SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 65 | Issue 4

2015

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

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Abstract

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

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Introduction

In the more than 125 years since Congress created the first regulatory body,[1] the number of regulatory agencies and the scope and reach of the regulations they issue has increased significantly. In 2014, there were more than seventy federal agencies, employing almost 300,000 people to write and implement regulation.[2] Every year federal agencies issue tens of thousands of new regulations,[3] which now occupy more than 175,000 pages of regulatory code.[4] For over a century, concerns over the accountability of what some have called the "fourth branch of government" have led all three branches of government to take steps to exercise checks and balances on the development and enforcement of regulations.[5]

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

1. The Interstate Commerce Act established the Interstate Commerce Commission in 1887 to regulate railroad rates. Interstate Commerce Act, ch. 104, 24 Stat. 445 (1887).

2. Susan Dudley & Melinda Warren, Economic Forms of Regulation on the Rise: An Analysis of the U.S. Budget for Fiscal Years 2014 and 2015, at 2, 7 (2014), *available at* http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/2015_Regulators_Budget.pdf. Note that "[a]gencies that primarily perform taxation, entitlement, procurement, subsidy, and credit functions are excluded from this report," so these figures exclude staff developing and administering regulations in the Internal Revenue Service, the Centers for Medicaid and Medicare Services, etc. *Id.* at 14.

3. Office of the Federal Register, Federal Register Pages Published 1936–2013 (2014).

4. Office of the Federal Register, Code of Federal Regulations Page Breakdown: 1975 through 2013 (2014).

5. *See* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2253–69 (2001) (outlining nonpresidential mechanisms of controlling agencies and presidential administration of agencies generally).

I. Evolution of Executive Discretion Regarding Regulatory Policy and Practice in the United States

We begin with a review of the evolution of regulatory policy in the United States, from the establishment of the first regulatory agencies in the late nineteenth century, to the passage of the Administrative Procedure Act (APA) of 1946,[6] to the economic deregulation of the 1970s and '80s, to the growth in health, safety, and environmental regulations since then, which has led to increased emphasis on executive branch oversight, congressional reforms, and judicial review.

A. Early Regulatory Agencies and the Delegation of Legislative Authority

Congress established the Interstate Commerce Commission (ICC), the first regulatory agency, in 1887 to regulate railroad rates.[7] The ICC was an independent, bipartisan commission of seven members, which reached decisions through an adjudicatory approach. Over the next several decades, this model served as the basis for subsequent regulatory commissions, including the Federal Trade Commission (FTC) (1914), the Water Power Commission (1920) (later the Federal Power Commission), and the Federal Radio Commission (1927) (later the Federal Communications Commission (or FCC)); Congress also created other agencies to regulate commercial and financial systems, including the Federal Reserve Board (1913), the Tariff Commission (1916), the Packers and Stockyards Administration (1916), and the Commodities Exchange Authority (1922).[8] Most of these early agencies were established as independent regulatory commissions outside executive departments[9] and were structured to be more independent of presidential control.[10] Their members could only be dismissed for good cause ("inefficiency, neglect of duty, or malfeasance in office")[11] in contrast to political appointees in executive departments, who serve "at the pleasure of the president"[12] and can be fired for any reason.

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6. 5 U.S.C. § 500 (2012).

7. Interstate Commerce Act, ch. 104, 24 Stat. 445 (1887).

8. Office of Management and Budget, Report to Congress on the Costs and Benefits of Federal Regulations (1997) [hereinafter OMB 1997].

9. For example, the Packers and Stockyards Administration was established within the Department of Agriculture. Packers and Stockyards Act, 1921, 7 U.S.C. § 181 (2012).

10. Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 Vand. L. Rev. 599, 615–19 (2010).

11. Humphrey's Ex'r v. United States, 295 U.S. 602, 623 (1935).

12. Myers v. United States, 272 U.S. 52, 190 (1926) (McReynolds, J., dissenting).

During this period, courts interpreted the separation of powers implicit in Articles I–III of the U.S. Constitution as prohibiting the delegation of legislative powers to the executive. Early cases held that limited delegation was permissible as long as the executive branch was merely "fill[ing] up the details."[13] "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[14]

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

In the 1930s, President Franklin Delano Roosevelt's New Deal brought an increase in the number of government regulatory agencies, including the Food and Drug Administration (FDA) (1931), the Federal Home Loan Bank Board (1932), the Federal Deposit Insurance Corporation (FDIC) (1933), the Commodity Credit Corporation (1933), the Farm Credit Administration (1933), the Securities and Exchange Commission (SEC) (1934), and the National Labor Relations Board (NLRB) (1935).[16] The jurisdiction of other agencies, including the ICC, the FCC, and the FDA, expanded during this period.[17] The Fair Labor Standards Act of 1938[18] created a new agency, now called the Employment Standards Administration, in the Department of Labor (DOL).[19]

The sweeping powers of these new regulatory agencies led to concerns over the constitutionality of congressional delegation to a "fourth branch" of government.[20] In 1935, the Supreme Court weighed

13. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).

14. Field v. Clark, 143 U.S. 649, 692 (1892).

15. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

16. OMB 1997, *supra* note 8.

17. *Id.*

18. Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219 (2012)).

19. OMB 1997, *supra* note 8.

20. Angel Manuel Moreno, *Presidential Coordination of the Independent Regulatory Process,* 8 Admin. L.J. Am. U. 461, 485–86 (1994) (quoting Robert E. Cushman, The Problem of the Independent Regulatory Commissions, *reprinted in*, The President's Committee on Administrative Management, Report of the Committee with Studies of Administrative Management in the Federal Government 205–43 (1937)).

in with a ruling that the National Industrial Recovery Act (NIRA)[21] was unconstitutional because it provided the President (and private industry associations) "virtually unfettered" decision-making power.[22]

B. Procedural Reform and the Administrative Procedure Act

Concern that agency "power was not sufficiently safeguarded and sometimes was put to arbitrary and biased use"[23] led both Congress and the Executive Branch to conduct extensive reviews of agency conduct.[24] Years of debate culminated in the passage of the Administrative Procedure Act (APA) in 1946.

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

> The battle over the APA helped to resolve the conflict between bureaucratic efficiency and the rule of law, and permitted the continued growth of government regulation. The APA expressed the nation's decision to permit extensive government, but to avoid dictatorship and central planning.[25]

The APA established procedures an agency must follow to promulgate binding rules and regulations within the area delegated to it by statute. As long as executive branch agencies act within the rulemaking authority delegated to them by Congress, and follow the procedures in the APA, recent courts have not found it unconstitutional for them to write and enforce regulations.[26]

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21. Pub. L. 73–67, 48 Stat. 195 (1933), *invalidated by* A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

22. A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935).

23. Wong Yang Sung v. McGrath, 339 U.S. 33, 37 (1950) (citing Elihu Root, *Public Service by the Bar*, 39 Ann. Rep. A.B.A. 355, 368 (1916)); Charles E. Hughes, *Some Aspects of the Development of American Law*, 39 Proc. of the Ann. Meeting of the N.Y.B.A. 266, 269 (1916); George Sutherland, *Private Rights and Government Control*, 40 Ann. Rep. A.B.A. 197, 205 (1917); *President Guthrie*, *Judicial Powers by Administrative Boards and the Creation of Administrative Courts*, 46 Proc. of the Ann. Meeting of the N.Y.B.A. 169, 186 (1923).

24. *E.g.*, *APA at 65: Is Reform Needed to Create Jobs, Promote Economic Growth, and Reduce Costs? Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 25–27 (2011) (statement of Jeffery A. Rosen, Kirkland & Ellis LLP) [hereinafter *Is Reform Needed*].

25. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557, 1559 (1996).

26. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

While some constitutional scholars still debate the question of delegation,[27] recent Supreme Court cases have not overturned legislation or regulation on nondelegation grounds. In 1989, the Supreme Court opined:

> In our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.[28]

Congress has supplemented the APA through legislation tailored to specific programs and passed government-wide procedural laws (e.g., the Freedom of Information Act of 1966,[29] and the Government in the Sunshine Act of 1976[30]).[31] However, the APA has guided executive branch rulemaking without significant amendment for more than sixty-five years and is one of the most important pieces of legislation ever enacted.[32]

C. Removal of Economic Regulation

The regulatory agencies formed during the New Deal and earlier generally issued "economic regulations." That is, they regulated a broad array of activities within particular industries using economic controls such as price ceilings or floors, quantity restrictions, and service parameters.[33] Economic regulation is often justified by concerns of "market power" or "natural monopoly"—where a market can be served at lowest cost with a single supplier.[34]

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27. *E.g.*, David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731 (1999); Paul Craig Roberts, *How the Law Was Lost*, 20 CARDOZO L. REV. 853 (1999).

28. Mistretta v. United States, 488 U.S. 361, 372 (1989); *see also* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 488 (2001) (Stevens, J., concurring in part and concurring in judgment) (arguing that agency rulemaking authority is legislative power).

29. 5 U.S.C. § 552 (2012).

30. *Id.* § 552(b).

31. *See* JEFFREY LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING (5th ed. 2012) (discussing generally the creation of programs to supplement the APA).

32. *Is Reform Needed*, *supra* note 24.

33. *See* MURRAY L. WEIDENBAUM, BUSINESS AND GOVERNMENT IN THE GLOBAL MARKETPLACE 23–41 (6th ed. 1999) (discussing the development and rationale of U.S. regulation).

34. *See* W. KIP VISCUSI, JOHN M. VERNON & JOSEPH E. HARRINGTON JR., ECONOMICS OF REGULATION AND ANTITRUST 356–57 (Mass. Inst. Tech. 4th ed. 2005) (1992) (discussing the regulation of natural monopolies).

Though established as independent commissions to avoid political influence,[35] observers began to be concerned that these agencies were "captured" by the industries they regulated. By the early 1970s, scholarship in the fields of economics, antitrust, and law generally supported the idea that regulation of private sector prices, entry, and exit tended to keep prices higher than necessary, to the benefit of regulated industries, and at the expense of consumers.[36] Policy entrepreneurs in the Ford, Carter, and Reagan Administrations, in Congress, and at think tanks were able to link this knowledge to the problem of inflation by showing that eliminating economic regulations and fostering competition would lead to reduced prices.[37] Bipartisan efforts across all three branches of government eventually led to the abolition of whole agencies such as the Civil Aeronautics Board and the ICC, and removal of unnecessary regulation in several previously regulated industries, with resulting improvements in innovation and consumer welfare.[38]

The transportation and telecommunications deregulation that took place in the 1970s and 1980s is generally regarded as a success, having lowered consumer prices and increased choices. Deregulation and consumer choice have aligned service quality with customer preferences. Competitive markets have generated real gains—and not just reallocated benefits—for consumers and society as a whole, and markets have evolved in beneficial ways that were not anticipated before deregulation.[39]

D. Growth in Health, Safety, and Environmental Regulation

At the same time that economic forms of regulation were declining, a new type of regulation began to emerge, aimed at protecting consumers, environmental quality, and workplace safety. Many of these new regulatory agencies were established as part of the executive branch, either in departments, such as the newly formed Department

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

36. George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971).

37. Susan E. Dudley, *Alfred Kahn 1917–2010*, REGULATION, Spring 2011, at 8.

38. MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION 5 (1985); ICC Termination Act of 1995, Pub. L. No. 104–88, § 101, 109 Stat. 803, 804 (1995).

39. Clifford Winston, *U.S. Industry Adjustment to Economic Deregulation*, 12 J. ECON. PERSP., 89, 89–90, 97 (1998).

of Transportation (DOT) (1967),[40] or as standalone agencies, such as the Environmental Protection Agency (EPA) (1970).[41] Unlike the economic regulatory agencies created earlier, these new agencies had the power to regulate across industry boundaries and affect industrial processes, product designs, and by-products.[42]

Safety regulatory agencies established within the DOT included the Federal Highway Administration (established in 1966 to set highway and truck safety standards), the Federal Railroad Administration (established in 1966 to issue rail safety standards), and the National Highway Traffic Safety Administration (established in 1970 to set passenger vehicle standards).[43]

Congress expanded the newly created EPA's authorities through the Clean Air Act (1970), the Clean Water Act (1972), the Safe Drinking Water Act (1974), the Toxic Substances Control Act (1976), and the Resource Conservation and Recovery Act (1976).[44]

Congress also created the Occupational Safety and Health Administration (1970) as part of DOL and expanded mine safety and health regulation.[45] Other labor-related regulations were authorized through the Pension Benefit Guaranty Corporation and the Pension and Welfare Administration, "established in 1974 to administer and regulate pension plan insurance systems."[46] During the same period, Congress established several independent regulatory agencies, including the National Credit Union Administration (1970), the Consumer Product Safety Commission (1972), the Nuclear Regulatory Commission (1973), and the Federal Energy Regulatory Commission (1977).[47]

E. Executive Controls on Regulation

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

40. Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 931 (codified at 49 U.S.C. § 102 (2012)).

41. David M. Bearden et al., Cong. Research Serv., RL 30798, Environmental Laws: Summaries of Major Statutes Administered by the Environmental Protection Agency 1 (2013).

42. *See* WEIDENBAUM, *supra* note 33 (comparing the "old method" of regulations, which were more industry specific, with the "new method" of regulations, where agencies have broader jurisdiction).

43. OMB 1997, *supra* note 8.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

the impact of new regulations and minimizing their burdens.[48] They also led to the passage of two significant pieces of legislation in 1980. The Regulatory Flexibility Act (RFA)[49] required agencies to analyze the impact of their regulatory actions on small entities and consider effective alternatives that minimize small entity impacts. The Paperwork Reduction Act (PRA) of 1980[50] established the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) to review and approve all new reporting requirements with an eye toward minimizing burdens associated with the government's collection of information.

When President Reagan took office in 1981, he continued to pare back economic regulations, and through Executive Order 12,291,[51] he gave the newly created OIRA a role in reviewing draft regulations to ensure their benefits exceeded their costs. Executive Order 12,498,[52] issued in 1985, established a Regulatory Program of the most significant upcoming regulations, published annually to "improve the management of regulatory activity within the Executive branch" and "provide the public and the Congress with a greater opportunity to learn about and evaluate . . . regulatory priorities and procedures."[53] Each subsequent president has continued and expanded OIRA's central regulatory oversight role,[54] if not its budget.[55]

President George H.W. Bush continued to operate under President Reagan's executive orders, and when President Clinton took office in 1993, he replaced them with E.O. 12,866,[56] which remains in effect today. E.O. 12,866 retained OIRA's review of significant new

48. President Carter's E.O. 12,044 required agency heads to determine the need for a regulation, evaluate the direct and indirect effects of alternatives, and choose the least burdensome. Exec. Order No. 12,044, 3 C.F.R. 152 (1979).

49. Pub. L. No. 96-354, 94 Stat. 1164 (1980) [hereinafter Regulatory Flexibility Act].

50. Pub. L. No. 96-511, 94 Stat. 2812 (1980).

51. Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

52. Exec. Order No. 12,498, 3 C.F.R. 323 (1986).

53. Message to the Congress on the Regulatory Program of the United States Government, 2 Pub. Papers 1066 (Aug. 7, 1986).

