

**FEDERAL GOVERNMENT ON AUTOPILOT:
DELEGATION OF REGULATORY AUTHORITY
TO AN UNACCOUNTABLE BUREAUCRACY**

HEARING
BEFORE THE
EXECUTIVE OVERREACH TASK FORCE
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED FOURTEENTH CONGRESS
SECOND SESSION

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FEDERAL GOVERNMENT ON AUTOPILOT: DELEGATION OF REGULATORY AUTHORITY TO AN UNACCOUNTABLE BUREAUCRACY

TUESDAY, MAY 24, 2016

HOUSE OF REPRESENTATIVES
EXECUTIVE OVERREACH TASK FORCE
COMMITTEE ON THE JUDICIARY
Washington, DC.

The Task Force met, pursuant to call, at 3:03 p.m., in room 2141, Rayburn House Office Building, the Honorable Steve King (Chairman of the Task Force) presiding.

Present: Representatives King, Goodlatte, Jordan, Cohen, Conyers, Nadler, Lofgren, Johnson, and Peters.

Staff Present: (Majority) Paul Taylor, Chief Counsel; Tricia White, Clerk; Zachary Somers, Parliamentarian & General Counsel, Committee on the Judiciary; (Minority) James Park, Minority Counsel; and Veronica Eligan, Professional Staff Member.

Mr. KING. The Executive Overreach Task Force will come to order. Without objection, the Chair is authorized to declare a recess of the Task Force at any time.

And I recognize myself for an opening statement.

Today's hearing of the Task Force on Executive Overreach will focus on the delegation of regulatory authority to an unaccountable Federal bureaucracy. Since the 1960's, the portion of the Federal budget dedicated to Federal regulatory agencies has grown dramatically. Not only does Congress delegate vast swaths of lawmaking power to Federal agencies, but there's been a great rise in additional ways Congress, the President, and the Federal agencies have deviated from the traditional process of lawmaking, thereby diffusing responsibility for policies in complicated ways that few people can even begin to understand.

For example, Congress has passed overlapping, overlapping delegations of regulatory power to multiple agencies. That allows a bevy of Federal regulators to bring simultaneous enforcement actions against Americans and American businesses, pressuring possibly innocent Americans to settle with them and comply simply to avoid the vast expense of fighting several Federal agencies at the same time, and that's not to mention conflicting regulations that—both of which cannot be complied with.

Further, more than one-third of major Federal rules have been promulgated without prior notice and comment by the public, which deprives the American people of any opportunity to weigh in on how new regulations might hurt them. The President now uses more executive memoranda and blog posts for major policy shifts. Controversial issues are also outsourced to boards and commissions, as happened with the new Medicare-cutting board created by ObamaCare.

Regulations also impose, de facto, by the issuance of Federal agency guidance that, while technically not binding, nevertheless tells Americans how their Federal regulatory overlords are interpreting the law and that Americans should comply immediately or risk an enforcement action against them brought by those same agencies. An egregious example of just this happened days ago.

The Department of Education and the Justice Department issued guidance claiming all public schools will lose Federal funding if they don't let anatomical boys use facilities formerly reserved for anatomical girls. As one of our witnesses today summarizes, it would be—and I quote, “it would be an understatement to say that the transgender guidance goes beyond what Title IX, which was passed in 1972, actually requires. If someone had said in 1972 that one day Title IX would be interpreted to force schools to allow anatomically intact boys, who physiologically identify as girls, to use the girls' locker room, he would have been greeted with hoots of laughter. OCR has simply engaged in legislating.”

These unorthodox practices have led to the type of legal uncertainty condemned by James Madison. In Federalist number 62, Madison wrote the following, which is worth quoting at length: “It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read or so incoherent that they cannot be understood. If they be repealed or revised before they are promulgated or undergo such incessant changes that no man who knows what the law is today can guess what it will be tomorrow. Great injury results from an unstable government. And what prudent merchant will hazard his fortunes in any new branch of commerce when he knows not but that his plans may be rendered unlawful before they can be executed? What farmer or manufacturer will lay himself out for the encouragement given to any particular cultivation or establishment when he can have no assurance that his preparatory labors and advances will not render him a victim to an inconstant government? In a word, no great improvement or laudable enterprise can go forward which requires the auspices of a steady system of national policy.”

With James Madison's concerns in mind, I look forward to the hearing today. But I would point out that I started a construction business in 1975, and through the course of, you know, seeking to advance my professionalism, I found myself conducting seminars in multiple States among other similar contractors similarly situated. I began asking the question, how many agencies regulate your trade? And I did that from State to State, and we came up with kind of a constant number. This is back in about, oh, the late 1980's or so. Forty-three different agencies had a voice on my construction business that regulated me, and that was consistent with

many other companies. We came to essentially an average consensus of 43. And so I wondered what I'd actually done to my oldest son when I sold that business to him. There are more agencies today that regulate him.

It's impossible to know even all the agencies that regulate your business, let alone know all of the regulations—statutes and regulations that regulate businesses. So I would submit this: not one business in America has a banner on their home page stating, “notice, we are in compliance with all government regulations, conflicting or otherwise.” You will not find that on anybody's Web site, because we know what would happen. If you once bragged about being in compliance with all regulations, regulators will show up to prove you wrong, and over time your profit margin goes into the red and eventually you will no longer be in business if we unleash all of the regulators that are available to be unleashed on our businesses in this country or on our people.

So I look forward to the testimony. And I would yield back the balance of my time and recognize the Ranking Member, Mr. Cohen, for his opening statement.

Mr. COHEN. Thank you. I appreciate that. I didn't listen as closely maybe as I should have, and I wasn't sure. What was James Madison's position on transgendered?

Mr. KING. He wants you to label your own bathroom.

Mr. COHEN. Was he—but did they even have that back then? That's the great thing about our Constitution, is it can adjust and change with the times and what needs to—you know, reflect the current situation.

James Madison probably didn't have much of an opinion on it, but this is a concept we've heard a lot about. And when I was Ranking Member of the Subcommittee on Regulatory Reform, Commercial, and Antitrust Law, most of our hearings were devoted to antiregulatory themes, a lot of talk about critics—critical of regulation by unelected bureaucrats and a lack of political accountability. We considered various measures that would have added numerous unnecessary and burdensome steps to the rulemaking process, throwing whatever we could into the wheel to stop the—stop it. There were recommendations to expand the authority of the Office of Information and Regulatory Affairs, OIRA, require ongoing retrospective review of all agency rules, and impose new rulemaking requirements on guidance documents. All these measures were to stop the agency's actions.

An important point that gets lost in all this is that Congress created the agencies, delegated broad authority to the agencies, and Congress funds the agencies. So if Congress does not approve the direction of the agency action, it can always rescind or limit the scope of the delegated authority. It can also restrict funds for the implementation of specific rules that it disapproves of. And the fact is, it can—the opponents of regulations often do not have the votes to achieve those ends through the legislative process, so instead they try to raise issues and rhetoric and propose changes that would muck up the process.

Most of the protections that are provided through regulation are popular. Most people like clean air and clean water, fresh air. It's a nice thing. They like the fact that the traffic is, especially in the

air is controlled in such a way that planes don't crash into each other regularly because we've got air traffic controllers. So people like that thing.

Regulations and broad agency authority that are necessary to craft those regulations are critical for public health and safety and protecting consumers from fraud and stopping unlawful discrimination, among many other things.

Workplace safety, the Bureau of Labor Statistics reports in its 2014 census of fatal occupational injuries that there were 4,821 workplace deaths in 2014, the most ever reported. And so a lot of the regulations are intended to make the workplace safer, and maybe could have helped some of those 4,821 people who no longer are with us.

According to researchers from the National Institute for Occupational Safety and Health, the American Cancer Society, and Emory School of Public Health, there are an estimated 50,000 to 70,000 deaths from occupation-related diseases in the United States annually.

Why is it that we have agencies that develop regulations? As the Supreme Court has recognized, Congress's delegation of authority, the executive arises from the practical recognition that our society and our economy are far more complex and problems far more technical than in the late 18th century at the time of the founding and at the time of James Madison and his inability to address the issue, of which seems to be the issue du jour in the scope of getting the American people aggravated about something that doesn't rise to a major level of aggravation with most people, because he didn't know about it, James Madison.

Congress sets broad principles into statute and leaves it to the agencies to carry out the statute and to formulate those principles. This process has worked well to protect millions of Americans from a wide variety of harms, enhance innovation and economic growth, and ensure basic fairness and justice. And Congress retains ultimate legislative authority over agency action, ensuring democratic accountability.

I thank the witnesses for participation in today's hearing. I welcome your testimony, and yield back the balance of my time.

Mr. KING. I thank the gentleman from Tennessee.

And now I yield to the Chairman of the full Committee, Mr. Goodlatte from Virginia.

Mr. GOODLATTE. Well, thank you, Chairman King, for convening this fifth hearing of the Task Force on Executive Overreach, this one focusing on executive overreach in Federal regulations.

Federal regulations take a huge toll on small business. Warren Meyer, the owner of a company who runs campgrounds said recently, "in 1 year I literally spent more personal time on compliance with a single regulatory issue, implementing increasingly detailed and draconian procedures, so I could prove my employees were not working over their 30-minute lunch breaks, than I did thinking about expanding the business or getting new contracts."

On a larger scale, a Mercatus working paper concludes that, had regulation been held constant at the lower levels observed in 1980, the economy would have been nearly 25 percent larger by 2012,

meaning regulatory growth since 1980 cost \$4 trillion to the American economy in 2012, or about \$13,000 per person in that year.

The U.S. economy has generally also grown less dynamic over time, as the number of firms less than a year old—as a share of all firms has declined dramatically, hampered in large part by regulatory burdens. Recently, and for the first time, the number of firms folding exceeded the number of firms created in America. It's no surprise, then, that the growth in startup company employment has also declined significantly over the last few decades.

Surveys of small business owners show a steady rise in the ranking of government requirements and red tape as a most important problem, and this has contributed to American companies having to move overseas to thrive. In a 2011 survey, Harvard Business School alumni were asked about 607 instances of decisions on whether or not to offshore operations. Of the reported results, the United States retained the business in just 96 cases and lost it in 511 cases. Research shows that the loss of jobs to overseas markets results in higher unemployment, lower labor force participation, and reduced wages, which in turn increases the demand for spending programs for those who are negatively impacted, making our fiscal crisis even worse.

More regulations also means higher prices generally. For example, since the once heavily regulated airline industry was deregulated in the 1970's, inflation-adjusted domestic airfare prices have fallen dramatically. Overall, while the cost of things the Federal Government regulates have soared, such as education, healthcare, and childcare, the costs of things the government generally doesn't regulate have declined, such as clothing, cell phones, personal computers, and televisions.

The way Federal agencies operate also makes it very expensive for people harmed by their regulations to challenge them in court. As Professor Gary Lawson has written, consider the typical enforcement activities of a typical Federal agency, for example, the Federal Trade Commission.

