**Testimony of:**

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**Before the:**

**United States Committee on House Administration**
**1309 Longworth House Office Building**
**Washington D.C. 20515**

**Hearing on:**

***Congress in a Post-Chevron World***
**Tuesday, July 23, 2024, 10:15 a.m.**

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## Introduction

Chairman Steil, Ranking Member Morelle, and Members of the House Committee on Administration, thank you for the opportunity to testify today on issues surrounding *Congress in a Post-Chevron World*. My name is Wayne Crews and I am the Fred L. Smith Jr. Fellow in Regulatory Studies at the Competitive Enterprise Institute – a non-profit, non-partisan public policy organization dedicated to advancing individual liberty and free enterprise with an emphasis on regulatory policy.

I will state my conclusion first, which is that Congress must reclaim its lawmaking and rule-writing authority from the executive branch by marshaling appropriate resources and full-time personnel to perform regulatory oversight, including cost-benefit analysis and disclosures often neglected by the executive branch, sometimes in violation of law.

There are numerous approaches to achieving this goal, and what follows is not exhaustive. But the Committee on Administration, with its focus on internal operations, can effectively engage in regulatory oversight support functions in collaboration with the Judiciary, Oversight, and Budget Committees. And by coordinating with existing congressional bodies such as the Government Accountability Office (GAO), the Congressional Budget Office (CBO), and the Congressional Research Service (CRS), this committee can have a crucial role to play in challenging regulatory premises and ensuring compliance with existing laws.

The committee can support broader regulatory reform efforts by advocating for necessary resources, enhancing oversight mechanisms and infrastructure, and promoting operational efficiencies. By leveraging its administrative oversight capabilities, the committee can improve coordination and collaboration with agencies and congressional offices. Additionally, it can contribute significantly to hearings and investigations into agency processes, transparency, compliance, data collection, and reporting. Utilizing reports and analyses from GAO, CBO, and CRS (and encouraging improvement in those reports) will support its efforts in regulatory reform and ensure comprehensive and effective reporting.

## Understanding the Scope of Regulatory Overreach

While federal spending and the $35 trillion national debt dominate the spotlight, the hidden tax of regulation is equally significant,[1] impacting nearly every facet of daily life – from the homes we live in to the food we consume, to the nature of our work. When the era of the "administrative state began" during the presidency of Woodrow Wilson, few could have anticipated the vast web of transformative rules now enveloping the economy and society, reflected in a *Code of Federal Regulations* that today spans 188,000 pages and growing. Unlike the precise figures available for debt and deficit,[2] many regulatory costs remain unaccounted for in Office of Management and Budget (OMB) assessments.[3] This includes influential independent agencies like the Federal Communications Commission and the Federal Trade Commission, as well as guidance documents, antitrust regulations, federal land management, and the oversight of spectrum and other commons. As we face unprecedented legislative enactments costing trillions,[4] the rise of public-private partnerships (PPPs),[5] subsidies, and governance-by-contract further

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[1] Consider President Jimmy Carter's *Economic Report of the President* in 1980: "[A]s more goals are pursued through rules and regulations mandating private outlays rather than through direct government expenditures, the Federal budget is an increasingly inadequate measure of the resources directed by government toward social ends." Council of Economic Advisers, *Economic Report of the President*, Executive Office of the President, January 1980, p. 125, http://www.presidency.ucsb.edu/economic_reports/1980.pdf.

[2] https://www.forbes.com/sites/waynecrews/2020/08/25/what-comes-after-trillion-coming-to-terms-with-the-impenetrable-costs-of-government-intervention/?sh=20c20f2132fe.

[3] https://www.whitehouse.gov/omb/information-regulatory-affairs/reports/#ORC.

[4] https://www.forbes.com/sites/waynecrews/2022/06/01/inflation-and-bidens-whole-of-government-price-hike/?sh=2b14e0a4c6b9.

[5] https://www.forbes.com/sites/waynecrews/2022/05/10/congress-is-causing-rising-regulatory-burdens-that-needs-fixing/?sh=15947392715a.

obscures the regulatory nature of federal actions that may remain undetected in the *Federal Register* and other reporting mechanisms. With so many unmeasured areas of intervention, no comprehensive justification for the net benefits of the regulatory enterprise exists. Congress should recognize the extent to which agency lawmaking has supplanted its own, as evidenced by the 3,018 rules and regulations issued by agencies in 2023 compared to just 65 public laws passed by Congress – 46 rules for every law.[6]