54. Susan E. Dudley, *Observations on OIRA's Thirtieth Anniversary*, 63 Admin. L. Rev. 113, 114–15, 127 (2011).

55. See Kathryn Vesey, *OIRA Celebrates 30th Anniversary*, The George Wash. Univ. Reg. Studies Ctr. (June 28, 2011), https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/20110628_oira_staffing.pdf (describing the budgetary and staffing constraints of OIRA).

56. Exec. Order No. 12,866, 3 C.F.R. 638 (1994).

regulations[57] and reinforced the philosophy that regulations should be based on an analysis of the costs and benefits of all available alternatives and that agencies should select regulatory approaches that maximize net benefits to society unless otherwise constrained by law.[58] President George W. Bush and President Obama have continued these policies and procedures. President Obama's recent reforms are discussed in the next section. In addition, over the last three decades, OIRA has issued several bulletins and memoranda elaborating on these executive orders, including OMB Circular A-4 providing agency guidance on preparing regulatory impact analysis,[59] bulletins articulating good practices for guidance documents,[60] data quality,[61] and peer review,[62] principles for risk analysis,[63] and others.[64] The table below lists the executive orders that have guided regulatory development and presidential oversight since 1978.

57. Executive Order 12,866 limited OIRA review to "significant" regulations but provides the OIRA with some room to determine what falls into that definition. *Id.* at 644–48.

58. *See id.* at 638–39 (stating the regulatory philosophy and principles that federal agencies should keep in mind when promulgating regulations).

59. Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular No. A-4, Regulatory Analysis (2003).

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

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

62. Office of Mgmt. & Budget, Exec. Office of the President, OMB Memo No. M-05-03, Issuance of OMB's "Final Information Quality Bulletin for Peer Review" (2004).

63. Office of Mgmt. & Budget, Exec. Office of the President, OMB Memo No. M-07-24, Updated Principles for Risk Analysis (2007).

64. OIRA's website provides links to guidance for regulatory departments and agencies when developing and reviewing regulations. *OIRA–For Agencies*, Office of Mgmt. & Budget, http://www.whitehouse.gov/omb/inforeg_regpol_agency_review/ (last visited Feb. 1, 2015).

Executive Orders on Regulatory Analysis and Oversight[65]

Executive Order	Title	Administration	Date Signed
EO 12,044[66]	"Improving Government Regulations" (revoked by EO 12,291)	Carter	March 23, 1978
EO 12,174[67]	"Paperwork" (revoked by EO 12,291)	Carter	November 30, 1979
EO 12,291[68]	"Federal Regulation" (revoked by EO 12,866)	Reagan	February 17, 1981
EO 12,498[69]	"Regulatory Planning Process" (revoked by EO 12,866)	Reagan	January 4, 1985
EO 12,866[70]	"Regulatory Planning and Review" (amended by EO 13,258)	Clinton	September 30, 1993
EO 13,258[71]	"Amending Executive Order 12866 on Regulatory Planning and Review" (revoked by EO 13,497)	G.W. Bush	February 26, 2002
EO 13,422[72]	"Further Amendment to Executive Order 12866 on Regulatory Planning and Review" (revoked by EO 13,497)	G.W. Bush	January 18, 2007
EO 13,497[73]	"Revocation of Certain Executive Orders Concerning Regulatory Planning and Review"	Obama	January 30, 2009

65. *Regulation 101*, George Wash. Univ. Reg. Studies Ctr., http://regulatorystudies.columbian.gwu.edu/regulation-101#ExecutiveOrders (last visited Apr. 11, 2015).

66. Exec. Order No. 12,044, 3 C.F.R. 152 (1979).

67. Exec. Order No. 12,174, 3 C.F.R. 462 (1980).

68. Exec. Order No. 12,291, 3 C.F.R. 127(1982).

69. Exec. Order No. 12,498, 3 C.F.R. 323 (1986).

70. Exec. Order No. 12,866, 3 C.F.R. 638 (1994).

71. Exec. Order No. 13,258, 3 C.F.R. 204 (2003).

72. Exec. Order No. 13,422, 3 C.F.R. 191 (2008).

73. Exec. Order No. 13,497, 3 C.F.R. 218 (2010).

EO 13,563[74]	"Improving Regulation and Regulatory Review"	Obama	January 18, 2011
EO 13,579[75]	"Regulation and Independent Regulatory Agencies"	Obama	July 11, 2011
EO 13,610[76]	"Identifying and Reducing Regulatory Burdens"	Obama	May 10, 2012

While these executive branch efforts have done little to slow the growth in new regulation,[77] they have focused attention on understanding the effects of regulations, and some argue they have resulted in "smarter regulation" that produces more benefits than costs.[78]

F. Congressional Efforts at Regulatory Reform

Political scientists agree that Congress has "an 'awesome arsenal' of weapons"[79] to control agencies' actions, including "legislation, appropriations, hearings, investigations, personal interventions, and 'friendly advice' that is ignored at an executive's peril."[80] James Q. Wilson used an analogy to explain the two main ways Congress exercises control over federal agencies. One is through authorizing legislation, which he characterized as "architectural; the life of an agency is constrained by its need to live within a certain space, move along prescribed corridors, and operate specified appliances."[81] The

74. Exec. Order No. 13,563, 3 C.F.R. 215 (2012).

75. Exec. Order No. 13,579, 3 C.F.R. 256 (2012).

76. Exec. Order No. 13,610, 3 C.F.R. 258 (2013).

77. The GW Regulatory Studies Center maintains various statistics on regulatory activity, including pages of regulatory code, on-budget costs and personnel at regulatory agencies, numbers of regulations, etc. *Reg Stats*, George Wash. Univ. Reg. Studies Ctr., http://regulatorystudies.columbian.gwu.edu/reg-stats (last visited Feb. 1, 2015).

78. *See, e.g.*, John D. Graham, Paul R. Noe & Elizabeth L. Branch, *Managing the Regulatory State: The Experience of the Bush Administration*, 33 Fordham Urb. L.J. 953 (2006) (explaining how President George W. Bush's administration used a "smart regulation" approach that evaluated regulations using multiple disciplines); Cass Sunstein, *Smarter Regulation: Remarks from Cass Sunstein, Administrator, Office of Information and Regulatory Affairs*, 63 Admin. L. Rev. 7 (2011) (describing President Obama's approach to federal regulation and the purpose of the regulatory system).

79. James Q. Wilson, Bureaucracy 236 (1989) (citing Herbert Kaufman, The Administrative Behavior of Federal Bureau Chiefs 164 (1981)).

80. *Id.*

81. *Id.*

other is like "fire fighting; when an alarm goes off signaling that an agency may be violating some congressional interest, members of Congress rush in to put out the fire."[82] Until the Supreme Court struck the legislative veto down in 1983,[83] Congress used its architectural powers to insert legislative veto provisions in more than two hundred statutes, allowing one or both houses or their relevant committees to disapprove, without the President's signature, an agency's exercise of delegated authority.[84]

Despite these powers, the legislative branch has been less active than the executive branch in exerting concerted oversight over the regulatory process.[85] In 1995, a Republican majority took control of both houses of Congress, having run on a platform that included regulatory reform. By this time, the social regulations (addressing health, safety, and environmental issues) that had begun in the 1970s were the focus of concern. In contrast to the consensus on economic regulations, academics and policy makers did not generally support outright deregulation, but rather reforms to make regulations less burdensome and more cost-beneficial.

The 104th Congress announced an ambitious agenda that included efforts to codify regulatory impact analysis procedures similar to those required through executive order, to require compensation for regulatory actions that reduced the value of property rights, to cap the costs of new regulations through a regulatory budget, and to give Congress more control and accountability over the content of new regulations.[86]

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

- The Unfunded Mandates Reform Act (UMRA) of 1995,[87] which required executive branch agencies to estimate and try to minimize burdens on state, local, and tribal governments, and private entities,

82. *Id.*

83. *See* INS v. Chadha, 462 U.S. 919 (1983) (holding that the congressional veto provision in Immigration and Nationality Act is unconstitutional).