The Commission promulgates substantive rules of conduct. The Commission then considers whether to authorize investigations into whether the Commission's rules have been violated. If the Commission authorizes an investigation, the investigation is conducted by the Commission, which reports its findings to the Commission. The Commission's complaint that a commission rule has been violated is then prosecuted by the Commission and adjudicated by the Commission. If the Commission chooses to adjudicate before an administrative law judge rather than before the Commission, and the decision is adverse to the Commission, the Commission can appeal to the Commission. If the Commission ultimately finds a violation, then and only then the affected private party can appeal to an Article III court, but the agency decision, even before the bona fide Article III tribunal, possesses a very strong presumption of correctness on matters of both fact and law.

That's not a recipe for freedom in America. That's not a recipe for success in America. That's not a recipe for job creation in America.

I look forward to hearing from all our witnesses today about the growth in Federal regulatory burdens imposed by an increasingly unaccountable Federal bureaucracy.

Thank you, Mr. Chairman.

Mr. KING. I thank Chairman Goodlatte for his opening statement, and now recognize the gentleman from Michigan and Ranking Member of the full Committee, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman King.

Members of the Committee, distinguished witnesses, and those who are attending the hearing in person, today's hearing is the 32nd antiregulatory hearing that we have had since the beginning of the 112th Congress. The antiregulatory fervor of some in this legislature is no doubt passionate and heartfelt, but as I have noted during the 31 previous hearings that we've had on this topic, regulation is vital to protecting everyday Americans from a myriad of harms. And broad agency authority is crucial to ensuring a well-run regulatory system that promotes public health and safety, while providing certainty for business.

So as we consider our witnesses' testimony, we should keep the following in mind: to begin with, the broad delegation of authority by Congress to administrative agencies is constitutional. During our first Task Force hearing, we heard testimony from some witnesses that called into constitutional doubt the entire notion of Congress delegating authority to an executive branch agency.

It is true that the Constitution provides that all legislative power is vested in the Congress and that Congress cannot completely delegate this power. The Supreme Court, however, has recognized that the Constitution doesn't prevent Congress from obtaining the assistance of the other branches of government. In fact, as the Court noted in *Mistretta versus the United States*, its decisions in this area have been driven by a practical understanding that 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. That recognition, in turn, highlights the central role of regulation and of administrative agencies in addressing a broad spectrum of harms in our modern society.

Without question, regulations provide critical protections, such as ensuring the safety of the water we drink, the air we breathe, the food we eat, the cars we drive, and the places where we work. These matters require highly technical expertise and sometimes years of study in order to address properly. After all, how many House Members have the knowledge and the time to determine exactly how many parts per million of carbon monoxide would be acceptable to ensure safe air to breathe? How many senators are equipped to determine the proper amount of air pressure that's necessary to ensure that a train's braking system works properly? I would guess that the answer is probably not many, not too many.

Finally, Congress already has at its disposal a number of tools to ensure due process and democratic accountability with respect to agency actions. Most obviously, Congress can always rescind or limit the scope of delegation, if it so chooses. Congress also has the power of the purse to limit an agency's power or its ability to implement a rule. The fact that congressional opponents of regulation

often lack the political support to do these things does not mean that checks do not exist.

And so with these points in mind, I look forward to our witnesses' testimony, and I thank the Chair and yield back.

Mr. KING. I thank the gentleman from Michigan. Precisely to the second.

And without objection, other Members' opening statements will be made a part of the record.

Let me now introduce the witnesses. Our first witness is John Graham, dean of the Indiana University School of Public and Environmental Affairs. Our second witness is Sofie Miller, senior policy analyst at George Washington University Regulatory Studies Center. Our third witness is Amit Narang, regulatory policy advocate at Public Citizen. And our fourth witness is Gail Heriot, a law professor at the University of San Diego School of Law, and a member of the U.S. Commission on Civil Rights.

We welcome you all here today and look forward to your testimony.

Each of the witness's written statements will be entered into the record in their entirety. I ask that each witness summarize his or her testimony in 5 minutes or less. To help you stay within that time, there's a timing light in front of you. The light will switch from green to yellow, indicating you have 1 minute to conclude your testimony. When the light turns red, it indicates that the 5 minutes have expired.

Before I recognize the witnesses for their testimony, it's the tradition of the Task Force that they be sworn in, so I'd ask you to please stand and raise your right hand.

Do you solemnly swear that the testimony that you're about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

You may be seated. Thank you.

Let the record reflect that the witnesses have answered in the affirmative.

I now recognize our first witness, Mr. Graham, for your testimony. Mr. Graham.

TESTIMONY OF JOHN D. GRAHAM, DEAN, INDIANA UNIVERSITY SCHOOL OF PUBLIC AND ENVIRONMENTAL AFFAIRS

Mr. GRAHAM. Thank you, Mr. King, and Members of the Committee.

I agree with the sentiments that Federal regulation is an essential tool of government, and my testimony addresses the question of how to make it more informed and smarter, based upon the available evidence and public opinion.

I want to introduce as a theme the notion of stealth regulation. In the dictionary, the word "stealth" refers to secretive behavior, like the sneakiness of a cat burglar. And I want to talk about regulators, who sometimes, not always, engage in this stealth-like behavior, and it's something that I want to draw to the Committee's attention.

Now, how do they do this? They do this with innocuous-sounding actions, such as guidance documents, official notices, policy statements, risk assessments, directives, enforcement advisories, and

waivers for State regulators. All of these constructs are often useful and necessary for a good functioning regulatory system, but they can also be used to accomplish what would normally be accomplished through rulemaking. And sometimes they do this to avoid the basic protections that are provided in the Administrative Procedure Act for rulemaking.

So, for example, today, some of the most controversial issues in regulatory policy are being resolved with stealth regulations: civil rights policy at the Department of Education, coal mining permits at the Department of Interior and EPA, immigration policy at the Department of Homeland Security, Affordable Care Act policies at the IRS and the Department of Health and Human Services.

So what are the process problems with a stealth regulation? The first is the basic concept of opportunity for public comment can be compromised, either because the agency doesn't seek public comment, they simply issue the guidance document, or they receive comments but are under no obligation to respond to the comments. In the rulemaking process, you have a legal obligation as an agency to consider and respond to those comments.

The second problem with stealth regulation is that OMB and the interagency review process may be compromised. In rulemaking, those draft regulations go to OMB and OMB shares those with all agencies of the government, they take comments, OMB passes back the comments. I worked 5 years, from 2001 to 2006, at OMB-OIRA, and I was in the midst of all that process.

Now, these other types of processes may not involve either OMB or the other agencies, so you don't get the same vetting process inside the government that you would do normally.

Third, requirements for cost-benefit analysis and small business impact analysis are applicable to rulemakings, but not necessarily to all of these other actions. So you don't get the same kind of economic analysis and small business analysis when you allow these stealth regulations to evolve.

And finally, the scope for judicial review of agency actions may be narrowed if it's not a rulemaking, if it's one of these other actions. Judges may be reluctant to intervene if there's not a robust rulemaking record that's been provided. And when you do these stealth regulations, you can often accomplish it without that robust record.

Now, there are some courts that are beginning to detect this problem and are striking down some of these regulations, de facto regulations through stealth activity.

I want to conclude and just give one small example, it's on an issue that we can all relate to, which is the growing interest in electric cars in America. And I happen to be a person who's interested in an electric car. I drive from Bloomington to Indianapolis. It takes about 60 miles. To get there and back, I need an electric car with a range of 120 miles. So the technology's getting better, but it's not quite there, but I'm interested in this.

What I find fascinating is that the State of California has actually required, through regulation, that 15 percent of all new vehicles will be electric or zero emission by 2025. Ten other states have joined them, so we now have effectively a third of the country covered by an electric car mandate.

Now, I looked closely at the history of this. Each of these electric vehicles could cost on average \$10,000 more than the average vehicle, but they'll save the consumer some money. So there's an important cost-benefit question there. But the California analysis that supports this regulation only analyzes the regulation from California's perspective. It doesn't consider the impact on other States in the country.

Meanwhile, California's not permitted to do this regulation unless they get approval from the EPA on a waiver authority under the Clean Air Act. EPA granted the waiver, but EPA never did a cost-benefit analysis on a national perspective. So here we have, through a combination of activities, a national regulatory program, never been subject to a national cost-benefit analysis.

Thank you very much. I look forward to the comments and questions.

[The prepared statement of Mr. Graham follows:]



May 23, 2016

The Honorable Steve King
The Honorable Steve Cohen
House Committee on the Judiciary
Executive Overreach Task Force
2138 Rayburn House Office Building
Washington, DC 20515

Re: Written Testimony by John D. Graham, PhD

Dear Chairman King and Ranking Member Cohen:

My name is John D. Graham, Dean of the Indiana University School of Public and Environmental Affairs and former administrator of the Office of Information and Regulatory Affairs (OIRA) of the US Office of Management and Budget (2001-2006). In my capacity as editor of an article series organized by the Mercatus Center at George Mason University and published in volume 37, issue 2 of the *Harvard Journal of Law & Public Policy*, I submit the attached articles as my written testimony for the Executive Overreach Task Force's hearing on May 24, 2016 entitled "The Federal Government on Autopilot: Delegation of Regulatory Authority to an Unaccountable Bureaucracy."

- John D. Graham and James W. Broughel, "Stealth Regulation: Addressing Agency Evasion of ORIA and the Administrative Procedure Act," *Harvard Journal of Law & Public Policy*, Federalist Edition 1, no. 1 (2014).
- John D. Graham and Cory R. Liu, "Regulatory and Quasi-Regulatory Activity without OMB and Cost-Benefit Review" *Harvard Journal of Law & Public Policy* 37, no. 2 (2014).

The viewpoints in my testimony do not necessarily reflect the viewpoints of the Mercatus Center at George Mason University or the School of Public and Environmental Affairs at Indiana University.

Also, please find attached my "Truth in Testimony" disclosure form and a brief biography.

Sincerely,

John D. Graham, PhD
Dean, School of Public and Environmental Affairs at Indiana University

Attachments

STEALTH REGULATION: ADDRESSING AGENCY EVASION OF OIRA AND THE ADMINISTRATIVE PROCEDURE ACT

JOHN D. GRAHAM* & JAMES W. BROUCHEL**

INTRODUCTION

In May 2014, the *Harvard Journal of Law & Public Policy* published a series of papers as part of a multiauthor collaboration organized by the Mercatus Center at George Mason University.¹ That series of papers, together with a forthcoming article by Hester Peirce², reviews ways in which U.S. federal regulatory agencies engage in regulatory-like actions while avoiding requirements outlined by the Administrative Procedure Act³ (APA) and regulatory oversight by the Office of Information and Regulatory Affairs (OIRA) of the U.S. Office of Management and Budget (OMB). This Article summarizes lessons from the series and offers reform proposals that may improve upon the current situation.

* Dean, Indiana University School of Public and Environmental Affairs; Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President, 2001–2006; Founding Director, Center for Risk Analysis, Harvard School of Public Health, 1989–2001; Ph.D., Carnegie Mellon University, 1983; M.A., Duke University, 1980; B.A., Wake Forest University, 1978.