**Congress and the Committee on Administration Must Confront Major Changes in the Administrative State**

The Trump-era ethos was one of regulating administrators rather than the public (there were, of course, exceptions[7]). Trump's flagship Executive Order 13,771 on "Reducing Regulation and Controlling Regulatory Costs"[8] established a one-in, two-out requirement for certain significant regulatory actions, implementing a rudimentary regulatory budget by stipulating that the "total incremental cost of all new regulations, including repealed regulations…shall be no greater than zero." The Biden Administration brought abrupt reversals of this streamlining,[9] culminating in E.O. 14,094 on "Modernizing Regulatory Review."[10] This directive raised thresholds for what regulatory actions are considered highly significant (from $100 million annually to $200 million and adjusted by changes in GDP) and worthy of extra OMB scrutiny. E.O. 14,094 also triggered a rewrite of OMB's Circular A-4 guidance on regulatory analysis, placing OMB in a regulatory advocacy role rather than that of a watchdog.[11] The nomenclature of cost-benefit analysis remains, but the elevation of largely unquantifiable whole-of-government progressive pursuits on the likes of equity, competition policy, and climate crisis substitute for it.[12] This makes an already opaque rulemaking process even more cloudy. Spending initiatives like the Inflation Reduction Act and the American Rescue Plan create further consolidation with goals brought to fruition via subsidies, contracting and procurement, grants-in-aid, and guidance documents.

Another major change influencing this committee's internal deliberations is found in the hearing title's own reference to a "*Post-Chevron* World," specifically the end of court deference with respect to agency interpretation of ambiguous statutes. *Loper Bright Enterprises v. Raimondo*[13] overruled the longstanding doctrine of *Chevron* deference (in effect since 1984's *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*.) which compelled courts to defer to federal agencies' reasonable interpretations regarding ambiguities in statutes they administered. *Loper* holds that deference to agency interpretations undermines separation of powers by expanding executive power at the expense of the judiciary.

While the end of Chevron deference represents a positive and potentially transformative shift, the committee should be aware that it will likely galvanize regulatory advocates. The *Loper* minority opinion, which suggests that recent Supreme Court decisions could "devastate the functioning of the federal government,"[14] seems exaggerated. Although there were significant expansions of central power during

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[6] "Rule Of The Unelected? Revisiting The 'Unconstitutionality Index'," Forbes, January 3, 2024, https://www.forbes.com/sites/waynecrews/2024/01/03/rule-of-the-unelected-revisiting-the-unconstitutionality-index/.
[7] https://cei.org/publication/swamp-things-trumps-discordant-regulatory-impulses-offset-his-deregulatory-successes-and-expanded-the-administrative-state/.
[8] White House, Office of the Press Secretary, "Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs," news release, January 30, 2017, https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling. Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs," *Federal Register*, Vol. 82, No. 22, February 3, 2017, https://www.gpo.gov/fdsys/pkg/FR-2017-02-03/pdf/2017-02451.pdf.
[9] https://cei.org/blog/bidens-repudiation-of-trumps-regulatory-streamlining-agenda-an-inventory/ and https://cei.org/blog/edward-scissorhands-and-federal-regulatory-disclosure/.
[10] https://www.govinfo.gov/content/pkg/FR-2023-04-11/pdf/2023-07760.pdf
[11] Draft Circular A-4, https://www.whitehouse.gov/wp-content/uploads/2023/04/DraftCircularA-4.pdf.
[12] https://cei.org/wp-content/uploads/2022/10/10000_Commandments_2022.pdf.
[13] *Loper Bright Enterprises v. Raimondo.*
[14] https://www.govexec.com/management/2024/07/will-recent-supreme-court-rulings-devastate-functioning-federal-government/397795/.

the COVID era and through subsequent legislation, much of the administrative framework was established prior to *Chevron*. *Loper* workarounds regulatory advocates may pursue include:[15]

- Coordinating with lawmakers to pass broad progressive legislation with minimal ambiguity (e.g., on energy transformation and artificial intelligence).
- Engaging private enterprises through subsidies, grants, partnerships, and blueprints to support economically-interventionist legislation, exploiting contracting rules for greater regulatory impact.
- Increasing reliance on sub-regulatory guidance documents and notices.

**Closing the Circular A-4 and *Loper* Loopholes with a Focus on Enumerated Powers**

In confronting how the regulatory state attained its sweeping yet unmeasured dimensions and how this committee can contribute to reform, deliberations naturally must address the over-delegation of legislative power. However, the main threat to liberty is not over-delegation, but Congress's mounting disregard for enumerated powers. This is why progressives may not fear constraints on agencies, such as overturning *Chevron* deference. A substantial part of our dilemma lies not in agency misinterpretation of ambiguous statutes, addressed by *Loper*, but in explicit statutes themselves. While the *Chevron* doctrine is dead, the enumerated powers doctrine is arguably even more so, and that's the opening progressives will exploit.

Via decidedly unambiguous statutory directives such as the CARES Act, American Rescue Plan, Infrastructure Investment and Jobs Act, Inflation Reduction Act, and the CHIPS and Science Act, we confront an increasing fusion of spending and regulation. These create compounding costs of intervention even if no specific notice-and-comment rules with questionable interpretations are issued. Businesses are seduced with downstream subsidies,[16] contracts, and procurement deals, while states and localities are enticed with grants-in-aid. The committee should appreciate that regulatory transformations enabled with cash neutralize what would otherwise be the natural constituency for regulatory liberalization, as evidenced by the surge in regulatory reform during the 1990s. Nevertheless, it is easy to fight unfunded mandates; but funded ones are tougher.