84. Wilson, *supra* note 79, at 243.

85. Kagan, *supra* note 5, at 2257 (noting that Congress used its veto powers rarely).

86. Susan E. Dudley, *Administrative Law & Regulation: Prospects for Regulatory Reform in 2011*, 12 Engage 7, 7 (2011).

87. Pub. L. No. 104-4, 109 Stat. 48 (1995).

- The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996,[88] which reinforced RFA requirements for small business impact analyses and provided for judicial review of agencies' determinations as to whether regulations would have "a significant economic impact on a substantial number of small entities,"[89]

- The Congressional Review Act (CRA) of 1996,[90] contained in SBREFA and passed in response to the loss of the legislative veto, which required agencies to submit final regulations with supporting documentation to both houses of Congress, and established expedited procedures by which Congress could overturn regulations within a specified time using a Joint Resolution of Disapproval,

- 1995 Amendments to the Paperwork Reduction Act,[91] which reauthorized OIRA and required further reductions in paperwork burdens, and

- Title VI, Section 645, of the Omnibus Consolidated Appropriations Act of 1997,[92] which directed OMB to submit a report to Congress estimating the costs and benefits of major regulations, and offer recommendations for reform. The Consolidated Appropriations Act of 2001[93] made permanent this requirement for OMB to report to Congress annually.[94]

These efforts have had mixed results. Agencies generally meet UMRA requirements with reference to regulatory impact analyses prepared pursuant to Executive Order 12,866 but rarely do more.[95]

88. Pub. L. No. 104-121, 110 Stat. 857 (1996).

89. *Id.* at 865–66.

90. *Id.* at 868–69.

91. Paperwork Reduction Act of 1995, Pub. L. No. 104-13, 109 Stat. 163 (1995).

92. Pub. L. No. 104-208, 110 Stat. 3009, 3009–366 (1996).

93. Pub. L. No. 106-554, 114 Stat. 2763 (2000).

94. *Id.* at 2763A–161. The 104th Congress also passed amendments to the Safe Drinking Water Act, directing the Environmental Protection Agency to set standards based on a balancing of costs and benefits. Safe Drinking Water Act Amendments of 1996, Pub. L. No. 104-182, 110 Stat. 1613 (1996).

95. *See Unfunded Mandates and Regulatory Overreach: Hearing Before the Subcomm. on Tech., Info. Policy, Intergovernmental Relations and Procurement Reform of the H. Comm. on Oversight and Gov't Reform*, 112th Cong. 11 (2011) (statement of Susan E. Dudley, George Washington Univ. Reg. Studies Ctr.) [hereinafter Dudley, *Unfunded*

While pursuant to SBREFA, courts have overturned regulations that fail to consider impacts on small business,[96] agencies have successfully defended regulations that ignore the RFA requirements if the regulation's effects on small entities are considered to be "indirect."[97]

"Congress has used the CRA to enact a resolution of disapproval only once, overturning an OSHA regulation addressing ergonomics in the workplace."[98] Though resolutions of disapproval require only a simple majority in Congress (and several have passed one house), they face the threat of presidential veto, which would require a two-thirds majority to override. The conditions surrounding the ergonomics regulation were likely key to its disapproval. It was a "midnight regulation," issued amid much controversy at the end of the Clinton Administration. The resolution disapproving the rule came at the beginning of the Bush Administration (which did not support the rule), eliminating the veto threat. Although it has only nullified one action using the CRA, Congress has introduced dozens of resolutions of disapproval,[99] and in some instances, the threat of passage of a resolution of disapproval may have compelled agencies to modify regulatory actions.[100]

Mandates] (discussing the shortcomings of UMRA for its limited coverage of regulations and inadequate requirement for agency analysis).

96. *See* Nw. Mining Ass'n v. Babbitt, 5 F. Supp. 2d 9 (D.D.C. 1998) (recognizing private business' rights to be informed when their interests are at stake by government regulations and to participate in the regulatory process); S. Offshore Fishing Ass'n v. Daley, 995 F. Supp. 1411 (M.D. Fla. 1998) (striking down a fishery management plan for failing to consider economic effects on small businesses required by RFA).

97. American Trucking Ass'ns v. EPA, 175 F.3d 1027, 1043–45 (D.C. Cir. 1999); *see also* Jeffrey J. Polich, *Judicial Review and the Small Business Regulatory Enforcement Fairness Act: An Early Examination of When and Where Judges Are Using Their Newly Granted Power over Federal Regulatory Agencies*, 41 Wm. & Mary L. Rev. 1425, 1449 (2000) (discussing cases where the regulations were upheld by courts).

98. *APA at 65: Is Reform Needed to Create Jobs, Promote Economic Growth, and Reduce Costs: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 14 (2011) (statement of Susan E. Dudley, George Wash. Univ. Reg. Studies Ctr.); *see also* Richard S. Beth, Cong. Research Serv., RL31160, Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act 9 (2001) (giving the details on both the Senate's and the House's disproval of the rule submitted by OSHA).

99. *Congressional Review Act FAQs*, U.S. Gov't Accountability Office, http://www.gao.gov/legal/congressact/cra_faq.html (last visited Feb. 7, 2015).

100. Steven J. Balla, *Legislative Organization and Congressional Review of Agency Regulations*, 16 J.L. Econ. & Org. 424, 429 (2000).

Pursuant to the Regulatory Right to Know Act,[101] OMB does report annually to Congress on the costs and benefits of major regulations,[102] but a 2001 Congressional Research Service report observed that OMB's reports "have been incomplete, and its benefits estimates have been questioned."[103] The General Accounting Office[104] and others[105] have noted that it is difficult for OMB to report objectively on estimates of regulatory benefits and costs.

II. Executive Branch Oversight of Regulation

A. *President Obama's Initiatives*

Like presidents before him, President Obama has reinforced and expanded the principles and practices of regulatory analysis and executive oversight. He retained OIRA, and its staff of fewer than fifty career civil servants who operate within the Executive Office of the President, reviewing regulations to ensure they are consistent with the President's priorities, and coordinating interagency review to avoid redundancy and conflict.[106] With its mission to ensure that regulations' benefits justify their costs, OIRA plays an important role. It is institutionally more interested in impacts on society broadly and less susceptible to special interest pressures than line agencies,[107] and provides what President Obama has called "a dispassionate and analytical 'second opinion' on agency actions."[108]

101. Pub. L. No. 106-554, § 624, 114 Stat. 2763A-161 (2000). 31 U.S.C. § 1105, Annual Statement and Report on Rules and Regulations (2012).

102. Office of Mgmt. & Budget, *OIRA Reports to Congress*, The White House, http://www.whitehouse.gov/omb/inforeg_regpol_reports_congress/ (last visited Feb. 7, 2015).

103. Rogelio Garcia, Cong. Research Serv., IB95035, Federal Regulatory Reform: An Overview 11 (2001).

104. U.S. Gov't Accountability Office, GAO/GGD-99-59, Regulatory Accounting: Analysis of OMB's Reports on the Costs and Benefits of Federal Regulation 56 (1999) [hereinafter GAO, Analysis of OMB's Reports].

105. Susan E. Dudley, *Perpetuating Puffery: An Analysis of the Composition of OMB's Reported Benefits of Regulation*, 47 Bus. Econ. 165, 175 (2012).

106. Off. of Mgmt. & Budget, *About OIRA*, The White House, http://www.whitehouse.gov/omb/inforeg_administrator (last visited Feb. 7, 2015).