** Program Manager of the Regulatory Studies Program at the Mercatus Center at George Mason University.

1. See John D. Graham & Cory R. Liu, *Regulatory and Quasi-Regulatory Activity Without OMB and Benefit-Cost Review*, 37 HARV. J.L. & PUB. POL'Y 425 (2014); Jerry Brito, "Agency Threats" and the Rule of Law: An Offer You Can't Refuse, 37 HARV. J.L. & PUB. POL'Y 553 (2014); Henry N. Butler & Nathaniel J. Harris, *Sue, Settle and Shut Out the States: Destroying the Environmental Benefits of Cooperative Federalism*, 37 HARV. J.L. & PUB. POL'Y 579 (2014); Nina A. Mendelson & Jonathan B. Wiener, *Responses to Agency Avoidance of OIRA*, 37 HARV. J.L. & PUB. POL'Y 447 (2014); Stuart Shapiro, *Agency Oversight as "Whac-a-Mole": The Challenge of Restricting Agency Use of Nonlegislative Rules*, 37 HARV. J.L. & PUB. POL'Y 523 (2014).

2. Hester Peirce, *Regulating Through the Back Door Rulemaking at the Commodity Futures Trading Commission*, 1 HARV. J.L. & PUB. POL'Y: FEDERALIST EDITION (forthcoming 2014).

3. Administrative Procedure Act, 5 U.S.C. §§ 551–559 (2012).

The papers in our series tell an important story about how federal regulators—whether by design or by effect—circumvent both the APA and OIRA oversight. Regulators thus can achieve their ends without adhering to the standard regulatory procedures that represent part of the checks and balances of American government. These procedures have been designed to ensure that technical expertise drives regulatory decisionmaking, as well as to ensure a certain degree of democratic accountability of regulators to the public.

How widespread the problem is remains an open question.⁴ Powerful anecdotes, however, demonstrate how significant, rule-like actions having large economic impacts are escaping both OIRA oversight and standard mechanisms for democratic input in the policymaking process.⁵ Some of these examples are related to highly controversial and highly political actions by the federal government.⁶ Other anecdotes represent the day-to-day activity of federal agencies operating below the level of political visibility and media attention.⁷ These anecdotes, because they emerge at multiple federal agencies in different administrations, suggest that a problem does in fact exist. Going forward, scholars and policymakers should, on an agency-by-agency basis, determine the extent of the problem and whether it is worsening over time.

This Article is structured as follows. Part I describes the current regulatory environment in which agencies are operating, including the checks and balances that are supposed to ensure a minimal level of competence and accountability. In Part II, we describe how agencies circumvent these procedures, and we provide a nonexhaustive list of potential remedies. We conclude with an overview of regulatory reforms that might improve the current environment and a summary of the lessons learned from the collaboration between the Mercatus Center at George Mason University and the *Harvard Journal of Law & Public Policy*.

4. Mendelson & Wiener, *supra* note 1, at 450.

5. John Graham and Cory Liu mention four in their paper. Graham & Liu, *supra* note 1, at 426.

6. For example, the Treasury Department's decision to delay portions of the Patient Protection and Affordable Care Act is described later in this paper. See *infra* notes 37–42 and accompanying text.

7. For example, the EPA's move to determine formaldehyde exposure can cause leukemia. Graham & Liu, *supra* note 1, at 439–42.

I. BACKGROUND

In theory, the regulatory system in the United States is a bilateral relationship between the will of Congress, as expressed in authorizing statutes, and the actions of agencies, ordered to implement the statutory mandates they receive.⁸ Assuming a statute is constitutional, the judiciary's role is to ensure that the agencies' actions are faithful to the statutes.

The reality of the regulatory state is more complicated because of additional checks and balances imposed by Congress and the President. The APA and the OIRA review process are perhaps the two most important checks and balances added since the Progressive Era.

Both the APA and OIRA review touch on the themes of democratic accountability and technical competence. Democratic accountability asks regulators to be sensitive to the wishes of the people the regulatory system is supposed to serve, as reflected in the legislation their elected representatives pass and the comments citizens submit to agencies. Technical competence refers to the proper use of scientific, engineering, and economic information, including the expectation that rules will accomplish their statutory objectives while, whenever feasible and lawful, meeting basic standards of economic efficiency.

The Administrative Procedure Act, passed in 1946,⁹ was designed to ensure democratic checks on regulatory agencies (e.g., the requirements for public participation in rulemaking) but has evolved to place substantive, technical checks on regulatory actions (e.g., the requirement for substantial evidence in support of regulatory actions). The APA emerged to resolve conflicts associated with New Deal regulatory policies.¹⁰ Interest groups who were left out of the rulemaking process wanted a tool to make regulations more democratic, and regulators wanted to make the rules harder to reverse in a subsequent administration. Although the APA procedures were established at a time when there were far fewer regulatory agencies than exist today, the APA procedures, as embellished through judicial interpretation, have had a

8. For a history and rationale of the U.S. regulatory state, see SUSAN E. DUDLEY & JERRY BRITO, *REGULATION: A PRIMER* (2d ed. 2012).

9. Administrative Procedure Act, 5 U.S.C. §§ 551–559 (2012).

10. Barry McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180 (1999).

lasting effect during the decades of expansion and modernization of the federal regulatory state.

The Act sets up two ways by which agencies can promulgate regulations.¹¹ For a variety of reasons, agencies rarely use the first, known as formal rulemaking.¹² The second, and the most common way of issuing regulations, is known as informal rulemaking. It dispenses with the trial-like procedures found in formal rulemaking, such as cross-examination of experts, and establishes a process by which the public can comment on regulations. Agencies are then required to respond to the public's comments. Failure to respond to comments can cause rules to be deemed "arbitrary and capricious" and vacated by a judge. This bar may be a fairly low one for agencies to pass, but it allows anyone with "standing," roughly meaning parties who are impacted by a regulation, to sue the agencies. It is essentially a bill of rights for those affected that allows for some judicial oversight. The process thereby allows the public an opportunity to participate in government rulemaking to mimic the democratic process, particularly because regulatory decisions can impact virtually every aspect of American life. Over time, the arbitrary and capricious test has evolved to embrace more technical expectations, such as the requirement for "substantial evidence" and the so-called "default rules" for benefit-cost analysis that the courts apply when Congress is silent about benefits and costs in the authorizing statute.¹³

The second important component of the regulatory oversight system is review of proposed and final regulations by OIRA, a statutory office housed within the OMB. OIRA was created in late 1980 by President Carter pursuant to the Paperwork Reduction Act.¹⁴ Several months later, in February 1981, President Reagan issued an executive order requiring that all "major" regulations be accompanied by a Regulatory Impact Analysis (RIA), which included a benefit-cost analysis.¹⁵ More importantly, President Reagan instructed agencies that they were

11. For more information on the processes through which regulations are created, see DUDLEY & BRITO, *supra* note 8, at 35–55.

12. Aaron Nielson, *In Defense of Formal Rulemaking*, OHIO ST. L.J. (forthcoming).

13. CASS R. SUNSTEIN, *THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION* (2003).

14. Paperwork Reduction Act, 44 U.S.C. §§ 3501–3521 (2006).

15. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981).

not permitted to publish a new regulation in the *Federal Register* until OIRA cleared it. Like the APA, the Reagan executive order sought to advance democratic values as well as technical competence. As the only elected official in the executive branch, the President was politically accountable for the actions of federal regulatory agencies (particularly those located in cabinet departments), and the Reagan executive order made clear that OIRA—and ultimately the White House—would review regulatory actions to make sure they were consistent with the President's policy priorities. From a technical-competence perspective, the Order also explicitly made economic efficiency an important goal of rulemaking, as the order mandated that agencies, where permissible under law, shall produce regulations whose benefits "outweigh" their costs and choose regulatory alternatives that "maximize net benefits."¹⁶

Although controversial when first implemented, OIRA review has become a permanent feature of the federal regulatory process.¹⁷ Some analytic requirements, however, preceded OIRA's creation. These requirements began during the Nixon administration and were buttressed by President Carter before Congress created OIRA and the Reagan administration established the formal OIRA regulatory review process.¹⁸ Since the Reagan administration, presidents from both parties have remained committed to regulatory review. For example, in 1993, President Clinton issued Executive Order 12,866,¹⁹ which modified Reagan's Executive Order 12,291 and targeted OIRA's review on "significant" actions but left in place the essential elements of E.O. 12,291 (i.e., centralized OIRA review and the RIA requirement). E.O. 12,866 is still in effect today, as Presidents George W. Bush and Barack Obama both remained committed to the Order's principles of regulatory review. Indeed, Bush

16. *Id.*

17. See Michael Livermore & Richard Revesz, *Three Stages in the Use of Cost-Benefit Analysis as a Tool for Evaluating U.S. Regulatory Policy* (Eur. Univ. Inst., Max Weber Lecture Series, MWP—LS 2012/05, 2012), available at <http://cadmus.eui.eu/handle/1814/22774>.

18. Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 ADMIN. L. REV. 37, 40–41 (2011).

19. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

and Obama both issued executive orders aimed at buttressing or expanding OIRA's review authority.²⁰

The ultimate effect of OIRA's emergence has been to give a nationally elected political figure, the President, greater authority over the federal regulatory process, as the ultimate source of OIRA's political muscle in battles with regulators is the White House. From a technical point of view, OIRA's emergence has also inserted a form of technical review over the work of agency managers and experts because, after interagency review, the final word on a technical matter may come from OIRA rather than a regulatory agency. OIRA has a limited staff, but it can draw on specialized expertise from numerous agencies in the executive branch as well as the Council of Economic Advisers, the Office of Science and Technology Policy, and the Council on Environmental Quality. An advantage of OIRA's emergence is that there is now an institutional check on the "tunnel vision" at agencies that have limited incentives to produce rules that take benefits and costs into account.²¹

The requirement for review by a centralized executive body was another attempt to provide a check on agencies, in this case, by the President, who oversees the agencies. The requirement to do an RIA and ensure that, at a minimum, benefits exceed costs, may provide a slightly higher bar to passage of regulations than was set by the APA's arbitrary and capricious standards. Moreover, federal courts are increasingly enforcing a default benefit-cost standard under the APA.²² The numeric test, however, is difficult to enforce in cases where a rule has important intangible benefits or costs. In fact, President Clinton changed the OIRA review standard from "benefits outweigh costs" to "benefits justify costs" to allow agencies to weigh a variety of intangible factors.

From a practical point of view, the bigger difficulty for the President is that OIRA's staff has shrunk since its creation, from a peak of about ninety employees to fewer than fifty at the start of the Obama Administration, and to a low of thirty-

20. See Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011); Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007).

21. For a discussion of the bureaucratic problem of tunnel vision at agencies, see STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 10–21 (1993).