Addressing federal bloat requires reassessment of centralized power as such, not just a rock/paper/scissors division of it amongst the three branches. The root problem is not just Congress's over-delegation of authority or numerous agency abuses; rather it is Congress exercising powers that we, as citizens, do not possess and cannot delegate to it. Therefore, even developments such as 2022's *West Virginia v. EPA*'s establishment of major questions doctrine barring agencies "from resolving questions of 'vast economic and political significance' without clear statutory authorization,"[17] cannot fully halt the wider regulatory state as opposed to the administrative one.

This emphasis on enumerated powers rather than on over-delegation underscores the importance of ensuring that Congress and this committee have the necessary resources and personnel for these initial deliberations and future legislative innovations in regulatory oversight. As Congress passes onerous laws in areas like finance, energy policy, manufacturing, health care, tech policy, artificial intelligence, digital currencies, and other spheres, it often imposes rapid statutory deadlines for new regulations, prohibits cost analysis of rules, creates loopholes that enable avoidance of review, or acts to benefit special interests. The traditional central review mechanisms, now weakened by the Circular A-4 rewrite, cannot block motivated legislators or presidents with regulatory ambitions.

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[15] "A Deep State Guide To Post-Chevron Regulating," *Forbes*, July 9, 2024, https://www.forbes.com/sites/waynecrews/2024/07/09/a-deep-state-guide-to-post-chevron-regulating/.
[16] https://www.forbes.com/sites/waynecrews/2023/11/06/congress-must-halt-the-ascendance-of-regulation-by-subsidy/?sh=9ceec9e445a6.
[17] https://law.stanford.edu/publications/testing-the-major-questions doctrine/#:~:text=The%20Supreme%20Court's%20recent%20decision,significance%E2%80%9D%20without%20clear%20statutory%20authorization..

**The GAO Recently Reinforced this Committee's Interest in Regulatory Oversight**

Given that costly "off-budget" regulatory interventions lack discipline and are rarely quantified, it is crucial to prioritize regulatory concerns alongside fiscal ones. Pertinent to this hearing, the Government Accountability Office's (GAO) December 2023 report on *Enhancing Congressional Oversight of Rulemaking and Establishing an Office of Legal Counsel*[18] should not be overlooked by this committee. Some of its rulemaking oversight reforms should be incorporated into fresh negotiations over federal spending. The bipartisan appeal of legislative oversight of the executive branch is reflected not only in GAO's report, this hearing, and in initiatives like the 117th Congress's formation of a Select Committee on the Modernization of Congress.

The GAO's proposed options for congressional oversight of rulemaking include (1) establishing a new regulatory review entity within Congress; (2) modifying existing review processes; and (3) reforming regulatory oversight procedures.

***Create a New Regulatory Entity*:** Noting the backdrop of the existing regulatory review function at OMB, GAO sketched options for creating an office, joint committee, commission, or advisory committee in Congress. This new body could be the strongest form of some version of the long-proposed Congressional Office of Regulatory Analysis (CORA)[19]. GAO points to the obvious staffing and cost considerations. But compared to the need to exercise necessary oversight, reconfigure existing regulatory laws and costs of over-regulation, those are negligible.

While non-partisanship and bipartisanship are crucial, the primary concern with a new regulatory review body is not necessarily partisanship, but rather the potential tendency to default to administrative regulatory solutions, akin to current practices at OMB. The administrative mindset often attributes ongoing policy concerns, from antitrust interventions to infrastructure rollout, blindly to market failure rather than potentially more significant political failures

***Revise Existing Regulatory Review Processes:*** GAO's second option involves amending current regulatory procedures but without creating a new oversight body. These mirror many already prominent legislative regulatory reform proposals. Options include publicly disclosing the information upon which a rule is based ("including data, and scientific and economic studies") before it can take effect; requiring periodic retrospective reviews of rules; allowing congressional disapproval of parts of a rule rather than the whole as provided for in the Congressional Review Act (CRA); cost ceilings, a unified regulatory budget; and mandating expiration dates or "sunsetting" for specific rules.

***Alter the Oversight Function:*** Modifying oversight functions in GAO's telling involves adjusting the duties of the entities already engaged in rulemaking. These proposals include:

- Having agencies perform uniform cost-benefit analysis for rules (GAO does not critique OMB's revised Circular A-4 regulatory review procedures, but these undermine the spirit of GAO's proposals by embedding interventionist biases into the regulatory process[20]).
- Development of rear-view mirror methods for evaluating rule effectiveness.
- Having congressional committees, when drafting laws that entail downstream agency rulemakings, estimate benefits and costs of regulatory programs.

