recently concluded that its clean-air regulations alone have delivered more than \$1 trillion in annual benefits).<sup>135</sup> Such methodological decisions have much greater influence on the trajectory of the administrative state than any given regulation could, yet it is the occasional tree rather than the forest that occupies OIRA’s time today.<sup>136</sup>

An important counter-example is the Social Cost of Carbon (SCC), an estimate developed by an interagency working group within the Obama administration for the long-term costs associated with climate change and the marginal cost imposed by emitting a ton of carbon-dioxide.<sup>137</sup> Both the conceptual and technical merits of that particular exercise deserve a great deal of skepticism,<sup>138</sup> but the establishment of a standardized value is admirable. As with many of the proposals here, it serves dual purposes of improving management within the administration and improving accountability and transparency externally. The decision of a future administration to significantly increase or decrease the SCC — whether for political or scientific reasons — would significantly impact regulatory analyses and would also send a highly salient public signal of a shift in the government’s climate policy.

Another important benefit of centralized, standardized assumptions would be the opportunity to ensure emphasis on regulatory *costs*. While agencies have invested significant resources in assigning large values to the benefits of their proposed regulations, they have shown no comparable interest in capturing costs. In some cases, analysis of a rule will include the following: second- and third-order benefits that are highly attenuated and speculative, like lower air pollution leading to fewer cases of childhood asthma leading to fewer missed workdays for parents;<sup>139</sup> “co-benefits” that comes not from addressing the legally cognizable target of regulation but rather from a side-effect the agency lacks authority to pursue directly;<sup>140</sup> and/or “private benefits” that accrue to private actors forced to make choices a regulator believes to be for their own good, like purchasing more costly but fuel-efficient vehicles.<sup>141</sup> Benefits like these accounted for the overwhelming majority of total benefits claimed by agencies for their regulations during President Obama’s first term.<sup>142</sup>

Yet often the only costs even considered are the immediate compliance

costs of regulated firms, while no consideration is given to the negative economic effects rippling outward.<sup>143</sup> When broader economic impacts are considered, they can be minimized through obscure technical details—for instance, the Department of Energy recently concluded that new requirements raising the cost of commercial refrigeration equipment would lead to *no* reduction in demand for that equipment.<sup>144</sup>

Thus, effective guidance from OIRA to agencies could standardize analysis, limit speculative and attenuated claims of benefit, and ensure cost received equal attention. Alongside the SCC, it could provide a default price elasticity of demand and presumed multipliers that translate direct compliance costs into reduced capital investment, employment, and productivity.<sup>145</sup> Alongside the value of a statistical life, it could produce the value of a statistical job—taking into account the voluminous research linking unemployment to negative economic and health outcomes for both individuals and their families.<sup>146</sup> Agencies would be free to argue, based on the specific circumstances of a regulation, for values other than the defaults. But the final decision would be OIRA's.

OIRA's expanded resources should be used not just to employ additional personnel but also to fund third-party research and support a broader ecosystem of academics and private-sector specialists, just as agencies do today. But whereas current incentives are weighted heavily toward validating agency actions, OIRA's participation would shift that balance toward a more productive emphasis on the quality and rationality of regulation.

As noted above, research efforts to quantify the effect of regulation on capital investment, employment, and productivity could significantly improve the quality of cost-benefit analysis. Broader issues like the obstacles to entrepreneurship or the effects of uncertainty and litigation risk would also benefit from additional study. Perhaps most important, OIRA would be best positioned to study the empirical questions of how real people perceive the tradeoffs that cost-benefit analyses attempt to simulate and conduct retrospective reviews of how closely results tracked forecasts. How do people perceive improvements that have been achieved in environmental quality and how do they value them? In what situations do people want to see industrial activity expanded versus constrained, or to pay more for more safety? Did compliance ultimately cost more or less than expected and did fatalities decline or efficiency improve as much as hoped? In some instances, OIRA might even design and incorporated



controlled studies into the implementation of some new regulations.

The ideological orientation of OIRA, and the questions it asks, would change across administrations. That is a good thing.<sup>147</sup> While OIRA would, by its nature, tend to be more skeptical of regulation than the agencies themselves, one could envision a president even more aggressive than agency personnel in his regulatory approach. Regardless, once created, knowledge would persist. A president eager to denigrate the value of regulation would remain constrained by well-established data and methodologies to the contrary, and vice-versa.

#### AGENCIES AND THE EXECUTIVE

At first glance, this proposed role for OIRA might appear to swallow the agencies whole. But that is only because, in an era of expansive congressional delegation, rulemaking and other regulatory actions have come to seem like the core role that agencies play. In fact, most of what agencies do—from information gathering and monitoring to permitting and management of day-to-day operations to enforcement and adjudication—is the actual work of the executive branch for which they were constituted long before they were thrust into the role of substitute legislators.

In a well-functioning government, the president would continue to leave those responsibilities to his chosen secretaries and administrators. But to the extent agencies must behave as a quasi-legislature for the sake of the modern administrative state, they will best serve the public if subject to the control of the democratically elected chief executive.

# Reforming Administrative Law to Reflect Administrative Reality

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*Adam J. White*

RESEARCH FELLOW, HOOVER INSTITUTION

SOME CASES ARRIVE at the Supreme Court explosively, their significance self-evident. But others arrive quietly, merely hinting at larger forces underneath—like fissures on the surface, a subtle symptom of tectonic forces working far below. Of those two categories, the recent case of *Perez v. Mortgage Bankers Association* fits into the latter.<sup>148</sup> At first glance, *Perez* presented a rather esoteric question of agency procedure (as described further below). But as the case was briefed, argued, and eventually decided in 2015, its deeper meaning became evident. The seemingly narrow dispute before the Court was but one symptom of a much more fundamental problem of today's administrative state.

The problem, simply put, is this: The laws that nominally govern our modern administrative state bear less and less resemblance to administrative *reality*, in terms of the ways in which today's agencies make law or otherwise impose policy upon the people and companies that they regulate. Our administrative state has changed profoundly in recent decades; agencies have grown ever more aggressive in their attempts to unilaterally impose their policies on the American people, too often in lieu of Congress, or in spite of it. But Congress and the courts have not reformed our administrative law—the body of laws that regulate the regulators—to reflect and respond to those changes.

Some of these developments have been discussed elsewhere in this book. This chapter focuses on two important, interrelated issues: the procedures that Congress requires agencies to undertake before imposing their policies on the public and the degree to which courts undertake review of agencies' actions afterward.

Seventy years ago, in the Administrative Procedure Act of 1946 (or APA),

Congress set standards governing the process by which agencies impose their policies on the public, through rulemaking or through agency “adjudications.” And in the APA and other statutes, Congress provided for judicial review of the agencies’ actions. In the intervening seven decades, the Supreme Court and lower federal courts have elaborated upon those statutes, especially with respect to judicial review. Most importantly, the courts have developed doctrines for judicial “deference” to the agencies’ interpretations of regulatory statutes and of the regulations themselves.

Reform is long overdue. With each passing year the APA’s 70-year-old categories and concepts, and the courts’ habit of “deference,” seem increasingly inapt in an era of unprecedented administrative power and discretion.

But reformers must avoid the mistake of treating agency process and judicial review as two separate issues. They should be reformed together. As we will see below, and as the Supreme Court’s justices saw in *Perez*, there is and must be a direct relationship between the procedural requirements that Congress imposes upon agencies in acting to formulate new law and the standards that Congress directs the courts to apply in reviewing actions taken by the agencies. *Perez* reminds us that we must think of these two sets of rules not in isolation from one another but interwoven with one another. And, as it happens, that is precisely the mindset that informed Congress’s framing of the Administrative Procedure Act seventy years ago.

It is time to reform administrative law — not to undermine the APA’s original purposes, but rather to *vindicate* the same spirit that informed its creation in the first place. The APA’s framers sought to promote not just administrative efficiency, but also individual rights and sound governance. We should follow their example, ever mindful of the connection between the procedural rules that bind agencies *ex ante* and the judicial-review standards that check agencies *ex post*. These points are best illustrated by beginning with the example of *Perez*, before turning to the APA’s history and text, and the need for broad reform.

PEREZ: A CASE STUDY IN  
DOUBLY UNCHECKED ADMINISTRATION

The case of *Perez v. Mortgage Bankers Association* is well worth examining closely, not for its specific legal issue so much as for the manner in which the justices grasped those issues and reasoned through them in a set of fascinating judicial opinions.

At first glance, *Perez* presented a rather mundane technical dispute:

namely, the legal standards defining agencies' obligation to subject some policy proposals to "notice and comment" procedures before finalizing them. In this case, the proposed policy involved granting some workers a legal right to overtime pay. The Obama Labor Department decided to reverse the Bush Labor Department's prior position — as the department usually does when a Democratic administration succeeds a Republican one, or vice versa — and declared that mortgage loan officers were now entitled to overtime pay.

To achieve this, the department re-interpreted one of its own regulations under the Fair Labor Standards Act. The act itself requires the Labor Department to set minimum-wage and overtime standards for full-time employees, but it exempts people who are "employed in a bona fide executive, administrative, or professional capacity...or in the capacity of outside salesman." The exemption is generally known as the "administrative exemption," and the Labor Department further construed that exemption by concluding, in a regulation, that the exemption does *not* apply to any "employee whose primary duty is selling financial products." The department promulgated that regulation through notice-and-comment rulemaking — that is, by notifying the public of the proposal, accepting public comments, considering and responding to those comments, and then publishing a final decision.

The practical question, then is what qualifies as "selling financial products." Since 2004 (*i.e.*, in the Bush administration), the department's official interpretation of that regulation was that mortgage loan officers *do* have a primary duty of selling financial products. The department arrived upon that interpretation not by notice-and-comment rulemaking, but by the unilateral issuance of agency "guidance" announcing this interpretation.

The agency changed its policy 2010, reversing course and announcing that mortgage loan officers are not in the business of selling "financial products" — that is, the agency concluded that mortgage loan officers are *not* subject to the extension; that is, they are entitled to the act's wage-and-hour protections. The department did not subject the policy change to public scrutiny through a notice-and-comment process. Instead, the agency simply announced the new policy, in one fell swoop, in a public letter.

The Labor secretary's decision to avoid notice-and-comment proceedings was hardly unprecedented; his predecessors had taken a

similar approach. But the D.C. Circuit rejected this tack: it struck down the Labor Secretary's policy, concluding the policy change required not just a public letter but full notice-and-comment proceedings.

The D.C. Circuit's reasoning proved to be no less controversial than the Labor secretary's own action. Specifically, the court's decision seemed in tension with the text of the APA, which requires notice-and-comment for substantive rulemakings<sup>149</sup> but which contains exceptions for mere "interpretative rules" and other minor proceedings.<sup>150</sup> The Labor secretary argued—with significant justification—that this policy was itself a merely "interpretative rule," exempt from the APA's requirement, but the D.C. Circuit disagreed. Applying D.C. Circuit precedent, the court held that the Labor Department could not reverse its well-established prior policy without opening the matter to public scrutiny through notice-and-comment proceedings.<sup>151</sup> Labor secretary Thomas Perez appealed to the Supreme Court, arguing that the D.C. Circuit erred in imposing such procedural requirements on the department.

But in the Supreme Court, this narrow technical case took on much greater importance. The procedural question about the agency avoiding notice-and-comment was overshadowed by a broader public debate over the amount of "deference" that courts afford agencies in interpreting regulations.

Under the doctrine of "*Auer* deference," courts give utmost deference to an agency's interpretation of the agency's own regulation. Specifically, an agency's interpretation of its own regulation is "controlling," unless it is "plainly erroneous or inconsistent with the regulation."<sup>152</sup>

But in the justices' eyes, the Labor Department was trying to have it both ways. On the one hand, the department was arguing that its new policy didn't need to go through notice-and-comment proceedings, because the new policy was simply a matter of "interpretation" and did not itself have "the force of law" (which is the standard for the relevant procedural exemption). On the other hand, the department was arguing that the Supreme Court needed to defer to the department's new interpretation of the overtime pay regulation, because its interpretation is "*controlling*" upon the Court.

At oral argument, the justices were quite sympathetic to the Labor Department's basic position that the APA did not require notice-and-comment proceedings for this new policy change, because the new policy was simply an "interpretative rule" and thus categorically exempt

from the APA's procedural notice-and-comment requirement. But justices bristled at the agency's attempt to avoid the *ex ante* procedures of notice-and-comment while at the same time trying to minimize the *ex post* protections of undeferential judicial review.<sup>153</sup>

"In this case," Justice Samuel Alito asked the government's lawyer, "didn't the government say explicitly that its interpretation would be entitled to *controlling* deference?"<sup>154</sup> Yes, the government lawyer replied. But, Justice Alito continued, "[i]f it has controlling deference," doesn't it rise to the level of binding legal force triggering the notice-and-comment process at the outset? "No, it doesn't," the government's lawyer urged unconvincingly.