107. Susan E. Dudley, *Regulatory Reform: Lessons Learned, Challenges Ahead*, Regulation, Summer 2009, at 6.

108. Memorandum on Regulatory Review, 74 Fed. Reg. 5977 (Feb. 3, 2009).

On January 18, 2011, the President published an op-ed in the *Wall Street Journal*[109] outlining his approach to regulation and issued a new executive order. Executive Order 13,563 on "Improving Regulation and Regulatory Review" reaffirmed the principles and practices that have been in effect since 1981.[110] It reinforced President Clinton's Executive Order 12,866 and stressed the importance of conducting sound analysis of likely regulatory impacts, of providing public opportunities to engage in the process of developing new regulations, and of designing less burdensome, more flexible approaches to achieve regulatory goals. It also required agencies to develop plans for periodically reviewing regulations already on the books, with an eye toward streamlining, repealing, or expanding them to make them more effective and less burdensome.

President Obama ventured further than previous presidents in issuing E.O. 13,579 in July 2011, encouraging independent regulatory agencies to comply with E.O. 13,563 requirements "concerning public participation, integration and innovation, flexible approaches, and science," to the extent permitted by law.[111] E.O. 13,579 also said that these "agencies should consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned," and make such information public.[112]

E.O. 13,610, issued in May 2012, focused on "Identifying and Reducing Regulatory Burdens."[113] It directed agencies to engage the public in their retrospective review of existing regulations, prioritize reviews that would produce significant quantifiable savings, and report regularly to OIRA on the progress of their initiatives.[114]

B. 113th Congress Proposals for Executive Branch Controls

The 113th Congress considered various regulatory reform proposals designed to give the executive branch more responsibility for ensuring

109. Barack Obama, Op-Ed., *Toward a 21st-Century Regulatory System*, Wall St. J., Jan. 18, 2011, at A17.

110. Press Release, Office of the Press Sec'y, Fact Sheet: The President's Regulatory Strategy, (Jan. 18, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/01/18/fact-sheet-presidents-regulatory-strategy.

111. Exec. Order No. 13,579, 3 C.F.R. 256 (2012).

112. *Id.* at 257.

113. Exec. Order No. 13,610, 3 C.F.R. 258 (2013).

114. *Id.* at 259.

new regulations meet procedural and analytical requirements.[115] None of these were enacted into law, but the concepts behind them may serve as the foundation for future initiatives.

1. Enhanced Regulatory Impact Analysis

Several bills focused on codifying requirements for regulatory impact analysis of proposed regulations.[116] As discussed above, presidents of both parties over the last thirty years have issued executive orders articulating nearly identical regulatory analysis principles to guide regulatory decisions, and at least since 1980, there have been attempts to codify these executive requirements in statute.[117]

Though the creation of a statutory obligation for meeting these regulatory impact analysis standards is probably not necessary to ensure that future presidents continue to endorse them, codifying the requirements could have several advantages. First, such legislation would lend congressional support to the nonpartisan principles and the philosophy that before issuing regulations agencies should identify a compelling public need, evaluate the likely effects of alternative regulatory approaches, and select the alternative that provides the greatest net benefit to Americans.[118] The Sound Regulation Act,[119] and

115. *See* Reg. Studies Ctr., *Regulatory Reform Bills, 113th Congress*, George Wash. U., http://regulatorystudies.columbian.gwu.edu/regulatory-reform-bills-113th-congress (last visited Feb. 8, 2015).

116. *See, e.g.*, Restoring Honesty for Our Economy Act, S. 786, 113th Cong. (2013) (requiring "agencies to quantify costs associated with proposed economically significant regulations"); Sound Regulation Act of 2014, S. 2099, 113th Cong. (2014) (placing more emphasis on the benefit-cost analysis developed to support regulations).

117. 1980 Economic Report of the President 125 (1980) [hereinafter 1980 Economic Report].

118. Exec. Order No. 12,866, 3 C.F.R. 638 (1994) ("Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.").

119. H.R. 3863, 113th Cong. (2014).

the Jumpstarting Opportunities with Bold Solutions Act[120] would have required federal agencies to identify "the nature and significance of the market failure, regulatory failure, or other problem that necessitates regulatory action and why other alternatives, such as market forces or state or local regulations, could not address the problem better than federal regulation,"[121] and "develop at least 3 distinct regulatory options, in addition to not regulating, that the agency estimates will provide the greatest benefits for the least cost in meeting the regulatory objective,"[122] among other analytical steps.

Second, legislation could apply these requirements to independent agencies (which administrations have been reluctant to do through executive order for fear of stirring up debate over the relationship between independent agencies and the President). For example, Independent Agency Regulatory Analysis Act of 2013[123] would allow the president by executive order to subject independent regulatory agencies to the executive analytical requirements applicable to other agencies. Several bills also attempted to impose analytical requirements on specific independent agencies, such as the FCC,[124] and the independent financial regulatory agencies.[125] When gathered at the OIRA 30th Anniversary conference hosted by the GW Regulatory Studies Center and the *Administrative Law Review*, former OIRA administrators of both parties agreed on the importance of engaging independent regulatory agencies in regulatory analysis and oversight.[126]

Third, Congress could make compliance with them judicially reviewable.[127]

Additionally, some bills emphasize certain features that members have found lacking in existing regulatory analysis requirements. For example, the small business community has been frustrated that courts have interpreted the RFA's requirements to assess economic impact as applying only to direct compliance costs. They argue that agencies should consider reasonably foreseeable indirect economic impacts on

120. H.R. 4304, 113th Cong. (2014).

121. H.R. 3863 (CRS bill summary); H.R. 4304.

122. H.R. 3863 § 3(f)(1)(C).

123. S. 1173, 113th Cong. (2013).

124. Federal Communications Commission Process Reform Act of 2014, H.R. 3675, 113th Cong. (2014); FCC "ABCs" Act of 2013, H.R. 2649, 113th Cong. (2013); Federal Communications Commission Process Reform Act of 2014, S. 1989, 113th Cong. (2014).

125. SEC Regulatory Accountability Act, H.R. 1062, 113th Cong. (2013); Financial Regulatory Responsibility Act of 2013, S. 450, 113th Cong. (2013).

126. Symposium, *OIRA Thirtieth Anniversary Conference*, 63 Admin. L. Rev. 1, 6 (2011).

127. *See* discussion *infra* Part IV.

small entities, such as increases in input prices (e.g., electricity, natural gas, or transportation) or state-level regulations issued pursuant to federal rules. This latter issue is particularly important for environmental regulations, where the "duty of regulating is passed on to the States . . . without any corresponding analysis or requirements for States to consider less burdensome alternatives for small business."[128] The Regulatory Flexibility Improvements Act[129] would have amended the RFA to include "any indirect economic effect on small entities which is reasonably foreseeable."[130]

The analytical requirements of Title II of Unfunded Mandates Reform Act (UMRA)[131] are similar to those in Executive Order 12,866. They both ask executive branch agencies to "assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector"[132] and "select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule."[133] But UMRA's coverage is much more limited than that of the Executive Order.[134] According to a CRS report, 72 percent of the economically significant rules covered by the Executive Order are not covered by UMRA.[135] This limited coverage is compounded by the fact that UMRA's requirements for analyzing the effects of proposed regulations are largely informational, and judicial review does not impose meaningful consequences for noncompliance. A bill introduced in the 113th Congress, H.R. 899, would have provided more detailed criteria

128. *Legislation to Improve the Regulatory Flexibility Act Before the H. Comm. on Small Bus.*, 110th Cong. 5 (2007) (statement of Thomas Sullivan, Chief Counsel, Office of Advocacy, U.S. Small Business Administration).

129. H.R. 2542, 113th Cong. (2013) [hereinafter Regulatory Flexibility Improvements Act of 2013].

130. *Id.* § 2(b)(9)(B).

131. Pub. L. No. 104-4, 109 Stat. 48 (1995).

132. 2 U.S.C. § 1531 (2012).

133. *Id.* § 1535.