22. SUNSTEIN, *supra* note 13.

eight at the end of 2013. Meanwhile, the regulatory agencies have roughly doubled in size during that period, with more than 200,000 people employed at rule-writing agencies.²³ Regulatory agencies outspend OIRA by a factor of 7000 to 1,²⁴ even while the small staff at OIRA is charged with overseeing the roughly 3000 regulations finalized each year.²⁵ Just to keep up with inflation, OIRA's budget would be over 30% higher today if the agency's resources had held constant since 1981.²⁶ Even keeping OIRA resources constant in real terms, however, is likely insufficient given the increased activity at the federal regulatory agencies. Had OIRA's budget kept pace with the growth of regulatory agency spending, OIRA's budget would be more than 200% above its 1981 levels in real terms.²⁷ As it stands, OIRA need only make marginal improvements to one of the many economically significant regulations the agency reviews each year to save society the resources to pay for the agency's currently small budget of a little over \$8 million annually (in 2013 dollars).²⁸

OIRA can draw on assistance from the Council of Economic Advisers and experts at other federal departments and agencies, but OIRA, due to its small size and limited authority, is now a modest force in the federal regulatory process relative to other agencies. As a result, despite OIRA review, the annual number of federal regulatory actions supported by quantitative estimates of benefits and costs is small—just fourteen in FY 2012.²⁹ Not

23. Susan Dudley & Melinda Warren, *Sequester's Impact on Regulatory Agencies Modest* (George Washington Univ. Reg. Studies Ctr. & Weidenbaum Ctr. on the Econ., Gov't, and Pub. Pol'y, Regulators' Budget Report 35, 2013), available at http://wc.wustl.edu/files/wc/imce/2014_regulators_budget.pdf.

24. Jerry Ellig & James Broughel, *OIRA Spending Falls as Agency Spending Swells*, MERCATUS CTR. AT GEORGE MASON UNIV. (Oct. 17, 2013), <http://mercatus.org/publication/oira-spending-falls-agency-spending-swells>.

25. U.S. OFFICE OF MGMT. & BUDGET, DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT (2013), available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/draft_2013_cost_benefit_report.pdf.

26. Ellig & Broughel, *supra* note 24.

27. *Id.*

28. *Id.*

29. See U.S. OFFICE OF MGMT. & BUDGET, *supra* note 25, at 22.

surprisingly, presidents since at least Harry Truman have complained about the difficulty of controlling regulatory agencies.³⁰

In addition to helping an elected official, the President, serve the public interest, OIRA's role is to ensure a minimum level of competence from agencies, in essence acting like a watchdog to provide oversight of agency actions.³¹ The requirement to do an RIA exists to ensure that agencies follow certain principles of good policymaking when promulgating regulations. These principles include steps like identifying the problem the agency is seeking to solve, identifying alternative ways to address the problem (including nonregulatory solutions), and evaluating the effectiveness, cost-effectiveness, and efficiency of each of those alternatives with a benefit-cost analysis.³²

These two components of our regulatory oversight system, democratic accountability and technical expertise, are now central features of the U.S. regulatory state. As we will see, without these components the system breaks down. When agencies are no longer subject to these checks and balances, they take actions that are questionable on both democratic and technical grounds. Not only is this behavior a problem for making regulations that achieve their goals, it also erodes the credibility of our political institutions in the public's eyes.³³

What we have described as "checks and balances" on agencies may seem to some like bureaucratic obstacles to serving their conception of the public interest. Neither the APA nor OIRA review, however, necessarily restrains or slows federal regulatory agencies. Many regulatory actions can be fully justified under the standards and procedures created by the APA and OIRA. In circumstances where the APA or OIRA do pose an obstacle to agency objectives, federal regulators do not necessarily surrender. To the contrary, we have shown—through the papers in this series—that agencies take creative steps to bypass the APA and OIRA review. Agencies behave this way

30. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2272–73 (2001).

31. *Hearing Before the H. Subcomm. on Regulatory Reform, Commercial, and Antitrust Law*, 113th Cong. (2013) (testimony of John F. Morrall III, Affiliated Senior Scholar, Mercatus Ctr. at George Mason Univ.), available at http://mercatus.org/sites/default/files/Morrall_OIRA-powers_testimony_092713.pdf.

32. See Exec. Order No. 12,291, *supra* note 15; Exec. Order No. 12,866, *supra* note 19.

33. Peirce, *supra* note 2.

because they are permitted to do so, although the process they follow is not always apparent to the President or to Congress.

II. PROBLEMS AND POTENTIAL SOLUTIONS

Although the usual rulemaking procedures give permanence and legality to a policy, for a variety of reasons that system may appear too burdensome to agencies at times, so agencies may prefer to use other, less accountable methods to set policy.³⁴ Here we describe several, but not all, of the ways agencies may regulate through the back door, so to speak.

There are important differences between the various methods agencies employ, and different agencies that engage in these actions may do so to different degrees, depending on their statutory constraints, agency culture, the receptivity of potential partners (e.g., the States), and other factors. Some methods of evading OIRA review and the APA, like consent decrees, may be legally binding, while others methods are not, such as threats made by agency officials (e.g., warning letters or enforcement actions) or issuances of policy memoranda or guidance documents.

A. *Policy Memoranda and Guidance Documents*

Guidance documents and policy memoranda are sets of instructions or announcements written by agencies to inform regulated parties of what they can do to be confident they are in compliance with a regulation.³⁵ Regulatory agencies also use these documents to control the activities of the agency staff and to avoid ad-hoc and inconsistent enforcement of rules by different personnel within an agency. Informal policy documents are not legally binding but they may elicit changes in behavior as individuals view actions outlined in these documents as a safe harbor for complying with a regulation or, even when no regulation exists, as a path to avoiding conflicts with the regulatory agency. Documents of this sort may have a purpose beyond avoiding the APA or OIRA, of course. They clarify the terms of regulations that may have been written originally with vague language. They help to keep the public informed about what

34. See Mendelson & Wiener, *supra* note 1, at 468–81.

35. Connor N. Raso, Note, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782 (2010).

agency staff are thinking and they are a method for administrative bureau chiefs to control their subordinates' behavior.

Agencies, however, can also use these documents in instances where they might want to change the behavior of the regulated public but for reasons of time, political sensitivity, or constraints on resources, they might find the usual regulatory procedures too burdensome.³⁶ Or agencies may simply want to avoid OIRA review and the informal rulemaking process. The line between what is a legitimate use of agency guidance or policy memoranda and what is not certainly is vague. One criterion for discerning this line could be whether guidance qualifies as "significant" as defined under Executive Order 12,866. If an agency action is non-binding, for example, it is difficult to imagine why it should have an annual impact of over \$100 million on the economy. A significance determination might upgrade the status of any guidance to the level of a traditional regulation.

One example of guidance that clearly had measureable economic impacts relates to the 2010 Patient Protection and Affordable Care Act.³⁷ In July 2013, the IRS delayed reporting requirements for employers for one year through an announcement in a Treasury blog post.³⁸ Employer "shared responsibility payments," which are fines imposed on employers for not providing health insurance to certain employees, were also delayed.³⁹ The IRS followed this announcement by issuing a "bulletin" to businesses outlining how to stay in compliance during the transition period before reporting requirements and fines would be fully implemented.⁴⁰ Previously, guidance to employers regarding the employer responsibility payment was

36. Guidance documents can also be used to elicit changes in firm behavior in order to make the costs and benefits of an actual regulation appear smaller in the future. For example, if a majority of firms are in compliance with guidance, formalizing the policy in a regulation appears to present little cost to society. This appearance is misleading, however, if firms felt pressure to comply with the original guidance. Enforcement actions by agencies can have similar effects. See Peirce, *supra* note 4.

37. Patient Protection and Affordable Care Act, Pub. Law No. 111-148, 124 Stat. 119 (2010).

38. Mark J. Mazur, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, U.S. DEP'T OF TREASURY (July 2, 2013), <http://www.treasury.gov/connect/blog/pages/continuing-to-implement-the-aca-in-a-careful-thoughtful-manner-.aspx>.

39. *Id.*

40. I.R.S. Notice 2013-45 (July 29, 2013).

issued in the form of a proposed rule in the *Federal Register*⁴¹ and the IRS took comments from the public on the proposal. The IRS's decision to issue the delay in the employer responsibility payment through a press release and subsequent bulletin, without taking further comments from the public as the policy changed, may be due either to the political sensitivity surrounding the issue or to the need to implement a policy change quickly before a key deadline on January 1, 2014. The implementation date for the fines changed yet again when the regulation was eventually finalized, demonstrating the ad-hoc and unpredictable nature of IRS policy.⁴² Even with the regulation finalized, employers have little assurance that a policy is now firmly in place that will not be overridden by another bulletin.

If nothing else, OIRA should find better ways of tracking guidance documents and policy memoranda. This responsibility is well in line with OIRA's role as an "information aggregator."⁴³ Information on agency use of guidance documents is dispersed throughout the government, making it difficult to track, and scholars have suggested that more empirical work is needed to determine the extent of the problems posed by these documents.⁴⁴ This suggestion should not be controversial, but it may mean that OIRA needs more resources. As we have already noted and will stress again later, OIRA staffing levels are a serious concern because the organization's staffing has diminished over time, while regulatory agency responsibilities and spending have increased significantly.⁴⁵

One solution would be to return to the system in place under President George W. Bush, where an executive order explicitly stated that OIRA would review all significant guidance documents.⁴⁶ The Obama administration later repealed President Bush's executive order.⁴⁷ The OMB, however, still claims au-

41. Shared Responsibility for Employers Regarding Health Coverage, 78 Fed. Reg. 217 (Jan. 2, 2013).

42. Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 29 (February 12, 2014).

43. See Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013).

44. See, e.g., Mendelson & Wiener, *supra* note 1, at 462–63.

45. Ellig & Broughel, *supra* note 24.

46. Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007).

47. Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Feb. 4, 2009).

thority to informally review these documents,⁴⁸ and it has retained a bulletin, written during the Bush administration, that outlines agency good guidance practices.⁴⁹

As such, OIRA has reviewed over 250 “notices” issued by agencies since 2009.⁵⁰ It is unclear how many more notices may have escaped OIRA’s attention. As with regulations, OIRA should have the explicit authority to return agency guidance and to require benefit-cost analysis for guidance having an economic impact of over \$100 million annually.

Another solution would be to label all guidance documents and policy memoranda as nonbinding.⁵¹ This policy would tell regulated parties that they can choose to ignore guidance documents and policy memoranda if they wish, so long as they comply with underlying regulations. Firms could also use labels in court to defend against any enforcement actions informed by agency guidance.⁵²

A stronger step would be to require notice and comment for all significant guidance documents.⁵³ A requirement to do an RIA could be mandated by executive order or by legislation. Or, an RIA could be required if OIRA’s Administrator requests it. Agency guidance would become very much like APA “legislative” rulemaking, and this is precisely the point. Agency actions that have rule-like effects should be treated like rules and go through the usual procedures that agencies have followed for over three decades.

48. Memorandum from Peter Orszag, Dir., Office of Mgmt. & Budget, to the Heads and Acting Heads of Executive Departments and Agencies (Mar. 4, 2009), available at http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf.

49. U.S. OFFICE OF MGMT. & BUDGET, FINAL BULLETIN FOR AGENCY GOOD GUIDANCE PRACTICES (2007), available at <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/fy2007/m07-07.pdf>.

50. *Historical Reports*, U.S. OFFICE OF MGMT. & BUDGET, www.reginfo.gov/public/do/eoHistoricalReport (last visited Feb. 4, 2014).

51. Administrative Conference of the United States, Recommendation 92-2, Agency Policy Statements, 57 Fed. Reg. 30,103 (July 8, 1992).