Justice Elena Kagan, too, shone a spotlight on what had motivated the lower court to declare that the department's "non-binding" guidance should have gone through notice-and-comment proceedings, given that the resulting interpretation would receive "controlling" deference from the courts. "[P]art of what's motivating [the D.C. Circuit] is a sense that agencies more and more are using interpretative rules and are using guidance documents to make law and that...it's essentially an end run around the notice and comment provisions...[T]he government is sort of asking for it all. It's asking for a lot of deference always, [and] it's asking for the removal of [notice-and-comment requirements]."

The Supreme Court ultimately upheld the Labor Department's action, concluding that the agency's new rule fit squarely within the APA's exception for merely "interpretative rules."<sup>155</sup> But in separate "concurring" opinions, some of the justices reiterated their worries about the government's ability to both avoid notice-and-comment proceedings at the beginning of the process and enjoy immensely deferential judicial review at the end of the process.

Justice Alito, for example, acknowledged the "understandable concern about the aggrandizement of the power of administrative agencies as a result of the combined effect of (1) the effective delegation to agencies by Congress of huge swaths of lawmaking authority, (2) the exploitation by agencies of the uncertain boundary between [rules that require notice-and-comment and those that do not], and (3) this Court's cases holding that courts must ordinarily defer to an agency's interpretation of its own ambiguous regulations."

Justices Scalia and Thomas voiced similar concerns. All of them, like Kagan and others at oral argument, sensed a fundamental connection

between the procedural requirements that protect the public in the administrative process, and the substantive judicial-review standards that protect the public once an agency has taken action. The Labor secretary's ability to avoid both the APA's *ex ante* procedural protections and the *ex post* judicial-review protections struck them as discordant, even disconcerting.

And with good reason. That basic relationship between the *ex ante* protections of agency procedural requirements and *ex post* protections of judicial review was at the heart of the Administrative Procedure Act of 1946, which created the modern administrative state. And today, as we consider how to reform the law governing today's turbo-charged version of the administrative state, our reforms must be guided by the same instincts and approach.

#### CHECKS, IN BALANCE

When we think today of the administrative state's origins, we tend to begin with Congress's creation of the Interstate Commerce Commission (1887) or maybe the Steamboat Inspection Service (1852), the forerunners of today's regulatory agencies, vested with significant power by Congress to set substantive standards for the regulation of industry and providing for their enforcement in conjunction with the courts.<sup>156</sup> These agencies were followed in turn by Progressive Era commissions such as the Federal Trade Commission (1914), and then New Deal commissions such as the Securities and Exchange Commission (1934) and National Labor Relations Board (1935).

But this initial proliferation of agencies lacked a common set of procedural rules consistent across the growing administrative state. Instead, by the mid-1940s there were what one historian describes as "dozens of agencies and commissions, each of which possessed its own messy and complicated history, institutional structure, and political context."<sup>157</sup>

Even before Franklin Roosevelt won the presidency, a debate had simmered among scholars, lawyers, and government officials over how law should constrain the administrative agencies: the powers that should be delegated to them; the procedures that they should be required to undertake in exercising those powers; and the standards by which courts should review the agencies' actions. Beginning in 1934, the American Bar Association issued a series of reports filled with blistering criticism of what it saw to be agencies' encroachments upon the province of the judiciary.<sup>158</sup> Five years later, Roosevelt himself would commission his

attorney general to appoint a committee to review the agencies' practices and recommend new rules to govern both the agencies' procedures and the courts' review of the agencies' actions.<sup>159</sup>

In reporting its recommendations, the attorney general's committee stressed that its task was not simply to pursue an abstract vision of what ideal regulatory legislation or regulations should be,<sup>160</sup> but rather to grapple seriously with the actual workings of administrative agencies as they then existed—to produce criticism and recommendations that “arose from and must be tested by knowledge of the practices and procedures of each of the agencies.”<sup>161</sup>

The attorney general's report built on previous studies of the burgeoning administrative state, such as the 1937 report of FDR's Committee on Administrative Management (often called the “Brownlow Committee”), which studied the agencies and issued comprehensive recommendations on organizing and regulating the agencies. “Throughout our history,” the committee urged, “we have paused now and then to see how well the spirit and purpose of our Nation is working out in the machinery of everyday government with a view to making such modifications and improvements as prudence and the spirit of progress might suggest.”<sup>162</sup> The Brownlow Committee took a close look at the actual reality of the nascent administrative state and, having studied its flaws, proposed practical reforms on many subjects, including the agencies' exercises of rule-making power.

These reports set the stage for what would become the Administrative Procedure Act of 1946, an overarching framework for administrative agencies. The APA largely requires agencies to notify the public of proposed regulations and give interested parties a meaningful opportunity to comment. It also sets basic standards for agency “adjudications.” And it sets the basic framework for judicial review of such agency actions.

But for all the intense debate and study that the APA has attracted since its inception, one must keep in mind the APA's foundation. It was the product not of abstract theorizing, but of prudence and compromise. After years of “fierce partisan and ideological debate” among the administrative state's opponents and proponents,<sup>163</sup> Congress eventually negotiated and passed unanimously a set of compromises intended to “resolve the conflict between bureaucratic efficiency and the rule of law,” as one historian put it.<sup>164</sup>

In that respect, the Republicans and Democrats who framed the APA resembled the Federalists and Anti-Federalists who framed our



Constitution. They argued seriously and forcefully about how government actually worked, and about what rules ought to be mapped onto government in order to properly channel, restrain, check and balance the administrative agencies' energy. In that respect it was fitting for the act's sponsor, Senator Pat McCarran, to call the act "a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government."<sup>165</sup> He and his colleagues were thinking in constitutional terms — that is, they were trying to ascertain basic rules that could both limit the administrative state while also channeling its energy.

Of all the APA's various provisions, the balance that its framers struck between efficiency and law was most evident in standards that it applied to agency rulemaking, which are described in greater detail below. Like the justices in *Perez*, the APA's framers recognized a fundamental connection between the process of an agency's policy formulation and the substance of judicial review of the agency's action: the stronger the procedural protections up front, the safer it is to relax judicial review for the sake of efficiency; or, the stronger the judicial review after an agency takes action, the safer it is to relax procedural requirements up front for the sake of efficiency.

This basic relationship was recognized at multiple points in the APA's "legislative history" — the legislative debates and reports giving rise to the APA. The Senate Judiciary Committee, for example, explained in its report on the then-proposed APA that, although an agency's rules would normally need to undergo the notice-and-comment process before being finalized, it would be unnecessary to subject merely "interpretative" rules to that process, because interpretative rules would undergo much stricter judicial review than ordinary substantive rules: "interpretative rules — as merely interpretations of statutory provisions — are subject to *plenary* judicial review, whereas substantive rules involve a maximum of administrative discretion."<sup>166</sup> The APA's sponsor, Senator McCarran, explained similarly that the APA "exempts from its procedural requirements all interpretative, organizational, and procedural rules, because under present law interpretative rules, being merely adaptations of interpretations of statutes, *are subject to a more ample degree of judicial review*."<sup>167</sup> Because interpretative rules would undergo stricter scrutiny in court, Congress felt comfortable relaxing the *ex ante* procedural requirements that

would otherwise have restrained the agencies in promulgating those interpretative rules in the first place.

The APA's framers were not stumbling on a novel discovery in recognizing the crucial connection between *ex ante* and *ex post* protections for the public in agencies' formulation of new regulations. Years earlier, Professor Ralph Fuchs, one of the era's leading administrative-law scholars, argued that if a regulation "is subject to challenge in all of its aspects after its promulgation," then "the need of advance formalities is reduced or eliminated"; by the same token, when "a regulation presents affected parties with ...only limited opportunity" for after-the-fact judicial review, then "the need is evident for an antecedent opportunity to influence its content or be heard in regard to it."<sup>168</sup>

Today, some scholars call this the "pay me now or pay me later" principle.<sup>169</sup> In 1946, Congress had it firmly in mind — along with the other balances struck between administrative energy, efficiency, and the rule of law — in passing the legislation that ultimately was enacted as the Administrative Procedure Act.

CONGRESS'S BALANCE IN PRACTICE:  
AGENCY PROCEDURE AND JUDICIAL REVIEW

As noted above, the APA is the primary law governing the processes that agencies must undertake in formulating new law in rulemakings and "adjudications," and the APA is also the primarily law governing judicial review of such agency actions. Various agency- or subject-specific statutes may supersede or supplement the APA in given cases, but the APA remains the default framework for agency action. It sets a basic dichotomy between rulemaking and adjudication — and the Supreme Court has made clear that agencies have broad latitude to make policy through either process, rulemaking or adjudication.<sup>170</sup>

Most rulemaking is done through the notice-and-comment process: an agency issues a "notice of proposed rulemaking" setting forth and explaining the proposed rules; interested parties submit comments to the agency; and the agency publishes the final version of its rule, including the agency's responses to all relevant comments.<sup>171</sup> This process is known generally as "informal rulemaking," to distinguish it from "formal rulemaking," a process in which participants have much greater rights to present evidence and to examine and cross-examine witnesses.<sup>172</sup> But formal rulemaking is an endangered species, if not

completely extinct, since the Supreme Court long ago strictly limited the class of issues that require “formal rulemaking.”<sup>173</sup> Thus, what the APA’s framers called an “informal” rulemaking process is today the most formal process that agencies actually undertake.

And, as illustrated by *Perez*, the APA also includes significant exceptions to the procedure requirement for rulemakings. The notice-and-comment process is not required for “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice,” or in emergency situations where the agency finds upon good cause that the requirements of the notice-and-comment would be “impracticable, unnecessary, or contrary to the public interest.”<sup>174</sup>

Those are the basic requirements for agencies promulgating new regulations. But, as noted, agencies can make law through an alternative approach — namely the case-by-case development of policy through an agency’s own quasi-judicial “adjudications.”<sup>175</sup> As with rulemakings, the APA’s minimalist process for “informal” adjudications is effectively the default rule, since the courts only rarely require agencies to use the heightened procedures of “formal” adjudications.<sup>176</sup>

Once an agency takes final action, attention turns to the federal courts. The APA’s provisions regarding agency procedure are followed by procedures generally governing judicial review — most importantly, the standards of review that courts apply in deciding whether to affirm or nullify an agency’s action. Specifically, when an appeal arises under the APA, the courts review whether the agency’s action is “not in accordance with law,” “arbitrary, capricious, an abuse of discretion,” “contrary to constitutional right,” “without observance of procedure required by law,” or “unsupported by substantial evidence.”<sup>177</sup> Most of these standards present relatively low bars for an agency to clear. To overturn an agency’s action as “arbitrary and capricious,” the challenger must show that the agency’s reasoning is not just contestable but irrational — *i.e.*, that it is “so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”<sup>178</sup> Similarly, to overturn an agency’s action as lacking “substantial evidence,” the challenger must show that the agency’s conclusions are supported by less than “a mere scintilla” of evidence.<sup>179</sup>

Given how lenient those standards are, the true bulwark of judicial review would seem to be the APA’s prohibition against agency actions that are “not in accordance with law.” As the Supreme Court has observed, “an agency literally has no power to act...unless and

until Congress confers power upon it.”<sup>180</sup> And once Congress has conferred power upon an agency, the agency must work within the limits of that legislative conferral, because “[r]egardless of how serious the problem an administrative agency seeks to address,” it “may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.”<sup>181</sup> Thus, the APA and other statutes providing for judicial review of agency action create the means by which the courts keep agencies within Congress’s limits.

But statutes are written in varying degrees of specificity. Indeed, as James Madison warned, there are often practical limits on how precise and accurate we could hope *any* written law to be. “All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications,” he wrote in Federalist No. 37. “Besides the obscurity arising from the complexity of objects, and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment...[N]o language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas.”

Those challenges are particularly acute in the context of regulatory agencies, which administer statutes that are often extremely complex in their substance or in their subject matter. When Madison observed in Federalist No. 37 that the “unavoidable inaccuracy” of written law increases in accordance with “the complexity and novelty of the objects defined,” he foreshadowed a major challenge inherent in the modern administrative state.

Beginning in the New Deal, courts began to cope with this complexity by adopting doctrines of judicial “deference” to agencies’ interpretations of regulatory statutes.<sup>182</sup> This trend toward deference initially produced a body of inchoate deference doctrines, before culminating in the seminal *Chevron* case.<sup>183</sup> There the Court announced that federal courts should defer to administrative agencies’ interpretations of the statutes that they administer, so long as the statutory language is “ambiguous” and the agency’s interpretation is “reasonable.” In later cases the Court would add further caveats and nuances to the analysis, but by and large this framework remains intact today.

In *Chevron*, the Court ascribed this deferential approach to two distinctly different justifications: technocratic expertise and democratic accountability. First, the Court explained, courts should defer to agencies' interpretations of these statutes because the agencies have much greater expertise on technical regulatory subjects than judges do.<sup>184</sup> Second, agencies are more accountable to the people than courts are, because agencies are overseen and influenced by the elected president; when a statute leaves room for discretion, the legal question effectively becomes a policy question, and on such matters "it is entirely appropriate for this political branch of the Government to make such policy choices — resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."