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[18] https://www.gao.gov/assets/d24105870.pdf; and see "The GAO Weighs In On Regulatory Reform Options For Congress," Forbes, February 26, 2024, https://www.forbes.com/sites/waynecrews/2024/02/26/the-gao-weighs-in-on-regulatory-reform-options-for-congress/.
[19] https://congress.gov/105/crpt/hrpt441/CRPT-105hrpt441-pt2.pdf.
[20] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4486617.

- Reporting on the number of rules in effect, the number of major rules, and total economic costs imposed.
- Having agency rulemaking preambles describe how regulatory impact analysis was incorporated into a given rule.
- Having agency draft regulatory impact analyses and incorporating their preferred alternatives before they issue a proposed rule.

**The Committee Should Consider Resourcing a Congressional Office of Regulatory Analysis (CORA) that Challenges the Presumption of Agency Expertise**

GAO's strongest recommendation is its first. Central OMB review has been a pivotal innovation but is only appropriate to a limited government setting we no longer occupy. Reconsideration is particularly relevant given the reversals that occur when administrations change. The same OMB championing "one-in, two-out" during the Trump administration[21] abandoned it under Biden.[22]

The call for an independent "Congressional Office of Regulatory Analysis" resembling the Congressional Budget Office to supplement or replace agency operations and the OMB oversight role stretch back at least to the 1990s.[23] The committee should recognize however that any such entity should formally chartered with an anti-regulatory "bias" to offset the pro-regulatory bias that prevails in the remainder of the federal government.[24] Recognizing that political failure rather than market failure is the dominant trend, this body could showcase market alternatives over command options for regulations, continually presenting cases for eliminating existing rules and creating plans for elimination of regulatory agencies themselves particularly as advancing technologies eliminate legacy arguments of market failure and public goods challenges.

Shifting agency resources to a CORA would be necessary, but Congress is where the lawmaking function and the capacity to address the administrative state belong.[25] A CORA could house expertise in cost benefit analysis, law, and even subject-matter proficiencies. However, the earlier caution over enumerated powers is crucial. Most matters should not rise to the federal level, which would free up resources for a CORA focused on limited objectives. The House's 2023 and 2024 attempt to defund the Circular A-4 rewrite through the appropriations may not succeed in the Senate, but reallocating money and staffing to a CORA would reconstitute the watchdog role within Congress. Given the reaction of regulatory advocates reaction to the demise of Chevron, any CORA the committee helps develop and perhaps supervise should have a founding charter that recognizes political and administrative failures as more likely than market failures. This would enable a culture of prioritizing competitive disciplines and devolving federal power.[26] A successful CORA would internalize the principle that benefits sought through regulation—such as public health, financial stability, food safety, auto safety, airspace allocation, privacy, cybersecurity and so forth, are also forms of *wealth* that require market disciplines, not just administrative ones, to flourish. As CEI founder Fred L. Smith Jr. has noted, markets and competitive enterprise make the world not just richer – but fairer, safer and cleaner.[27]

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[21] Clyde Wayne Crews Jr., *Ten Thousand Commandments 2021: An Annual Snapshot of the Federal Regulatory State*, June 30, 2021, Available at SSRN: https://ssrn.com/abstract=3877388 or http://dx.doi.org/10.2139/ssrn.3877388.
[22] https://cei.org/studies/ten-thousand-commandments-2022/.
[23] See for example, U.S. House of Representatives Report 105-441, 1998.
[24] Crews, "Congress Should Charter An "Office Of No" To Counter Federal Overregulation," Forbes, October 25, 2021, https://www.forbes.com/sites/waynecrews/2021/10/25/congress-should-charter-an-office-of-no-to-counter-federal-overregulation/?sh=7fc70d9c4928.
[25] See Dan Greenberg and Devin Watkins, "Constitutional Restoration: How to Rebuild the Separation of Powers," June 22, 2023, https://cei.org/studies/constitutional-restoration-how-to-rebuild-the-separation-of-powers/.
[26] https://www.forbes.com/sites/waynecrews/2021/10/25/congress-should-charter-an-office-of-no-to-counter-federal-overregulation/?sh=7a33682d4928.
[27] https://cei.org/content/morality-and-virtues-capitalism-and-firm.

**The Committee Can Play a Role in Ensuring Compliance with Existing Regulatory Law**

Enacting new laws is important to regulatory reform, but this committee and any offices it oversees or takes an interest in (including a hypothetical CORA) should ensure that existing laws are followed. Compliance with prior laws and procedures (the Regulatory Right-to-Know Act, the Congressional Review Act, E.O. 12,866) has been disregarded or has languished. Even the *Information Collection Budget* created by the Paperwork Reduction Act has vanished from the scene.[28] The "annual" *Report to Congress* on costs and benefits of "significant" and "major" rules remains perpetually tardy (the last one covers fiscal year 2022). A recent hearing showcased disregard of the Regulatory Flexibility Act, which had been intended to ease small business burdens. The aggregate regulatory cost assessment required by the Regulatory Right-to-Know Act has been ignored almost since the law's inception.[29]

