Regulatory Improvements to Ensure Process Certainty: Ten Impactful Ideas

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# TABLE OF CONTENTS

Foreword ................................................................................................................................. 2  
Executive Summary .................................................................................................................. 3  
Introduction ............................................................................................................................. 6  
I. Increase Public Transparency ............................................................................................... 7  
II. Clarify Guidance Documents .............................................................................................. 9  
III. Ensure a Rigorous and Consistent Cost-Benefit Analysis. .................................................. 11  
IV. Expand Retrospective Review and Consider Regulatory Budgeting .................................... 13  
   Regulatory Accumulation ....................................................................................................... 13  
   Regulatory Budgeting ............................................................................................................ 15  
V. Require Congressional Approval for “High-Impact” Rules ..................................................... 16  
VI. Improve Oversight of the Agencies ................................................................................... 17  
VII. Define the Courts’ Role for Judicial Review ...................................................................... 19  
   Judicial Standards of Review for Agency Action .................................................................. 20  
   Pre-Chevron Analysis ........................................................................................................... 20  
   Chevron: Two-Part Test ......................................................................................................... 21  
   Chevron Distinguished ........................................................................................................... 21  
   Congressional Response to Chevron Progeny ....................................................................... 22  
VIII. Enforce Statutes and Hold Agencies Accountable .............................................................. 23  
   Regulatory Flexibility Act (Protect Small Businesses) ............................................................ 23  
   Information Quality Act (Protect Integrity of the Process) ...................................................... 24  
   Unfunded Mandates Reform Act (Protect State and Local Governments and Businesses) ........ 26  
IX. Consolidate and Expedite the Permit and Approval Process ............................................... 27  
   Permitting, not Funding, was the Problem ........................................................................... 27  
   A Structural Foundation for Improving the Permitting Process ....................................... 28  
   Executive Orders and Agency Guidance .............................................................................. 29  
X. Extend Presidential Regulatory Oversight to Independent Agencies ....................................... 31  
Conclusion .................................................................................................................................. 33  
Acknowledgements ................................................................................................................ 33
FOREWORD

Improving the federal regulatory system has never been more important than it is today. Regulations are vital to successfully administering the laws that Congress passed to protect our health, welfare, environment, and the economy. The process in which they are promulgated is intended to provide the public an assurance of competence, as well as an opportunity to participate. However, the sheer volume of regulations that are added to the Federal Register each year has been increasing exponentially over the last 40 years. As such, improving the regulatory process is in everyone’s best interest, regardless of one’s political affiliation, ideology or geographic location in our diverse country.

The simple answers that sometimes seem attractive don’t work in this field of public policy. Large-scale deregulation won’t happen because Congress has passed laws that require regulation and many regulations have benefits that exceed their costs. Likewise, we cannot afford to let regulators do whatever they wish, since regulators have a well-known tendency to have “tunnel vision” about the consequences of their actions, and they have little incentive to consult all of the impacted stakeholders or coordinate what they are doing with what other federal and state regulators are doing. The Administrative Procedure Act of 1946 was intended to address some of these concerns but, as this paper reveals, the Act needs to be modernized.

The wide range of topics covered in this paper are a good foundation for constructive discussions about how to improve the federal regulatory system. Currently, some of the reform ideas have more bipartisan support than others, but all of the reforms discussed here are worthy of consideration with an open mind. The key is to identify the process problems described here and work toward finding practical solutions.

The themes of this paper are increasing transparency at regulatory agencies, enhancing public, congressional and judicial oversight of agencies, stimulating retrospective review of old regulations, and ensuring evidential support for new regulations. These themes underpin a fundamental function of government and give expression to the principles of democratic accountability and checks and balances.

I offer here only a few comments on some of the specific reforms discussed in the paper. Ensuring a proper benefit-cost analysis in support of costly regulations has a strong bipartisan history in presidential executive orders, but needs an unambiguous expression of support from Congress. Agency guidance documents are increasingly used to serve regulatory purposes and should be subject to some of the same procedural protections that govern rulemaking.

Requiring Congressional approval of “high impact” rules may have some accountability merit in an atmosphere of a growing federal regulatory state but, if the other reforms identified in this paper are properly implemented, it may not be necessary to involve Congress in the rulemaking process on a regulation-by-regulation basis. The current administration has made a major step toward formal regulatory budgeting, and careful studies need to be undertaken to determine what effect that is having on the federal regulatory state. For the business community, consolidating and expediting the permit process may be the most important near-term improvement. This issue has bipartisan support and would boost the economy and long-term business planning.

With all the suggested improvements contained here, and others in the regulatory reform literature, the central ideas are to ensure competence and accountability in the process so that our nation’s communities and businesses can properly plan for the future.

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EXECUTIVE SUMMARY

The American Council for Capital Formation’s Center for Policy Research (ACCF-CPR) has for decades been involved with improving the regulatory process. To foster a continued bipartisan dialogue on regulatory issues, ACCF-CPR has convened numerous discussions on improving the framework for developing solutions that result in more efficacious regulations while protecting the health, welfare, environment, and economic stability of the public. This paper is a result of a November 16, 2016 bipartisan roundtable discussion identifying ten specific issues and beginning the dialogue on finding solutions.

I. Increase Public Transparency: An open and transparent regulatory process requires early participation by the public. However, many times the public learns of a proposed regulation after a policy decision has been set, and sometimes after it has already become finalized. Later public input is not as effective because once an administrative decision to regulate is made, the process starts moving in that direction, and the sheer inertia of that process often makes it difficult to alter course and near impossible to stop.

One bipartisan idea is to require agencies to use advanced notices of proposed rulemaking (ANPRM) in all “economically significant” rules. This added requirement would not unnecessarily delay agency action when one looks at the whole process. Having input earlier in the process helps agencies determine the best course of action, adds uniformity to the process, and could reduce the likelihood of legal challenge to the final rule.

II. Clarify Guidance Documents: Guidance documents are “interpretive rules” and “general statements of policy” of agencies to assist in administering their responsibilities and inform the public. However, unlike a regulation that must go through the “notice and comment” process, guidance documents are issued at the discretion of the individual agency, and yet some still have the same effect as a regulation because of the inferred discretion given to agencies by Congress and upheld in the courts. If guidance documents are going to be enforceable on the regulated community and public, Congress should require that they go through the same notice and comment period as are required of regulations.

III. Ensure a Rigorous and Consistent Cost-Benefit Analysis: Cost-benefit analysis is a vital tool in a regulatory analysis to objectively evaluate the costs and benefits of an agency action. Opponents of its use claim it does not adequately account for intangibles, such as societal welfare. In response, more factors were included in the analysis, though that led to concerns that certain factors carried either too much or too little weight, depending on the policy positions of the administration. Some of the concerns were addressed when the Office of Management and Budget (OMB) issued a guidance, which clarified and assisted agencies in conducting a cost-benefit analysis and required agencies to: 1) explain the “need” for the rule; 2) evaluate the alternatives, including no action; and 3) analyze the costs and benefits.

To ensure consistency, Congress should consider codifying and expanding OMB guidance, so that all agencies are held accountable not only for their actions, but also for their analysis. Congress should also mandate that regulators contemplate whether the proposed agency action will “do more good than harm.” If the answer is in the affirmative, then the process should move forward; if it’s in the negative, then the process should be put on hold until a better approach is developed. Allowing judicial review of the analysis would also bring additional accountability to the process.

IV. Expand Retrospective Review of Ineffective Regulations: The regulatory system has accumulated thousands of regulations and guidance documents over the years and has often been referred to as the “fourth branch of government.” The problem with “regulatory accumulation” is that the layering of multiple, seemingly unrelated, regulations on top of each other can harm the economy.

There are several ways to address regulatory accumulation. One such way is for Congress to require retrospective review of all significant rules, with the assistance of OMB, which would coincide with previous executive orders that instructed agencies to retrospectively review their regulations for applicability of purpose. Another option would be to establish a congressionally sanctioned bipartisan review committee that would review old regulations periodically and submit their findings to Congress for action. A more recent option is the executive order that requires agencies to remove the economic equivalent of two regulations for every new one that is finalized.
V. Require Congressional Approval for “High-Impact” Rules: Congress has for years been contemplating ways to be more involved in the promulgation of economically significant regulations. The Congressional Review Act was a previous attempt at this, though its practice is limited to a particular political scenario.

Congress is considering requiring overt approval before certain “high impact” rules are finalized. While some claim that Congress is too political and not objective enough to make such significant decisions, others argue that elected officials are exactly who should be making such decisions. Another argument against Congress getting involved at this level is that they lack the technical capacity to make such informed decisions. However, Congress certainly could put together a commission of some type that could handle the detailed analysis involved. In addition, if congressional involvement were limited to “high impact” rules, the number of rules evaluated would be substantially less than the total number of rules promulgated each year. While there may be some constitutional questions as to its use, requiring Congress and the President to agree on these types of rules before they are finalized is worthy of discussion.

VI. Improve Oversight of the Agencies: Congress has the constitutional authority to both create laws and conduct oversight of their implementation. The goal of the oversight process is to weed out waste, abuse, and fraud and subsequently make legislative modifications where necessary to further the intent of Congress. Congress has numerous tools to conduct a robust oversight agenda, though the effectiveness of some has been reduced. Congress should work in a bipartisan manner with the administration to clarify, advise, and support their efforts to administer the law.

The executive branch also has a major role in oversight. Through a fully funded and staffed Office of Information and Regulatory Affairs (OIRA) within OMB, the administration should expand the centralized review of all significant regulations proposed. Having an expanded centralized process would result in better collaboration between various agencies and increase efficiencies in the process.

VII. Define the Courts’ Role for Judicial Review: The balance between congressional intent and the faithful execution of statutes has been at times contentious. However, the arbiter of that balance has historically been the judiciary. Congress passed the Administrative Procedure Act (APA) in 1946 to bring uniformity to the regulatory process, and establish guidelines for an expanding regulatory state at the time. The APA explicitly made clear Congress’ intent to confer to the courts judicial review of agency action. Historically, the courts looked at all the circumstances surrounding a case, including justification for an agency action.

This was typically the process until the seminal 1984 Chevron case. There the Supreme Court attempted to simplify the process by creating a two-part test. The test was that: 1) if the text of the statute is clear, it must be followed; 2) if, however, it is unclear deference is given to agency action over other factors. Critics have claimed that, as a result of Chevron, the courts have delegated their constitutional role in determining what that law is to the agencies.

Recent Supreme Court decisions have created “exceptions” to Chevron, and may be a sign that the court is reasserting its authority to determine what the law is. The appointment of Supreme Court Justice Neil Gorsuch, a known critic of the Chevron decision, may well lead the Supreme Court to reevaluate its role in judicial review. However, Congress should also contemplate instructing the courts to dispense with Chevron deference and return to an analysis that looks at all relevant factors before determining what that law means.

VIII. Enforce Statutes and Hold Agencies Accountable: One of the main deficiencies in the regulatory process has been a lack of a meaningful enforcement mechanism with which to ensure congressional intent. While most of these problems could be addressed through executive action, many times Congress, an administration, and the courts do not agree on the implementation of certain statutes.

The Regulatory Flexibility Act was enacted as a safeguard for small businesses before an agency finalized a rule. Unfortunately, agencies only evaluate direct impacts on small
business and at times disregard indirect impacts. Moreover, the courts have deferred to agencies’ interpretation of the law to the detriment of small business. As a result, Congress should require agencies to calculate indirect impacts.