134. *See* Dudley, *Unfunded Mandates*, *supra* note 95, at 17 ("Section 4 of the Act lists seven exemptions (including, for example, for regulations that enforce constitutional rights of individuals, provide conditions for federal assistance, or are necessary for national security). UMRA's title II provisions also do not apply to regulations issued by independent agencies, rules for which no proposal was issued, or rules implementing statutes that prohibit consideration of costs. Further, mandates are defined as 'direct costs,' or amounts governmental or private sector entities 'will be required to spend in order to comply with the Federal private sector mandate,' in contrast to the more encompassing term, 'effects on the economy,' used in Executive Order 12866.").

135. Robert Jay Dilger & Richard S. Beth, Cong. Research Serv., R40957, Unfunded Mandates Reform Act: History, Impact, and Issues 27 (2010).

to federal agencies for assessing unfunded mandates and expanded consultation, among other things.[136] "To make the executive branch more accountable for the goals of UMRA, Congress could provide OMB oversight authority beyond certifying and reporting on agencies' actions."[137]

2. Amendments to the APA

The bicameral Regulatory Accountability Act (RAA),[138] first introduced in the 112th Congress, would amend the Administrative Procedure Act. It was one of the more comprehensive legislative proposals introduced in the 113th Congress and encompassed analytical as well as procedural changes, codifying and extending some of the requirements in presidential executive orders. It was reintroduced in 2015.[139]

The RAA would classify regulations into three categories: "high impact" rules, with estimated effects of $1 billion or more in a year; "major" rules, defined (as in the Congressional Review Act) as having impacts of $100 million or more in a year; and "other" rules.[140] It would also cover guidance documents, which are exempt from APA notice and comment procedures, and classify them as "major," and "other."[141] Depending on their classification, rules and guidance documents would be subject to procedures beyond the notice and comment procedures currently embodied in the APA. Some of the key changes are summarized here:

- High impact and major regulations would begin with an advanced notice of proposed rulemaking (ANPRM), through which agencies would share and gather information before they develop an approach to address the identified problem through proposed rulemaking.[142]

- High impact regulations would also be subject to a public hearing (akin to more adjudicatory procedures conducted under the "formal rulemaking" requirements), where rules of evidence

136. Unfunded Mandates Information and Transparency Act of 2013, H.R. 899, 113th Cong. (2013).

137. Dudley, *Unfunded Mandates*, *supra* note 95, at 20.

138. S. 1029, 113th Cong. (2013); H.R. 2122, 113th Cong. (2013).

139. Regulatory Accountability Act of 2015, H.R. 185, 114th Cong. (2015) (passing a House of Representatives vote on January 13, 2015, and currently referred to the Committee on Homeland Security and Governmental Affairs in the Senate).

140. S. 1029 § 2.

141. *Id.*

142. *Id.* § 3(c).

apply, and parties may both subpoena and cross-examine witnesses. Decisions must address each of the findings presented and be supported by "substantial evidence."[143]

- All final rules would include a plan for review at least every ten years, to "determine whether, based upon evidence, there remains a need for the rule, whether the rule is in fact achieving statutory objectives, whether the rule's benefits continue to justify its costs, and whether the rule can be modified or rescinded to reduce costs while continuing to achieve statutory objectives."[144]

- The RAA would require the heads of agencies to certify that they have complied with the Information Quality Act (IQA),[145] which attempts to ensure the "quality, objectivity, utility, and integrity" of information disseminated to the public, and provides procedures by which affected parties can petition agencies to correct information that does not meet those standards.[146]

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

3. Subject Significant Guidance Documents to Regulatory Review and Notice Requirements

Various authorities have raised concerns that agency guidance practices are sometimes used to circumvent rulemaking procedures and recommended that they "should be more transparent, consistent and accountable."[147] To address that concern, the RAA and the Clearing Unnecessary Regulatory Burdens (CURB) Act[148] would have applied regulatory analysis requirements to guidance documents that have the effect of regulation.[149] CURB would codify OMB's 2007 Good Guidance Practices Bulletin to ensure that significant guidance documents are subject to OIRA regulatory review as well as public notice and comment requirements. The Closing Regulatory Loopholes Act of

143. *Id.* § 3(e), § 3(g), § 6.

144. H.R. 2122, 113th Cong. § 3((f)(4)(G)(i) (2013).

145. Pub. L. No. 106-554, 114 Stat. 2763A-153 (2000) [hereinafter Information Quality Act].

146. *Id.* at 2763A-154; S. 1029 § 3(f)(4)(F).

147. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB BULLETIN NO. 07-027, FINAL BULLETIN FOR AGENCY GOOD GUIDANCE PRACTICES (2007).

148. S. 1730, 113th Cong. (2013).

149. *Id.*

2013[150] would have required congressional approval of guidance documents.[151]

4. Incentives to Reexamine Existing Regulations

Most legislative and executive branch reforms have focused on analyzing and improving new regulations, and agencies seldom look back to evaluate the cumulative effects of regulations or whether existing regulations are having their intended effects. Section 610 of the RFA provides for periodic review of regulations for their impact on small businesses, but researchers have found that most agencies "comply with the letter of the law for only a small percentage of their rules, and they rarely take action beyond publishing a brief notice in the *Federal Register*."[152] The Regulatory Improvement Act of 2013[153] would have created a legislative commission to recommend regulations for modification and repeal by Congress.[154] Title VI of H.R. 4304 called for a "periodic review and termination of regulations"[155] and would have relied on sunset provisions and petition procedures to identify rules for review.

Congress has considered using budgeting concepts to alter regulatory agencies' incentives to issue new regulations and examine the effectiveness of existing regulations.[156] In 1980, President Carter's *Economic Report of the President* discussed proposals to "develop a 'regulatory budget,' similar to the expenditure budget, as a framework for looking at the total financial burden imposed by regulations, for setting some limits to this burden, and for making tradeoffs within those limits."[157] The Report noted analytical problems with developing a regulatory budget but concluded that "tools like the regulatory budget may have to be developed" if governments are to "recognize

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150. S. 320, 113th Cong. (2013).

151. *Id.*

152. Michael R. See, *Willful Blindness: Federal Agencies' Failure to Comply with the Regulatory Flexibility Act's Periodic Review Requirement—And Current Proposals to Invigorate the Act*, 33 Fordham Urb. L.J. 1199, 1200 (2006).

153. S. 1390, 113th Cong. (2013).

154. *Id.*

155. Jumpstarting Opportunities with Bold Solutions Act, H.R. 4304, 113th Cong. (2014).

156. *See Federal Regulation: A Review of Legislative Proposals Before S. Comm. on Homeland Sec. and Governmental Affairs*, 112th Cong. 124 (2011) (statement of Sen. Rob Portman) (noting the Unfunded Mandates Reform Act would require "cost-benefit analysis of economically significant rules" and require agencies to select the "Least Onerous Alternative").

157. 1980 Economic Report, *supra* note 117.

that regulation to meet social goals competes for scarce resources with other national objectives," and set priorities to achieve the "greatest social benefits."[158]

The National Regulatory Budget Act[159] would have established an independent executive office responsible for reporting annually to Congress on the costs of existing regulations and the costs of proposed new regulations. Congress would use these data to establish binding regulatory caps for each executive regulatory agency.[160]

The United Kingdom has adopted a "one-in, two-out" approach to regulation that shares similarities with a regulatory budget in that "departments have to remove or modify existing regulation(s) to the value of £2 of savings for every pound of cost imposed,"[161] and members of the U.S. Senate are considering similar legislation currently under development.[162] A "regulatory paygo" "would require federal agencies to identify and eliminate one existing regulation for each new regulation they want to add."[163] Regulatory agencies, with oversight from OIRA and either the Congressional Budget Office (CBO) or the GAO, would be required to eliminate one outdated or duplicative regulation before issuing a new regulation of the same approximate economic impact.