The CRA provides Congress with a 60-legislative-day window in which to review a major rule and pass a "resolution of disapproval." But despite the issuance of thousands of rules since passage, fewer than two dozen have been overturned. The CRA is also undermined by the fact that major rules are not always submitted to the GAO,[30] and there is no way to readily affirm the required submission of major rules to both houses of Congress.[31] Even before Biden's E.O. 14,094, the proportion of non-major rules with any reviewed cost analysis averaged less than one percent.[32] Meanwhile, the Unfunded Mandates Reform Act, surveyed in the *Report to Congress*, exempts a significant amount of regulatory intervention from critical analysis.[33] Even the recent changes to discount rates required by EO 14,904 have been incorrectly applied.[34] Addressing sub-optimal compliance with these key laws and executive orders could be fostered by this committee.

**The Committee Can Foster Legislative Reforms to Right-Size Government**[35]

While regulatory reform is contentious, we know that streamlining sometimes becomes overwhelmingly bipartisan. A generation ago, the Unfunded Mandates Act, the Small Business Regulatory Enforcement Fairness Act, and the Congressional Review Act—the CRA now causing consternation—passed with overwhelming bipartisan support, led by figures like Nevada's Senator Harry Reid (D).

Today's hearing shows there is an appetite in the 118th Congress for reforms, and we certainly do periodically see bipartisan appeals for transparency, better disclosure, and supervision of regulatory burdens, even today. Members may have forgotten that Biden signed the "Providing Accountability Through Transparency Act of 2023" (Public Law 119-9[36]), requiring agencies to include a 100-word plain language summary of proposed rules when providing notice of rulemaking. Modern proposals such as the Regulatory Accountability Act, the Guidance Out of Darkness Act, a Regulatory Improvement Commission, and regulatory budgeting all boast bipartisan support.

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[28] https://www.forbes.com/sites/waynecrews/2023/09/25/federal-paperwork-consumes-the-equivalent-of-14883-human-lifetimes-annually/
[29] https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/assets/OMB/inforeg/2002_report_to_congress.pdf.
[30] Copeland, Curtis W. 2014. "Congressional Review Act: Many Recent Final Rules Were Not Submitted to GAO and Congress," July 15. White Paper. http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2014/07/25/National-Politics/Advance/Graphics/CRA%20Report%200725.pdf; and see Crews, "Many Federal Agency Rules and Guidance Documents are Still Not Properly Reported to Congress and the GAO as Required by the Congressional Review Act," Competitive Enterprise Institute, November 4, 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4219091.
[31] https://cei.org/blog/use-the-congressional-review-act-to-strike-rules-not-reported-to-congress-and-gao/.
[32] https://cei.org/opeds_articles/trump-white-house-quietly-releases-overdue-regulatory-cost-benefit-reports/.
[33] Federal Mandates: Few Rules Trigger Unfunded Mandates Reform Act, Testimony of Denise M. Fantone, United States Government Accountability Office, February 15, 2011, http://www.gao.gov/assets/130/125488.pdf.
[34] https://www.forbes.com/sites/jamesbroughel/2024/07/18/federal-economists-are-still-getting-the-discount-rate-wrong/
[35] Crews, "Laws Against Laws: A 118th Congress Regulatory Reform Agenda For Rightsizing Washington," Forbes, March 15, 2023, https://www.forbes.com/sites/waynecrews/2023/03/15/laws-against-laws-a-118th-congress-regulatory-reform-agenda-for-rightsizing-washington/?sh=68a67dcb7a23.
[36] https://www.congress.gov/118/plaws/publ9/PLAW-118publ9.pdf.

*The following is a sample inventory of regulatory reform legislation. If passed, this committee could foster the bills through the necessary effort of resourcing regulatory oversight and liberalization.*

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***Enact the REINS Act (Regulations from the Executive In Need of Scrutiny)***

While the GAO proclaimed that "rulemaking generally begins with a congressional delegation of authority," it did not further address delegation or how excess delegation contributes to the decay of congressional oversight authority, a key issue in the GAO report. This omission is significant. While the GAO touched on numerous legislative proposals from the past decades, it did not highlight perhaps the most foundational one: requiring Congress to approve major or controversial rules before they become binding. In this same spirit, the formal rulemaking permitted in the Administrative Procedure Act, as opposed to the informal notice-and-comment rulemaking most agencies now use, could have received more encouragement from GAO.

The "Congressional Responsibility Act" from the 1990s embodied the requirement for Congress to affirm significant regulations, which would have "prohibit[ed] a regulation from taking effect before the enactment of a bill comprised solely of the text of the regulation." While never passed, this concept is now known as the REINS Act (Regulations from the Executive in Need of Scrutiny[37]), which requires an expedited vote on certain major rules before they are effective. This essentially replaces the Congressional Accountability Act's resolution of disapproval with a Congressional affirmation.[38] Whether votes on rules occur through tabulated vote or unanimous consent, or whether they are approved individually or in bundles, what matters is that members of Congress are on record. The committee should support broadening REINS to cover any controversial rule, regardless of its "major" designation, and encourage the inclusion of significant guidance documents in the requirements for congressional approval.