The Information Quality Act was enacted, and later clarified through OMB guidance documents, to ensure “quality, objectivity, utility, and integrity” in the information that agencies used in promulgating regulations. Agencies should have to show how they arrived at a certain conclusion based on the information used. To hold agencies accountable for the information they use, one idea is to create a private right of action. Another is to require that agencies use diverse advisory panels with independent peer reviewers.

The Unfunded Mandates Reform Act was a congressional response to a growing concern that an increasing amount of legislation mandated action, but did not provide the requisite funding for its implementation to the states, local municipalities, and the private sector. While the law affords some enforcement mechanisms with regard to pending legislation that would prevent its passage, no such protection is afforded to pending regulations. Congress must determine whether this law is being properly implemented as intended and, if not, it should re-evaluate whether judicial review should apply to the substantive aspects of the requirements.

IX. Consolidate and Expedite the Permit and Approval Process: There is bipartisan agreement that there are lengthy delays in the permitting process. These delays have unnecessarily increased costs to many infrastructure and building projects. President Obama and Congress attempted to address the problem with Title 41 (Federal Permitting Improvement) of the FAST Act of 2015. However, since its passage, there are still concerns that delays in the process are unnecessarily impeding projects.

President Trump issued Executive Order 13766 in an attempt to address these delays by putting time limits on environmental reviews, and mandating a “one federal decision policy,” to facilitate better coordination between the federal agencies. Under this policy, a lead agency will prioritize making permit decisions in 90 days, and be given a two-year window to process all environmental reviews. Congress also has a vital role in clarifying existing legislation; enacting new legislation to expedite the process where necessary; and, when warranted, grant waivers to certain statutory requirements for permit approval.

X. Extend Presidential Regulatory Oversight to Independent Agencies: Congress created independent agencies with certain protections from political or executive branch influence. However, oversight of these agencies is still a necessary function of government. The APA affords some protection from abuses of discretion by the agencies as it applies to all agencies. However, independent agencies have been excluded under recent executive orders, which in many cases gives guidance on best practices and adds certainty to the regulatory process. While Congress has some oversight options, including requiring reports and appearance of agency heads before the appropriate committee, this limited oversight is considered by some to be lacking.

To conduct effective oversight, independent agencies should be required to justify and be held accountable for their regulations. While it may not be appropriate for all executive orders to apply to independent agencies, there are certainly some that should be to ensure certainty in the process. Congress should evaluate relevant executive orders and OMB guidance documents that have best practices and contemplate their applicability to independent agencies.
INTRODUCTION

The ACCF-CPR’s work to improve the federal regulatory process goes back decades. ACCF-CPR has hosted numerous bipartisan discussions with policymakers, business leaders, and academics on how to make the regulatory system more efficient and cost-effective in protecting the environment and public health and welfare. Participants have included elected officials, state-based organizations, business leaders, special interest groups, and members of academia. This paper is the result of a November 16, 2016, bipartisan roundtable discussion on potential policy solutions to improve the federal regulatory system. The following pages highlight specific issues that arose during the roundtable, provide additional background information, and include further analysis of subsequent Presidential Executive Orders and federal agency actions.

Dr. Murray Weidenbaum, the former Chairman of President Reagan’s Council of Economic Advisers and a founding Director of the American Council for Capital Formation Center for Policy Research (ACCF-CPR), was known for his pioneering work on U.S. regulatory policy, arguing that regulatory improvement must be central to our economic policy goals. To effectively reach these goals the federal regulatory system must achieve the proper balance between protecting the health and well-being of our communities, and facilitating an environment for job growth and economic prosperity. The problem is that federal regulation now permeates all segments of the economy putting increased pressure on all businesses both large and small. As a result, it is taking a major toll on the U.S. economy and specifically on American enterprise and innovation. As shown by the ACCF-CPR’s own sponsored research, investment has remained sluggish due in part to an outdated U.S. corporate tax code and regulatory overreach that has weakened business confidence and discouraged investment. Decreased investment is just one of the many unintended consequences of “overregulation.” This paper looks at possible responses Congress and the President could take to improve the federal regulatory system.

Historically, periods of regulatory expansion by the executive branch have been followed by clarifications, revisions and, when warranted, revocations of rules both by the legislative and judicial branches. These types of checks and balances were not only contemplated by our country’s Founding Fathers, but were considered instrumental to the success of the United States’ three-equal-branches form of government. In fact, one of the three branches of government almost always responds when another branch attempts to expand its authority. This is one of the reasons Congress passed the Administrative Procedure Act of 1946. In addition, Congress wanted to address the expanded role of the regulatory system by clarifying, consolidating, and unifying the process. A similar response occurred again after the expansion of the federal regulatory bureaucracy in the 1970s. This culminated in additional safeguards in the process and with a particular focus on small businesses and communities who could least afford the increasing regulatory burden. More recently, the administrative state was expanded during the Obama Administration, though this is arguably more to do with the Administration’s inability to compromise with Congress on its policy goals than as a result of some real regulatory need. Nonetheless, as a result, the election of a reform-minded president in 2016 may well usher in another period of regulatory review that seeks to improve the process and lessen the economic burden on the American people.

Unfortunately, the “regulatory pendulum” swings back and forth with seemingly each successive administration all the while creating uncertainty in the regulatory system. While arguably just part of the political process in Washington, D.C., for the average American this is both daunting and costly. Moreover, in the end, taxpayers and consumers are the ones who eventually pay the price for that uncertainty.

Unfortunately, to make matters worse, some special interests groups have achieved their policy goals through the expanded regulatory process. While it is understandable why these special interest groups would object to changing a system that has benefited them, society benefits more from an open, answerable, and reliable government process. Until this is

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1 The ACCF Center for Policy Research (ACCF-CPR) is a 501(c)(3) nonprofit organization that focuses on research and education. It is affiliated with the American Council for Capital Formation (ACCF), a 501(c)(6) trade association.


4 Administrative Procedure Act (APA) of 1946, 5 U.S.C. §551 et seq.; (This was seen by many as a check on President Roosevelt’s New Deal.).
realized by all stakeholders, improving the regulatory system will be fraught with challenges, and regrettably unfounded accusations of improper intentions. This could not be better stated than by a contributor to an ACCF-CPR roundtable discussion on “Regulatory Improvement” just after the 2016 Presidential election:

“It’s not going to be easy because there are people who think that any change in the regulatory process is a threat to the underlying protection of public health safety and the environment. I don’t think it’s the case, but I think we’re going to continue to try and find some consensus on, and perhaps effectuate some change.”

If ensuring the safety of the public and the environment is truly the goal of the opponents of altering the current system, then supporting certainty in the process should surely be a mutually shared goal.

The uncertainty in the regulatory system stems from the unpredictability of the “process” in which regulations are promulgated. It is here that those interested in good governance should focus their attention. Focusing on producing better regulations is something upon which everyone should agree, as opposed to individual regulations, which can be politically divisive, self-interested, and can result in significant unintended consequences. Whatever side one comes down on with regards to a particular regulation, the one common theme is that the process needs to be open, fair, and use the best available information. When process certainty is achieved, communities and businesses will be able to properly plan for the future.

I. INCREASE PUBLIC TRANSPARENCY

One of the ongoing problems with the growth of the regulatory state is that once an administrative decision to regulate a certain sector of the economy is made, the process starts moving in that direction, and the sheer mass of that process often makes it difficult to alter course and near impossible to stop. As John D. Graham, former Administrator of OIRA and Sr. Advisor to ACCF-CPR, indicated:

“[A]gencies take public comment and public participation after they have proposed a solution... [a]nd ... once [an agency] think[s] [they] know what the solution is ... it is not that easy to move people off that original proposal.”

Given the difficulty in addressing this issue, public input is always the best check on regulatory action. Generally speaking, some agencies try to give ample public notice about their intentions to regulate. In fact, per Executive Order (EO) 12866 and the Regulatory Flexibility Act of 1980, some agencies release a “Unified Agenda” every six months to give notice as to the areas they plan to regulate.

However, these are often not detailed enough to adequately inform the public of what is to come and how it might affect them. While the Administrative Procedure Act (APA) requires a notice of proposed rulemaking (NPRM), by the time a NPRM is issued, many times the decision on what, when, why, and how to regulate has already been made. The process can thus seem like nothing more than agencies checking off the statutory requirements with little or no change to the underlying decision to regulate.

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1 ACCF-CPR hosted a roundtable discussion and reception on Improving the Federal Regulatory System (“ACCF-CPR Roundtable”), Senate Dirksen Office Bldg., (Nov. 16, 2016) (The discussion featured Sens. James Lankford (R-OK); Angus King (I-ME); Mike Rounds (R-SD); and Chairman Ron Johnson (R-WI)).


6 Id at note 7. (John D. Graham’s Congressional Testimony).
Having meaningful input at an earlier stage in the process goes a long way in helping an agency determine the best course of action. It also adds uniformity to the process and presumably reduces the number of challenges to the final rule. In fact, this is the rationale behind agencies using advanced notices of proposed rulemaking (ANPRM).\textsuperscript{11} However, the APA does not require agencies to use ANPRMs.\textsuperscript{12} Although some agencies use them, it is not consistently used government-wide.\textsuperscript{13} Therefore, to ensure certainty to the regulatory process, its mandated use in certain situations should be contemplated.

One bipartisan idea has been to require agencies to use them in all "economically significant" rules.\textsuperscript{14} This would give the public additional time to comment. While organized interest groups on both sides of a promulgated rule know when and how to express their input, the less organized public "has remarkably little weight in current regulatory processes."\textsuperscript{15} These less organized also include the most vulnerable and arguably the largest segment of the public.\textsuperscript{16}

In addition to helping the public become more involved at an earlier stage, a wider use of ANPRMs would also benefit the agencies in determining the extent of the perceived problem, the legislative authority to use, and an opportunity to conceptualize better alternatives.

There is some concern that adding an additional requirement would add unnecessary delays in the process. In fact, unnecessary delay is one of the most cited reasons for opposing regulatory change or improvement.\textsuperscript{17} While adding this requirement to every promulgated rule would add time to the process, this would be mitigated by requiring an ANPRM on only those rules that meet a certain economic threshold. Depending on what that dollar amount is set, the number of rules that would be effected by this type of change would be greatly diminished.\textsuperscript{18}

Another argument cited is that any delay would potentially harm the health and welfare of the community. While this claim is arguable, having an exemption in place allowing the administration to expedite certain procedural requirements, when it is determined that the standard procedure is not in the public interest, would help rebut that argument. Furthermore, while adding requirements may appear to have the potential for delayed administration action, according to various sources, that delay would be insignificant when one looks at the whole process.\textsuperscript{19}

Looking at the whole process is how all regulatory action should be viewed. If the process itself is more transparent from the onset and the public has an earlier opportunity to give input before a regulation is already conceived, the result will...


\textsuperscript{12} See APA, 5 U.S.C. §551 et seq.


\textsuperscript{14} See S.579, 115th Cong. 1st Sess, (2017) (Early Participation in Regulations Act of 2017) (Co-sponsored by Sens. Lankford (R-OK) and Heitkamp (D-ND).; See also EO 12866, Regulatory Planning and Review, (It defines "significant regulatory action" broadly as having "… an annual effect on the economy of $100 million or more or adversely affect in a material way the economy…."); (Sept. 30, 1993), 58 FR 51735; at https://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf.


\textsuperscript{16} See Id.