Unlike a regulatory budget, agencies would only have to estimate costs for regulations being introduced (which they should already do) and offsetting regulations they propose to remove. While still subject to analytical challenges, a regulatory "paygo" has the potential to impose some needed discipline on regulatory agencies and to generate a constructive debate on the real impacts of regulations. Focusing on the costs of regulations and allowing agencies to set priorities and make tradeoffs among regulatory programs might remove some of the contentiousness surrounding benefit-cost analysis. Congress would probably need to establish regulatory burden baselines in new authorizing legislation, unless they expect those costs to be offset with existing regulations.[164]

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158. *Id.* at 126 (1980).

159. S. 2153, 113th Cong. (2014); H.R. 5184, 113th Cong. (2014).

160. *Id.*

161. Dep't for Bus., Innovation & Skills, *One-in, Two-out: Statement of New Regulation*, GOV.UK (last updated July 9, 2014), https://www.gov.uk/government/collections/one-in-two-out-statement-of-new-regulation#documents.

162. *See Federal Regulation: A Review of Legislative Proposals Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 112th Cong. 172 (2011) (statement of Sen. Mark R. Warner) (discussing his proposal "to improve cost accountability for federal regulations").

163. Mark R. Warner, *Red-tape Relief for a Sluggish Recovery*, Wash. Post, Dec. 13, 2010, at A19.

164. *See* Dudley, *Unfunded Mandates*, *supra* note 95, at 21.

III. Legislative Branch Oversight of Regulation

As noted above, Congress has not taken full advantage of its "'awesome arsenal' of weapons"[165] for controlling agencies' actions.[166] Members do use oversight hearings and occasionally use appropriations to limit agencies' ability to develop or enforce regulations,[167] but as Justice Elena Kagan has noted, "the complaint-driven nature of congressional oversight, especially in combination with its reliance on committees . . . pushes toward the ad hoc rather than the systematic consideration of administrative policy."[168] Recent Congresses have introduced legislation that would strengthen the legislative branch's own ability to control regulation. One approach would require a congressional vote before major new regulations can become effective (the REINS Act), and another would establish a congressional office to review and evaluate regulations.

A. The REINS Act[169]

The Regulations from the Executive In Need of Scrutiny (REINS) Act,[170] which has been introduced in each of the last three Congresses, and passed the House of Representatives in the 113th Congress,[171] is designed to "increase accountability for and transparency in the federal regulatory process."[172] It "is patterned after the 1996 CRA, providing expedited procedures for evaluating and voting on major regulations,"[173] but it would change the default outcome. Rather than requiring Congress to enact a "joint resolution of disapproval" to prevent a rule from going into effect, no major rule could go into effect until Congress enacted an affirmative "joint resolution of approval."[174]

165. Wilson, *supra* note 79, at 236 (quoting Herbert Kaufman, The Administrative Behavior of Federal Bureau Chiefs 164 (1981)).

166. Kagan, *supra* note 5, at 2257–58.

167. Curtis W. Copeland, Cong. Research Serv., RL34354, Congressional Influence on Rulemaking and Regulation Through Appropriations Restrictions 1–2 (2008).

168. Kagan, *supra* note 5, at 2260.

169. Although this Article discusses the REINS Act in context of its 113th Congress introduction, since the writing of the Article, the act has been introduced to the 114th Congress. Regulations from the Executive in Need of Scrutiny (REINS) Act, S. 226, H.R. 427, 114th Cong. (2015).

170. H.R. 367, 113th Cong. (2013).

171. It was also introduced in the Senate. S. 15, 113th Cong. (2013).

172. H.R. 367 § 2.

173. Dudley, *supra* note 86, at 10.

174. H.R. 367 § 802.

This would be a significant change to the current regulatory procedures and would likely change the incentives and behavior of legislators, regulators, and affected parties in positive and negative ways.[175] Opponents argue that current procedures, where Congress delegates regulatory decision-making to agencies, are "consistent with the Framers' intention"[176] and provide sufficient regulatory constraint on executive agencies through (1) authorizing legislation, (2) the APA public comment process, (3) executive branch review and oversight, (4) the threat of a resolution of disapproval under the CRA, and (5) judicial review.[177] They also argue that expert agencies are in a better position to make complex regulatory decisions than political officials.[178]

Others defend the constitutionality of the Act[179] and see it as way to "force Members to take responsibility for the laws they pass, and to force Administrations to be accountable for the laws they create through regulation."[180] Many federal regulations being promulgated today depend on legislation passed decades ago by different congresses focused on different concerns. The REINS Act would ensure that major regulations based on authority delegated years ago could only be adopted with consent from the current Congress.[181]

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175. For a discussion of these incentives, see Dudley, *supra* note 86.

176. Sidney Shapiro, The REINS Act: The Latest Conservative Plan to Gum Up the Regulatory Works, CPRBlog (Jan. 14, 2011), http://www.progressivereform.org/CPRBlog.cfm?idBlog=84F5CF0B-E804-F8D1-7197786456C5DC4F.

177. *REINS Act—Promoting Jobs and Expanding Freedom by Reducing Needless Regulations: Hearing on H.R. 10 Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 90–92 (2011) (statement of Sally Katzen).

178. Sidney Shapiro, Ctr. for Progressive Reform, CPR Backgrounder: The REINS Act: The Conservative Push to Undercut Regulatory Protections for Health, Safety, and the Environment (2011).

179. Jonathan H. Adler, *The Regulations from the Executive in Need of Scrutiny (REINS) Act*, The Federalist Soc'y for Law & Pub. Policy Studies (Jan. 14, 2011), http://www.fed-soc.org/publications/detail/the-regulations-from-the-executive-in-need-of-scrutiny-reins-act; *REINS Act—Promoting Jobs and Expanding Freedom by Reducing Needless Regulations*, *supra* note 177, at 83–84 (statement of Jonathan H. Adler, Professor of Law and Director of the Center for Business Law and Regulation, Case Western Reserve University School of Law); *id.* at 44–45 (statement of David McIntosh, Member of Congress, retired).

180. Editorial, *The Congressional Accountability Act*, Wall St. J., Jan. 14, 2011, http://www.wsj.com/articles/SB10001424052970203525404576049703586223080.

181. Adler, *supra* note 179.

B. Create a Congressional Regulatory Oversight Body

The President's Council on Jobs and Competitiveness encouraged Congress to consider a congressional staff, modeled on the CBO or GAO, to review agencies' regulatory analysis and the cumulative effects of existing regulations.[182]

The Truth in Regulating Act of 2000[183] required the GAO independently to evaluate agencies' regulatory impact analyses supporting final regulations, but this requirement was contingent upon the GAO receiving yearly appropriations of $5,200,000.[184] These funds have never been appropriated.

The Strengthening Congressional Oversight of Regulatory Actions for Efficiency Act[185] would have created an office within the Congressional Budget Office with responsibility for assessing the impact of federal rules and regulations.

A non-executive branch agency responsible for reviewing regulations would have several benefits.[186] Most importantly, it would serve as an independent check on the analysis and decisions of regulatory agencies and OMB.[187] A 1999 GAO report evaluating OMB's annual reports to Congress on the benefits and costs of regulation observed,

> It is politically difficult for OMB to provide an independent assessment and analysis of the administration's own estimates in a public report to Congress. If Congress wants an independent assessment of executive agencies' regulatory costs and benefits, it may have to look outside of the executive branch or outside of the federal government.[188]

While a congressional office would not have the same authority OMB exercises to affect agency draft regulations, it would be able to devote resources to areas OMB cannot, "such as examining the effects of regulations issued by independent regulatory agencies."[189] "Just as

182. President's Council on Jobs and Competitiveness, Roadmap to Renewal: Invest in Our Future, Build on Our Strengths, Play to Win 45 (2011).