52. An additional labeling requirement could be to force agencies to cite in documents the statute or regulation that spells out the agency’s authority in the area where the agency is providing guidance. This requirement would help in those cases where an agency’s legal authority to issue guidance is in doubt.

53. ACUS recommended a voluntary approach. See Administrative Conference of the United States, Recommendation 76-5, Interpretive Rules of General Applicability and Statements of General Policy, 41 Fed. Reg. 56,769 (Dec. 30, 1976).

An even more forceful solution would be judicial review of guidance documents, meaning a legal process could be set up that outlines the process for creating guidance documents, and regulated entities could challenge the guidance in court if agencies did not follow the proper procedures. However, as Stuart Shapiro has argued, this type of proposal may lead to more use of interim final rules or other even less accountable methods that are harder to track than guidance documents.⁵⁴ Agencies might resort to ad-hoc enforcement, issuance of warning letters, or threats directed at firms if they feel that issuing guidance documents has become too burdensome.⁵⁵ Indeed, there may be diminishing marginal returns to the oversight measures OIRA could implement if agencies simply find further evasion techniques.

Nonetheless, judicial review is worth considering on a subset of guidance documents with significant welfare consequences as it is unclear whether Shapiro's findings—that evasive activities are likely to increase with more oversight—apply beyond his case study of the Department of Labor. There are reasons to think agencies will continue to use guidance because these documents maintain an element of permanence that can be hard to reverse in subsequent years, and regulators are likely concerned about their legacies. Furthermore, it is not clear that regulatory review requirements under Executive Order 12,866 are leading to more evasive tactics because similar evasive activities occur at independent regulatory commissions, which are exempt from 12,866 requirements.⁵⁶ Factors other than judicial review or OIRA review, such as political salience, may be primary drivers of agency avoidance of proper regulatory channels.

B. *Agencies Delegating to State-Level Authorities*

Another problem occurs when agencies defer or delegate their regulatory authority to the state level. Generally, the fed-

54. Shapiro, *supra* note 1.

55. There are reasons to think this outcome would not happen, however. For one, warning letters and threats must be targeted at specific firms, while guidance documents are relevant to all firms. Threatening one firm at a time may require too much effort from regulators. Additionally, even if agencies resorted to this practice, it may be preferable to the use of guidance documents since the scope of the evasion is confined to one or two firms, rather than an entire industry.

56. See Peirce, *supra* note 2.

eral government should consider preempting state laws in instances where having a multitude of state and local regulations is less efficient than having one standard at the federal level.⁵⁷ Even when efficiency is maximized, there are still costs to centralization, however. States lose the ability to tailor regulations to their unique populations and conditions and they lose the opportunity to serve as laboratories of democracy.

In some instances, federal regulators—when they desire a stricter regulation than can be justified under APA or OIRA review—may collaborate with key state regulators to set standards that will have national implications. A business regulation that is adopted in large states such as California or New York certainly has national economic ramifications and may end up being a de facto federal regulation if regulated firms decide to adjust their nationwide production processes rather than produce different products for populations in different states. Under some authorizing statutes, states are permitted to set stricter standards than the federal government, either unequivocally or only if the federal government determines that the states have satisfied certain evidentiary conditions. Graham and Liu point to California, which has the special status of being able to apply for a waiver from preemption of federal laws under the Clean Air Act. A waiver of preemption of this sort occurs when a state decides to “go its own way,” and the evidentiary requirements for the waiver vary by statute. In some cases, these waivers are desirable because they allow states to experiment with different solutions to societal problems. As such, it is important to identify those cases where a waiver will have implications beyond the border of the state receiving it.

In 2009, the EPA granted a waiver to California to set its own standards for greenhouse gas emissions from automobiles.⁵⁸ Given that California is such a large part of the U.S. car market, this change could have major implications for the entire U.S. car market. Yet this policy was not accompanied by a national benefit-cost analysis even though it was likely to have significant impacts on the national economy. Indeed, there are strong reasons to believe the policy might fail a benefit-cost test were one to be done.⁵⁹

57. Graham & Liu, *supra* note 1, at 431.

58. California State Motor Vehicle Pollution Control Standards, 74 Fed. Reg. 32,745 (July 8, 2009).

59. See Graham & Liu, *supra* note 1, at 436.

One solution would be to allow OIRA to require an RIA for significant waivers of preemption that are likely to have national implications. Requiring comment on these waivers from the national public would also allow impacted parties, in this case parties outside of California, to be heard in a democratic manner.

C. *Failure to Enforce Existing Rules*

A similar problem occurs when agencies choose not to enforce existing laws and regulations or they issue waivers to parties that normally would be required to comply with a regulation. For example, in June 2012, then-Secretary of Homeland Security Janet Napolitano issued a memorandum titled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children.”⁶⁰ This memo explained that the deportation of illegal immigrants who arrived in the United States as children would be halted under certain circumstances. The policy was announced by posting the memo on the Department of Homeland Security website and in a press conference given by President Obama.⁶¹ Analysts speculated that the policy was announced because legislation that the President preferred was stuck in a divided Congress and thus had little chance of passage.⁶² In fact, the President cited this reason in his speech. The policy was highly controversial, was cited in news stories, and became a theme in the 2012 election campaign. This example suggests that agencies may use backdoor rulemaking when political sensitivity is high or when Congress has blocked a legislative initiative.⁶³ This policy was likely to be controversial whether it went through legislative

60. Memorandum from Janet Napolitano, Sec. of Homeland Security, to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Protection, et al. (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

61. Barack H. Obama, *Remarks by the President on Immigration*, OFFICE OF THE PRESS SEC’Y, THE WHITE HOUSE (June 15, 2012), <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>.

62. Kevin Loria, *DREAM Act Stalled, Obama Halts Deportations for Young Illegal Immigrants*, CHRISTIAN SCI. MONITOR (June 15, 2012), <http://www.csmonitor.com/layout/set/r14/USA/Politics/2012/0615/DREAM-Act-stalled-Obama-halts-deportations-for-young-illegal-immigrants-video>.

63. For more discussion of political sensitivity as a motivation for agency use of guidance documents, see James T. Hamilton & Christopher H. Schroeder, *Strategic Regulators and the Choice of Rulemaking Procedures: The Selection of Formal vs. Informal Rules in Regulating Hazardous Waste*, 57 LAW & CONTEMP. PROBS. 111; Raso, *supra* note 35.

or regulatory channels, so perhaps there was little additional cost in added controversy by setting policy through a memorandum rather than through a regulation.

When agencies issue waivers for policies that have national implications or are significant in nature, these waivers should undergo OIRA review and potentially be accompanied by a benefit-cost analysis. Agencies might also be required to seek public comments before issuing significant waivers. Going further, judicial review is a useful device when agencies fail to enforce rules, as this behavior is otherwise very difficult for an organization like OIRA to monitor.⁶⁴ At the very least, OIRA should track waiver activity at agencies and post the information on its website.

One of the primary elements of a political system that adheres to the rule of law is the notion that all are treated equally under the law.⁶⁵ Waivers by their very nature violate this notion, and as such should arouse suspicion whenever they are used in a politically sensitive manner. Failure to enforce a regulation is a choice by regulators and a form of policy making, just as is enforcement of a regulation. As such, examples of nonenforcement should be treated no differently than any regulation. One way to do this would be for Congress to lay out more clearly under what circumstances agencies are allowed to decline enforcing a particular regulation and to allow parties impacted by nonenforcement to challenge an agency decision in court. If Congress is clear about when agencies may decline to enforce policies, it also would help rein in abusive “sue and settle” practices (described shortly) while still allowing legitimate claims against agency nonenforcement of rules. One of the easiest ways for Congress to do this would be to allow agencies more time when setting legislative deadlines, because lack of time is one important reason agencies might not be able to enforce a particular statute. As a result, agencies would not be violating the law if they ran into problems implementing a policy by a date set by Congress.

D. Sue and Settle Litigation

Still another method of avoiding checks on agency activities occurs when states or non-profit organizations sue federal regulatory agencies and settle in the form of a consent decree by

64. Stephen M. Johnson, *In Defense of the Short Cut*, 60 KAN. L. REV. 495, 538 (2012).

65. See generally F. A. HAYEK, *THE ROAD TO SERFDOM* (1944).

agreeing to issue a regulatory action.⁶⁶ Generally, this behavior occurs when an outside group believes an agency is not acting as it is required by statute. Agency staff who favor the regulation may view such lawsuits as “friendly.” In these cases, the agency (or parts thereof), whose interests may be aligned with those of the suing group, will agree to settle the lawsuit in exchange for issuing a regulation of some kind. In many instances, the regulations will still undergo OIRA review and notice and comment. The agency, however, is often under such a strict time constraint due to deadlines set in the consent decree that it can be difficult or impossible for OIRA to provide effective oversight or for the agency to adequately respond to public comments. Empirical research has found that longer OIRA review times are correlated with higher-quality economic analysis from agencies.⁶⁷ If better analysis drives better decisions, speeding up the regulatory review process with strict judicially enforced deadlines can lead to regulations that do not achieve objectives.

An example of this “sue and settle” phenomenon occurred in 2009 when several environmental groups sued the EPA for not properly enforcing the regional haze standards (RHS) outlined by the Clean Air Act.⁶⁸ The EPA entered into five consent decrees with the suing groups, and these agreements set strict deadlines for the EPA to initiate plans for enforcing RHS regulations. The EPA then used these deadlines as an excuse to reject state plans for compliance, claiming the agency did not have enough time to evaluate the states’ plans.⁶⁹ This excuse left some states out in the cold and forced them to adhere to the EPA’s preferred standard rather than their own.

One solution to this problem would be to have OIRA review proposed consent decrees that agencies wish to sign. After all, the agency and OIRA are both representing the President in the litigation, and the President, by executive order or pursuant to legislation, could stipulate that OIRA must clear any draft consent agreement. OIRA, however, currently lacks the staff to review all these judicial settlements, and some might argue that

66. See generally Butler & Harris, *supra* note 1.

67. Jerry Ellig & Rosemarie Fike, *Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis* (Mercatus Ctr. at George Mason Univ., Working Paper No. 13-13, 2013).

68. Butler & Harris, *supra* note 1, at 604–606.

69. *Id.*

OIRA, because it is part of the Executive Office of the President, will politicize the judicial process. As an alternative, OIRA might require an RIA for any regulations promulgated as a result of a consent decree, whether significant or not (assuming there is adequate time for the agency to conduct one).

Henry Butler and Nathaniel Harris propose several additional solutions to this problem. First, they recommend that judges take a more active role in monitoring sue-and-settle consent decrees, and that the Supreme Court make it easier for states or other third parties, who are impacted by the agreement but are not direct parties entering into it, to intervene in the consent decree. A final option would be for Congress to pass legislation making it easier for third parties to engage in the consent decree process.⁷⁰

Butler and Harris are skeptical of the role that notice and comment can play in the consent decree process, but they do not discuss what role RIA might play. If agencies were required to produce an RIA as a prelude to entering into consent decrees, it might shed light on those instances where these agreements produce highly inefficient results.