\textsuperscript{17} Coalition for Sensible Safeguards, Groups Strongly Oppose Anti-Regulatory Bills Considered by the U.S. S. Homeland Sec. and Govt. Affairs Comm., (October 6, 2015) ("[R]egulatory delay and inaction is the true threat to our economy and leads to preventable deaths, injuries, illnesses, damage to the environment, unfair competition, and an unstable financial system."); at http://sensiblesafeguards.org/outreach/groups-strongly-oppose-anti-regulatory-bills-considered-by-the-u-s-senate-homeland-security-and-government-affairs-committee/; Also, the coalition's membership is a broad list of organizations that oppose regulatory improvement. For a complete list see http://sensiblesafeguards.org/about-us/members/.


likely be fewer challenges, and the final rule will ultimately have a better opportunity to maximize the benefits and further minimize the costs to the community.

II. CLARIFY GUIDANCE DOCUMENTS

Guidance documents are referenced in the APA as “interpretive rules” and “general statements of policy.” They are excluded from the notice and comment requirement of proposed regulations, though some agencies still do seek comments. In addition, they are outlined in Executive Order 12866 as agency policy statements or interpretation of certain regulations and statutes.

A statute needs both congressional and executive branch support to become law. A regulation, on the other hand, must go through the notice and comment process before being enforceable, though there are exceptions to this requirement, which agencies regularly use. However, guidance documents are drafted and issued at the discretion of the individual agency. The purpose for guidance documents is to give an agency the flexibility it needs to address issues that are left unresolved by the authorizing statute and subsequent regulations. However, concerns about due process, coordination of documents among agencies, and subverting the APA process have been a persistent problem.

Moreover, guidance documents that “look and feel more like enforceable regulations and less like guidance” increase uncertainty in the process. Without the checks provided for public input to promulgating regulations, agencies can flout the congressional intent of an authorizing statute and can impose their own will with little outside oversight. As a result, these documents add to a growing body of “rules” that have not received the scrutiny envisioned in the APA, leading to what one policy analyst aptly referred to as “regulatory dark matter.” As the D.C. Circuit Court so aptly described:

“Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in regulations. One guidance document may yield another and then another and so on…. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.”

The sheer volume and lack of uniform procedure for guidance documents have led to multiple law suits resulting in inconsistent application of the holdings from various federal courts. The question becomes: when are guidance documents mandated? In National Mining Association v. Secretary of Labor, the court held that when guidance documents are used as “policy statements” they are valid, and discretion is given to the agency in their implementation. Other courts have held, like in the Appalachian Power Co. v. EPA case, that if a guidance document “looks like a regulation and acts like a regulation, then it is regulation.” As such, if considered a “regulation,” it would be voided until promulgated through the APA’s notice and comment procedure. To complicate the matter, the Supreme Court in Perez v. Mortgage Bankers Association unanimously held that guidance documents that interrupt a

21. 5 U.S.C § 553(b)(3)(A) (Exceptions to the notice of proposed rulemaking.).
22. See EO 12866 at note 8.
23. With the exception of a Congressional override of a Presidential veto.
27. Natl. Mining Assoc. vs. SEC of Labor, 589 F.3d 1368, 1370-1 (11th Cir. 2009).
29. See id at 1021.
statute need not go through the notice and comment process, as expressly stated in the APA.31 This inconsistency, or at least its application, has yet to be resolved by the courts. As the Congressional Research Service (CRS) indicated in a recent report, “[u]ltimately, the precise effect of either legal approach on agency behavior is unclear. For now, federal courts do not consistently apply either test.”32 This becomes particularly problematic when previously interpreted statutes are reinterpreted in new ways, especially where it results in expanding the scope of a statute outside its intended purpose.

One response to the increasing number and broadening application of guidance documents was the 2007 Office of Management and Budget (OMB) “Bulletin on Good Guidance Practices,” dealing with “significant” guidance documents. In it, guidance documents that lead to an annual effect on the economy of more than $100 million, or have a materially adverse effect on the economy, would be given greater scrutiny.33 At the same time of its release, President George W. Bush also issued EO 13422 that sought to add procedural requirements for their use, such as an OMB review before “significant” guidance documents were finalized.34 President Obama later revoked those requirements claiming that it gave too much authority to the administration to influence the regulatory process.35 While it is certainly debatable whether OMB should have more or less of a role in the federal regulatory process, notable is that the Obama Administration left the 2007 OMB bulletin in place. Furthermore, the Trump Administration shows no signs of revoking the bulletin.

While the continued use of the 2007 OMB bulletin does alleviate some of the uncertainty with guidance documents, it is worth noting that it is not legislatively or judicially enforceable. In fact, some agencies don’t use it at all, others such as independent agencies are exempt, they do not apply to “interpretive” guidance, and any subsequent administration could modify or revoke it at will.36 For these reasons and the uncertainty they create, there is an ongoing discussion on whether the use and scope of guidance documents should be clarified and then codified in statute.

A good starting point may be to codify the 2007 OMB bulletin given its seemingly bipartisan support. To go even further, Congress may want to legislatively require that “guidance documents” should be treated as regulations when they have a “significant” impact on the economy. Given the economic effect that certain guidance documents can cause, there is ample reason to require heightened scrutiny of their use. This would protect the public’s interest in “significant” agency action, and yet still allow some agency flexibility on less impactful matters. Since some of the courts have already applied a higher level of scrutiny, clarifying and codifying the applicability of guidance documents would bring needed certainty to the issue.

Another idea would be to amend the APA so that interpretive rules must go through the notice and comment period if they are changing existing interpretive rules.37 This would ensure certainty in the process for those who have relied on agency decisions and would otherwise be left with no recourse. Also, this would hopefully have a chilling effect on agencies drafting overly broad rules, only to be later reinterpreted as subsequent administrations change their policy positions.

Guidance documents are a necessary part of effectively administering federal agencies. They should be used internally for the efficacious management of the agency and externally to assist and clarify to the public and regulated community the nexus between duly enacted statutes and their subsequent implementation. The public should be given notice of their creation and an opportunity to be heard on their implementation.

31. 5 USC § 553.
III. ENSURE A RIGOROUS AND CONSISTENT COST-BENEFIT ANALYSIS

The issue of when and how to implement a cost-benefit analysis while an agency conducts a regulatory analysis is one of the most contentious proposals for improving the regulatory process.38 A regulatory analysis is a vital process for an agency to conduct in evaluating a proposed rule. It is, in many cases, the justification for agency action. As is indicated in the 2003 OMB Circular A-4:

“Regulatory analysis is a tool regulatory agencies use to anticipate and evaluate the likely consequences of rules. It provides a formal way of organizing the evidence on the key effects, good and bad, of the various alternatives that should be considered in developing regulations. The motivation is to (1) learn if the benefits of an action are likely to justify the costs or (2) discover which of various possible alternatives would be the most cost-effective.”39

However, the cost-benefit analysis (CBA), first used in the U.S. by the Army Corp. of Engineers in the late 1930s, stood for the proposition that, to justify agency action, the benefits should be more than the estimated costs.40 A CBA could then quantify and monetize both costs and benefits.41 With regard to regulatory action, the costs are typically those involving increased fees or prices on goods and services, less economic opportunity including job loss, and overall costs associated with reduced economic activity. The benefits are typically those associated with the public’s health, welfare, and environment.

The CBA was used sparingly until the expansion of the regulatory state in the 1970s.42 During the 1980 presidential election, then candidate Ronald Reagan campaigned on addressing the growing regulatory bureaucracy. After being elected, President Reagan issued EO 12291 that mandated the use of cost-benefit analysis in the regulatory process.43 It also required that “significant” regulations must go through an OMB review process.44

One of the goals of EO 12291 was to bring consistency and objectivity to the regulatory process. The CBA was considered vital to improving the regulatory process because it provided an objective analysis of the costs and benefits before agency action is taken.45 There was opposition to its broader use because, among other concerns, it did not adequately account for intangibles such as societal welfare. While realizing the importance of a CBA, President Clinton responded to some of these concerns when he issued EO 12866, which required that the benefits should merely “justify” the costs as opposed to exceed them.46 The EO also broadens the use of quantifiable benefits to help in the overall analysis.47 In EO 13563, President Obama expanded the use of values that were “difficult or impossible to quantify, including equity, human dignity, fairness, and disruptive impacts.”48

However, as the number of factors that go into an analysis increases, some argued that certain factors carried too much or too little weight, depending almost solely on the policy positions of the current administration. As a result, it became more of a policy decision and the analysis itself began to lose its intended objectivity. For, if anything can be considered a

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38. The Coalition for Sensible Safeguards might best describe this contention when explaining their opposition to regulatory improvement be claiming that “... cost-benefit analysis, [is] a flawed tool that undermines strong regulation.”; at http://sensiblesafeguards.org/factsheets/raa-2017-c951/.
42. See Id.
44. EO 12291.
46. EO 12866.
47. See EO 12866.
benefit or cost, then the analysis becomes counterproductive. However, most agree that analytics in some form should be used in measuring the usefulness of proposed regulations.

OMB’s Circular A-4 Regulatory Analysis was intended to assist agencies in conducting a cost-benefit analysis when required to do so. The guidance document identified factors to consider when determining cost-benefit analysis under the framework of EO 12866. Specifically, it required agencies to 1) explain the “need” for the proposal; 2) evaluate the alternatives, including no action; and 3) analyze the costs and benefits. Even with Circular A-4’s guidance, however, there was still concern with the subjectivity of the analysis even though it was addressed in the document:

“It will not always be possible to express in monetary units all of the important benefits and costs…. In such cases, you should exercise professional judgment in determining how important the non-quantified benefits or costs may be in the context of the overall analysis. If the non-quantified benefits and costs are likely to be important, you should carry out a ‘threshold’ analysis to evaluate their significance. Threshold or ‘break-even’ analysis answers the question, ‘How small could the value of the non-quantified benefits be (or how large would the value of the non-quantified costs need to be) before the rule would yield zero net benefits?’ In addition to threshold analysis you should indicate, where possible, which non-quantified effects are most important and why.”

Explaining and justifying intangibles is a difficult task. In the end, it comes down to agencies following the guidance document and engaging in good governance.

As one contributor to the ACCF-CPR roundtable discussion, quoting a Clinton era report to Congress on the costs and benefits of federal regulations, indicated:

“[R]egulations have enormous potential for good and harm. The only way to distinguish between regulations that do good and those that do harm is through careful assessment of their benefits and costs. Such analysis can be used to redesign harmful regulations and even redesign good regulations so they do … have even more net benefits.”

To ensure consistency to the extent that it is possible, Congress should codify OMB Circular A-4 so that agencies are held accountable not only for their actions but also their analysis. Furthermore, Congress should mandate that regulators contemplate at every stage of the process whether a proposed action will “do more good than harm.” If the answer is the affirmative, then the process should move forward; if it’s the negative, then the process should be put on hold until a better approach can be developed.

Also, as previously mentioned, getting earlier public input on the costs and benefits during ANPRMs comment period would help agencies better conduct a final analysis. This coupled with expanding the role of the Office of Information and Regulatory Affairs (OIRA), in providing guidance on categorizing and analyzing both direct and indirect costs, as well as calculating tangible and intangible benefits, would help bring certainty to the process.