Similar principles informed another of the Supreme Court's deference doctrines, known as "*Seminole Rock* deference" or "*Auer* deference" — that is, the form of deference described in the beginning of this chapter. Where *Chevron* involves deference to agencies' interpretation of statutes, *Seminole Rock* or *Auer* deference pertains to agencies' interpretation of the agencies' own *regulations*. Under this doctrine, the courts must afford "controlling" deference to an agency's interpretation of its own regulation, unless the interpretation is "plainly erroneous or inconsistent with the regulation."<sup>185</sup> Like *Chevron*, this doctrine reflected the Supreme Court's view of agencies' expertise and democratic accountability, but also the fact that regulations' original author — the agency — is best positioned to accurately "reconstruct the purpose of the regulations in question."<sup>186</sup>

These doctrines were defended on both sides of the political and jurisprudential aisles, from the Reagan administration and Clinton administrations that advanced them in court to Justices Scalia and Stephen Breyer (the latter a Clinton appointee), who both generally supported judicial deference to agencies' interpretations of ambiguous statutes.<sup>187</sup>

And for Justice Scalia, the best justification for *Chevron* was the lived experience of actual governance, as he explained in an article published five years after *Chevron*. "I tend to think," he wrote, "that in the long run *Chevron* will endure and be given its full scope — not so much because it represents a rule that is easier to follow and thus easier to predict

(though that is true enough), but because *it more accurately reflects the reality of government, and thus more adequately serves its needs.*<sup>188</sup>

ADMINISTRATIVE LAW MEETS  
OUR NEW ADMINISTRATIVE REALITY

When Justice Scalia wrote of “the reality of government,” and of what “adequately serves its needs,” he was not describing a theoretical society or government. Rather, he was writing at a very specific moment, in terms of the history of the administrative state and administrative law.

In 1989, the doctrine of *Chevron* deference was only five years old. And, no less importantly, the framework for White House oversight of administrative agencies through the Office of Information and Regulatory Affairs (as described in “Modern Management for the Administrative State,” p. 33) was still in its early years, with the newly inaugurated President Bush continuing this experiment in OIRA-overseen cost-benefit analysis and interagency review.

For proponents of limited government, this was a significant achievement. And it was also a significant departure from longstanding conservative conventional wisdom as to how best to restrain the administrative state. Even after President Nixon’s efforts to assert greater presidential power over the agencies,<sup>189</sup> conservatives had believed that the best strategy for restraining agencies was to enact legislation to encumber the executive branch. The arrival of President Reagan, however forced a fundamental rethinking of this approach — as Scalia himself had recognized and stressed, while still a professor and editor of *Regulation* in 1981.

Recognizing that the nation now had an opportunity to use the executive branch itself to restrain the administrative state, then-Professor Scalia took the occasion of *Regulation*’s 1981 inauguration issue to urge his fellow conservatives to recognize that, on matters of regulatory reform, “the game has changed.”<sup>190</sup> “Executive-enfeebling measures” long pursued by Congress-focused conservatives “do not specifically deter regulation. What they deter is change,” Scalia explained. And when “imposed upon an executive that is seeking to dissolve the encrusted regulation of past decades,” they “will impede the dissolution.”

He punctuated this point in the strongest terms possible: “Regulatory reformers who do not recognize this fact, and who continue to support the unmodified proposals of the past as though the fundamental game had not been altered, will be scoring points for the other team.”

Scalia's point is instructive: Administrative law is not simply a matter of first principles; it ultimately strikes a prudential balance. At its best it reflects a set of compromises within the Constitution's broader limits. And the balance struck by Congress and the courts is not and cannot be a timeless one. For sometimes, as Professor Scalia observed, the fundamental game will change, and the rules that promote good government in one era may have precisely the *opposite* effect in another era.

And, unfortunately, that is precisely the experience of recent decades—especially the last eight years, which have witnessed a wave of lawmaking undertaken outside of either the notice-and-comment rule-making process or even the agency-adjudication process; instead, agencies increasingly make policy without meaningful public scrutiny, through amorphous “guidance” documents and other unaccountable methods, or they effectively change the law by formally “waiving” laws, adopting *de facto* policies of wholesale non-enforcement. And, at the same time, agencies' ever more aggressive pushing of their statutory boundaries have cast the problems of judicial deference in ever starker relief.

We'll consider those issues in turn, starting with “guidance,” “Dear Colleague letters,” and other forms of passive-aggressive regulation. As explained above, the APA's general notice-and-comment requirement for rulemaking is subject to a major caveat: the APA expressly exempts “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice” from that requirement.<sup>191</sup> These are often grouped together generally as “guidance.” One need not obtain a master's degree in public administration to recognize the incentive that such an exception creates: On the margin, an agency would prefer to make and revise policy through guidance than to endure the formalities of the notice-and-comment process.

To be sure, exempting guidance documents from notice-and-comment rulemaking is in many respects a good thing. Inducing agencies to publish guidance documents serves the public's interest in regulatory transparency and predictability, by keeping the public apprised of an agency's own interpretation of the statutes and regulations that it enforces. As the Government Accountability Office explained in a 2015 report, “[o]ne of the main purposes of guidance is to explain and help regulated parties comply with agency regulations,” by “explain[ing] how they plan to interpret regulations,” or to provide further clarity in “circumstances they could not have anticipated when issuing a regulation and when additional clarifications

are needed.”<sup>192</sup> If agencies were to produce no such guidance, and simply keep their interpretations and nascent policies until applying them in agency enforcement proceedings or other adjudications, then the public would suffer the costs of regulatory uncertainty.

But just as the benefits of agency guidance documents should not be ignored or downplayed, nor should we ignore their cost, in terms of denying the public a meaningful opportunity to participate in their development.

And this problem is growing ever more evident. The GAO recently studied the practices of four major cabinet departments (Agriculture, Education, Health and Human Services, and Labor) and found that the agencies issued “varying amounts of guidance, ranging from about 10 to over 100 guidance documents each year.”<sup>193</sup> The GAO further found that those agencies vary widely in terms of the processes and standards—if any—that governed the issuance of guidance documents by agency personnel, and also in terms of the extent to which the agencies published even “significant” guidance documents online for public inspection and feedback.<sup>194</sup> More recently, the GAO published similar criticism of the IRS: Despite issuing hundreds of guidance documents annually,<sup>195</sup> and doing so in formats ranging from official “Internal Revenue Bulletins” to *ad hoc* “Frequently Asked Questions” documents online,<sup>196</sup> the IRS lacked reliable standards governing such policymaking by the agency.<sup>197</sup>

There are myriad other examples. Former OIRA administrator John Graham and the Mercatus Center’s James Broughel highlighted the Obama administration’s efforts to change policy on implementation of the Affordable Care Act: Instead of formally publishing a proposed rule and subjecting it to notice and comment, the Treasury Department informally posted a notice on its “blog” site, simply announcing that the controversial “employer mandate” would be deferred for a year; the IRS followed this announcement with an informal “bulletin” to regulated parties.<sup>198</sup> Moreover, as Professor Josh Blackman observes, that was just one of myriad occasions on which the Obama administration unilaterally changed federal policy on implementation of the Affordable Care Act, a “cavalier approach” in which, “[m]ore often than not, the explanation of a modification would come in a social media update on the Department of Health and Human Services (HHS) blog (often on a Friday afternoon).”<sup>199</sup>

Blackman calls this “Government by Blog Post.” Graham and Broughel call it “stealth regulation.” Wayne Crews, of the Competitive



Enterprise Institute, calls it a form of “Regulatory Dark Matter.”<sup>200</sup> Other controversial examples include the Consumer Financial Protection Bureau’s 2013 memorandum asserting jurisdiction to regulate auto lenders,<sup>201</sup> a policy that raised significant questions in light of the Dodd-Frank Act’s express provision denying the CFPB jurisdiction over auto dealers.<sup>202</sup>

Most recently — and most controversially — the Department of Education’s persistent use of “Dear Colleague” letters to set education policy<sup>203</sup> culminated with its issuance of a directive effectively ordering schools to implement the Obama administration’s policy on “transgender” students. Specifically, the Education Department ordered that teachers and staff should address students by the pronoun of their choosing even if it is not their natural gender, and further required schools to open restrooms and locker rooms up students of the opposite sex who “identify” by the other gender.<sup>204</sup> Schools that do not comply with this policy are subject to the threat of lawsuits or the denial of federal funds.

When agencies are criticized for using guidance documents to avoid notice-and-comment procedures, the agencies and their proponents often downplay the actual impact of such guidance documents, asserting that that guidance documents do not legally “bind” regulated parties. But this exalts form over substance: As the GAO notes, “[e]ven though not legally binding, guidance documents can have a significant effect on regulated entities and the public, both because of agencies’ reliance on large volumes of guidance documents and the fact that the guidance can prompt changes in the behavior of regulated parties and the general public.”<sup>205</sup>

Congress has drawn similar conclusions on several occasions. In a 2000 investigation, the House Committee on Government Reform recognized both the benefits of guidance documents and their systemic costs:

Agencies sometimes claim they are just trying to be “customer friendly” and serve the regulated public when they issue advisory opinions and guidance documents. This may, in fact, be true in many cases. However, when the legal effect of such documents is unclear, regulated parties may well perceive this “help” as coercive — an offer they dare not refuse. Regrettably, the committee’s investigation found that some guidance documents were intended

to bypass the rulemaking process and expanded an agency's power beyond the point at which Congress said it should stop. Such "backdoor" regulation is an abuse of power and a corruption of our Constitutional system.<sup>206</sup>

When the House Oversight and Government Reform Committee returned to the subject in 2012, it reaffirmed these basic findings:

Guidance documents, while not legally binding, are supposed to be issued only to clarify regulations already on the books. However, under this Administration, they are increasingly used to effect policy changes. *While not technically enforceable, they often are as effective as regulations in changing behavior due to the weight agencies and the courts give them. Accordingly, job creators feel pressure to abide by them because they fear backlash from agencies.* Agencies who wish to avoid meaningful scrutiny can avoid regulatory analyses by issuing policy changes through guidance documents.<sup>207</sup>

That is the key point, one that Supreme Court justices, too, sensed at oral argument in *Perez*: Agencies may purport that their guidance documents are "non-binding," but as a matter of fact such documents are regularly treated as binding—and agencies are clearly aware of this. Guidance documents are effectively a form of "passive-aggressive regulation," and given their increasing prevalence the law's treatment of them should be better informed by their substance than by their mere form.

Beyond these problems of passive-aggressive guidance are agencies' half-hearted efforts at notice-and-comment rulemaking. In criticizing the lack of notice-and-comment process for guidance documents, one must not overstate the rigors of that process. As explained above, most rulemaking today is "informal" rulemaking—that is, it does not grant participants a right to an in-person hearing, the right to cross-examine agency experts, or other trial-type procedures.

Instead, the APA's standards for "informal" rulemaking are much more relaxed. The APA requires the agency to publish notice of the proposed rulemaking, including "either the terms or substance of the proposed rule or a description of the subjects and issues involved."<sup>208</sup> Interested parties must be given "an opportunity to participate in the rule making through submission of written data, views, or arguments,"<sup>209</sup>

but this might be done simply through the submission of paper briefs. And agencies must identify the data and other technical information that its rule is premised upon, so that commenters can criticize it.

But if an agency clears that low bar, and responds to the substance of comments submitted on the proposal,<sup>210</sup> the courts are likely to affirm the agency's process as having afforded the public an opportunity for "meaningful" participation.<sup>211</sup> And unless the agency decision-maker approaches the proceedings with blatant prejudice as to the intended outcome, the courts will not likely overturn the decision for lacking a sufficiently "open mind."<sup>212</sup>

And again, as noted earlier, when participants submit reams of conflicting studies and analyses, the agency is not required to determine factual questions by a "preponderance of the evidence." Instead, the agency need only show that its own analysis was not "arbitrary and capricious,"<sup>213</sup> meaning that it was reasonable and that it was supported by at least *some* evidence in the record.<sup>214</sup>

Taken together, the procedural protections of notice-and-comment rulemaking are important but could be strengthened. As a practical matter, they are perhaps least robust when the policy in question is most significant to the administration or agency. On minor rulemakings, the agency may consider significant criticism with an open mind; but on the policies most important to the administration, the agency has all the more reason to be less flexible.

For example, when the Obama administration took office eager to reverse the Bush administration's policy on the funding for embryonic stem-cell research, the National Institutes for Health's final rule refused to address comments highlighting "scientific and ethical problems" implicated by the proposed rule, because those comments disagreed with President Obama's position on embryonic stem-cell research.<sup>215</sup>

At its worst, this can degrade the quality of notice-and-comment rulemaking to a point where the process is little more than Kabuki theater. That is how it was characterized by E. Donald Elliott, former EPA general counsel and a prominent scholar of administrative law. Elliott writes that when an agency cares enough about a policy agenda, the proposal of a regulation marks the *end* of the agency's real analysis, not the beginning; in such cases, the notice-and-comment process is merely a shadow of discussions and decisions that long preceded the agency's formal "proposal" of the regulation:

No administrator in Washington turns to full-scale notice-and-comment rulemaking when she is genuinely interested in obtaining input from interested parties. Notice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions—a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues.<sup>216</sup>

As with the question of exempting guidance documents from the usual rulemaking procedures, one must admit that there is benefit to allowing an agency to forge ahead with its policies. A president is elected by the people to carry out his policies, and, to the extent that the president's policies remain within the bounds of the agency's discretion, it may be inefficient to slow the agency down with a process that will not ultimately affect the final outcome; in addition, to require the agency to not give significant weight to the president's preference would degrade the agency's democratic accountability.