E. Other Evasion Tactics

Agency threats, ad-hoc enforcement, and warning letters are some of the methods most available to agencies to influence firms' behavior, as well as some of the most difficult to monitor. For example, the Food and Drug Administration (FDA) recently issued a warning letter to 23andMe, Inc., a company that sold take-at-home genetic tests, including disease-risk analyses.⁷¹ The letter directed the company to cease offering its personal genome services until it received further approval from the FDA. 23andMe responded by ceasing its disease-risk analysis services, although it continued its genetic testing services.⁷² Warning letters such as this one clearly elicit responses from regulated firms, although they are not technically binding like a statute or a regulation is.

^{70.} *Id.*

^{71.} Warning Letter from Alberto Gutierrez, Dir., Office of In vitro Diagnostics & Radiological Health, Ctr. for Devices & Radiological Health, U.S. Food & Drug Admin., to Ann Wojcicki, CEO, 23andMe, Inc. (Nov. 22, 2013), <http://www.fda.gov/iceci/enforcementactions/warningletters/2013/ucm376296.htm>.

^{72.} Michael Hiltzik, *23andMe's Genetic Tests Are More Misleading Than Helpful*, L.A. TIMES (Dec. 15, 2013), <http://www.latimes.com/business/la-fi-hiltzik-20131215,0,1359952.column#axzz2nl3U9zrm>.

One simple reform is to require agencies to inform regulated parties when a communication is only a recommendation and is not legally binding. This reform would clarify the policy and reduce uncertainty. Agencies could also be required to cite the statute or regulation that defines agency authority in the area the warning letter addresses. This requirement could also pertain to agencies using social media to pressure or intimidate firms, such as when the Director of the Consumer Financial Protection Bureau used Twitter to put companies “on notice” about the Agency’s intentions to rein in deceptive practices.⁷³

Stronger OIRA requirements sometimes have the perverse effect of inducing agencies to employ techniques that are harder to track and review. Shapiro’s article points to the danger that agencies will increasingly use more evasive tactics, like threats, warning letters, and ad-hoc enforcement, as Congress or the President place new OIRA review requirements on other activities, such as agency guidance. We believe this danger is likely overblown, however. First, agencies are unlikely to prefer using a warning letter over a guidance document because guidance documents are relevant to all firms in a particular domain, and warning letters or threats are likely only applied to one firm at a time. Next, subsequent administrations can easily reverse threats and enforcement, whereas the effects of guidance documents are harder to undo if firms have already expended resources to comply. Regulators concerned with their legacies would likely prefer guidance for this reason.

Finally, not all possible evasion tactics that agencies could use are worth the trouble to police. For example, an agency could split a big rule into multiple rules to escape OIRA review, because each of the smaller rules may fall short of the minimum significance thresholds that trigger the OIRA review process.⁷⁴ But regulations take a lot of agency time and resources to write, and adding work for themselves by creating multiple rules is unlikely to appeal to agency staff. Additionally, the nature of repeated interaction between OIRA and the agencies makes it likely that OIRA will eventually catch on to this activity and find

73. Hester Peirce, *Regulation by Tweet and Other CFPB Follies*, U.S. NEWS & WORLD REP. (Apr. 22, 2013), <http://www.usnews.com/opinion/blogs/economic-intelligence/2013/04/22/bureau-of-consumer-financial-protection-must-be-held-accountable>.

74. Mendelson & Wiener, *supra* note 1, at 483–85.

a way to reprimand agencies that behave in this manner.⁷⁵ For example, OIRA could determine that a small rule is significant because it is closely related to several other proposed rules that, together, are significant. OIRA has final authority on significance determinations. For similar reasons of repeated interaction, it is unlikely that agencies are combining regulations to add complexity to the review process, and thereby confuse OIRA, though some cases of this activity may exist.⁷⁶

Incorporation by reference of private or international standards is another way agencies might avoid some review procedures. In this case, agencies give up discretion over the precise terms of the standard chosen and thus it is unlikely that they would choose this method routinely. Regulatory staffs of U.S. agencies, however, can and often do play a large role in international standard-setting discussions. The Basel capital adequacy standards is one such example.⁷⁷ In these instances, agencies may have a strong interest in deferring to international standards, especially because departing from such standards may prove difficult once a standard is in place. Even so, such standards will still have to be set in a regulation, thereby making them subject to the APA and to OIRA review.

III. CONCLUSION

The solutions mentioned in this Article fall into several broad reform categories, which we explore more closely below.

A. *Earlier Engagement*

OIRA could engage agencies earlier in the process of creating policy documents, including guidance documents or policy memoranda or any regulatory policy that significantly affects regulated entities. In theory, this solution is attractive, but it is unrealistic today given the considerable declines in OIRA's

⁷⁵ *Id.*

⁷⁶ For example, two scholars from Resources for the Future point to a recent EPA regulation that might easily have been split into parts. Art Fraas & Randall Lutter, Commentary, *Rule-making Negligence at the EPA*, WASH. TIMES (Oct. 8, 2013), <http://www.washingtontimes.com/news/2013/oct/8/fraas-and-lutter-rule-making-negligence-at-the-epa/>.

⁷⁷ For example, the Basel Committee's membership includes several banking regulators in the United States. *Basel Committee membership*, BANK FOR INT'L SETTLEMENTS, <http://www.bis.org/bcbs/membership.htm> (last visited Feb. 27, 2014).

staffing and funding levels since the agency's inception.⁷⁸ OIRA's resources clearly should be increased for this reason. In addition to the resource problem, however, OIRA would have to rely on early notification from agencies to make a determination that an issue is significant. As the very point of such notification and oversight is precisely why agencies sometimes resort to these non-APA tools to begin with, it is unlikely that OIRA would see complete compliance.

Presidents also have other means to control agencies, such as budgets and removal of agency heads. Unfortunately, although presidents can recommend budget cuts to non-compliant agencies, Congress may ignore them (and often does), and presidents are extremely wary of removing agency heads.⁷⁹

If, at a minimum, OIRA were to track agency use of policy documents and guidance, it would be an important source of transparency and would make empirical analysis of agencies' back-door rulemaking activities easier. The Government Accountability Office could also perform this role because it already tracks many rulemakings.⁸⁰ Tracking would also not interfere with the useful role that these documents play in terms of informing the public and allowing agency management a method for controlling lower-level staff.

Once given this tracking authority, OIRA should have the right to review these documents, as it does now in some cases, as well as the ability to return guidance documents for further improvements and to ask the agency to conduct an RIA, assuming OIRA's Administrator believes the document will have significant economic impacts. Similarly, OIRA could require the agency to take public comments on these items.

B. Ex-Post Review

Tracking of policy documents also might take place after the agency has already issued them. In this case, OIRA would act less as an ex-ante oversight mechanism and more in its role of information aggregator. OIRA could ensure transparency in this way and might also reserve the right to ask for a retrospec-

78. Ellig & Broughel, *supra* note 24.

79. Kagan, *supra* note 30, at 2273–74.

80. GAO *Federal Rules Database Search*, U.S. GOV'T ACCOUNTABILITY OFFICE, <http://www.gao.gov/fedrules.html> (last visited Feb. 4, 2014).

tive analysis of agency actions if it deems them to be of sufficient magnitude. Or, instead of aggregating information at OIRA, it may make sense to give this responsibility to the General Services Administration (GSA), as the GSA already houses some regulatory information. Some would argue that OIRA is better seen as a transactions office on behalf of the White House than as an information-collection and management office for the executive branch.

When agencies conduct a retrospective analysis, OIRA should ask that agencies evaluate not just individual rules but entire regulatory programs. One guidance document, like one rule, may not have a significant impact. Groups of rules or guidance documents, however, may have a very large impact in terms of benefits and costs. Agencies should be encouraged or even required to evaluate entire programs or to focus on how a multitude of regulations affect specific economic sectors. As part of an evaluation of regulatory programs, agencies should consider not just regulations, but guidance documents and other policy memoranda as well.

C. Legislative Solutions

Ultimately, all of the authority granted to agencies is done at the behest of Congress. One reason that agencies are given broad discretionary powers that can be easily abused is because Congress—due to internal conflicts or uncertainty—is often vague about what exactly it is authorizing an agency to do. Another reason is that Congress perceives that it can react to and fix a problem if agencies overreach. As such, Congress ultimately may be responsible for agency abuses. If this theory is correct, the solution also rests in Congress. To start, Congress should be as specific as possible about what it is authorizing an agency to do when legislation is written. This guidance will limit agencies' ability to expand their regulatory domains. Courts can police Congress on this matter by making sure that delegations of authority to agencies are clear and bounded. Congress could also play a stronger oversight role with respect to agency evasion of OIRA and the APA by holding routine congressional hearings on the topic and fashioning judicial review standards that are especially strict for agency actions that have been supported by no formal regulatory analysis.

Further, Congress could create institutional barriers to attenuate or reduce non-APA rulemaking. For example, Congress could require by law that significant guidance, warning letters, and enforcement actions go through an expanded review by OIRA. Congress should also be on the lookout for lawsuits against agencies made by friendly parties. Although lawsuits are an important way of holding agencies accountable to the law, some friendly lawsuits have had the opposite effect. Courts could be more aggressive, compelling agencies to notify affected parties in these instances. For example, where agency efforts are deficient, the court could notify a list of affected parties supplied by OIRA to the Justice Department or the agency.

Deadlines placed in legislation also need careful thought. Congress should sometimes consider giving agencies more time to implement regulations because the need to rush may be one reason agencies resort to quicker, less formal regulatory approaches.⁸¹

D. *Independent Agencies*

If an executive branch agency that answers to the President wants to circumvent the APA or OIRA review, it will have to find a clever way around the mandates imposed on it by statute and by executive order. Some agencies have a clear way around OIRA review because they are not subject to the executive orders governing the regulatory review process. So-called “independent regulatory commissions,”⁸² which occupy a constitutionally fuzzy part of our government, are not required to undergo OIRA review for their significant regulations, nor are they required to conduct an RIA for their major regulations.⁸³

As Jerry Brito and Hester Peirce demonstrate in their articles, independent agencies like the Consumer Product Safety Commission (CPSC) and the Commodity Futures Trading Commission (CFTC) also have incentives to avoid the APA when it suits their interests.⁸⁴ These articles provide some evidence to mitigate

81. See Peirce, *supra* note 2.

82. The primary characteristic of independent agencies is that the head of the agency cannot be removed except “for cause” by the President. See 44 U.S.C. § 3502(10) (2012), for a further definition of “independent regulatory commissions.”