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50. Id.
51. Id.
52. OMB, Circular A-4, Regulatory Analysis, (Sep. 17, 2003), 68 FR 58366; at https://www.whitehouse.gov/omb/circulars_a004_a-4.
53. ACCF-CPR hosted a roundtable discussion and reception on Improving the Federal Regulatory System (“ACCF-CPR Roundtable”), Senate Dirksen Office Bldg., (Nov. 16, 2016) (The discussion featured Sens. James Lankford (R-OK); Angus King (I-ME); Mike Rounds (R-SD); and Chairman Ron Johnson (R-WI)).
56. Office of Information and Regulatory Affairs (OIRA), is part of the OMB and the Executive Office of the President.
Lastly, to ensure certainty in the process, a cost-benefit analysis must be judicially reviewable. This is not a new concept as judicial review has been a fundamental check on agency action for decades. However, the cost-benefit analysis does have its flaws and would be improved by enabling judicial accountability.

“… the status quo is inadequate for many reasons, including the institutional limitations of the agencies and OIRA (such as bureaucratic turf battles, failure to utilize both internal and external expertise, bias, and the mismatch between the vast volume of regulation and OIRA’s shrinking resources), as well as political dysfunctions (including inconsistent support for OIRA by varying administrations, interest group rent-seeking, and presidential electoral politics). Scholars have shown that the courts are quite capable of competently reviewing agency use of benefit-cost analysis. Indeed, benefit-cost balancing is so fundamental to rational decision making that the courts already have shifted toward requiring agencies to do more good than harm, even in the absence of Congressional action.”

Improving the cost-benefit analysis may be the single most influential step toward ensuring certainty to the federal regulatory process. It merits attention and an in-depth review and discussion.

IV. EXPAND RETROSPECTIVE REVIEW AND CONSIDER REGULATORY BUDGETING

The regulatory system with its accumulation of thousands of regulations and guidance documents each year has often been referred to as the “4th branch of government.” Some call this a normal response to a gridlocked Congress. Others claim it is an example of an out-of-touch Congress that for decades has surrendered its Article I constitutional authority to the executive branch to avoid difficult political decisions. In response, the courts have claimed that Congress lacks the expertise to adequately understand the implementation of its own legislation.

Regulatory Accumulation

For a multitude of reasons, regulatory “red tape” is getting more difficult to navigate every year. The problem with “regulatory accumulation” is that it is not apparent when each regulation is viewed as a separate action. While the addition of a regulation here and there will not usually adversely affect the economy or a particular project, the accumulation of multiple, seemingly unrelated, regulations can have an incredibly negative effect. The Progressive Policy Institute compared the accumulation of regulations to the flow of a stream. If one adds a few small rocks to a stream, it is minimally affected. However, add enough rocks in the same location and the build-up can alter or even stop the flow of the river. Just like rocks in a stream, regulations that accumulate year after year eventually will adversely affect development.

57 Paul R. Noe, AF&PA Blog, Bringing Accountability to Regulation: Doing More Good than Harm, (May 15, 2017); John D. Graham & Paul R. Noe, p. 72-87 at fn. 15.


64 See id.
projects and, eventually, economic growth. If left unchecked, certain segments of the economy could be drastically reduced or even cease to function completely. The result is that the accumulation of regulations can grow to a point where entire sectors of the economy may no longer be viable.

As many small business owners know, regulatory compliance cost with regulations can be devastating to their bottom line and impact their investment decisions. As the National Small Business Association has indicated:

“The impact of regulatory burden [on small businesses] cannot be overstated: more than one-third have held off on business investment due to uncertainty on a pending regulation, and more than half have held off on hiring a new employee due to regulatory burdens.”

There are a couple of options for addressing regulatory accumulation that have bipartisan support. One option is to have agencies review current regulations to see if they are still doing what they were originally intended to do, and whether the costs still justify the benefits. If the answer is no, there should be a process to remove outdated regulation to reduce the burden on businesses and create an atmosphere for job creation and economic growth. There are laws in place to address this problem but they are limited in scope, applicability, and lack an effective enforcement mechanism. One example is the statutory requirement to retrospectively review significant rules that affect small businesses after 10 years. Another is President Obama’s EO 13563 that instructed agencies to review regulations for applicability of purpose. While relying on the expertise of the agencies to identify and address outdated and ineffective regulations is a good start, it is likely not going to be enough to address the sheer volume of regulations on the books. There also may be a concern that agencies alone may not be objective enough to make the necessary decisions on certain regulations tied to their operating budgets. A revised option to agency retrospective review, outlined in EO 13563, would be to increase the role that OIRA has in reviewing old regulations. Still another option may be to establish a congressionally sanctioned bipartisan review committee that would periodically review old regulations and submit the findings to Congress for action. The committee could apply a cost-benefit analysis, as discussed previously, that would require a “net benefit.”

There are numerous options available to tackle the specific problem of regulatory accumulation and its negative effects on communities throughout the country. Some have suggested public-private partnerships in addressing the issues by having citizens or groups submit alternatives to proposed agency action. Others suggest that mandating agencies to determine whether regulations achieve their purpose would incentivize regulators to improve their initial analysis of proposed rules.

65 Catherine Clifford, CNBC, Small-business owners pay over $83,000 in regulatory costs in the first year, new survey shows, (Jan 18, 2017) (Quoting NSBA Chair Pedro Alfonso and President and CEO Todd McCracken); at https://www.cnbc.com/2017/01/17/small-business-owners-pay-over-83000-dollars-in-regulatory-costs-in-first-year.html.


68 EO 13563, 76 FR 3821, (Jan. 21, 2011).


Regulatory Budgeting

Another option is regulatory budgeting. This would address both retrospective view of regulatory accumulation, as well as, prospective planning for future regulations. This bipartisan concept has been around since the 1970s and is based on the principle that, by putting agencies “on a budget,” they would be incentivized to prioritize regulatory goals and propose rules more cost effectively. Moreover, there is at least one analysis that found a “high” correlation between agency budgets and corresponding agency regulations. The concept’s rationale is again being discussed as evident in a recent congressional hearing:

“First, the agency would avoid new regulations that would not achieve high benefits relative to their budgetary cost. Second, the agency would have incentive to eliminate old regulations that are found to be ineffective or intolerably inefficient. In other words, a regulatory budget process would resemble an error-correction process: it would lead to fewer new errors as well as aid in the identification and correction of existing ones.”

Regulatory budgeting also has the benefit of bringing transparency to the regulatory process across multiple agencies. While measuring both costs and benefits can be subjective and difficult, Congress must develop an objective process to ensure economic accountability. Therefore, Congress should discuss setting up the framework for the Executive Branch to implement regulatory budgeting.

A step toward regulatory budgeting was taken when President Trump issued EO 13771, requiring agencies to remove the economic equivalent of the costs of two regulations for every new one that is finalized. Under this so-called “one-in-two-out” model, a limit is placed on incremental regulatory costs starting in a given fiscal year. The EO was later clarified through interim guidance that it only applies to “significant” regulatory action as defined under EO 12866, but still does not apply to independent agencies. Generally speaking, it will therefore only apply to regulations that have a $100 million impact or otherwise adversely affect the economy. While critics of this EO claim that it endangers the health and welfare of the public, there are safeguards in place that allow for OMB to respond if the proposed regulation addresses “critical health, safety, or financial matters,” or is otherwise prohibited by law. Whether this “one-in-two-out” policy will ultimately succeed in its intended purpose is worthy of further study. It is worth noting that there has been some success with this model in British Columbia, Canada, where the province was able to reduce regulatory requirements 43 percent.


Patrick A. McLaughlin and Oliver Sherouse, Mercatus Ctr., The High Correlation Between Agency Budgets and Agency Regulations, George Mason Univ. (Sept. 29, 2015); at https://www.mercatus.org/publication/high-correlation-between-agency-budgets-and-agency-regulations.

Id at p. 2 (Testimony of Patrick McLaughlin in front of the H. Comm. on the Budget on July 7, 2016.).

EO 13771, Reducing Regulation and Controlling Regulatory Costs (Specifically calling “for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.”), (Jan 30, 2017), 82 FR 9939; at https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling.

Id; See also Laura Jones, Mercatus Research Ctr., Cutting Red Tape in Canada: A Regulatory Reform Model for the United States?, George Mason Univ. (Nov. 11, 2015); at https://www.mercatus.org/system/files/Jones-Reg-Reform-British-Columbia.pdf.


Id.


change may not be fully realized for years to come and could have a profound long-term effect on the federal regulatory system.\footnote{Susan Dudley, American Bar Assoc., Putting a Cap on Regulation, Vol. 6, No. 11, (June 2017); at https://www.americanbar.org/publications/gpsolo_ereport/2017/june_2017/putting_cap_regulation.html.}

While some options may be more controversial than others, the fact remains that the regulatory “rocks” are blocking the economic “stream” and need to be consolidated to minimize their effect, and where appropriate be removed altogether. To keep the “stream” clear for future growth, some form of prospective view will be required to keep the regulatory state from merely replacing current regulations with new ones.

V. REQUIRE CONGRESSIONAL APPROVAL FOR “HIGH-IMPACT” RULES

In the mid-1990s, Congress responded to an increasing regulatory state by passing the Congressional Review Act (CRA)\footnote{Congressional Review Act (CRA), 5 U.S.C. § 801 et al, Pub. L. No. 104-121, (March 29, 1996).} as part of the “Contract with America.”\footnote{Phillip A. Wallach et al, Brookings Institute, How Powerful is the Congressional Review Act, (April 4, 2017), at https://www.brookings.edu/research/how-powerful-is-the-congressional-review-act/} Under the CRA, Congress established a procedure to nullify certain controversial regulations. The process required both chambers of Congress to pass a resolution and for the President to ultimately sign it. Until the election of President Trump, the CRA was only used once to address a perceived overreach of the regulatory system.\footnote{Maeve P. Carey et al, CRS Rpt. No. R43992, The Congressional Review Act: Frequently Asked Questions, p. 5, (Nov. 17, 2016); at https://fas.org/sgp/ct/smisc/R43992.pdf; Also U.S. Dept. of Labor, Occ. Safety and Health Admin., “Ergonomics Program,” (Nov. 14, 2000), 65 FR 68262-68870.} The shortcomings of its availability and use were likely known at the time of its passage. For the CRA to work effectively, a change in the political party occupying the White House is needed along with that same political party controlling Congress. Otherwise, you would have a situation where an administration would have to overrule its own agency’s regulatory action or at least the same political party. Either scenario is highly unlikely.

This situational necessity for its effective use resulted in Congress looking for other ways to be more involved with the promulgation of major rules before they were finalized. Initially, there were constitutional limits to that type of involvement in the administration of an agency’s decisions. The seminal example of this being the U.S. Supreme Court’s decision in INS vs. Chadha. Here, the court held that one chamber of Congress could not nullify an administrative rule.\footnote{Immigration and Naturalization Service (INS) v. Chadha, 462 U.S. 919 (1983).} Congressional action of this type was considered a “legislative veto” and deemed unconstitutional. However, the dissenting opinion stressed the absolute necessity of the legislative veto power as a check on the executive branch.\footnote{See Id.}

More recently there have been bills proposed that would require congressional approval before certain rules are finalized. These approvals would apply only to rules with a “very significant” effect or “high impact” on the economy. The threshold for review of these rules would be that the specific rule in question would have a $1 billion or greater impact on the economy.\footnote{REINS Act of 2017 (Regulations from the Executive in Need of Scrutiny Act) (S. 21) (Introduced by Sen. Paul (R-KY) and has 36 cosponsors.).}

Some question the constitutionality of Congress evaluating rules before they are finalized. While the Chadha case addressed the constitutionality of a legislative veto, it did not specifically address whether Congress could, under certain limited circumstances, include economic limits on regulations promulgated from authorizing legislation. However, given the sheer economic impact of these types of rules, requiring Congress and the President to agree on them before they are finalized is certainly worthy of discussion.