Still, the costs of this approach are equally self-evident. And when the only process required of an agency in undertaking the costliest and most controversial regulatory programs is to accept briefs from interested parties and offer cursory replies, the agency has too little incentive to approach the issue with an open mind in good faith.

As noted a few times in this report, one of the basic premises of modern administrative law is that the administrative state's legitimacy is rooted not just in the agencies' technocratic expertise, but also in their democratic accountability. A new presidency can and should create an opportunity for agencies, under new leadership, to re-evaluate old policies. As the Supreme Court observed, "a change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration."<sup>217</sup> For that reason, the Court gives agencies broad leeway to reverse policies, so long as they remain within the broad limits set by the statutes they administer.<sup>218</sup> For agencies headed by political appointees, this freedom cuts both ways: a cabinet officer has the freedom to turn his agency in a new policy direction...but, only a few years later, so will his successor.

In recent years, agencies have attempted to “lock in” a particular regulatory agenda—especially in the context of environmental regulation—through a practice known as “sue-and-settle.” An agency is sued by ideologically aligned activists, who criticize the agency for not regulating aggressively enough. But the lawsuit is not necessarily adversarial: The agency and the activists may plan the lawsuit in advance; as soon as the suit is filed in federal court and docketed before a judge, the agency and plaintiffs will agree to “settle” the case, and ask the judge to approve the settlement, known as a “consent decree.” The judge’s review is minimal, and once he signs off on the agreement, the agency is legally bound to executing it—usually an obligation to begin and complete a rulemaking within a limited period of time. Because the agreements are finalized by the court in a lawsuit, they continue to bind the agency even after its leadership changes.

Thus, as Andrew Grossman explained in a recent Heritage Foundation report, such consent decrees often “appear to be the result of collusion, with an agency’s political leadership sharing the goals of those suing it and taking advantage of litigation to achieve those shared goals in ways that would be difficult outside of court.”<sup>219</sup>

As Grossman observes, such collusion has profound ramifications in terms of democratic accountability. Other parties interested in the subject of a sue-and-settle suit—usually the private individuals, companies, or interest groups that would oppose the regulation—have no seat at the table before the sham lawsuit is filed, and they have little or no opportunity to participate in the judicial proceeding. By the time they arrive on the scene, the court may already have signed the consent decree.

Sue-and-settle also undermines the agency’s accountability to Congress and the president, Grossman observes. Consent decrees “diminish the influence of other executive branch actors, such as the President and the Office of Management and Budget, and of Congress, which may use oversight and the power of the purse to promote its view of the public interest.”<sup>220</sup>

Meanwhile, the regulatory process required by the consent decree is too often truncated in terms of time and process, and the agreement may effectively pre-decide the substance of a rulemaking. Indeed, as Grossman notes, “[t]ossing the normal rulemaking procedures by the wayside is, in some sense, the very point of sue and settle: Doing so empowers the special-interest group that brought suit in the first place

at the expense of parties that might otherwise use their political leverage and the rulemaking process to force compromises that serve the broader public interest.”<sup>221</sup>

Unsurprisingly, sue-and-settle has been used as the foundation for environmental regulations that impose hundreds of millions or even billions of dollars in compliance costs upon the regulated public, despite truncating the public’s procedural or substantive rights.<sup>222</sup> The U.S. Chamber of Commerce has attempted to estimate the prevalence of this practice, at the EPA specifically: “EPA chose at some point not to defend itself in lawsuits brought by special interest advocacy groups at least 60 times between 2009 and 2012. In each case, it agreed to settlements on terms favorable to those groups. These settlements directly resulted in EPA agreeing to publish more than 100 new regulations, many of which impose compliance costs in the tens of millions and even billions of dollars.”<sup>223</sup>

The House Oversight and Government Reform Committee condemned this practice, for its distortive impact on the regulatory process: Through collusive sue-and-settle lawsuits, activists and agencies use the courts as a weapon allowing them to “bypass the proper rulemaking process and avoid basic principles of transparency and accountability.”<sup>224</sup>

Sue-and-settle is an example of litigation affecting the *commencement* of regulatory proceedings. Even more important are the ways in which the modern administrative state distorts the litigation that comes *after* an agency decides to regulate. Some of the distortions owe to procedural or tactical advantages that the agencies wield against the parties they are regulating. But the most important advantages are doctrinal — namely, the doctrines of judicial deference to agencies’ legal interpretations.

Long ago, Alexander Hamilton recognized that the executive’s energy gives the executive branch what today we would call a “first-mover advantage” vis-à-vis the legislative branch: “The Legislature is free to perform its own duties according to its own sense of them — though the Executive in the exercise of its constitutional powers, *may establish an antecedent state of things* which ought to weigh in the legislative decisions.”<sup>225</sup>

The executive’s first-mover advantage is not limited to its dealings with Congress. The executive’s “energy” is all the more advantageous vis-à-vis the people and companies that agencies regulate. Because once an agency issues a new regulation, it has broad leeway to enforce that new regulation against the regulated parties even while the regulation’s

legality is being litigated in federal court. Regulated parties cannot normally block a rule's enforcement while the appeal is pending.

To lay observers, that fact often comes as a surprise: When a court is reviewing an agency's new regulation, should the agency not wait for the litigation to be resolved before enforcing that regulation against the litigants? Should the court not preserve the "status quo" until the appeal is decided?

Not according to the D.C. Circuit, the federal court hearing most major regulatory appeals. Under its precedents, an agency's action will be "stayed" pending appeal only in exceptional circumstances. The challenger asking the court to freeze the agency's action during the appeal must show that four things are true: first, that it has a strong likelihood of winning the lawsuit in the end; second, that the challenger will otherwise be "irreparably injured" by the agency's enforcement while the case is pending; third, that other parties to the case will not be "substantially harmed" by the court's freezing the agency's action pending appeal; and fourth, that the broader "public interest" would be served by freezing the agency's action pending appeal.<sup>226</sup>

The APA, as currently written, allows this. While the act authorizes the courts to grant this relief to parties, it leaves the courts free to set the standard for granting that relief.<sup>227</sup>

Ultimately, the courts see the relief of a stay pending appeal as an "extraordinary and drastic remedy," appropriate for only the most exceptional cases. In the vast bulk of cases, no such relief is available while the appeal is pending, and so the agency can begin to enforce its new policy against regulated parties if it so chooses, even while the policy's legality is being litigated.<sup>228</sup>

The law thus leaves the agencies with immense leverage over potential challengers to new regulation. If the agency can force the challengers to comply with the regulation while their appeal is pending, forcing the challengers to change their business practices or invest in modifications to their business operations, the challengers may conclude that even a successful lawsuit would not be worth the time and expense; having made those investments or changes, they would not likely undo their own actions even after winning their appeal.

This is not a strictly academic assumption. In *Michigan v. EPA* (2015), various parties challenged the EPA's Utility MACT Rule, which would have regulated mercury emissions from power plants. It was an

immensely costly rule: The EPA's own analysis, noted the Court, projected that the regulation "would force power plants to bear costs of \$9.6 billion per year." And the Court struck down the rule as unlawful, since the EPA had failed to consider all of the factors relevant under the applicable Clean Air Act provision before finalizing the rule.<sup>229</sup>

But the day after the EPA lost its case in court, it made a startling announcement: "EPA is disappointed that the court did not uphold the rule," the agency said in a statement, "but this rule was issued more than three years ago, investments have been made and most plants are already well on their way to compliance."<sup>230</sup> It repeated these comments on the EPA's website.<sup>231</sup> In short, the EPA had already succeeded in cajoling the regulated power plants into investing immense sums to comply with the law, investments that the companies would not unwind even after winning the case. The EPA had lost in court but won in reality — and was not afraid to say so.

The EPA's bluntly self-congratulatory comment may already have spurred a judicial backlash in one major case. Months later, when the EPA's controversial "Clean Power Plan" for greenhouse-gas regulation was appealed to the federal courts, the Supreme Court took the extraordinary step of issuing an order staying the EPA's enforcement of that rule until all litigation could be completed.<sup>232</sup> (The Court's order was all the more extraordinary for the fact that the case's merits had not yet reached the Justices; it was still pending in the D.C. Circuit, where judges had denied such a stay to the challengers.)

The Court's eagerness to stay enforcement of the Clean Power Plan while the litigation was pending was taken by many to reflect the EPA's intemperate comments after *Michigan*, especially since the EPA's comments were highlighted in the brief seeking Supreme Court relief.<sup>233</sup>

But the relief that the Court granted in the Clean Power Plan litigation remains truly exceptional. While courts grant such a stay from time to time, they usually do not — and agencies are left free to impose their orders on people and companies even before those people and companies get meaningful judicial review. This is a blunt tool for agencies to wield against would-be challengers — especially when judicial review may take years to complete.

Agencies enjoy an even blunter tool: the basic threat of reprisal against the parties that might challenge a regulation. Most regulated parties are "repeat players" before a given agency, or before federal and



state regulators generally. If any agency facing a challenge to its regulation is poised to take retaliatory action against a regulated party in another forum or matter, then it can leverage that threat to deter the party from challenging the first regulation.

Like the problem of an agency attempting to negate judicial review by enforcing a regulation while the litigation is pending, the problem of agency threats to deter judicial review is not hypothetical. In 2009, for example, the Obama administration seized upon U.S. auto companies' perilous financial condition to secure their assent to the administration's proposals for a massive greenhouse-gas regulation program. As the House Oversight Committee later documented, White House personnel went to extreme lengths to secure the companies' agreement:

The President, joined by members of his cabinet and several state governors [in a 2009 Rose Garden ceremony], lauded the work done by his Administration, the automobile industry, environmental interest groups, and state officials in negotiating an "historic agreement" in which "everyone wins." Left unsaid by the President and virtually untold until now is the story of how the Obama Administration empowered the state of California to nearly destroy the domestic auto manufacturers, then leveraged their financial plight to set into law the unrealistically high fuel economy standards desired by environmental extremists. The Administration, assuming the mantle of the imperial presidency, acted in spite of clear congressional intent, using heavy-handed, Chicago-style tactics to achieve its ends. These tactics proved so useful that the White House employed them again two years later in developing a second round of regulations. Although many in the automobile industry recognized the overreach by the Administration, the industry found itself ultimately tied to the Obama White House, believing it would "gain nothing by publicly grouching or simply walking away."<sup>234</sup>

Specifically, as the House Oversight Committee detailed, the Obama administration threatened to authorize California regulators to impose strict new regulations on the auto companies—"a 'gun to the head' of automakers, forcing them to engage the Administration on a path toward an integrated federal-state standard."<sup>235</sup> (This episode is detailed

in an article in the Summer 2012 issue of *National Affairs*, titled “Obama’s Cynical Energy Agenda.”)

The White House steered the auto companies and state regulators to a deal, and as the deal came together the White House presented each of the auto companies a “pre-drafted commitment letter,” and told the companies that the deal needed to be signed within a strict 24-hour deadline, with no further edits or negotiations.<sup>236</sup> Years later, one of the White House officials who helped to push the auto companies into the deal wrote about the negotiations, favorably, as “a striking success for many reasons,” an “example of how the federal government can mobilize its resources and coordinate even the most complicated of matters when it really puts its mind to it.”<sup>237</sup>

In that article, Jody Freeman notes that the auto companies made a significant concession: They agreed not to appeal any of the regulatory standards that would ultimately flow from the agreement for years after the deal.<sup>238</sup> But the House Oversight Committee’s report included significant details not found in Freeman’s article, such as the fact that the EPA and California’s regulators deliberately phrased this provision vaguely, “to foster confusion rather than make their true intentions clear.” As a California official wrote to his EPA counterpart, “Unless we’re trying to be over-the-top transparent by providing a potentially confusing and esoteric legal ‘test,’ I would not spell it out; auto’s attorneys can figure this out.”<sup>239</sup>

The EPA’s treatment of financially distressed U.S. auto companies is a particularly egregious example of an agency using threats to advance a regulatory program and thwart judicial review, but it is by no means the only example of what another scholar calls “administrative arm-twisting.”<sup>240</sup> In 2011, law professor Tim Wu highlighted examples from the Federal Communications Commission and Federal Trade Commission.<sup>241</sup> Wu wrote in defense of agency threats, but suggested that concerns “that rule by threat is a means of avoiding judicial review may be overstated,” since threatened parties “can and do test the threats, forcing the agency to use its more formal powers and therefore invoke judicial review.”<sup>242</sup> (Notably, Wu was also a senior advisor to the FTC at the time he published his article.)

That mindset may well reflect the views of scholars, or of agency personnel. But to people and companies regulated by federal agencies, the risk of agency threat is all too prevalent. People and companies in highly

regulated industries often refrain from appealing even legally dubious agency actions, precisely because they recognize that a “win” in one case—or even just the decision to appeal an agency action—might cause the agency to treat the person or company less kindly in other contexts.