83. These agencies still adhere to the APA and to the usual notice-and-comment procedures required under the Act.

84. Peirce, *supra* note 2.

Shapiro's concern that too many requirements on agencies will lead to further evasion tactics. Agencies like the CPSC and the CFTC are not subject to the same scrutiny by OIRA that executive branch agencies are, yet independent agencies evade the notice-and-comment process and the APA as well.⁸⁵

Presidents have asked independent regulatory commissions to follow the same requirements as executive branch agencies but have not made this request a binding legal requirement.⁸⁶ Most of the federal financial regulators are considered independent agencies, as are the Federal Communications Commission, the Federal Trade Commission, and others. Given the vast responsibilities handed to financial regulators by the Dodd-Frank Act, with hundreds of new regulations expected to be written, it is distressing that agencies are making these decisions without the insights provided by thorough RIA.⁸⁷

Requiring independent agencies to follow rulemaking procedures in line with executive branch agencies is a crucial part of any reform of agency evasion tactics. Bringing independent agencies up to speed on state-of-the-art policymaking techniques, like benefit-cost analysis, will make rulemaking more transparent and regulators more accountable, and will likely improve regulatory outcomes by making evidence, rather than politics, a more fundamental driver of policy.⁸⁸ In the case of independent agencies, the solution may be simple. The President could issue an executive order stating that E.O. 12,866 and

85. *See id.*

86. Curtis W. Copeland, *Economic Analysis and Independent regulatory commissions* (Admin. Conf. of the U.S. Draft Report, 2013), available at <http://acus.gov/sites/default/files/documents/Copeland%20CBA%20Report%203-29-13.pdf>.

87. The SEC, the CFTC, and the CFPB have moved toward incorporating economic analysis into their rulemaking procedures. *See, e.g.*, Memorandum from Div. of Risk, Strategy, and Fin. Innovation & Office of the Gen. Counsel, Sec. & Exch. Comm'n, to Staff of the Rulewriting Divisions and Offices (Mar. 16, 2012), available at http://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_seculemaking.pdf; Emily Pierce & Niels Lesniewski, *How Cordray Snagged 17 Republicans*, ROLL CALL (July 16, 2013), <http://blogs.rollcall.com/wgdb/how-cordray-snagged-17-republicans/>; Jamila Trindle, *CFTC Taps Help for Cost Analysis on New Rules*, WALL ST. J. (May 10, 2012), <http://online.wsj.com/news/articles/SB10001424052702304070304577396192653277890>.

88. *See generally* Hester Peirce, *Economic Analysis by Federal Financial Regulators*, 9 GEO. MASON J. L. ECON. & POL'Y 569 (2013).

E.O. 13,563 apply to independent agencies.⁸⁹ Congress could also achieve the same ends through legislation.

E. Final Thoughts

The solutions presented here vary depending on the types of avoidance mechanisms, but some central themes remain. These include more accountability to the public through the notice-and-comment process, more opportunity for the President to make sure, through OIRA review, that the regulatory action is a presidential priority, and a higher standard of technical accountability by strengthening OIRA oversight of both executive branch and independent agencies.⁹⁰

This said, scholars and practitioners should be on the lookout for changes in agency behavior that result from any new requirements.⁹¹ OIRA, the agencies, Congress, and the courts are in a competition for power that shares the characteristics of a multiparty, multistage game. Institutional incentives matter, and any proposed solution must take into account the diminishing returns to hurdles placed in front of agencies. Similarly, there are costs and benefits to using OIRA resources to track and regulate agency behavior.⁹² OIRA resources, even if expanded in terms of staffing and funding, should be used carefully. It may also make sense to transfer some of the informational requirements now imposed on OIRA to an agency such as the General Services Administration.

The United States has built an impressive system of regulatory oversight procedures over the last sixty years. This system exists to ensure that the public is adequately represented by its government and that agencies act in the public interest rather than serve a more narrow interest. To ignore the procedures put in place over the last century is not just to ignore good public policy practices, it is to ignore the unfortunate lessons of history and to run the risk of repeating them.

89. Some scholars disagree that the President has the authority to do this. For more on this debate, see DUDLEY & BRITO, *supra* note 8, 47–48.

90. Another option, outside the scope of this paper, would be sharpening the “substantial evidence” test under the APA.

91. See generally Shapiro, *supra* note 1.

92. Mendelson & Wiener, *supra* note 1, at 15–21.

REGULATORY AND QUASI-REGULATORY ACTIVITY WITHOUT OMB AND COST-BENEFIT REVIEW

JOHN D. GRAHAM* & CORY R. LIU**

Whenever a federal agency proposes a significant regulatory action, that action must be reviewed by the Office of Information and Regulatory Affairs in the White House Office of Management and Budget (OMB).¹ OMB review is designed to ensure that the action is consistent with presidential priorities and is coordinated with the related actions of other federal agencies.² In addition, the federal agency must provide a rationale for the action and an assessment of its potential benefits and costs.³ OMB clears the regulatory action if there is a reasoned determination that its benefits justify its costs.⁴ This review, coupled with the cost-benefit requirement, is designed to ensure that federal agencies have carefully considered all the consequences of the regulations they propose.⁵

Although OMB and cost-benefit review are required for significant regulatory actions, a substantial amount of regulatory activity occurs without any OMB or cost-benefit review. Some of this activity is clearly regulatory in nature, in the sense that it creates binding legal obligations on regulated entities, while other activity might best be described as “quasi-regulatory,” because

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1. See Exec. Order No. 12,866, 58 Fed. Reg. 5911 (Jan. 22, 1993), *reprinted as amended in* 5 U.S.C. § 601 (2012).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

the actions shape the regulatory environment and impact regulated entities but are not necessarily or directly binding.

This Article illustrates four types of regulatory and quasi-regulatory activities that operate outside OMB and cost-benefit review: (1) agency issuance of quasi-regulatory documents such as memoranda, policy statements, and guidance documents; (2) agency approval of state regulatory policies under federal laws that authorize selective waiver of federal preemption of state regulation; (3) federal agency issuance of hazard determinations related to technologies, substances, and practices that impact the litigation and regulatory environment; and (4) federal agency decisions to enter into binding agreements with pro-regulation litigants favoring certain regulatory outcomes, where settlements create nondiscretionary agency duties to initiate new rulemakings. This Article illustrates how these four types of regulatory and quasi-regulatory activities have had a profound effect on important areas of the economy such as coal mining, automobile production, and housing construction, and suggests that Congress should consider subjecting all or some of these regulatory activities to routine OMB and cost-benefit review.

I. ISSUING INFORMAL QUASI-REGULATORY DOCUMENTS

Federal regulators often issue informal, quasi-regulatory documents such as memoranda of understanding, policy statements, and guidance documents. These quasi-regulatory documents can create major policy shifts that impose significant burdens on industries or compel those industries to engage in costly litigation if they intend to protect their rights under administrative law.

A vivid illustration of this phenomenon is the recent use of quasi-regulatory documents to institute dramatic policy changes in the granting of permits for surface coal mining operations in Appalachia. In the mid-1900s, the most prevalent form of coal mining in Appalachia was underground mining.⁶ But over the past twenty years, the coal industry increasingly has engaged in surface mining in Appalachia, even at the tops

6. E.g., Emily S. Bernhardt et al., *How Many Mountains Can We Mine? Assessing the Regional Degradation of Central Appalachian Rivers by Surface Coal Mining*, 46 ENVTL. SCI. & TECH. 8115, 8115 (2012).

of mountains, a practice called “mountaintop mining.”⁷ Today, surface mining accounts for about thirty-seven percent of the coal mined in Appalachia.⁸

Proponents of surface and mountaintop mining argue that it is safer and more efficient (on a cost-per-ton basis) than underground mining.⁹ Mountaintop mining avoids the subsidence issues that periodically have caused environmental harm to communities located above abandoned underground mines.¹⁰ In addition, it is a valuable source of economic activity in Appalachia. Mountaintop mining has created about 14,000 mining jobs with salaries that are high for rural Appalachia, and an additional 60,000 jobs that are related to the mining industry.¹¹ Those jobs also bring revenues to state and local governments. In West Virginia, for example, almost nine percent of the state’s tax revenue is linked to mountaintop mining.¹²

Critics of mountaintop mining object to its adverse effects on the environment.¹³ Mountaintop mining levels the tops of mountains, and the excess dirt and rock are disposed of in the valley fills on the mountainsides.¹⁴ Entire streams are sometimes buried.¹⁵ Although mines should be reclaimed and the impact on streams should be mitigated under the Surface Mining Control and Reclamation Act, reclamation and mitigation efforts are not always effective.¹⁶ Recent evidence

7. E.g., James Wickham et al., *The Overlooked Terrestrial Impacts of Mountaintop Mining*, 63 *BIOSCIENCE* 335, 335 (2013).

8. *U.S. Coal Production by State, Region and Method of Mining*, NAT’L MINING ASS’N (2011), http://www.nma.org/pdf/c_production_method.pdf, [http://perma.cc/X8FY-SR6M].

9. E.g., Neela Banerjee, *Taking on a Coal Mining Practice as a Matter of Faith*, N.Y. TIMES, Oct. 28, 2006, <http://www.nytimes.com/2006/10/28/us/28mountains.html?>, [http://perma.cc/0xCq1JmDffb].

10. NAT’L MINING ASS’N, MOUNTAIN TOP MINING FACT BOOK 2 (2009), http://www.nma.org/pdf/fact_sheets/mtm.pdf, [http://perma.cc/MCV4-QZ92].

11. *Id.*

12. *Id.*

13. *See, e.g.*, Bernhardt, *supra* note 6.

14. *Id.* at 8115.

15. *Id.*

16. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-206, SURFACE COAL MINING: FINANCIAL ASSURANCES FOR, AND LONG-TERM OVERSIGHT OF, MINES WITH VALLEY FILLS IN FOUR APPALACHIAN STATES 3–5, 22 (2010), <http://www.gao.gov/assets/310/300079.pdf>, [http://perma.cc/P7CS-RRLT].

suggests that some reclaimed areas have become significant sources of surface water contamination, and the extent of contamination has been proportional to the amount of mountaintop mining in the area.¹⁷ Even with the best of reclamation efforts, mountaintop mining creates ecological disturbances, at least temporarily.¹⁸

Under the Clean Water Act, the Army Corps of Engineers has the authority to issue five-year permits for mountaintop mining activities.¹⁹ In 1982, the Corps issued Nationwide Permit 21, which was most recently renewed in 2007, authorizing all mountaintop mining activities that will have a minimal impact on the aquatic environment after reclamation and mitigation.²⁰ Historically, the determination of whether a mountaintop mining project is authorized by Nationwide Permit 21 occurred through a project-by-project analysis performed at the state level under the guidance of federal officials.²¹ From 2000 to 2008, about 511 mining reclamation projects were approved in West Virginia alone under the procedures Nationwide Permit 21 spelled out.²²

In June 2009, the Environmental Protection Agency (EPA) issued a press release titled “Obama Administration Takes Unprecedented Steps to Reduce Environmental Impacts of Mountaintop Coal Mining, Announces Interagency Action Plan to Implement Reforms.”²³ The press release was accompanied

17. See T. Ty Lindberg et al., *Cumulative impacts of mountaintop mining on an Appalachian watershed*, 108 PROC. NAT’L ACAD. SCI. 20,929, 20,929–30 (2011).

18. See *id.*

19. See CLAUDIA COPELAND, CONG. RESEARCH SERV., 97-223, THE ARMY CORPS OF ENGINEERS’ NATIONWIDE PERMITS PROGRAM: ISSUES AND REGULATORY DEVELOPMENTS 1 (2012).