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89. See Id.
90. REINS Act of 2017 (Regulations from the Executive in Need of Scrutiny Act) (S. 21) (Introduced by Sen. Paul (R-KY) and has 36 cosponsors.).
91. John D. Graham & Paul Noe, p. 75 at fn. 15.
93. Here, the problem with the concept was not the lack of expertise, but rather Congressional funding. Specifically funding for the GAO to conduct independent reviews of agency regulations. (Government Accountability Office, Letter B-302705 from U.S. Comptroller David Walker to Rep. Tom Davis, Chairman of House Committee on Government Reform, (June 7, 2006), at http://www.gao.gov/assets/380/377239.pdf.
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Other critics have claimed the regulatory process is nonpartisan and therefore Congress is too political to be involved. However, a persuasive argument can be made that agencies are indirectly political as well, given that agency heads serve at the pleasure of the President and that their positions must be confirmed through the Senate. Granted, once confirmed administrators are not held accountable to the electorate per se, they still are administrating and implementing the President’s policy agenda and must report to Congress.

Another concern is that Congress lacks the background and expertise to make the kind of technical decisions integral to the regulatory process. This premise derives mainly from two circumstances.

The first is that authorizing legislation has a tendency to be drafted broadly. Critics claim that Congress does not contemplate the intricacies and applicability of the legislation it passes. As a result, the courts, in reviewing the statutes, have repeatedly criticized Congress for using ambiguous language, claiming that it should draft legislation with more specificity to make clear its intent. But this ignores the reality that legislation is typically drafted and passed through compromise, and therefore ambiguous language is often necessary. What’s more, legislation is often drafted broadly so that agencies have flexibility in implementing it.

The second circumstance is that Congress cannot adequately address regulatory matters. There have been proposals for Congress to create an independent commission or committee to review regulations both before they become final, as previously discussed, as well as retrospectively within the constraints of Chadha. While examining every regulation, even for an independent entity, would be a challenge, Congress could limit reviews to only regulations that are “economically significant” or that have a potentially “high impact.” Regardless of how it is structured, Congress is capable of creating the framework for reviewing and, when necessary, obtaining the requisite expertise from academia and the private sector to evaluate even the most technical aspects involved. According to former OIRA Administrator John D. Graham:

“Although regulators possess substantial technical resources to assist in estimating the consequences of regulatory alternatives, the best available expertise is not necessarily located in the regulating agency.”

In fact, Congress attempted to address the issue with the Truth in Regulating Act of 2000 (TIRA). Here the concept of a CORA (Congressional Office of Regulatory Analysis) was proposed on a three-year trial basis. Therefore, it may be shortsighted to suggest that Congress is unable to handle the task or, correspondingly, that agencies have a monopoly on expertise in regulatory matters.

The extent to which Congress is able and willing to involve itself in “economically significant” regulations is still to be determined. However, given the expansion of the regulatory system over the last decade, it is likely that Congress will look for ways to be more involved with regulations that have a significant impact on the economy.

VI. IMPROVE OVERSIGHT OF THE AGENCIES

Oversight of federal agencies has historically and principally been one of two primary constitutional functions of Congress. However, since roughly the Johnson Administration, the Executive Office of the President has fluctuated in its oversight and management of federal agencies depending on the respective policies of the individual administration. One constant has been the need for each administration to come to terms with a growing federal bureaucracy.

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94 For purposes of this paper, “agencies” includes cabinet departments as well as independent regulatory agencies.

Article I of the Constitution gives Congress the power to create laws and with it the implied authority to conduct oversight of those laws. The degree and extent to which Congress can conduct oversight has been held by the courts to be quite broad.

On a day-to-day level, Congress has broad authority to hold hearings, request information, and, when necessary, subpoena documents and witnesses. To carry out this authority, Congress enacted criminal violations for materially lying or obstructing Congress, though ultimately enforcement requires the support of the executive branch through the Department of Justice. In practice, the oversight process between congressional requests of information and an administration’s response has been an evolving “process” since its inception.

The oversight process can be described as, not an end goal that one reaches, but rather, a process to shed light on the executive branch’s administration of laws. Ultimately, the goal is to weed out waste, abuse, and fraud, and then make legislative modifications where necessary. This can be referred to as the goal of good governance. However, there is also oversight conducted to seemingly undermine or embarrass an administration for political gain. While both types of oversight have their purpose, the former can usually be done in a bipartisan manner and may well help develop a legislative solution to a public policy challenge. The latter, unfortunately, typically increases partisanship and deepens the inherent distrust between the parties, making subsequent attempts at passing bipartisan legislation more difficult.

On a long-term oversight strategy, the legislative branch can use its other constitutional powers. For instance, Congress has the “power of the purse” and the Senate has substantial influence over federal appointments through its “advise and consent” duties. Both functions can be used tactically in the oversight process. However, both have been reduced over the past few years, arguably to the detriment of the legislative branch. First, the ability to withhold funding from individual agencies that Congress believes are not acting in a manner that is “faithfully executing” the law, was once considered an effective mechanism to ensure congressional intent. However, the decline of “regular order” in the appropriations process and its replacement by the use of “omnibus” bills has eroded Congress’ effectiveness at holding agencies accountable.

Second, the Senate plays a significant role in confirming presidential appointments. Historically, an individual senator from the minority party could “place a hold” on a nominee by threatening to filibuster the nomination process. This “hold” would then require a 60-vote threshold to cut off debate and allow a vote on the Senate floor. However, this process was recently changed to allow a simple majority of the Senate to end debate and confirm a nominee. While more limited in its application, the change has nonetheless weakened the ability of Congress to conduct oversight.

One way to overcome these procedural setbacks in a broad oversight plan would be to work in a bipartisan manner to improve the efficacy of government. If good governance is truly the goal, Congress should work with the administration to clarify, advise, and support efforts to administer the law.

The executive branch also has a role in oversight. As the size of the federal bureaucracy has grown over the years it has correspondingly become increasingly difficult for administrations to effectively manage. As a result, many agency actions have not received the same level of centralized scrutiny as others.

“...there is a large volume of ‘stealth regulation’ that occurs without any OMB review or benefit-cost justification, and much of this activity is permitted under current procedural requirements.”

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96 U.S. Constitution, Art 1, § 1.
97 Eastland vs. United States Servicemen’s Fund, 421 U.S. 491, 504, n. 15 (1975) (Quoting Barenblatt vs. U.S., 360 U.S. 109, 111 (1959) (The “scope of [Congress’s] power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”).
98 Id.
99 The process for debating and individually funding each of the agencies’ budget requests.
100 In this case, it is multiple requests in one package.
Whether considered effective or not, administrations have been monitoring some and overseeing the drafting of other types of rules. The Paperwork Reduction Act (PRA) of 1980 (President Carter) and executive order 12291 (President Reagan) attempted to ensure consistency with the regulatory process through establishing centralized reviews of agency actions. The former created OIRA within OMB to reduce the regulatory burden, and establish requirements for collecting information from, the public. Since that time various attempts have been made to increase, and at other times decrease, the role of OIRA in the overall regulatory process.

An example of the latter was the Reagan Administration’s attempt to expand the role of OIRA in overseeing the process focusing on expanding centralized review. This also included President George W. Bush’s EO13422, which required OIRA to review certain guidance documents. However, subsequent administrations have scaled back OIRA’s role. For instance, the Obama Administration was concerned that too much authority and political influence was being concentrated in OMB and revoked EO 13422. The Obama Administration later asked individual agencies to conduct their own oversight to look for and remove outdated or ineffective regulations. Whatever the varying policy strategies have been under different administrations, what has remained consistent is the role OIRA plays in overseeing certain types of significant rules. For OIRA to be effective, however, the office must have adequate staff and resources. This is a contentious issue because of overall federal budgetary concerns. However, as one participant indicated at the ACCF-CPR Roundtable: “OIRA … is a laudable concept, [but] totally inadequately staffed and resourced. The idea that regulation … throughout the Federal government should go through the Office of Management Budget for review, a kind of second look, to me makes sense.”

Oversight of the agencies is an important constitutional and statutory function of both the legislative and executive branches of government. While occasionally used as a pretext to score political points with the public, arguably it is far better for oversight to be used to help agencies more efficaciously implement the law. Given the growing size of the regulatory state, having one office reviewing final rules for government-wide consistency will not only bring certainty to the process, but in the end it is good government practice.

VII. DEFINE THE COURTS’ ROLE FOR JUDICIAL REVIEW

The balance between congressional intent and the faithful execution of statutes has been at times contentious. However, the arbiter of that balance has historically been the judicial branch. While the federal courts are constitutionally of “limited jurisdiction,” Congress bestowed on them the authority to adjudicate certain administrative matters. This was added to their constitutional authority to review the constitutionality of certain government actions. Therefore, Congress has the authority to specifically address judicial
review of its statutes. The best example of conferring judicial review is the general provision in the APA that states:

“... a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 114

The passage of the APA in 1946,115 and granting federal courts jurisdiction in all federal civil matters,116 was historically described as an attempt to bring uniformity to the regulatory process, and establish guidelines for an expanding regulatory state under President Roosevelt’s New Deal.117 The consolidation of the procedures necessary to promulgate rules and the jurisdiction to adjudicate the influx of regulations was a defining period in administrative law. Unfortunately, the volume of regulations has exponentially increased since that time.118

Judicial Standards of Review for Agency Action

Although the courts have the statutory authority to compel agency action,119 they have not always been clear on what standards to use and under which circumstances to use it. Depending on the issue, the courts appear to apply different standards. The first is the “arbitrary and capricious” standard under the APA and further developed in the Skidmore case.120 These two can arguably be summarized as a “totality of circumstances” analysis. Under this analysis, a court looks at multiple factors and gives weight to the varying factors based on the individual case. The second, and more profound for its bright-line rule, is the standard set out in the seminal Chevron case.121 Here, the court created a two-part test: 1) if the text of the statute is clear, it must be followed; 2) if, however, it is unclear, deference will be given to agency action over other factors.122

Pre-Chevron Analysis

There are also challenges to an agency’s factual basis for their decisions. The Supreme Court established a different standard to use under these circumstances that has been referred to as the “hard look doctrine.”123 Here, a court will reverse agency actions as being “arbitrary and capricious” for a number of reasons including, but not limited to, whether the agency action was not based in fact; contrary to congressional intent; or without any rational basis.124 Historically, the courts determined that deference to an agency’s action should be based on the “thoroughness” of an agency’s promulgation of the rule, and the “validity of reasoning” given.125

For forty years this Skidmore analysis was used in interpreting agency action. The perceived problem was that this type of analysis was difficult to predict. At varying times, the courts looked at different factors in determining the outcome. It was therefore up to the individual court to determine how much weight each factor should be given. This general “totality of circumstances” analysis stood until the Supreme Court’s 1984 Chevron case.126

114. 5 U.S.C. § 702.
122. See id.
124. See id at 43.
125. Skidmore vs. Swift & Co., 323 U.S. 134, 140 (1944) (The Supreme Court held that the “weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade….”).
Chevron: Two-Part Test

In Chevron, the Supreme Court established a two-part test in an attempt to bring certainty and clarity to the process. The court held that first, a reviewing court must look to see if the authorizing statute specifically addressed the issue relating to the agency. If congressional intent is “clear” and “unambiguous,” the text of the statute must be followed. However, if the statute is found to be silent or ambiguous to the issue at hand, a court is to determine, as “step-two,” whether the agency’s action is “based on a permissible construction of the statute.” In this analysis, courts must assume Congress has conferred an “express delegation of authority” to the agency and, as such, the courts will grant deference to the agency’s actions unless it is found to be “arbitrary, capricious, or manifestly contrary to the statute.” Part of the rationale for the “deference” is that agencies have the expertise in the particular subject matter in question, and are more politically accountable to the people than the courts. Furthermore, the court reasoned that, if Congress intended an agency to handle an issue a specific way, it would have been clearly drafted in the legislation. However, it is worth noting that the APA did not specifically grant agencies interpretive powers, rather, it states clearly that the “court shall decide all relevant questions of law, [and] interpret ... statutory provisions” (emphasis added). While the holding in Chevron seemingly defers to agencies on legal interpretations of the statute, the court did recognize, in footnote 9, that “[t]he judiciary is the final authority on issues of statutory construction....”