By the same token, regulated people and companies have every incentive to treat agencies’ nominally “voluntary compliance” or “best practices” programs as effectively mandatory. When agencies announce such programs, people and companies tend to comply with them, going above and beyond what is actually required by law, in order to avoid attracting unwelcome scrutiny (or worse) from the agencies.

The preceding two problems—agency efforts to negate judicial review by enforcing disputed rules, and agency efforts to expressly intimidate regulated parties from exercising their right of judicial review—are self-evidently problematic but perhaps relatively uncommon in the day-to-day operations of the administrative state. Another problem, by contrast, is pervasive throughout administration yet is relatively uncontroversial in modern administrative law—at least until recently. That is the problem of judicial deference to agencies’ legal interpretations.

When someone challenges an agency’s actions in federal court, the judicial playing field is not level. As described above, agencies receive significant “deference” from the courts with respect to their interpretations of laws and regulations. Under the doctrine of *Chevron* deference, a court will largely defer to an agency’s interpretation of an ambiguous statute, so long as the interpretation is reasonable. And under *Seminole Rock* or *Auer* deference, a court will defer to an agency’s interpretation of its own regulation so long as the interpretation is not blatantly contrary to the statute.

Chief Justice Roberts warned recently that judicial deference “is a powerful weapon in an agency’s regulatory arsenal.”<sup>243</sup> Studies have demonstrated precisely how powerful that weapon is. A new study by law professors Kent Barnett and Christopher Walker finds that federal agencies enjoyed a 77% win rate when courts applied the *Chevron* deference framework to the agencies’ interpretation of statutes—as opposed to just a 66% win rate when the court did not say whether it was employing any deference framework in its review, and just a 39% win rate when the court expressly refused to grant any deference to the agency.<sup>244</sup>

Similarly, the Competitive Enterprise Institute’s William Yeatman surveyed two decades of cases involving agency interpretations of federal regulations, and found that government agencies enjoy a 74% win

rate when appellate courts apply *Auer* deference to the agencies' interpretations, and just a 60% win rate when the courts apply lesser forms of deference to the interpretations.<sup>245</sup> Other studies make similar findings regarding the real-world impact of judicial-deference doctrines, if to varying degrees.<sup>246</sup>

In recent years, these doctrines have attracted increasingly vocal criticism from scholars and even some judges. This criticism falls along two lines: criticism of how deference doctrines are applied in practice, and criticism of deference doctrines in principle.

The practical criticisms are largely directed at *Chevron* deference — judicial deference to agencies' statutory interpretations — as critics argue that the deference should not apply in certain cases. This criticism is phrased in terms of congressional intent, for *Chevron* itself is premised on the presumption that Congress expressly or implicitly wanted the agency, not the courts, to “fill any gap left” in a given statute by “elucidat[ing] a specific provision of the statute by regulation.”<sup>247</sup> By the same token, then, it is often argued that *Chevron* should not apply in a given case because the statute is one for which Congress would have wanted the courts to interpret the law for themselves instead of letting the agency “fill” any “gaps.”

We see this in cases where the Supreme Court or lower courts conclude that the agency is attempting to regulate an issue of such sheer political or economic magnitude that Congress cannot be presumed to have delegated interpretive responsibility to the agency instead of the court. In *King v. Burwell* (2015), for example, the Supreme Court concluded that the court, not the IRS, needed to take the lead in interpreting the Affordable Care Act's provision for health-insurance subsidies: “Whether those credits are available on Federal Exchanges is thus a question of deep ‘economic and political significance’ that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.”<sup>248</sup> Even though the same justices ultimately ruled in favor of the Obama administration, they did so without explicit deference to the administration's interpretation; they decided the issue for themselves instead.

Similarly, the Supreme Court suggests that if Congress has not empowered an agency to undertake particular policymaking formalities, such as notice-and-comment rulemaking, then Congress presumably did not want the courts to give *Chevron* deference to the

agency's statutory interpretations.<sup>249</sup> Moreover, other justices (though not yet a majority) have gone still further, arguing that courts should withhold *Chevron* deference for any interpretation of a statute defining the agency's "jurisdiction," since Congress should not be presumed to have given agencies the power to effectively define their own jurisdiction — which, naturally, they would define as expansively as possible.<sup>250</sup>

Finally, in addition to these practical criticisms of *Chevron* deference, there are practical criticisms of *Auer* deference — again, judicial deference to an agency's interpretation of the agency's own regulations. Justice Scalia pressed such a criticism forcefully in his final years. When an agency both writes the regulation and interprets it, he argued, the agency has a natural incentive to write the regulation vaguely, in order to leave itself leeway to interpret it creatively and expansively in the future.<sup>251</sup>

These are practical criticisms of deference; in recent years, however, they have been surpassed in intensity by criticism of deference as a matter of first principles. In books, articles, and judicial opinions, critics argue that judicial deference is an abdication of judicial duty, a violation of the rule of law.

First among these critics is Justice Thomas, who in recent opinions has urged that both *Chevron* and *Auer* deference are incompatible with the Constitution's "judicial power," which, "as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws."<sup>252</sup> "[W]e seem to be straying further and further from the Constitution without so much as pausing to ask why," Thomas concludes. "We should stop to consider that document before blithely giving the force of law to any other agency 'interpretations' of federal statutes."<sup>253</sup>

In criticizing judicial deference and the administrative state more broadly, Justice Thomas has invoked the research of law professor Philip Hamburger, a strong critic of *Chevron* deference — or, as he calls it, "*Chevron* bias."<sup>254</sup> And Hamburger is hardly alone, as lawyers and even non-legal scholars have criticized judicial deference with increasing intensity.<sup>255</sup>

But while judicial deference is opposed today primarily (though not exclusively<sup>256</sup>) by the administrative state's critics, it is important to recognize that these doctrines of judicial deference have not always been seen as inherently pro-regulatory doctrines. Indeed, in *Chevron* the Court was affirming the Reagan administration's efforts to adopt a

much more flexible and less burdensome interpretation of the Clean Air Act's regulation of smokestacks, over the objections of the Natural Resources Defense Council and other environmentalist activists.<sup>257</sup> The Supreme Court's decision pushed back against lower court judges, especially with respect to the D.C. Circuit, where judges appointed by prior Democratic presidents had been particularly unwelcoming of the Reagan administration's regulatory reforms. One Carter appointee on that court explained that the D.C. Circuit had opposed the Reagan agencies' reforms because the judges saw the agencies as insufficiently faithful to prior Democratic Congresses. "We were, if you will, a trustee for the ghosts of Congresses past," Judge Patricia Wald, a Carter appointee, later reflected. A public-interest lawyer told the *New York Times* in 1982 that the D.C. Circuit had become the federal government's "last bastion of liberalism" amid Reagan's reforms.<sup>258</sup>

But whatever the actual or perceived merits of judicial deference three decades ago, the passage of time has cast its very real costs in stark relief. Even Justice Scalia, the Supreme Court's most reliable defender of *Chevron* deference, reportedly began to rethink the doctrine's merits in the last years of his life.<sup>259</sup> "Much as he admired the framework *Chevron* should have been," his friend Ronald Cass writes, "he had come to be more skeptical of the benefit of the decision."<sup>260</sup>

If these accounts are accurate, then Justice Scalia's change of mind on *Chevron* was rooted in the same reason that had first led him to endorse it—not first principles, but prudential judgment. On this question (to borrow a line from Justice Oliver Wendell Holmes, Jr.), "a page of history [was] worth a volume of logic."<sup>261</sup>

REFORMING ADMINISTRATIVE LAW  
TO REFLECT ADMINISTRATIVE REALITY

The APA is 70 years old. *Chevron* deference is 30 years old; many of the other seminal judicial precedents defining administrative law are still older. And in defining these laws, both Congress and the courts saw themselves as making practical judgments in light of the actual reality of public administration.

But today, nominal administrative law speaks less and less to the reality of our administrative state. "[T]here is an increasing mismatch between the suppositions of modern administrative law and the realities of modern regulation," two scholars recently observed. "Or to put

it another way, administrative law seems more and more to be based on legal fictions.”<sup>262</sup>

It is time to return from fiction to reality. More to the point, it is time for today’s Congress to do what its predecessors did in 1946: to legislate administrative law procedures and standards of judicial review that will meaningfully limit and channel the energies of the administrative state. Only by doing the hard work of legislating reality-based reforms can Congress once again strike the proper balance between limited government, executive energy, administrative expertise, and the rule of law. In doing this, today’s Congress would not depart from the spirit of its predecessors — rather, Congress would *vindicate* the APA framers’ spirit of realistic reforms.

Because the modern shift from republican governance to the administrative state is exacerbated by the lack of sufficient accountability and limitation at *both* ends of the process — both in the agency’s own proceedings and in subsequent judicial review — reforms should focus on both ends of the regulatory process. And not simply in isolation from one another: Some reforms require integration of both procedural reform and judicial-review reform *together*.

The rest of this chapter proposes reforms. That is sometimes easier said than done, particularly with respect to the rulemaking process, for to pile new procedural requirements upon agencies creates a risk that agencies will have greater incentives to avoid rulemaking formalities altogether, and to try instead to make law through other means. The challenge, therefore, is to make agencies more accountable while at the same time creating the incentives — both carrots and sticks — that will induce the agencies to accept the burdens of these new means of accountability.

First, even after limiting the powers delegated to agencies, Congress should improve the rulemaking process for agencies’ most significant regulations.

Through statutes delegating vast powers to regulatory agencies, Congress entrusts regulators with decisions on matters of immense public importance in forums that lack the fundamental checks and balances of our constitutional legislative process. Congress empowers agencies to bestow immense benefits and to impose immense burdens.

Problems of agency abuse are unavoidable, so long as Congress delegates such powers to agencies. Thus, the first obvious step toward reform must be for Congress to reform substantive regulatory statutes to clarify

and tighten such delegations of power, and to enact legislation such as the REINS Act to categorically withdraw the delegation of power to impose the most burdensome regulations without congressional assent.<sup>263</sup>

But even if Congress reforms its delegation of power to agencies, the agencies will inevitably retain power to impose immensely consequential regulations. Thus, Congress should also enact procedural reforms, requiring agencies to undertake additional procedures before promulgating the costliest regulations, in order to improve the quality of those regulations.<sup>264</sup>

The Regulatory Accountability Act, introduced by Representative Bob Goodlatte in 2015, exemplifies many of these qualities. For the most significant rules, it would require the agency to undertake procedures above and beyond those that the APA already requires for “informal rulemakings.” The public would receive extra notice of the agency’s regulatory intentions, giving interested parties an additional opportunity for commenting on the agency’s original concept for the regulation, including the rule’s basic objective and the substantive statutory authorization for the rule.

Moreover, the act would require the agency to convene an actual in-person hearing, to provide interested parties with a reasonable opportunity to cross-examine agency experts and to challenge the agency’s factual basis for the rule. To be clear, these are very broadly worded requirements, and as a practical matter Congress will have to take care to prevent abuse by interested parties and regulators alike, and this is easier said than done. And, as Oren Cass rightly observes in his recommendations for OIRA reform, defining tiers of regulatory scrutiny strictly in terms of arbitrary dollar-values entails problems of its own. Congress must be mindful of these problems; in the end, specific reforms are not ends in themselves, but means toward the greater end of improving the procedural protections afforded to the public for the most immensely consequential rules.

All of these reforms speak to the very same point discussed at the outset of this chapter: namely, that the APA’s 70-year-old provisions for “informal” rulemaking lack rigor concomitant with the magnitude of the regulations that the agencies are promulgating, as law professor Aaron Nielson observes in his own defense of the heightened protections of “formal rulemaking.”<sup>265</sup>

Regulators and their most emphatic supporters among administrative-law scholars too often lose sight of what should be a matter of common



sense: It strains credulity to think of billion-dollar regulations as the stuff of “informal” regulatory decisions. It is irresponsible for Congress to allow agencies to decide such matters through “informal” rulemaking.

When congressmen or other reformers suggest imposing additional requirements on agency’s rulemaking proceedings, agencies and administrative-law scholars often argue that such requirements are self-defeating. In 2015, for example, a coalition of law professors and practitioners opposed to the Regulatory Accountability Act sent a letter to Congress employing such an argument.

“We seriously doubt that agencies would be able to respond to delegations of rulemaking authority or to congressional mandates to issue rules if this bill were to be enacted,” the critics wrote. “Instead, its new hurdles would likely cause agencies to avoid rulemaking and make increasing use of underground rules, case-by-case adjudication, or even prosecutorial actions, to achieve policies without having to surmount these hurdles.”<sup>266</sup>

That is not a frivolous concern. When the rulemaking process becomes costlier for an agency, the agency has a natural incentive to try to make policy through other means—just as private-sector actors change their own behavior when agencies make their work costlier.