***Enact Bipartisan Regulatory Budgeting***

Unknowable costs can only be internalized by a democratically accountable Congress that grapples with an aggregate regulatory budget constraint. Regulatory budgeting would make Washington's presence in the economy more explicit by capping what agencies individually and collectively compel the private sector to spend on compliance, a concept that boasts bipartisan pedigree.

Former Democratic Texas Senator Lloyd Bentsen, who served as Treasury Secretary in the Clinton Administration, proposed in 1979 an "annual cap on the compliance costs each agency could impose on the private sector" to "make it possible to coordinate the regulatory and fiscal budgets." Regulatory budgeting was also referenced in President Jimmy Carter's 1980 *Economic Report of the President*. Trump demonstrated the potential (and limitations) of an executive-driven approach encompassing individual agencies. This committee could work with others to explore allocating regulatory cost authority among agencies in a regulatory cost budget that distinguishes between categories like economic, health and safety, environmental, and paperwork. Then, Congress could compare questionable rules across the board to the benefits that could be gained if the compliance costs went elsewhere. While agencies could regulate unwisely, stupidly, or even maliciously, Congress could shift the squandered budgetary allocation to a rival agency that saves more lives. This approach could invigorate supervisory mechanisms like central review and sunsetting, inspiring agencies to "compete" with one another in terms of lives

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[37] https://www.congress.gov/bill/118th-congress/house-bill/277.

[38] For an overview of the latest version, see Ryan Young, "Regulatory Reform Bills in the 118th Congress: The REINS Act," Competitive Enterprise Institute, February 8, 2023, https://cei.org/blog/regulatory-reform-bills-in-the-118th-congress-the-reins-act/.

saved or other regulatory benefits rather than operating in silos, as they might continue to do even with the Circular A-4 rewrite underway. The 118th Congress's leading vehicle is the Article I Regulatory Budget Act (H.R.261[39]). It would amend the Congressional Budget Act and the Regulatory Flexibility Act to enlist multiple offices (the White House, the Congressional Budget Office, Government Accountability Office, Bureau of Economic Analysis) in determining and capping the costs of regulations and guidance documents, significant and allegedly non-significant alike, individually and in the aggregate.

To be clear, apart from certain dollar-denominated payroll-rooted paperwork/compliance burdens, the objective costs of each year's thousands of regulations typically cannot be calculated.[40] If, as the economist Ludwig von Mises proclaimed, "Economic Calculation in the Socialist Commonwealth" is impossible,[41] then regulatory cost calculation in an elemental sense is also impossible. Costs experienced subjectively or indirectly by someone who is not the regulated party cannot be measured by that being. Instead, we must work with magnitudes, thresholds, and "idiosyncratic guesstimates," [42] and even as we budget as best we can, require Congress to approve rules.

***Create a Regulatory Reduction Commission***

The difficulty of removing rules administratively, even during the Trump administration, underscores the intractability of decades of regulatory accumulation and highlights Congress's essential role. A potential solution for bipartisan, [43] cross-branch, and bicameral cooperation is a "Regulatory Improvement Commission." First proposed in the 1990s by then-Sen. Phil Gramm (R-Texas), this body would review the entire regulatory apparatus, similar to the military base closure and realignment commission, and select a bundle of rules for rollback with an expedited congressional vote. The commission's activities could also support the aforementioned regulatory budget.

***Continue to Pursue "One-in, Two-out" and Sunsetting***

Long before the Trump administration, other nations had experimented with rule-in, rule-out campaigns. A project in Canada was praised by NPR in 2015, [44] and Britain's "one-in, one-out" approach—later evolving into "one-in, three-out"—was credited with cutting £10 billion in permitting burdens and reducing overlap among agencies.[45] While these results may not be revolutionary, they highlight the importance of setting goals and targets. For instance, British Columbia's program achieved a one-third reduction in "requirements" and reportedly cut hundreds of thousands of paperwork hours. The committee should consider such reforms, focusing on reducing equivalent burdens rather than merely counting rules – perhaps aiming for dollar-for-dollar reductions instead of rule-for-rule. [46]

Similarly, Congress has occasionally considered regulatory sunsetting, including in the 118th Congress. Without an engaged executive, rule sunsets or phase-outs may be disregarded without legislative support. Formal reporting on deadlines, extensions, and the ratios of rules retained versus discarded will help