Chevron Distinguished

While clarity and certainty may be what the Supreme Court intended with their groundbreaking Chevron case, ultimately, its subsequent decisions carved out expectations that arguably have made matters more confusing and difficult to predict. To make matters worse, in deferring to agency interpretations of statutes, the courts were in practice deferring their own historical authority to determine what the law is. It is this fact that may explain why the exceptions to Chevron began to inconsistently appear in court holdings.

One of the most discussed “exceptions” is referred to as Chevron Step Zero. This initial analysis is to determine if Chevron is even applicable in a particular case. Here, the courts must first determine if an agency action is related to a non-authorizing statute or constitutional question. If either situation is found to be true, then Chevron does not apply. However, “Step Zero” got somewhat more convoluted with the Supreme Court’s opinion in the 2001 Mead case. There the analysis dealt with an authorizing statute. The court held that to afford Chevron Deference to an agency’s action, a court must first determine whether the agency’s action had “the force of law,” and that its interpretation of the statute was part of their statutorily granted authority. If the agency action does not “speak” with the “force of law,” Chevron does not apply.

Another exception was in the FDA vs. Brown case. There, the Supreme Court held that, unless specifically stated in the statute, the court will not defer to an agency if the action taken by the agency is of “economic and political significance.” Another exception is found in the Seminole Rock case where the court found that an agency’s interpretation of its own regulations will be given deference, provided it is not “plainly erroneous.” An issue that

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127 Id at 842-3.
128 Id at 843.
129 Id at 842-4.
130 Id at 865.
131 See id.
133 Chevron, at 467 n.9.
135 U.S. vs. Mead Corp., 533 U.S. 218, 226-7 (2001) (Chevron only applies if “it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”).
arises is whether this type of deference allows agencies to promulgate broader regulations, abiding by the notice and comment requirement, only to then interpret the regulation more narrowly without having to go through the notice and comment requirement. As previously discussed, this becomes especially relevant to guidance documents, as opposed to regulations, because the APA specifically excludes them from the notice and comment requirement. The real issue here is that without the notice requirement, the public may not be aware of an agency action and, without public comment, an agency action can go forward without public input as to the potential effects on the community.

As noted in a law review article on the subject, the courts have not been consistent with their application of Chevron Deference and, unfortunately, have only added to the uncertainty of the public and the regulated community on how future courts will rule.

“The Court’s discussion of the relationship between Chevron Step Two and arbitrary or capricious review has been confusing, and leads to uncertainty over whether Chevron is about deference to agency interpretation or deference to agency policymaking.” Moreover, “… there is no way to know in advance whether a case should be decided under the Chevron doctrine or under the arbitrary or capricious standard specified in the APA.”

Whether the Supreme Court ultimately decides to reevaluate the rationale under the Chevron case will no doubt be a monumental decision. It should be noted that, with the 2017 appointment of Justice Neil Gorsuch to the Supreme Court, a known anti-Chevron critic to replace the late Justice Antonin Scalia, the Court may decide to reevaluate its holding in Chevron. More specifically, it may be more willing to reassert its pre-Chevron authority to decide questions of law based on a broader set of circumstances. The fact of the matter is that if Chevron were overturned, the court would likely revert back to its analysis under the APAs “arbitrary and capricious” standard and Skidmore analysis. More importantly, the court would reinstate the long history it once had in deciding questions of law in administrative matters.

**Congressional Response to Chevron Progeny**

If in fact the court is moving toward reclaiming its historic authority, the question becomes whether Congress should act as well. Given the uncertainty with judicial review and the Supreme Court’s standard set in Chevron, Congress may well decide to better define judicial review in the APA.

In fact, Congress has recently sought to address the issue through the Separation of Powers Restoration Act of 2017. It was introduced in the Senate in an attempt to clarify judicial review. In introducing the bill, Senate Judiciary Committee Chairman Chuck Grassley (R-Iowa) indicated:

“The Constitution’s separation of powers makes clear that it is the responsibility of Congress, as the People’s representative, to make the law. And it’s the job of the courts—not the bureaucracy—to interpret the law. This bill helps to reassert those clear lines between the branches. By doing so, it makes the government more accountable to the People and takes a strong step toward reining in the regulators.”

While Congress can’t instruct a court on how to decide a matter, it certainly can tell a court what to consider in making their decision. Either through congressional action or judicial review, Chevron and its progeny need to be clarified or overruled so that certainty can be brought back to the regulatory process in this vital area.

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139. Jack M. Beermann, Chevron at The Roberts Court: Still Failing After All These Years, 83 Fordham L. Rev. 731, 733 (2014).
142. See id; See also Skidmore (In the Mead case, the Supreme Court remanded it back to determine whether the agency’s rationale had the “power to persuade” the court under a “Skidmore analysis.”).
VIII. ENFORCE STATUTES AND HOLD AGENCIES ACCOUNTABLE

Since the APA's enactment, Congress has attempted, at various times, to address specific deficiencies in the regulatory process. However, such parochial, and at times political responses, have had a tendency to leave behind a patchwork of procedural hurdles that can be confusing and unnecessarily add to the uncertainty in the process. Arguably, this is due to the lack of a meaningful enforcement mechanism with which to ensure that the congressional responses to issues are fully and consistently implemented. Therefore, the enforcement of a few prominent statutes would likely help bring certainty to the process.

While most problems with enforcement could be addressed through executive action, many times Congress and an administration do not agree on the implementation of certain statutes that are intended to improve the regulatory process. This becomes even more difficult when these types of prophylactic statutes are judicially distinguished or pretextually ignored by agencies. The following statutes were conceived and enacted with good intentions, but have arguably failed to live up to their intended purpose.

Regulatory Flexibility Act (Protect Small Businesses)

The 1980 Regulatory Flexibility Act (RFA), followed by the 1996 Small Business Regulatory Enforcement Fairness Act (SBREFA), were statutes enacted as additional safeguards for small businesses from costly and burdensome federal regulations. The purpose was for agencies to analyze “significant economic impacts on a substantial number of small entities” before finalizing a rule. One of the shortfalls of the RFA is its lack of an enforcement mechanism. In fact, this was one of the central issues addressed by the SBREFA. However, once passed in 1996, the courts greatly reduced its effectiveness by ruling that an agency only has to analyze and correspondingly respond to claims of direct, as opposed to indirect, economic impacts on small businesses. This distinction, while seemingly innocuous, had the effect of substantially reducing the protections intended in the original law. If an agency can claim no direct impact on a particular group of small businesses, then it is not required to conduct an economic impact analysis. An example is the National Ambient Air Quality Standards imposed under the Clean Air Act, which can represent a significant cost to small businesses, but is not considered a “direct” cost because its implementation and enforcement falls under the “indirect” state plan.

Congress has recently responded to this concern with the introduction of the Small Business Regulatory Flexibility Improvement Act (SBRFIA). The bill would require agencies to consider the “indirect” effects of proposed regulations on small entities. The rationale is that small businesses bear...
Regulatory Improvements to Ensure Process Certainty


159. Defines “Garbage In, garbage Out” (GIGO) (“A reference to the fact that computers, unlike humans, will unquestioningly process the most nonsensical of input data and produce nonsensical output.”); at http://www.webster-dictionary.org/definition/GIGO.

160. U.S. Senate definition of a “rider,” (“Informal term for a nongermane amendment to a bill or an amendment to an appropriation bill that changes the permanent law governing a program funded by the bill.”); at https://www.senate.gov/reference/glossary-term/rider.htm.

161. OMB, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, (Oct 1, 2001) (“In the guidelines, OMB defines ‘quality’ as the encompassing term, of which ‘utility,’ ‘objectivity,’ and ‘integrity’ are the constituents. ‘Utility’ refers to the usefulness of the information to the intended users. ‘Objectivity’ focuses on whether the disseminated information is being presented in an accurate, clear, complete, and unbiased manner, and as a matter of substance, is accurate, reliable, and unbiased. ‘Integrity’ refers to security -- the protection of information from unauthorized access or revision, to ensure that the information is not compromised through corruption or falsification.”); at https://obamawhitehouse.archives.gov/omb/fedreg_final_information_quality_guidelines/.

162. Id.

163. Id.

164. Id.
In addition to the broad language of the rider and subsequent OMB guidelines, enforceability is a central issue in adding certainty to the process. The clear language of the IQA amends the Paperwork Reduction Act (PRA) of 1995.\footnote{515 of the Consolidated Appropriations Act, 2001 (Pub. L. 106–554) (“(a) In General. – The Director of the Office of Management and Budget shall … issue guidelines under sections 3504(d)(1) and 3516 of title 44, United States Code, that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions of … [the] Paperwork Reduction Act.”).} The PRA §3507(d)(6) explicitly removes judicial review for that specific section.\footnote{44 U.S.C. § 3501 et seq.} However, the IQA does not reference §3057, which merely addresses the Director of the OIRA’s decision to request information. The IQA, on the other hand, under §§3504(d)(1) and 3516 requires the Director to issue guidelines for the dissemination of information and the promulgation of rules and procedures necessary to implement the statute respectively. Arguably, the court in the 2001 T ozzi vs. EPA case, did not address whether other sections of the PRA were open to judicial review.\footnote{See Jim T ozzi, et al vs. EPA 148 F .Supp.2d 35 (2001).} Moreover, where there is silence as to whether there is judicial review, the courts are inclined to review the matter under the APA’s general grant of judicial review.\footnote{§ 515 of the Consolidated Appropriations Act, 2001 (Pub. L. 106–554) (“(a) In General. – The Director of the Office of Management and Budget shall … issue guidelines under sections 3504(d)(1) and 3516 of title 44, United States Code, that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions of … [the] Paperwork Reduction Act.”).}

In the end, the real question is, when Congress requires agencies to act, should those actions be enforceable subject to judicial review? If the standard is for agencies to “use the best science and data available,” one solution may be for Congress to require that agencies, and subsequent court review, use an objective test, such as a Daubert analysis,\footnote{5 U.S. Code § 702 (Right of Review) (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”).} before an agency relies on scientific data. This analysis is used in federal court cases to require that the “scientific knowledge” relied on in a case was derived from a known “scientific methodology.”

Given the lack of legislative history, Congress may well have to revisit this well-intentioned law to ensure that agencies use the best quality information and include some type of accountability through an enforcement mechanism.