Among administrative-law scholars, this is known as the “ossification” problem: Namely, agencies’ regulations become rigid—they “ossify”—as agencies eschew the rulemaking process and seek to effectively change their policies without actually engaging the rulemaking process.<sup>267</sup> All things being equal, agencies would prefer to make law and policy through the means that are least burdensome. (That is, least burdensome to the agency—not the public. “Ossification” of economic growth in the private sector seems to attract less concern from regulators and many scholars.)

But to concede that this is a problem is not to concede that it is insurmountable—far from it. If Congress determines that the most consequential rules deserve more than merely an “informal” process in the agency, then the objective must be to create incentives for agencies to comply with Congress’s additional procedural requirements instead of evading them.

Thus, this chapter’s second recommendation must be inextricably tied to the first. Congress should reward agencies that comply with the procedural requirements for rulemakings by allowing courts to

continue to afford *Chevron* deference to statutory interpretations in rulemakings. And, by the same token, Congress should direct the courts to afford no deference to agencies' statutory interpretations outside of the rulemaking process.

The House of Representatives recently passed legislation that would eliminate *Chevron* deference altogether. The Separation of Powers Restoration Act would amend the APA's judicial-review provision: Where Section 706 currently directs courts to "decide all relevant questions of law" and to "interpret constitutional and statutory provisions," the new act would direct the courts to "decide *de novo* all relevant questions of law, including the interpretation of constitutional and statutory provisions[.]" By use of the "de novo" or similar terms, Congress would instruct the courts to interpret statutes without deference to the agency.<sup>268</sup>

My proposal, by contrast, would not be to eliminate *Chevron* deference altogether. Instead, the APA's judicial-review provision should eliminate *Chevron* deference in judicial review of agencies' non-rulemaking actions. When agencies elect to make policy through notice-and-comment rulemaking—or, for the most consequential rules, even more rigorous procedural requirements—Congress would authorize the courts to afford them *Chevron* deference for ambiguous statutes. But when the agencies elect to regulate the public through other means, they are also electing to subject themselves to judicial review without deference.

Such an approach vindicates the basic premise of *Chevron*. As the Supreme Court explains, *Chevron* is a function of Congress's intent. In cases such as *King* and *Mead*, the Supreme Court grants or withholds *Chevron* deference based on the justices' presumptions regarding Congress's intent. *But Congress can speak for itself—and it should*, by making clear in the APA that it intends for the *Chevron* framework to continue to apply in judicial review of rulemakings, but not in judicial review of other agency actions.

This approach necessarily concedes that *Chevron* does not violate the Constitution's judicial power, or the duty of judges to interpret the law. As with Justice Scalia's defense of *Chevron* in his 1989 article, it treats judicial deference as a question of prudential line-drawing within bounds allowed by the Constitution. Thus, this approach will be unsatisfactory to Justice Thomas, Professor Hamburger, and other thoughtful critics who believe that *Chevron* deference is inherently illegitimate.

But to those who see *Chevron* as a legitimate means to the ends of vindicating congressional intent and improving public administration, this doctrine of judicial review can and must be tied to the Regulatory Accountability Act's procedural reforms.

And in that respect, this approach reflects the instincts of the Congress that enacted the original APA, and of Supreme Court justices in *Perez v. Mortgage Bankers Association*: It recognizes the practical relationship between the *ex ante* protections of agency process and the *ex post* protections of judicial review. When agencies make policy through a process that incorporates heightened public participatory rights, they can more safely receive deferential judicial review; but when agencies avoid the protections of notice-and-comment rulemaking (including the heightened standards for the most consequential rules), the courts should review their work more carefully. Agencies are given a choice, but they must “pay now” or “pay later.”

As the earlier discussion of agency “guidance documents” attempts to make clear, guidance documents are not problematic in and of themselves. Quite the contrary: When agencies publish materials further clarifying the agencies' interpretations of the statutes and regulations they administer, or previewing nascent policies that the agency intends to elaborate in future rulemakings or agency adjudications, the public *benefits*.

In other words, the problem with guidance documents isn't the guidance *per se*. The problem is that agencies formulate guidance documents with little or no transparency or public participation, and then the resulting guidance documents receive utmost *Auer-Seminole Rock* deference from the courts. The resulting guidance documents are “non-binding” in name but effectively binding in fact—and the agencies know that, and use it to their advantage.

Thus, the task of reforming guidance documents, much like the task of improving the rulemaking process for the most consequential rules, is not to deter agency guidance documents, but rather to create incentives for agencies to continue to produce guidance documents but through a more transparent, participatory process. And, as with the reform of rulemaking, the reform of guidance documents ultimately requires us to connect agency process to judicial review.

Accordingly, this chapter's third recommendation is that Congress should amend the APA to direct courts to give no deference to agencies' interpretations of their own regulations—no *Auer* or *Seminole Rock*

deference—unless the agency made those interpretations in the course of notice-and-comment rulemaking.

The APA, as it currently stands, does not require agencies to avoid notice-and-comment proceedings when they formulate guidance. Rather, the APA simply gives agencies the *option* to use notice-and-comment for guidance.<sup>269</sup> They need an incentive to exercise that option more often.

The availability of more deferential judicial review would surely be such an incentive. An agency might see no need for judicial deference to a particular interpretation, if the underlying regulation is already clear, and in such a case the agency could proceed to publish guidance without process, and face un-deferential judicial review afterward. But when an agency seeks to publish guidance clarifying an unclear regulation, the agency may find great value in the promise of deferential judicial review afterward—and, indeed, the unclear regulations are precisely the ones for which an agency's interpretive guidance needs the most public participation.

As with the preceding reform of *Chevron* deference, this reform will likely not satisfy those who believe that *Auer* or *Seminole Rock* deference is inherently illegitimate. But to others, who see judicial deference as a legitimate judicial tool in service of the public interest, the task is to make judicial deference as effective a tool as possible. The best use of deference would be to improve the administrative process, in the spirit of the APA's original framers.

The Supreme Court's justices saw the problem of process-deference connection in *Perez*, but they recognized that the problem was one that only Congress could solve. Congress should solve it.

Fourth, Congress should remove incentives for agencies to abuse the litigation process. As described above, the judicial system provides agencies with many tools for advancing their substantive policy aims. Because judicial review is a lengthy process, agencies can often force regulated parties to fully implement a regulatory program before the courts have had a chance to definitively decide whether the program is even lawful. And agencies can use sham "sue and settle" lawsuits to lock in a regulatory agenda, prejudicing the rights of the public at large and truncating the public's ability to participate meaningfully in policy development.

Such gamesmanship will never be removed fully from the judicial process. But it can be reduced, with the following three reforms: First,

for the most significant rules, Congress should flip the presumption against agency enforcement of challenged rules while judicial review is pending; second, it should bifurcate judicial review for the costliest rules; and third, Congress should subject sue-and-settle consent decrees to a form of notice-and-comment public participation. We'll examine each in turn.

The law does not prohibit courts from “staying” an agency’s action while judicial review is pending; it just renders such relief extraordinary, establishing a presumption that such relief will not be granted unless the challengers can convince the court that a given case merits extraordinary relief.

Congress should reverse this presumption, at least in the case of the highest-impact rules (perhaps those costing the public \$100 million annually). Congress can accomplish this by amending 5 U.S.C. § 705 to expressly provide for an automatic stay of agency action for those rules, but then provide an exception in cases where the agency satisfies four factors akin to those faced today by challengers seeking a stay. The agency would need to show: one, that it has a strong likelihood of winning the lawsuit in the end; two, that the challenger faces no risk of being “irreparably injured” by the agency’s enforcement while the case is pending; three, that other parties to the case will be “substantially harmed” by the court freezing the agency’s action pending appeal; and four, that the broader “public interest” would be served by allowing the agency to take the extraordinary step of enforcing the challenged rule while judicial review is pending.

By its own terms, such legislation would cover only an agency’s most significant rules, not most rules, and not adjudications of any magnitude. Adjudications are not normally classified in terms of economic impact. Rather than attempt to create a new system of cost-benefit analysis for adjudications, Congress should choose either to subject all adjudications to an automatic freeze while judicial review is pending, without exception, or, to create a similar exception allowing agencies to enforce an adjudication while judicial review is pending, in the rare cases when the agency satisfies the four-factor test.

I note, however, that this provides another opportunity for Congress to create incentives for agencies to develop policy through rulemaking. If agencies’ adjudications are always subject to a stay while the appeal is pending, but not in the case of some rulemakings, then agencies

will have yet another reason (though perhaps only a small reason) to engage in rulemaking.

As the second reform to reduce gamesmanship, this chapter suggests bifurcating judicial review for the costliest rules. Judicial review of major agency actions can now take a year or more to complete, and the sheer length of judicial review contributes to the agency's ability to force compliance before the appeal is complete. Furthermore, the length and cost of litigation is a factor that can deter regulated parties from even seeking judicial review in the first place.

This problem could be mitigated in part, however, if Congress creates a process for fast-tracking the courts' review of "purely legal questions" regarding interpretation of the agency's authority, saving more complicated questions of fact to be adjudicated only if necessary. If the court holds that an agency's new regulation is unlawful, then further questions of factual adequacy become a moot point.

To that end, Congress should amend the APA to create a fast-track option. Parties challenging an agency's new rule would be given the option to litigate purely legal questions of agency authority all the way to completion, before moving on to complicated record-based questions. Challengers might prefer in particular cases not to bifurcate the case, but if they believe they have a particularly strong case on a core legal question, fast-tracking that issue could save their time and resources, and that of the courts and agencies.

This would require resolution of some related details. First, Congress would need to make clear whether, in cases involving multiple challengers, the option is held by each challenger individually or whether it requires a collective decision. Second, Congress would need to decide how this would interact with the aforementioned stay of agency action pending appeal; the purpose of bifurcating the litigation is to improve efficiency, after all, not to delay ultimate resolution of the case in order to slow the agency's enforcement. And third, Congress would need to decide whether to attempt to require the courts to decide the "fast tracked" question within a certain period of time (which is not unprecedented<sup>270</sup>) or whether to leave it to the courts' good-faith discretion.<sup>271</sup>

Our third aspect of removing incentives for agencies to abuse the litigation process would be to subject sue-and-settle consent decrees to a form of notice-and-comment public participation. Agencies and pro-regulatory activists can use sham collusive sue-and-settle lawsuits — and

the judicially approved consent decrees that result from such lawsuits—to lock in an agency’s regulatory agenda. They can prejudice the rights of other affected parties and sometimes even dictate substantive regulatory outcomes. This short-circuits the normal process of notice-and-comment rulemaking.

For precisely that reason, these consent decrees should be subjected to a form of notice-and-comment participation by the public, if only to ensure that the judge hearing the sue-and-settle case is fully apprised of the full range of issues and interests implicated by the consent decree.

Sometimes, proposals for reform are framed in terms of actual notice-and-comment rulemaking.<sup>272</sup> An alternative reform, however, would be to model the public participation on the legal framework that already exists for class-action lawsuits. When a class-action lawsuit is filed, the Federal Rules of Civil Procedure provide for the notification of putative class members so that they can fully protect their own rights.<sup>273</sup> Further notice is required at other points in the class-action litigation.<sup>274</sup> And, most important for present purposes, the class members must be notified before a settlement can be concluded.<sup>275</sup>

That framework should serve as the model for sue-and-settle cases regarding agency action, since agency actions implicate even more diverse and widespread interests than normal class-action lawsuits do. “Notice” could be achieved through publication in the *Federal Register*.

While such legislative reforms can remove incentives for agencies to abuse the litigation process, the problem of agency threats against regulated parties may be difficult to solve through legislation, since what constitutes a “threat” depends upon the intentions and perceptions of both the agency and the putatively threatened party. But that is not a reason to eschew reform, because Congress already has a roadmap for precisely this type of issue: whistleblower protection laws.

At least 19 federal statutes provide for whistleblower protection, according to the Congressional Research Service.<sup>276</sup> The Sarbanes-Oxley Act, for example, provides that no employer may “discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee” in relation to reporting corporate wrongdoing to federal agencies.<sup>277</sup>

This model can and should be applied to regulated persons and companies in their interactions with federal agencies. If a federal

agency or official threatens or retaliates against a person or company for exercising their procedural or substantive rights, including their rights to judicial review, then the agency and its officials should be sanctioned just as private companies and officials are sanctioned for mistreating whistleblowers.

Furthermore, as described above, agencies too often conduct nominally “public” rulemaking proceedings with tightly closed minds: An agency’s proposed rule is effectively the agency’s final decision, and the notice-and-comment process devolves into Kabuki theater.

But an agency’s closed-mindedness is not always intentional. Like all of us, agency personnel are not always aware of their own particular analytic prejudices — even when confronted with contrary evidence in the notice-and-comment process. One way to open an agency’s closed mind would be to require the agency to revisit its own past work, to assess whether its own previous predictions and other conclusions proved accurate and tenable.

The process for such re-examination is “retrospective review” or “lookback.” And the Obama administration in particular pressed its agencies to undertake such critical self-examination, to review their old regulations and see whether any were in need of reform or repeal. President Obama required his agencies to “consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.”<sup>278</sup> He stressed that “it is particularly important for agencies to conduct retrospective analyses of existing rules to examine whether they remain justified and whether they should be modified or streamlined in light of changed circumstances, including the rise of new technologies.”<sup>279</sup>

Congress has recognized the importance of retrospective review, too. The proposed Regulatory Accountability Act would require agencies to include in new rulemakings a lookback provision for review of the new regulation after 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.”