183. Pub. L. No. 106-312, 114 Stat. 1248–50 (2000).

184. *Id.* at 1249.

185. S. 1472, 113th Cong. (2013).

186. *See* Robert W. Hahn & Robert E. Litan, Recommendations for Improving Regulatory Accountability and Transparency (2003).

187. *Id.* at 11.

188. GAO, Analysis of OMB's Reports, *supra* note 104, at 5.

189. Susan Dudley, *Congress Needs Its Own Regulatory Review Office*, Penn Program on Regulation: RegBlog (Aug. 10, 2011), http://www.law.upenn.edu/blogs/regblog/2011/08/congress-needs-its-own-regulatory-review-office.html.

the CBO provides independent estimates of the on-budget costs of legislation and federal programs, a congressional regulatory office could provide Congress and the public independent analysis [regarding] the likely off-budget effects of" legislation and regulation.[190] This would be particularly important if Congress enacts some of the other procedural changes being discussed, such as the REINS Act or a regulatory paygo.[191]

IV. Judicial Branch Oversight of Regulation

Under the APA, after a regulatory agency issues a final rule, an affected party may challenge it in court. Reviewing courts may reverse or remand the rule to the agency for reconsideration on constitutional grounds, on procedural grounds (whether the agency followed the procedures specified in the APA), or on the basis of the agency's interpretation of the authorizing statute.

A. Changes to the Standard by Which Courts Review Regulations

The courts review regulations issued through informal rulemaking procedures under the "arbitrary and capricious" standard of review,[192] while regulations issued under formal rulemaking procedures are subject to a "substantial evidence" standard.[193] The substantial evidence standard directs a reviewing court to set aside an agency action unless the record provides "such relevant evidence as a reasonable person would accept as adequate to support a conclusion."[194] It is arguably a more exacting standard than "arbitrary and capricious," which grants considerable deference to agency expertise. Substituting a substantial evidence test could motivate agencies to develop and provide better scientific and technical data and analysis in support of regulations.[195] Some argue that the substantial evidence test used as part of an informal (or even hybrid) regulatory proceeding would differ very little from an arbitrary and capricious test, however.[196] The RAA would

190. *Id.*

191. *Id.*

192. 5 U.S.C. § 706(2)(A) (2012).

193. *Id.* § 706(2)(E).

194. Mareno v. Apfel, 1999 U.S. Dist. LEXIS 8575, at *6–7 (S.D. Ala. Apr. 8, 1999) (describing the evidence standard as "more than a scintilla but less than a preponderance").

195. Eve E. Bachrach, *The Case for a Substantial Evidence Amendment to the Informal Rulemaking Provision of the Federal Food, Drug, and Cosmetic Act*, 55 Food & Drug L.J. 293, 297–99 (2000); *Is Reform Needed*, *supra* note 24 (statement by Howard Coble).

196. Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Reserve Sys., 745 F.2d 677, 684 (D.C. Cir. 1984) ("In review of rules of

subject major and high impact final regulations to the substantial evidence standard of review.[197]

B. Judicial Review of Regulatory Impact Analysis

Presidential executive orders governing regulatory impact analysis have stated that their requirements are not enforceable by law[198]; however, several bills introduced in the 113th Congress would change that.[199] "Judicial review could be valuable—not because the courts have a particular expertise in regulatory analysis but because agencies tend to take more seriously aspects of their mission that are subject to litigation. Like executive and congressional oversight, judicial oversight would likely make regulatory agencies more accountable for better decisions based on better analysis."[200]

Courts have overturned several regulations of the Securities and Exchange Commission as being arbitrary and capricious and in violation of the APA, finding that compliance with the Commission's statutory criteria demanded a more rigorous analysis of benefits and costs to evaluate the "rule's effects on efficiency, competition, and capital formation."[201]

general applicability made after 'notice and comment' rule-making, [substantial evidence and arbitrary or capricious] criteria converge into a test of reasonableness."); Matthew J. McGrath, Note, *Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review During Informal Rulemaking*, 54 Geo. Wash. L. Rev. 541 (1986).

197. H.R. 2122, 113th Cong. § 6 (2013) [hereinafter Regulatory Accountability Act].

198. *See* Exec. Order No. 12,866, 3 C.F.R. 638 (1994) ("*Judicial Review.* Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.").

199. For a summary of bills, see *Status of Regulatory Reform Legislation, 113th Congress*, Reg. Studies Ctr., http://regulatorystudies.columbian.gwu.edu/status-regulatory-reform-legislation-113th-congress (last visited Mar. 23, 2015).

200. Susan Dudley, George Wash. Univ. Reg. Studies Ctr., Prepared Statement of Susan E. Dudley, Hearing on Federal Regulation: A Review of Legislative Proposals, Part II, at 17 (2011).

201. For a discussion of recent cases, *see* Jane C. Luxton, *An Uncomfortable Wake-Up Call for Dodd-Frank Regulators*, Client Alert (Pepper Hamilton, LLP, Berwyn, Pa.), *available at* http://www.pepperlaw.com/pdfs/ClientAlert021012.pdf.

C. *Judicial Review of Statutory Requirements*

Congress has considered legislative amendments that would provide for judicial review of statutory requirements, such as those encompassed in the Information Quality Act,[202] the Regulatory Flexibility Act,[203] and the Unfunded Mandates Reform Act.[204] For example, the IQA does not explicitly provide for judicial review of agency denials of requests for correction, and to date, courts have chosen not to try cases that have been brought.[205] The RAA would have required the heads of agencies to certify that they have complied with the IQA and subject compliance with the IQA to judicial review.[206] Responding to concerns noted above, the Regulatory Flexibility Improvement Act would have provided for judicial review of final agency actions.[207]

Congress also considered legislation (such as H.R. 899)[208] that would make compliance with UMRA requirements judicially reviewable under the APA, so that an agency's failure to justify not selecting the "least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule"[209] could be grounds for staying, enjoining, invalidating, or otherwise affecting such agency rule.

Conclusion

All three branches of government have responsibility under the Constitution for ensuring accountable regulation by providing checks and balances against each other. Over the last century, they have experimented with approaches to improving the outcomes of administrative laws by controlling the procedures and principles by which regulations are generated. With concern over regulatory impacts rising, proposals for regulatory reform are gaining traction in the executive, legislative, and judiciary branches of government. The 114th Congress is likely to consider legislation to reform the procedures by which

202. Information Quality Act, *supra* note 145, at 2763A-153–154.

203. Regulatory Flexibility Act, *supra* note 49, at 1169–70.

204. Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48, 70–71 (1995).

205. For different perspectives on this issue, see James W. Conrad Jr., *The Information Quality Act—Antiregulatory Costs of Mythic Proportions?*, 12 Kan. J.L. & Pub. Pol'y 521, 538 (2003); Sidney A. Shapiro, Rena Steinzor & Margaret Clune, Ossifying Ossification: Why the Information Quality Act Should Not Provide for Judicial Review 1, 9 (2006).

206. Regulatory Accountability Act, *supra* note 197.

207. Regulatory Flexibility Improvements Act of 2013, *supra* note 129.

208. Unfunded Mandates Information and Transparency Act of 2013, *supra* note 136.

209. 2 U.S.C. § 1535 (2012).

regulations are issued, clarify the decision criteria agencies use to develop regulations, and take responsibility for the content of individual regulations promulgated pursuant to statutes. While none of the major regulatory reform legislation considered by the 113th Congress passed, the bills considered there may have laid the groundwork for reforms in 2015. Like the bipartisan, inter-branch regulatory reform efforts of the 1970s and 1980s, which brought about unexpected innovation, higher quality and lower prices in previously regulated industries, reforms today could spur economic growth and improve the welfare of American families, workers, and entrepreneurs.