Otherwise, courts will defer to an agency’s interpretation of what the “best” science is to use. Some have been critical of agencies making the determination without congressionally defined guidelines. As David Hawkins, founder of the Natural Resources Defense Council (NRDC), stated back in 2003:

“… it is quite inappropriate for OMB to come in and essentially do administratively what it was unable to have adopted in an open process in Congress.”\footnote{Jennifer Dloughy, Bloomberg, EPA to bar some scientists from advisory panels over conflicts, (Oct. 31, 2017); at https://www.bloomberg.com/news/articles/2017-10-31/epa-shakes-up-scientific-panels-by-adding-more-industry-voices.}

Therefore, Congress could hold agencies accountable for the information they choose to use by adding a private right of action and better defining how an agency uses scientific information.\footnote{But See, Salt Institute vs. Leavitt, 440 F.3d 156, 159 (2006) (The 4th Circuit Court of Appeals, held that the IQA, “by its terms” does not give a private right of action).} Congress may also want to consider legislatively mandating the use of diverse science advisory panels that have corresponding independent peer reviewers to ensure that the best available scientific information is being used. The Trump administration appears to have been addressing this issue when it required that members of the EPA’s science advisory panel not receive federal grants for issues over which they are advisers.\footnote{Jennifer Dloughy, Bloomberg, EPA to bar some scientists from advisory panels over conflicts, (Oct. 31, 2017); at https://www.bloomberg.com/news/articles/2017-10-31/epa-shakes-up-scientific-panels-by-adding-more-industry-voices.} In the end, ensuring process certainty means that Congress should help agencies receive and use the best available information to implement their legislation. As former OIRA Administrator John D. Graham indicated:

“To achieve excellence, regulators need access to the best available scientific and technical information, including objective and unbiased interpretation of that information … In a regulatory system where interest-groups and electoral politics are dominant concerns, the quest for high-quality scientific and technical information can be diminished.”\footnote{John D. Graham & Paul Noe, p. 75 at fn. 15.}
Unfunded Mandates Reform Act
(Protect State and Local Governments and Businesses)

The Unfunded Mandates Reform Act of 1995 (UMRA)\textsuperscript{174} was a congressional response to a growing concern that an increasing amount of legislation mandated action, but did not provide the requisite funding for its implementation.\textsuperscript{175}

These “unfunded mandates” were to be passed on to the states, local municipalities, and the private sector.\textsuperscript{176} UMRA’s Titles I and II address unfunded mandates in legislation and regulations respectively. Title I requires a congressional authorizing committee to provide a proposed bill with unfunded mandates to the Congressional Budget Office (CBO) for analysis. Title II requires an agency promulgating a rule to produce a written statement before submitting a notice of proposed rulemaking if it includes any mandate of more than $100 million to be realized by a state, local government, or the private sector.\textsuperscript{177} The agency report must include, among other things, a “qualitative and quantitative assessment of the anticipated cost and benefits of the Federal mandate,” as well as, “estimates … of the effect on the national economy ….”\textsuperscript{178} While there are exemptions from the requirements set forth in the UMRA,\textsuperscript{179} critics point out that the requirements that do apply are merely informational and procedural in nature and therefore carry little practical weight.\textsuperscript{180}

While under Title I an unfunded mandate may prevent passage of legislation, there are no equivalent procedural safeguards under Title II.\textsuperscript{181} Therefore, while procedural safeguards against unfunded mandates have had an effect on legislation, no equivalent effect has occurred on rulemaking.\textsuperscript{182} This is partly due to the number of exceptions afforded under the statute,\textsuperscript{183} but also because Title II merely codified some provisions of EO 12866. Under EO 12866, agencies are required to provide information to the public, such as a cost-benefit analysis for economically significant rules.\textsuperscript{184}

Enforcement was another controversial aspect of the UMRA. Judicial review of the substantive nature of an agency’s written statement was removed as a part of the compromise to the original bill’s passage.\textsuperscript{185} However, Title IV still grants the courts the authority to review an agency’s action under the “arbitrary and capricious” standard set out in the APA.\textsuperscript{186} While Title IV grants a court the ability to compel an agency to draft a written statement,\textsuperscript{187} the courts afford the agencies discretion in how those statements are completed. Judicial review comes down to whether an agency puts forth a reasonable effort to prepare a written statement to comply with the requirements and does not involve a substantive look at the analysis.

Congress must determine whether this law has been properly implemented. If the intent of the legislation was to have a meaningful input from those affected by unfunded regulatory mandates, then Congress may well want to clarify and revise the statutory language to include an enforcement mechanism.


\textsuperscript{177} 2 U.S.C. §658(c).

\textsuperscript{178} 2 U.S.C. §1532(a).

\textsuperscript{179} 2 U.S.C. §1532(a); (a)(2); and (a)(4).


\textsuperscript{181} Id at 31.

\textsuperscript{182} Id at 24.

\textsuperscript{183} See id at 19-22; 30-31.

\textsuperscript{184} Id at 31.

\textsuperscript{185} Id at 25; also EO 12866.

\textsuperscript{186} Id at 46.

\textsuperscript{187} 2 U.S.C. 1571; See 5 U.S.C. 706(1).

\textsuperscript{188} 2 U.S.C. 1571(a)(2)(B).
IX. CONSOLIDATE AND EXPEDITE THE PERMIT AND APPROVAL PROCESS

Improving the permit and approval process has received bipartisan support both in Congress and from both Presidents Obama and Trump. The problem with delays in the process was known in 2009 when Congress was discussing implementing the American Recovery and Reinvestment Act (Recovery Act)\(^{190}\) and President Obama’s corresponding “shovel ready” jobs initiative.\(^{190}\) In a bipartisan response to some of the concerns, Senators John Barrasso (R-WY) and Barbara Boxer (D-CA) cosponsored an amendment to the Recovery Act to expedite the National Environmental Policy Act of 1969 (NEPA)\(^{191}\) review process.\(^{192}\)

Some critics of regulatory change claim that the NEPA review process does not significantly delay the overall permitting process and thus should not be changed. However, even the nonpartisan Congressional Research Service acknowledged that:

“Although the extent to which the environmental review process may delay project delivery is unclear, it is generally not disputed that the time it takes to demonstrate compliance with environmental requirements can be time-consuming, [and costly], particularly in cases where EIA preparation is required. . . .”\(^{194}\)

What is clear is that, historically, there has been bipartisan agreement that the environmental reviews have caused delays in the permitting process. In fact, according to a 2016 report prepared for President Obama’s Treasury Department, the delays and increased costs attributable to NEPA reviews have been happening for 30 years and have increasingly been getting longer.\(^{195}\) Specifically, the report cites studies conducted by the Federal Highway Administration that found: “[T]he average time to complete a NEPA study increased from 2.2 years in the 1970s, to 4.4 years in the 1980s, to 5.1 years in the 1995-2001 period, to 6.6 years in 2011.”\(^{196}\)

This report also acknowledged that policymakers recognized the “growing length of time needed for environmental review and permitting and its impact on project delivery times and development costs . . .”\(^{197}\) This problem appears to have continuously plagued the Obama Administration and its ability to spend federal “stimulus” dollars following the 2008 financial crisis.

Permitting, not Funding, was the Problem

By 2010, President Obama acknowledged that “there’s no such thing as shovel-ready project” when explaining why it was taking so long to spend the “stimulus” money from the Recovery Act.\(^{198}\) By 2012, the process had not markedly improved and President Obama issued EO 13604


\(^{193}\) See supra, Recovery Act, fn. 1.

\(^{194}\) Kevin DeGood, Debunking the False Claim of Environmental Review Opponents, (May 3, 2017); at https://www.americanprogress.org/issues/economy/reports/2017/05/03/431651/debunking-false-claims-environmental-review-opponents/.


\(^{196}\) Toni Horst, Ph.D et al, 40 Proposed U.S. Transportation and Water Infrastructure Projects of Major Economic Significance, (Fall 2016) (This report was prepared for the U.S. Department of the Treasury on behalf of President Obama’s Build America Investment Initiative); at https://www.treasury.gov/connect/blog/Documents/final-infrastructure-report.pdf.

\(^{197}\) Id. U.S. Treasury Report at p. 7.

to ensure that agencies worked collaboratively, encouraged early involvement of all stakeholders, mandated timelines and performance goals, and tracked progress. President Obama’s EO was intended to increase the efficiencies within the agencies. However, it was premised on delays being attributable to factors outside the federal government’s control such as a “poor project design, incomplete applications, uncertain funding, or multiples reviews.” A month later the administration released its “Federal Plan,” that focused on “modernizing the federal permitting and review process for better projects, improved environmental and community outcomes, and quicker decisions.” However, a year later in 2013, there were still permitting problems. President Obama then indicated that one of the key goals of implementing EO 13604 was to address delays in the process and thereby instructed agencies to reduce permitting timelines by 50 percent. In February of 2014, the Obama Administration released a “final” report on the effectiveness of the Recovery Act indicating the number of jobs that were “saved or created” and how the stimulus money was spent. However, the report indicated that of the roughly $800 billion in stimulus money only $30 billion had been spent on transportation infrastructure, a sector known for permitting delays.

To some this was a clear indication that there was still a serious problem with permitting and approvals, as increased funding in transportation infrastructure had bipartisan support. The reforms that President Obama attempted to implement do not appear to have reached their intended goals. As some have suggested, the “shovel ready” jobs promised by President Obama were hindered by delays attributable to the federal government, and not by nongovernmental factors. Unfortunately, as proposed projects languished year after year awaiting permit approval, costs increased and eventually projects were determined to be no longer financially viable. Businesses were forced to calculate the costs of lengthy delays in their budgets for proposed projects. The extent of the problem, partially addressed by Congress in early 2009 and throughout the Obama Administration, was finally acted on in 2015.

A Structural Foundation for Improving the Permitting Process

A bipartisan response to the delays in permitting was addressed in the Federal Permitting Improvement Act, which was incorporated into Title 41 of the Fixing America’s Surface Transportation Act of 2015 (FAST Act) and is commonly referred to as “FAST-41.” This was seen by many as a vital step in addressing the delays in federal permitting. As U.S. Chamber of Commerce Senior Vice President Bill Kovacs indicated in Congressional testimony:

“The enactment of FAST-41 was the first time since the passage of a 1969 federal law requiring environmental reviews of major infrastructure projects having federal involvement, that a structure was established for the management, coordination, timing and transparency of the environmental review process for such projects.”

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200. See id, (“Reviews and approvals of infrastructure projects can be delayed due to many factors beyond the control of the Federal Government….”).

201. See id, (“Reviews and approvals of infrastructure projects can be delayed due to many factors beyond the control of the Federal Government….”).


205. Id. at p. 34, Table 8.


207. See Philip K. Howard, Common Good, Two Years, Not Ten Years: Redesigning Infrastructure Approvals, (Sept. 2015); at http://commongood.3cdn.net/c613b4cfa25b55cfb_e8m6b5t3x.pdf.


209. See William Kovacs’ testimony supra fn. 188.
FAST-41 established a Federal Permitting Steering Council (Permitting Council) to foster interagency and state coordination to identify a “review and permitting” representative from relevant agencies; engage in “early consultation;” categorize and publicly listing qualifying projects for review; integrate “environmental reviews,” and establish “performance schedules.”\(^{210}\) Having early coordination, public project plans, and deadlines, was an important step forward in making the process more accountable, transparent, and efficient.

One of the notable changes is that it added the requirement that the courts consider “the potential for significant negative effects on jobs resulting from an order or injunction” and a presumption of harm if the negative effects are found.\(^{211}\) Before this provision, the effect of judicial action on jobs was not a required factor. This was a vital and necessary requirement for the business community, given the investment necessary for large projects.