But retrospective review’s greatest value is not in the possibility that old regulations will be repealed. (As the American Action Forum’s Sam Batkins



observes, the Obama administration's retrospective reviews did not actually reduce regulatory burdens.<sup>280</sup>) Instead, its greatest value is *forward*-looking: When retrospective review forces an agency to confront the mistakes or miscalculations that it has made in the past, the agency will become more likely to develop “epistemological modesty” going forward.<sup>281</sup>

#### REGULATORY REFORM FOR THE 21<sup>ST</sup> CENTURY

It would be a mistake to suggest that regulatory reform is a simple chore. As Stuart Shapiro and Deanna Moran observe in a report for the Mercatus Center, the history of regulatory reform since the APA's original enactment is largely one of failure. Time and time again, Congress has legislated new constraints on agencies, but in each iteration of the legislative process the agencies' supporters “fight constraints on agency decision making and ensure that if constraints are passed, they will contain sufficient loopholes so as to be largely ineffectual.” (Yet, “[a]bsent the loopholes, passing the constraints is impossible.”)<sup>282</sup>

The reforms proposed in this chapter, as in the other chapters, attempt a different approach. Instead of trying to prevent agencies from doing the wrong thing, these reforms primarily attempt to create a structure that will cause agencies to do the right things: by using judicial deference as a reward for procedural rigor; by removing opportunities for agencies to misuse the judicial process; and by causing agencies to look more skeptically at their own analyses, not to punish them for past mistakes and prejudices, but to encourage them to avoid those similar mistakes and prejudices next time.

The APA was enacted to reflect and govern the administrative state as it actually existed in 1946. Congress should reform the APA in a similar spirit today.

# Notes

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## REPUBLICAN REMEDIES FOR THE ADMINISTRATIVE STATE

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4. Jonathan Karl, “Obama’s Long Lost Campaign Promise,” ABC News (Feb. 17, 2014), <http://abcnews.go.com/blogs/politics/2014/02/obamas-long-lost-campaign-promise>.
5. Barack Obama, *The Audacity of Hope* (New York: Three Rivers Press, 2006), 131.
6. See, for example, Adam J. White, “Obama’s Cynical Energy Agenda,” *National Affairs* (Summer 2012): 16-34.
7. See, for example, Adam J. White, “Unfaithful Executive,” *City Journal* (Winter 2015).
8. See, for example, Adam J. White, “Reining in the Agencies,” *National Affairs* (Spring 2012): 42-58.
9. The White House, “Statement by the President on Net Neutrality,” press release, November 10, 2014.
10. The White House, “Weekly Address: Working When Congress Won’t Act,” press release, May 17, 2014.
11. The White House, “Remarks by the President Before Cabinet Meeting,” press release, January 14, 2014.
12. Cf. “No. 51” in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, (New York: Signet Classics, 2003), 319. (“The interest of the man must be connected with the constitutional rights of the place.”)
13. See, for example, Daryl J. Levinson and Richard H. Pildes, “Separation of Parties, Not Powers,” *Harvard Law Review* 119 (2006): 1.
14. “No. 48” in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, (New York: Signet Classics, 2003), 306.

15. See, for example, Christopher DeMuth, “Can the Administrative State Be Tamed?,” *Journal of Legal Analysis* 8 (2016): 121; Adam J. White, “The Administrative State and the Imperial Presidency: Then and Now,” in *The Imperial Presidency and the Constitution*, ed. Gary J. Schmitt et al. (forthcoming, 2017); Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (New Haven: Yale University Press, 2012); Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (New Haven: Yale University Press, 2008); Leonard D. White, *The Federalists: A Study in Administrative History* (New York: Macmillan, 1948); Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (Cambridge: Cambridge University Press, 1982); Daniel R. Ernst, *Tocqueville’s Nightmare: The Administrative State Emerges in America, 1900–1940* (Oxford: Oxford University Press, 2014); Joanna L. Grisinger, *The Unwieldy American State: Administrative Politics Since the New Deal* (New York: Cambridge University Press, 2012); Richard P. Nathan, *The Administrative Presidency* (Hoboken: John Wiley & Sons, 1983); Gary Lawson, “The Rise and Rise of the Administrative State,” *Harvard Law Review* 107 (1994): 1231.
16. James Q. Wilson, “The Rise of the Bureaucratic State,” *The Public Interest* 41 (Fall 1975).
17. See, for example, Act of July 31, 1789 (authorizing customs officials to, receive reports, keep records, receive vessels and goods, and, “to estimate the duties payable thereon”); *The Brig Aurora*, 11 U.S. 382 (1813).
18. *Wayman v. Southard*, 23 U.S. 1 (1825).
19. See, for example, *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935); *NBC Inc. v. United States*, 319 U.S. 190 (1943).
20. See, for example, Christopher DeMuth, “Can the Administrative State Be Tamed?” *Journal of Legal Analysis* 8 (2016): 121, 124–27.
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  26. Sam Batkins, “600 Major Regulations,” *American Action Forum*, August 6, 2016, <https://www.americanactionforum.org/insight/600-major-regulations/>.
  27. Susan E. Dudley, “Perpetuating Puffery: An Analysis of the Composition of OMB’s Reported Benefits of Regulation,” *Business Economics* 47 (2012): 165; Sam Batkins, “To Presume Much,” *Regulation* (Spring 2016).
  28. Adam J. White, “Reviewing Independent Agency Rulemaking,” Testimony Before the Senate Committee on Homeland Security and Government Affairs, Subcommittee on Regulatory Affairs and Federal Management (September 8, 2016); Office of the Inspector General, CFTC, *An Investigation Regarding Cost-Benefit Analyses Performed by the Commodity Futures Trading Commission in Connection with Rulemakings Undertaken Pursuant to the Dodd-Frank Act* (April 15, 2011); Arthur Fraas and Randall Lutter, *On the Economic Analysis of Regulations at Independent Regulatory Commissions*, RFF Discussion Paper 11-16 (April 2011).
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  30. *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (quotation marks, citations, and brackets omitted).
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  32. John Hart Ely, *War and Responsibility* (Pennsylvania: Diane Publishing, 1993), ix.

### REASSERTING CONGRESS IN REGULATORY POLICY

33. “No. 48” in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, (New York: Signet Classics, 2003), 306.
34. The president also effectively “legislates” through executive orders.
35. Kevin R. Kosar, “Three Steps for Reasserting Congress in Regulatory Policy,” R Street Institute policy study no. 34, March 2015.
36. “No. 70” in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, (New York: Signet Classics, 2003), 422.
37. Alexander Hamilton, Pacificus No. 1, June 29, 1793, in *The Papers of Alexander Hamilton*, ed. Harold C. Syrett et al., 26 vols. (New York and London: Columbia University Press, 1961-79) (emphasis added).
38. In the Senate today, moving legislation usually requires the assent of 60 of the 100 senators.

39. Office of the Federal Register, *United States Government Manual* (U.S Government Publishing Office, 2015); Kevin R. Kosar, “How to Strengthen Congress,” *National Affairs* (Fall 2015); and Clyde Wayne Crews, Jr., “Mapping Washington’s Lawlessness 2016: A Preliminary Inventory of ‘Regulatory Dark Matter,’” Issue Analysis 2015 No. 6, Competitive Enterprise Institute, December 2015.
40. James Madison, *Virginia Report of 1799-1800* (Richmond: J.W. Randolph, 1850), 201-202. See also Richard Samuelson, “Return to Monarchy,” *The Weekly Standard* (September 26, 2016): 11-12.
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42. Congressional Management Foundation and Society for Human Resource Management, “Life in Congress: The Member Perspective,” 2013. See also Bipartisan Policy Center, “Healthy Congress Index,” <http://bipartisanpolicy.org/congress/#working-days>.
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48. *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374 (1986).
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50. Gallup, “Trust in Government,” September 2015, <http://www.gallup.com/poll/5392/trust-government.aspx>.
51. Gallup, “Majority in U.S. Prefer State Over Federal Government Power,” July 11, 2016, <http://www.gallup.com/poll/193595/majority-prefer-state-federal-government-power.aspx>
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62. U.S. Const. art. I, § 8.
63. Jeff Rosen, "Putting Regulators on a Budget," *National Affairs* (Spring 2016).
64. Sean Speer, "Regulatory Budgeting: Lessons from Canada," R Street Institute policy study no. 54, March 2016.
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71. The House and Senate full appropriations committees would be eliminated as the roles would be absorbed by the joint congressional budget committee and the small appropriation committees.
72. A modest reform would have Congress work five days a week for three weeks out of every five weeks.
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76. U.S. Const., art. II, § 3.
77. 1 *Annals of Cong.* 463 (1789).
78. See *PHH Corp. v. Consumer Financial Protection Bureau*, slip op. (D.C. Cir. 2016); see also *Free Enterprise Foundation v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010).
79. Elena Kagan, “Presidential Administration,” *Harvard Law Review* 114 (2001): 2245, 2248-49.
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81. See, e.g., Jennifer Epstein, “Obama’s Pen-and-Phone Strategy,” *Politico*, January 14, 2014, <http://www.politico.com/story/2014/01/obama-state-of-the-union-2014-strategy-102151>.
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  87. *Ibid.*
  88. Edward Walsh, “If You Don’t Like It, Get Out, White House Tells EPA Staff,” *Washington Post*, February 23, 1979, [http://www.thecre.com/pdf/20110612\\_WashPostIfYouDontLikeIt.pdf](http://www.thecre.com/pdf/20110612_WashPostIfYouDontLikeIt.pdf).
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  91. Exec. Order No. 12,291, 46 Fed. Reg. 13193 (Feb. 17, 1981), <https://www.archives.gov/federal-register/codification/executive-order/12291.html>.
  92. Exec. Order No. 12,866, 58 Fed. Reg. 190 (Oct. 4, 1993), [https://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo12866\\_10041993.pdf](https://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo12866_10041993.pdf).
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  98. Hornblower, “Muskie Criticizes White House Meddling.”
  99. Proposed Executive Order Entitled “Federal Regulation,” 5 Op. Off. Legal Counsel 59 (1981), <https://www.justice.gov/sites/default/files/olc/opinions/1981/02/31/op-olc-0005-p0059.pdf>.
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  103. *Ibid.*, 2294.
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107. See, for example, Kathryn Watts, “Controlling Presidential Control,” *University of Michigan Law Review* 114 (2016): 683, 685.
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114. Livermore, “Cost-Benefit Analysis and Agency Independence,” 627.
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116. See Nou, “Agency Self-Insulation.”
117. Livermore, “Cost-Benefit Analysis and Agency Independence,” 613.
118. *Ibid.*, 629.
119. *Ibid.*, 631-32.
120. *Ibid.*, 632.
121. Lisa Heinzerling, “Inside EPA: A Former Insider’s Reflections on the Relationship Between the Obama EPA and the Obama White House,” *Pace Environmental Law Review* 31 (2014): 325-26.
122. *Ibid.*, 346.
123. See “Circular A-11,” Office of Management and Budget, July 1, 2016, [https://www.whitehouse.gov/omb/circulars\\_a11\\_current\\_year\\_a11\\_toc](https://www.whitehouse.gov/omb/circulars_a11_current_year_a11_toc).
124. While the president’s direct power of removal may extend only to principal officers, his power to take action against other administration personnel is transmitted via his control of the principal officers who may in turn take action directly. See *Morrison v. Olson*, 487 U.S. 654, 724 n.4 (1988) (Scalia, J., dissenting). This is no different from other organizational contexts in which a chief executive has no plausible