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[39] See Crews, "A Case For The Article I Regulatory Budget Act," Forbes, February 16, 2023, https://www.forbes.com/sites/waynecrews/2023/02/16/a-case-for-the-article-i-regulatory-budget-act/?sh=24cffa622e64.
[40] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2502883.
[41] von Mises, Ludwig. 1920. *Economic Calculation in the Socialist Commonwealth*, Mises Institute: Auburn Alabama. (2012 Edition) http://library.mises.org/books/Ludwig%20von%20Mises/Economic%20Calculation%20in%20the%20Socialist%20Commonwealth_Vol_2.pdf.
[42] https://www.newsbusters.org/blogs/nb/clyde-wayne-crews/2016/07/23/washington-post-fact-checker-column-still-denial-over.
[43] Mandel, Michael and Diana G. Carew, "Regulatory Improvement Commission: A Politically-Viable Approach to U.S. Regulatory Reform," Progressive Policy Institute Policy Memo. May 2013, http://www.progressivepolicy.org/wp-content/uploads/2013/05/05.2013-Mandel-Carew_Regulatory-Improvement-Commission_A-Politically-Viable-Approach-to-US-Regulatory-Reform.pdf.
[44] http://www.npr.org/2015/05/26/409671996/canada-cuts-down-on-red-tape-could-it-work-in-the-u-s.
[45] https://www.rstreet.org/wp-content/uploads/2016/03/RSTREET54.pdf and https://www.gov.uk/government/news/government-going-further-to-cut-red-tape-by-10-billion.
[46] https://www.cato.org/blog/president-trumps-one-two-out-rule-lessons-uk.

assess whether streamlining and supervision are effective. If not, the generated record could prompt Congress to take action. As with regulatory budgeting, Congress could recommend modifications to entire regulatory programs, compare the costs of regulations against superior alternatives, and push for more effective oversight.

***Reform the Use of Agency Sub-Regulatory Guidance Documents***

Despite the existence of OMB's "Good Guidance Practices" from the Bush era,[47] notices, guidance documents, memoranda, and bulletins often evaded rigorous scrutiny before the Trump administration. It is insufficient for only "significant" or "major" rules to receive scrutiny review. Sub-regulatory guidance, such as the Federal Trade Commission's policy on "unfair methods of competition"[48] or the Commerce Department's child care requirement for CHIPS and Science Act funds,[49] can influence policy without the transparency and public scrutiny that formal rules typically require.

With Biden's revocation of Trump's one-stop online portals and the guidance procedures established under E.O. 13,891,[50] guidance documents have become less regulated. Legislation like the Guidance Out of Darkness Act (GOOD Act)[51] is crucial for enhancing scrutiny of these documents, especially as reliance on them increases in the post-*Chevron* era. Measures to ban certain types of guidance or improve inventory practices are also important.[52]

Despite being technically non-binding, informal agency proclamations often pressure the regulated public to comply. Congress and this committee should enhance oversight in this area, restoring formal procedures for guidance document preparation and disclosure. A 2018 congressional report, *Shining Light on Regulatory Dark Matter*, revealed a chaotic landscape of about 13,000 guidance documents, with the residual effects of Trump-era portals still allowing the public to access over 107,000 documents. Congress should reaffirm the non-binding nature of guidance and ensure a clear, mappable disclosure process.

Guidance documents, including non-legislative rules, presidential memos, policy statements, and bulletins,[53] can enact policy directly or indirectly, often without clear understanding of associated costs or burdens. Congress should not only restore Trump-era initiatives such as guidance portals but go beyond to ensure that all significant agency directives receive proper scrutiny and democratic accountability.

***Improve Annual Regulatory Transparency Reporting***

The federal government possesses extensive resources that could be harnessed to enhance oversight of the regulatory process. This committee should champion a comprehensive "regulatory report card" that surveys and summarizes agency regulatory outputs, incorporating both current data and historical trends.

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[47] See Crews, "Mapping Washington's Lawlessness: A Preliminary Inventory of Regulatory Dark Matter," Competitive Enterprise Institute, Issue Analysis, No. 4, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733378.
[48] Crews, "The Unfairness of the FTC's Policy Statement Regarding the Scope of Unfair Methods of Competition," Competitive Enterprise Institute, November 14, 2022, https://cei.org/blog/the-unfairness-of-the-ftcs-policy-statement-regarding-the-scope-of-unfair-methods-of-competition/.
[49] Andrea Hsu, "Biden has big ideas for fixing child care. For now a small workaround will have to do," NPR, March 17, 2023, https://www.npr.org/2023/03/17/1162869162/child-care-chips-semiconductors-manufacturing-raimondo-subsidies.
[50] https://www.govinfo.gov/content/pkg/DCPD-201900706/pdf/DCPD-201900706.pdf.
[51] Crews, "The 'Guidance Out Of Darkness Act' Is The Low-Hanging Fruit Of Regulatory Reform," Forbes, March 21, 2023, https://www.forbes.com/sites/waynecrews/2023/03/21/the-guidance-out-of-darkness-act-is-the-low-hanging-fruit-of-regulatory-reform/?sh=571551f2ccc8.
[52] Crews, "An Emergency Law to Extinguish Regulatory Dark Matter," Competitive Enterprise Institute, April 7, 2022, https://cei.org/blog/an-emergency-law-to-extinguish-regulatory-dark-matter/.
[53] Clyde Wayne Crews Jr., "Mapping Washington's Lawlessness: A Preliminary Inventory of 'Regulatory Dark Matter'," *Issue Analysis 2017 No. 4*, Competitive Enterprise Institute, March 2017. https://cei.org/sites/default/files/Wayne%20Crews%20-%20Mapping%20Washington%27s%20Lawlessness%202017.pdf; also available on SSRN Social Science Research Network. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733378.