With a foundation to start building, there are always places from improvement. One area, in particular, is with judicial review. While addressed in FAST-41, it actually did more to limit the court’s involvement than incorporate it. The timeframe for third party challenges to an issued permit were reduced to a two-year window from final agency action. While a reduced statute of limitations is helpful, it may still be too costly for some to have to respond to a challenge to a duly issued permit.\(^{212}\) For many, this was certainly an improvement to the six-year statute of limitation that had been allowed by some courts.

Another issue that needs to be addressed is the fact that FAST-41 sunsets in seven years.\(^{213}\) This fact is especially problematic for major infrastructure projects, that have historically taken years, and sometimes more than seven years, to get all the necessary permits.\(^{214}\) Given that FAST-41 had bipartisan support and Presidential backing, Congress should remove the sunset provision and continue to use it as a foundation to improve permitting, by creating a base level of certainty to the process.

While FAST-41 has set the foundation for improving the process, problems have persisted. As one contributor to the ACCF-CPR roundtable discussion indicated:

> “Eisenhower took Europe in 11 months, [any approval process] longer than that [shouldn’t] pass muster.... The process itself should not be a substantive factor [in a project’s likelihood of success].”\(^{215}\)

While the Trump administration has begun to require deadline for agency permitting decisions, Congress should also consider legislation that mandates judicially enforceable legal deadlines.

**Executive Orders and Agency Guidance**

As Congress contemplates improving FAST-41 and other regulatory improvement ideas, the change of administrations has brought new ideas and solutions to the problem of permitting. While speaking about infrastructure and permitting at the Department of Transportation, President Trump indicated:

> “… one of the biggest obstacles to creating this new and desperately-needed infrastructure … is the painfully slow, costly and time-consuming process for getting permits and approvals to build.”\(^{216}\) The Trump Administration has focused on the federal government’s role in the process, instead of outside sources of delay. To further his position, in January of 2017 President Trump signed EO 13766 to help expedite the permitting process that was perceived as “routinely and excessively delayed by agency processes and procedures.”\(^{217}\)

210. See FAST-41, Subpart D, §§ 41001; 41002; 41003; and 41005(a).
211. FAST-41, Subpart D, § 41007(b)(1)&(2).
212. FAST-41, Subpart D, § 41007(a)(1)(A).
213. FAST-41, Subpart D, § 41013.
216. David Shepardson, Reuters, Trump announces push to speed up ‘desperately-needed infrastructure’ (Jun. 9, 2017); at https://www.reuters.com/article/us-usa-trump-transportation/trump-announces-push-to-speed-up-desperately-needed-infrastructure-idUSKBN19022D.
The administration focused on expeditiously addressing overall agency complacency with certain types of permitting decisions. While the EO could not substantively change the statutory requirements to which permits are subject, the administration certainly had the authority to prioritize certain projects with national significance, and more importantly, require agencies to expeditiously review permit applications. To that end, the EO specifically directed the Chair of the Council for Environmental Quality (CEQ) to not only coordinate with the appropriate federal agencies, as already regulatorily required, but it also required the Chair to develop an expedited procedure for permit approval. As the U.S. Chamber of Commerce has advocated, the Permitting Council, should work with other federal agencies to coordinate “high priority” projects under EO 13766 and those identified under FAST-41.

To give further guidance in an attempt to help the coordination process, in August of 2017, President Trump signed EO 13807 to further add efficiencies to the permitting process. This EO established a “one federal decision policy” where there would be a lead agency that would not only be required to work expeditiously to make permit decisions in 90 days, but would also be given a two-year window to process all environmental reviews. Having a “one-stop-shop,” with a “lead agency” for all permits on a given project, may well expedite the permitting process and prevent an errant regulator from unnecessarily holding up the process. As another participant in the ACCF-CPR roundtable stated, “regulators should not be able to delay the process long enough so that the applicant gives up.” Applicants for federal permits clearly deserve fair treatment and certainty in the process.

EOs set priorities and policy for an administration. These are many times followed-up by individual agencies interpreting them and putting out guidance on how to implement them. As for EO 13807, the Department of Interior (DOI) issued Order No. 3355 in an attempt to address delays in the NEPA process. The order attempts to streamline the NEPA review process by requiring only truly relevant information be included in the analysis and summarizing the rest; limiting the length of the reports to ensure focus; and setting time limits to enforce accountability.

While some may disagree with Assistant Secretary David Barnhardt’s decision to place parameters on the review process, given that the problem with delays in NEPA reviews has been a recognized bipartisan issue, he should be commended for addressing and implementing identifiable efficiencies to the process.

In the end, both Congress and the executive branch have numerous tools at their disposal to expedite the permit approval process. The executive has begun to do so through the President’s E.O.s. Congress also has a vital role in clarify existing legislation, enacting new legislation to expedite the process where necessary, and, when warranted, grant waivers to certain statutory requirements for permit approval. Given the national importance of updating the country’s infrastructure and the historically lengthy permitting process, Congress and the President should continue to act to further expedite the permitting approval process.

218. See id.
219. Id.
220. FAST-41, Subpart D, § 41010 (Application); See also fn. 188 written statement from William L. Kovacs, Senior Vice President for Environment, Technology & Regulatory Affairs at the US Chamber of Commerce (Sept. 7, 2017).
222. Id.
226. Michael Doyle, E&E News, Order limits most NEPA studies to a year, 150 pages, (Sept. 6, 2017); at https://www.eenews.net/stories/1060059865.
X. EXTEND PRESIDENTIAL REGULATORY OVERSIGHT TO INDEPENDENT AGENCIES

Congress created independent agencies as a hybrid government entity within the executive branch and afforded them certain protections from political influence. The idea was that, because the agencies were dealing with crucial issues to the country, they needed to be insulated from political pressures. This was accomplished through non-traditional funding and a heightened standard for removal from office. Traditional agency heads serve at the pleasure of the President, i.e., are “at-will employees,” and are responsible for justifying their budgets to Congress. Independent agencies, on the other hand, typically have a multi-person commission that serves for a specified term and with a higher standard for removal from office. In addition, they are either funded through other agencies or have their own funding source beyond congressional influence.

However, even though they are intended to be independent, oversight of independent agencies is still a necessary function of government. Therefore, the real concern with oversight of independent agencies is that, on the one hand, they need to be independent to be able to do their job uninfluenced by politics, but on the other hand, they need to be held accountable for their actions.

Certainly, there are safeguards against complete and unfettered abuses of discretion. For one, the APA covers all executive agencies including independent agencies. However, EO are not applicable to independent agencies, even though they are the seminal guidance used as best practices in implementing the federal regulatory system. There are certainly arguments on both sides as to why consecutive presidents, regardless of party, have not mandated that independent agencies follow the basic tenets of best practice procedures to ensure, as previously stated, that regulations always “must do more good than harm.” But that overriding principle should not be exempt from independent agencies. Some argue that, in addition to the APA, which only applies to regulations and not enforcement decisions, there is always judicial review of agency action afforded under the APA. While this provides some protection against “arbitrary and capricious” acts by an agency, the current discretion granted to agencies under the Supreme Court’s Chevron decision often makes its effect negligible.

Others have pointed to the fact that commissioners or the heads of agencies still have to go through the Senate confirmation process. Recent changes in Senate procedures, however, have made this a less effective means of conducting oversight. Moreover, this still only applies to the initial appointment and does not affect how the agency promulgates rules.

Finally, congressional action may be the best place for conducting additional oversight. Congress continues to hold the power of the purse over many agencies, though some have developed independent funding sources. The constitutionality of these outside sources of funding aside, Congress still can request, and in some cases mandate, the appearance of commissioners and agency heads to appear before them and require the agencies to file reports on their activities.

Given the shortcomings inherent in the system, Congress should consider whether the agencies have sufficient oversight. While independent agencies must remain “independent” if they are to successfully administer the tasks assigned to them by Congress, all government agencies need to be held accountable for their actions in some way, be it at the ballot box through our elected officials, removal by the President, or by the judicial system.

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227 These include, but are not limited to, the Securities and Exchange Commission (SEC); Federal Energy Regulatory Commission (FERC); Federal Communications Commission (FCC); National Transportation Safety Board (NTSB); and the Consumer Financial Protection Bureau (CFPB).


229 See id.

Regulatory Improvements to Ensure Process Certainty

The Administrative Law and Regulatory Practice of the American Bar Association (ABA),\(^{231}\) has supported presidential oversight of the independent regulatory agencies since the 1990s and in 2016 strongly advised the President-elect to:

“… bring the independent regulatory commissions within the requirements for cost-benefit analysis, OMB review, and retrospective review of rules currently reflected in Executive Order 12866 and Executive Order 13563.”\(^{232}\)

The rationale for their recommendation was that the “policymaking of independent agencies is not functionally distinct” from other agencies, and they are already required to be part of the “regulatory plan” under EO 12866.\(^{233}\)

In addition, the Supreme Court has already acknowledged that independent agencies fall under the Executive Branch and are therefore subject to its oversight.\(^{234}\)

In addition, numerous former OIRA Administrators from both political parties have voiced support for applying EOs to independent agencies.\(^{235}\) While it may not be appropriate for all EOs to apply to independent agencies, there are certainly some that should apply to ensure certainty in the process. Given the importance of the OMB review of “significant” regulations, at least when it comes to a cost-benefit analysis, Congress should evaluate relevant EOs and OMB guidance documents that have best practices and contemplate their applicability to independent agencies.

\(^{231}\) Administrative Law and Regulatory Practice of the ABA, Improving the Administrative Process: A Report to the President-Elect of the U.S. (2016) (ALRP-ABA is a non-partisan group of “private practitioners, government attorneys, judges, law professors, and members of the nonprofit organizations”); at https://www.americanbar.org/content/dam/aba/administrative/administrative_law/Final%20POTUS%20Report%2010-26-16.authcheckdam.pdf.

\(^{232}\) Id at p. 10.

\(^{233}\) Id.

\(^{234}\) Id (Citing Free Enter. Fund vs. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010)).

CONCLUSION

The never-ending expansion of the federal regulatory system has forced the legislative and judicial branches to consider how best to fulfill their constitutional roles in the regulatory process. Both branches of the government at times have had to check the expansion of executive branch influence, while at other times have appeared to acquiesce to the wishes of the executive branch. While some argue that Congress intended the agencies to efficaciously administer its broadly written laws, resulting in voluminous regulations, others argue that Congress never intended to delegate its constitutional authority to create law and that the courts should not have delegated their constitutional authority to determine what the law is. Unfortunately, the result is a public and business community saddled with a complicated system that can be difficult to navigate and even harder to change.

The regulatory process needs to be open and transparent so that the public and interested parties can provide meaningful input before final decisions are issued. Collaboration at every stage of the regulatory process is the best way to ensure a more transparent outcome.

The process also needs to be fair. Fairness needs to be guaranteed by mandating that all agencies use similar metrics to evaluate their regulations and, more importantly, their potential impact on the public. The idea of fairness also applies to a court’s legal analysis in determining whether agency action is consistent with congressional intent.

Finally, using the best available information in analyzing the need for government action is paramount to good governance. Not only is it important for agencies to rely on good information but it is equally important for the public to have access to that information to validate its applicability to a perceived problem and its suggested solution.

While our three branches of government were designed to serve as a system of checks and balances on each other, the American people deserve a process that is open, fair and uses the best available information. When all three of these goals are realized, certainty will be brought to both the process and the resulting regulations.

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