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- mechanism to *personally* conduct all Human Resources tasks but can nevertheless exercise necessary authority through his direction of his own subordinates.
125. See Kagan, “Presidential Administration,” 2364, 2369 (arguing *Chevron* more appropriate where president’s role ensures accountability); but see Heinzerling, “Inside EPA,” 350 (arguing *Chevron* less appropriate where president treads on agency’s expertise).
  126. “2015 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act,” Office of Management and Budget, 2015, [https://www.whitehouse.gov/sites/default/files/omb/inforeg/2015\\_cb/draft\\_2015\\_cost\\_benefit\\_report.pdf](https://www.whitehouse.gov/sites/default/files/omb/inforeg/2015_cb/draft_2015_cost_benefit_report.pdf) (estimating annual cost of regulations issued between 2005 and 2014 at \$57 to \$85 billion in 2001 dollars).
  127. In 2016 dollars, OIRA’s budget would increase to approximately \$300 million out of approximately \$60 billion in spending on Federal regulatory activity. See Ellig and Broughel, “OIRA Spending Falls.”
  128. “Economic Report of the President,” January 1980, 125-26, [http://www.presidency.ucsb.edu/economic\\_reports/1980.pdf](http://www.presidency.ucsb.edu/economic_reports/1980.pdf).
  129. Jeff Rosen, “Putting Regulators on a Budget,” *National Affairs* (Spring 2016).
  130. See, e.g., Howard Shelanski, “Making All Levels of Government More Efficient and Effective Through Retrospective Review,” White House Blog, Mar. 4, 2016, <https://www.whitehouse.gov/blog/2016/03/04/making-all-levels-government-more-efficient-and-effective-through-retrospective> (claiming a total of less than \$6 billion in annual cost reductions).
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  136. *Ibid.*, 621.
  137. “Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866,” Interagency Working Group on the Social Cost of Carbon, February 2010, <https://www3.epa.gov/otaq/climate/regulations/scc-tsd.pdf>.
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139. See, for example, “Regulatory Impact Analysis of the Proposed Revisions to the National Ambient Air Quality Standards for Ground-Level Ozone,” Environmental Protection Agency, November 2014, <https://www3.epa.gov/ttn/ecas/regdata/RIAs/20141125ria.pdf>.
140. See, for example, “Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards,” Environmental Protection Agency, December 2011, <https://www3.epa.gov/ttnecas1/regdata/RIAs/matsriafinal.pdf>; see also Susan E. Dudley, “Review of Mercury Pollution’s Impacts to Public Health and the Environment,” Testimony Before the Committee on Environment and Public Works (April 17, 2012), [http://www.epw.senate.gov/public/\\_cache/files/b269df79-8ef3-4897-8483-c5f33fb3ec62/41712hearingwitness testimonydudley.pdf](http://www.epw.senate.gov/public/_cache/files/b269df79-8ef3-4897-8483-c5f33fb3ec62/41712hearingwitness testimonydudley.pdf).
141. See, for example, “Corporate Average Fuel Economy for MY 2017-MY 2025 Passenger Cars and Light Trucks: Final Regulatory Impact Analysis,” Department of Transportation, August 2012, [http://www.nhtsa.gov/staticfiles/rulemaking/pdf/cafe/FRIA\\_2017-2025.pdf](http://www.nhtsa.gov/staticfiles/rulemaking/pdf/cafe/FRIA_2017-2025.pdf); see generally Ted Gayer and W. Kip Vancusi, “Overriding Consumer Preferences with Energy Regulations,” Mercatus working paper, July 2012, <https://www.mercatus.org/system/files/Overriding-Consumer-Preferences-with-Energy-Regulations-Final.pdf>.
142. See Susan E. Dudley, “OMB’s Reported Benefits of Regulation: Too Good to Be True?” *Regulation* (Summer 2013); see also “The Rule of More,” *Economist* (February 18, 2012), <http://www.economist.com/node/21547772>.
143. See Oren Cass, “The New Central Planners,” *National Affairs* (Spring 2016).
144. See “Final Rule—Technical Support Document,” Regulation EERE-2010-BT-STD-0003, Department of Energy, February 2014, 9-8, 9-9, <https://www.regulations.gov/document?D=EERE-2010-BT-STD-0003-0102>.
145. The RegData project of the Mercatus Center at George Mason University offers an illustrative starting point. Omar Al-Ubaydli and Patrick A. McLaughlin “RegData: A numerical database on industry-specific regulations for all United States industries and federal regulations, 1997-2012,” *Regulation & Governance* (2015), doi: 10.1111/rego.12107. By compiling detailed data on regulatory burdens and economic performance across industries, the database allows for analysis of the broader economic implications of increased regulation—in many ways akin to the epidemiological research used to establish relationships between concentrations of air pollutants and public health outcomes. See, for example, James Bailey and Diana Thomas, “Regulating Away Competition: The Effect of Regulation on Entrepreneurship and Employment,” Mercatus working paper, September 9, 2015, <http://mercatus.org/publication/regulating-away-competition-effect-regulation-entrepreneurship-and-employment>; Antony

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- Davies, “Regulation and Productivity” Mercatus research paper, May 8, 2014, <http://mercatus.org/publication/regulation-and-productivity>.
146. See, for example, Austin Nichols et al., “Consequences of Long-Term Unemployment,” Urban Institute, August 20, 2013, [http://www.urban.org/research/publication/consequences-long-term-unemployment/view/full\\_report](http://www.urban.org/research/publication/consequences-long-term-unemployment/view/full_report).
147. Cf. *Motor Vehicles Manufacturers Association v. State Farm*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) (“A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.”).

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TO REFLECT ADMINISTRATIVE REALITY

148. *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199 (2015).
149. 5 U.S.C. § 553.
150. 5 U.S.C. § 553(b)(A).
151. *Mortgage Bankers Ass’n v. Harris*, 720 F.3d 966 (D.C. Cir. 2013).
152. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).
153. See Transcript of Oral Arg., *Perez v. Mortgage Bankers Ass’n*, Nos. 13-1041 *et al.* (Dec. 1, 2014).
154. Emphasis added.
155. 135 S. Ct. at 1206–07.
156. See, for example, Stephen Skowronek, *Building a New American State* (Cambridge: Cambridge University Press, 1982), 121–162; Jerry L. Mashaw, *Creating the Administrative Constitution* (New Haven: Yale University Press, 2012), 187–208.
157. Joanna L. Grisinger, *The Unwieldy American State* (Cambridge: Cambridge University Press, 2012), 59.
158. See Richard J. Pierce, *Administrative Law Treatise*, 5th ed., vol. 1 (New York: Aspen Publishers, 2009), 15.
159. See *Final Report of the Attorney General’s Committee on Administrative Procedure* (1937), 1.
160. *Ibid.*
161. *Ibid.*, 2.
162. *President’s Committee on Administrative Management* (1937), 2.
163. Pierce, *Administrative Law Treatise*, 18.
164. George B. Shepherd, “Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics,” *Northwestern University Law Review* 90

- (1996): 1557, 1559.
165. *Administrative Procedure Act: Legislative History*, S. Doc. No. 79-248, 2d Sess. (1946), at 298.
166. *Ibid.*, 18 (Staff. of S. Comm. on the Judiciary, 79th Cong. (Comm. Print. 1945)) (emphasis added, quotation marks omitted).
167. *Ibid.*, 313 (floor statement of Sen. McCarran) (emphasis added).
168. Ralph F. Fuchs, “Procedure in Administrative Rule-Making,” *Harvard Law Review* 52 (1938): 259, 271-72.
169. Matthew C. Stephenson and Miri Pogoriler, “Seminole Rock’s Domain,” *George Washington Law Review* 79 (2011): 1449, 1464.
170. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).
171. 5 U.S.C. § 553.
172. 5 U.S.C. § 556.
173. *U.S. v. Fla. E. Coast Rail. Co.*, 410 U.S. 224 (1973); see also Aaron L. Nielson, “In Defense of Formal Rulemaking,” *Ohio State Law Journal* 75 (2014): 237.
174. 5 U.S.C. § 553(b).
175. 5 U.S.C. § 554.
176. See *Chem. Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477 (D.C. Cir. 1989); *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006).
177. 5 U.S.C. § 706(2). Technically speaking, the APA applies the “substantial evidence” standard only to formal rulemakings or adjudications, not informal rulemakings or adjudications; but the courts have held, questionably, that even informal rulemakings and adjudications must be supported by “substantial evidence” because agency action lacking such evidence would be “arbitrary and capricious,” thus failing to satisfy the APA’s other applicable standard. *Ass’n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Res. Sys.*, 745 F.2d 677 (D.C. Cir. 1984)
178. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).
179. *Chrysler Corp. v. EPA*, 631 F.3d 865 (D.C. Cir. 1980) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197 (1938)).
180. *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355 (1986).
181. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (quotation marks omitted).
182. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); Reuel E. Schiller, “The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law,” *Michigan Law Review* 106 (2007): 399.
183. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).
184. *Ibid.*

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185. *Auer v. Robbins*, 519 U.S. 452 (1997); see also *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).
186. *Martin v. OSHA*, 449 U.S. 144 (1991).
187. See, for example, Stephen Breyer, “Judicial Review of Questions of Law and Policy,” *Administrative Law Review* 38 (1986): 363.
188. Antonin Scalia, “Judicial Deference to Administrative Interpretations of Law,” *Duke Law Journal* 1989: 511 (emphasis added).
189. See, for example, Richard P. Nathan, *The Plot That Failed: Nixon and the Administrative Presidency* (Hoboken: John Wiley and Sons, 1975).
190. Antonin Scalia, “Regulatory Reform—The Game Has Changed,” *Regulation* (Jan./Feb. 1981); see generally Adam J. White, “Scalia and *Chevron*: Not Drawing Lines, But Resolving Tensions,” *Yale Journal on Regulation’s Notice and Comment*, February 23, 2016, <http://yalejreg.com/nc/scalia-and-chevron-not-drawing-lines-but-resolving-tensions-by-adam-j-white/>.
191. 5 U.S.C. § 553(b)(A).
192. GAO, *Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices*, GAO-15-368, at 5 (Apr. 2015); see also Testimony of Michelle A. Sager, GAO, *Regulatory Guidance Processes: Agencies Could Benefit from Stronger Internal Control Practices*, GAO-15-834T, at 3 (Sept. 2015).
193. GAO, *Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices*, GAO-15-368, at 13-14 (Apr. 2015).
194. *Ibid.*, 21-38.
195. GAO, *Regulatory Guidance Processes: Treasury and OMB Need to Reevaluate Long-Standing Exemptions of Tax Regulations and Guidance*, GAO-16-720, at 10 (Sept. 2016).
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197. *Ibid.*, 17.
198. John D. Graham and James W. Broughel, “Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act,” *Harvard Journal of Law & Public Policy: Federalist Edition* 1 (2010): 30, 39.
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204. U.S. Department of Justice Civil Rights Division and U.S. Department of Education Office of Civil Rights, “Dear Colleague Letter on Transgender Students,” May 13, 2016, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.
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209. *Id.* § 553(c).
210. *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977).
211. *Owner-Operator Indep. Drivers Ass’n v. FMCSA*, 494 F.3d 188 (D.C. Cir. 2007).
212. *Federal Express Corp. v. Mineta*, 373 F.3d 112 (D.C. Cir. 2004).
213. 5 U.S.C. § 706(2)(A).
214. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Chrysler Corp. v. EPA*, 631 F.3d 865 (D.C. Cir. 1980) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197 (1938)).
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225. Alexander Hamilton, *Pacificus No. 1*, June 29, 1793, in *The Papers of Alexander Hamilton*, ed. Harold C. Syrett et al., 26 vols. (New York and London: Columbia University Press, 1961-79) (emphasis added).
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259. See, for example, Adam J. White, "The American Constitutionalist," *The Weekly Standard* (February 29, 2016). Both before and after Justice Scalia's passing, I was informed of the late justice's reconsideration of the doctrine by several people who witnessed him making such comments on several occasions.
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263. See, for example, Jonathan H. Adler, "Placing 'Reins' on Regulations: Assessing the Proposed REINS Act," *New York University Journal of Legislation and Public Policy* 16 (2013): 1.
264. Cf. Aaron L. Nielson, "In Defense of Formal Rulemaking," *Ohio State Law Journal* 75 (2014): 237.
265. *Ibid.*
266. Letter regarding H.R. 185, the Regulatory Accountability Act of 2015, from Alfred C. Aman, Jr., et al., to Representatives Bob Goodlatte and John Conyers, Jr., (January 12, 2015).
267. See, e.g., Richard J. Pierce, Jr., "Seven Ways to Deossify Agency Rulemaking," *Administrative Law Review* 47 (1995): 59.
268. Some critics of the Separation of Powers Act have suggested that "de novo" review requires the courts to disregard not just the agency's statutory interpretation but also all prior judicial precedents interpreting the statute at issue. But such suggestions, lacking any basis in the statute's text or legislative history, are advanced only by the act's cynical critics, rather than by commentators seeking in good faith to interpret the act in light of Congress's actual intent.

- 269.5 U.S.C. §553(b)(A).
270. The Dodd-Frank Act, for example, gives the federal district court only 24 hours to hear an appeal of the government's decision to liquidate a systemically important financial institution. 12 U.S.C. § 5382. Compared to that, a six- or ten-month review period for core legal questions in ordinary agency appeals would seem rather leisurely.
271. Under the Energy Policy Act of 2005, certain decisions of federal and state agencies, regarding natural-gas infrastructure, are subject to "expedited" review in federal court, but without further specification. 15 U.S.C. § 7171(d)(5).
272. See, for example, Andrew M. Grossman, "Regulation Through Sham Litigation: The Sue and Settle Phenomenon," Heritage Foundation Legal Memorandum No. 110, February 2014, 12.
273. Fed. R. Civ. P. 23(c)(2).
274. Fed. R. Civ. P. 23(d)(1)(B).
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276. Jon O. Shimbukuro and L. Paige Whitaker, *Whistleblower Protections Under Federal Law: An Overview*, Congressional Research Service, R42727, September 13, 2012.
277. 18 U.S.C. § 1514A(a).
278. Exec. Order 13563 § 6 (2011).
279. Exec. Order 13610 § 1 (2012).
280. Sam Batkins, "Three Years of Regulatory Reform: Did the President's Executive Orders Work?" *American Action Forum*, January 21, 2014, <https://www.americanactionforum.org/insight/three-years-of-regulatory-reform-did-the-presidents-executive-orders-work/>.
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