Such reports could be published by Congress or integrated into existing documents like the Federal Budget, the *Economic Report of the President*, or the OMB *Benefits and Costs* report.

Agencies and OMB should present quantitative and qualitative data in easily digestible formats, including charts and historical tables, to facilitate cross-agency comparisons. Ratios of rules and guidance with versus without benefit calculations should be highlighted to assess whether the regulatory process is achieving intended outcomes. An annual report could summarize these findings by program, agency, and in aggregate, with accompanying historical data to track progress over time. Here is an example:

**Regulatory Transparency Report Card:**
**Suggested Official Summary Data by Program, Agency & Grand Total**
**(with Five-Year Historical Tables)**

- Tallies of "economically significant" rules and minor rules by department, agency, and commission, by cost tier (an "ALERT Act" component)

| **Breakdown of "Economically Significant" Rules** | |
|---|---|
| Category 1 | > $50 million, <$500 million |
| Category 2 | > $500 million, < $1 billion |
| Category 3 | > $1 billion |
| Category 4 | > $5 billion |
| Category 5 | >$10 billion |

- Number and percentage of interim final rule (IFR) enactments and reviewed, since all are presumably "significant" but escaped notice and comment.
- Breakdowns of the broader number of rules that are "major" and "significant" – tallies of significant and other guidance documents, memoranda, and other "regulatory dark matter" by department, agency, and commission.
- Ranking of most active rule-making agencies.
- Identification of which agencies increased rule output most in absolute and percentage terms.
- Numbers and percentages of executive and independent agency rules deemed "Deregulatory"[54] (that is, a restoration of the distinction made in Trump's E.O 13,771).
- Numbers and percentages of rules affecting small business by significance, with RFA-required and non-required.
- Depictions of how regulations/guidance accumulate as a small business grows.
- Tallies of regulatory and guidance cost estimates, including subtotals by agency and grand total by category: paperwork, economic (for example, financial, antitrust, communications), social, health and safety, environmental; Aggregate cost estimates of regulation and guidance (Restoration of Right-to-Know Act requirements).
- Numbers and percentages of regulations that contain these numerical cost estimates.
- Numbers and percentages lacking cost estimates, with explanation (compile "statistics" on what we do not know about regulatory burdens).
- Traditional *Federal Register* analysis, including number of pages and proposed and final rule breakdowns by agency, and reconciliations with other reporting vehicles, such as numbers of rules new to the *Unified Agenda*; numbers that carry over from previous years.
- Number of major rules reported on by the GAO in its database of reports on regulations.

[54] https://cei.org/blog/in-blow-to-disclosure-unified-agenda-of-federal-regulations-database-removes-deregulatory-designation/

- Number/percentage of agency rules and guidance documents presented properly to Congress in accordance with the Congressional Review Act.
- Assessment of rules that purportedly affect internal agency procedures alone.
- Numbers and percentages of rules facing statutory or judicial deadlines that limit executive branch ability to restrain them, or for which weighing costs and benefits is statutorily prohibited.
- Percentages of rules and guidance documents reviewed (and not reviewed) by the OMB and action taken. (This could entail a reconstruction of items from the one-time *Regulatory Program of the U.S. Government*.)

Regular highlights like the foregoing would underscore the significance of transparency and reveal the extent to which Congress contributes to regulatory excess through over-delegation and, crucially, the neglect of enumerated powers.

**Conclusion**

Despite appeals to the Administrative Procedure Act and the end of *Chevron* deference, regulatory power remains substantial. Over-delegation continues to be a significant concern, with Congress's disregard for enumerated powers becoming increasingly problematic.

To address these challenges, advocates must recognize the evolving nature of the regulatory landscape and take decisive action to limit the federal government's expansive role. While the *Loper* ruling represents a significant shift, it does not fully address the core areas where federal consolidation occurs.

Unchecked regulation and rulemaking often fall short of delivering the promised benefits, impeding economic efficiency and undermining progress in crucial areas like health, safety, and the environment. Effective policy must acknowledge the drawbacks of coercive interventions and ensure robust legislative and executive oversight to curb unnecessary rulemaking. Congress must allocate the necessary resources and personnel committed to regulatory reform and process streamlining to demonstrate genuine dedication to improvement. The House Committee on Administration is well-positioned to play a crucial role in the regulatory arena, contributing significantly both before and after rules are finalized.