20. Reissuance of Nationwide Permits, 72 Fed. Reg. 11,092, 11,117 (Mar. 12, 2007).

21. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-21, SURFACE COAL MINING: CHARACTERISTICS OF MINING IN MOUNTAINOUS AREAS OF KENTUCKY AND WEST VIRGINIA 7 (2009), <http://www.gao.gov/assets/300/299226.pdf>, [<http://perma.cc/P6MY-PAXK>].

22. *Id.* at 58.

23. Press Release, EPA, Obama Administration Takes Unprecedented Steps to Reduce Environmental Impacts of Mountaintop Coal Mining, Announces Interagency Action Plan to Implement Reforms: Federal agencies take coordinated action to strengthen oversight and regulation, minimize adverse environmental consequences of mountaintop coal mining (June 11, 2009), *available at* <http://yosemite.epa.gov/opa/admpress.nsf/3881d73f4d4aaa0b85257359003f5348/e7d3e5608bba2651852575d200590f23!OpenDocument>, [<http://perma.cc/0uEP1xyN5eL>].

by a memorandum of understanding signed by the EPA, the Army Corps of Engineers, and the Department of the Interior, which oversees the Office of Surface Mining Reclamation and Enforcement.²⁴ The memo affected a significant shift in regulatory policy toward greater restrictions on mountaintop mining by allowing the EPA, in addition to the States, to make project-by-project determinations about water-quality issues.²⁵ In effect, it suspended the existing procedures set forth in Nationwide Permit 21, a policy shift that occurred without any public comment, OMB review, or cost-benefit analysis. Although the Corps eventually proposed a formal suspension of Nationwide Permit 21 in July 2009,²⁶ that action was not finalized until June 2010, months after regulators had already changed their approach to issuing permits.²⁷

The mining industry complained that the EPA's criteria for project-by-project determinations were not clear, and that mining developers did not know what was expected of them.²⁸ After months of uncertainty, on April 1, 2010, the EPA issued a thirty-one page guidance document.²⁹ This document stated that the EPA did not intend to bring a complete halt to mountaintop mining, but that it was forcing the mining industry to adopt a practice of minimal or zero filling of valleys with mining debris.³⁰ In addition, it set strict limits on water conductivity levels that would take effect immediately.³¹ Again, no public comments were solicited, and no cost-benefit analysis

24. Memorandum of Understanding Among the U.S. Dep't of the Army, U.S. Dep't of the Interior, and U.S. Env'tl. Prot. Agency Implementing the Interagency Action Plan on Appalachian Surface Coal Mining (June 11, 2009), available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2009_06_10_wetlands_pdf_Final_MTM_MOU_6-11-09.pdf, [<http://perma.cc/KC69-58LZ>]; see also CLAUDIA COPELAND, CONG. RESEARCH SERV., RS21421, MOUNTAINTOP MINING: BACKGROUND ON CURRENT CONTROVERSIES 8 (2013).

25. See COPELAND, *supra* note 24, at 8-9.

26. Proposed Suspension and Modification of Nationwide Permit 21, 74 Fed. Reg. 34,311 (July 15, 2009).

27. Suspension of Nationwide Permit 21, 75 Fed. Reg. 34,711 (June 18, 2010).

28. See David A. Fahrenthold, *EPA at center of coal controversy*, WASH. POST, Jan. 28, 2010, http://articles.washingtonpost.com/2010-01-28/business/36905912_1_epa-officials-coal-industry-epa-statement, [<http://perma.cc/0zZxjDWTgVT>].

29. See COPELAND, *supra* note 24, at 11.

30. *Id.*

31. *Id.* at 12.

was conducted.³² The mining industry responded that the EPA's new, unprecedented regulatory approach was an arbitrary and unlawful expansion of power beyond its statutory authority.³³ The guidance document is now the subject of lawsuits brought by Kentucky and West Virginia, which argue that it attempts to write new rules unlawfully by not following the notice-and-comment procedure of the Administrative Procedure Act.³⁴ The mining industry won a federal district court case against the EPA when the EPA decided to revoke an existing permit, but the EPA won on appeal, and the entire matter has been returned to the federal district court to address other issues raised by the industry that were not resolved in the original case.³⁵

Our point is not that the Obama administration is not entitled to initiate changes in federal policy toward mountaintop mining. Indeed, both John McCain and Barack Obama indicated during the 2008 presidential campaign that they were opposed to mountaintop removal mining.³⁶ Rather, if a president or agency seeks to change regulatory policy, there are some basic administrative procedures that should be followed.

A change in regulatory policy accomplished through a memorandum of understanding, policy statement, or guidance document can have the same costly (or beneficial) impacts, at least in the short run, as an official rulemaking under the Administrative Procedure Act. When agencies use such quasi-regulatory documents to make major shifts in regulatory policy, these shifts should be subjected to routine OMB review and a cost-benefit analysis that is informed by a public comment process. In other words, what is currently required for informal rulemakings should also apply to policy shifts initiated through memoranda of understanding, policy statements, and guidance documents.

32. *Id.* at 13.

33. *Id.*

34. *Id.*

35. *Mingo Logan Coal Co. v. EPA*, 714 F.3d 608 (D.C. Cir. 2013).

36. Ken Ward, Jr., *McCain, Obama both oppose mountaintop removal mining*, MOUNTAIN EAGLE, (Oct. 1, 2008), <http://www.themountaineagle.com/news/2008-10-01/News/057.html>, [<http://perma.cc/0L21bi8in6m>].

II. FEDERAL AGENCY COLLABORATION WITH STATE AGENCIES IN
THE PROMULGATION OF STATE REGULATIONS USING A
WAIVER OF PREEMPTION

Under the principle of federalism, there is often a strong case for allowing each state to develop its own public policies. Local conditions in the States will vary, the preferences of their citizens may vary, and state policy is seen as a source of innovation and learning that is lost with uniform federal action. Even if the federal government develops policy on an issue, allowing each state to consider policy innovations that go beyond the federal policy may make sense, assuming federal policy is not contradicted or frustrated.

An exception to the preference for states' rights may occur in settings where regulated businesses produce products in one state but sell them in many other states. If businesses engaged in interstate commerce face a proliferation of different state regulations, their costs of operation may rise significantly.³⁷ Moreover, if a significant number of states join together, they can issue a regulation that impacts an entire industry or the national economy, possibly placing U.S. businesses at a competitive disadvantage relative to businesses in other countries. In recognition of these concerns, Congress sometimes preempts state and local regulatory action, or at least requires federal approval of state and local regulatory initiatives in arenas where federal regulatory authority has been established.³⁸

Our concern is that federal regulators are collaborating with state agencies to promulgate regulations with a national economic impact that are not subject to OMB review or cost-benefit analysis under OMB guidelines. Of particular concern are arbitrary inconsistencies in state regulations that have a nationwide impact on key industries and the national economy. In some cases, federal agencies give states official permission to enact inconsistent state regulations without any OMB or cost-benefit review of the federal decision to grant such permission.

37. See, e.g., Joseph R. Mason et al., *The Economic Impact of Eliminating Preemption of State Consumer Protection Laws*, 12 U. PA. J. BUS. L. 781, 782-83, 788 (discussing efficiency gains from preemption in banking industry).

38. *Id.* at 784 (discussing the National Bank Act and Office of the Comptroller of the Currency preemption of state law).

A sobering example of this phenomenon is the recent decision of federal officials to allow California³⁹ to require that automakers produce an increasing number of zero-emission vehicles (ZEV) from 2018 to 2025.⁴⁰ Before enacting such a requirement, California needed explicit permission from the federal government.⁴¹

Under the Clean Air Act, the EPA's emission standards for new motor vehicles preempt all state and local standards.⁴² California, however, has special regulatory privileges and applied for a waiver of preemption from the EPA.⁴³ Other states must choose between following the federal emission standards or enacting their own standards that are identical to California's standards.⁴⁴ In 2005, California proposed emission standards requiring that, by 2025, each major automaker doing business in California sell enough ZEVs to comprise at least fifteen percent of its new-vehicle sales in California.⁴⁵ The regulation's original purpose was to control smog, but the rationale has shifted to include the control of greenhouse gases linked to global climate change.⁴⁶

The EPA is authorized to grant a waiver under section 209(b)(1) of the Clean Air Act unless it finds that California's health and welfare rationale is arbitrary and capricious, California does not need its own standards to meet compelling and extraordinary conditions, or California standards (and accompanying

39. Fourteen states have chosen to align with California's standards, but we simplify the presentation by referring to compliance in California.

40. As a practical matter, a ZEV under California criteria is likely to be a plug-in vehicle that is powered entirely or partly by electricity, though some hydrogen-powered vehicles also qualify.

41. See California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 74 Fed. Reg. 32,744 (July 8, 2009) (granting waiver of Clean Air Act) [hereinafter California 2009 Waiver].

42. *Id.* at 32,745.

43. *Id.*

44. *Id.* at 32,781.

45. AIR RES. BD., CAL. ENVTL. PROT. AGENCY, STAFF REPORT: INITIAL STATEMENT OF REASONS: ADVANCED CLEAN CARS: 2012 PROPOSED AMENDMENTS TO THE CALIFORNIA ZERO EMISSION VEHICLE PROGRAM REGULATIONS ES-2 (2011), <http://www.arb.ca.gov/regact/2012/zev2012/zevisor.pdf>, [http://perma.cc/7TH4-64RT].

46. *Id.* at ES-1.

enforcement procedures) are not consistent with section 202(a) of the Act.⁴⁷ The third criterion encompasses consideration of the cost of the California standards, the lead time afforded the industry, and the certification issues that arise when the same vehicle cannot meet both California and national standards.⁴⁸

California's ZEV program has a weak environmental-effectiveness rationale, yet it may impose significant costs on the auto industry and the national economy. First, the program would not slow climate change by any meaningful degree, because global climate change is caused by worldwide concentrations of greenhouse gases and cannot be solved by small regional policies.⁴⁹ Second, the Obama administration, through a joint rulemaking of the EPA and the Department of Transportation (DOT), is already mandating a sharp reduction in greenhouse gases from new cars and light trucks for model years 2017 to 2025 through a performance standard, a numeric standard based on carbon emissions that allows automakers to undertake some averaging of low-emitting and high-emitting vehicles.⁵⁰ Third, the joint EPA-DOT rule already provides generous compliance incentives to manufacturers who offer ZEVs. For example, a ZEV's "upstream" emissions at the electric power plant are ignored, and each ZEV may be counted more than once in the compliance process.⁵¹ The federal government is also offering up to a \$7,500 income tax credit to purchasers of qualified plug-in vehicles.⁵² Fourth, the California ZEV program may not accomplish additional greenhouse gas control beyond that achieved by the EPA-DOT rule because any extra ZEVs produced and sold due to California's rule may be offset by extra sales of more high-emitting vehicles in other states. This

47. California 2009 Waiver, *supra* note 41, at 32,745.

48. EPA, EPA-420-F-12-083, EPA DECISION TO GRANT CALIFORNIA'S REQUEST FOR WAIVER OF PREEMPTION FOR ITS ADVANCED CLEAN CAR PROGRAM 2 (2012).

49. See, e.g., Michael Hoel, *Global Environmental Problems: The Effects of Unilateral Actions Taken by One Country*, 20 J. ENVTL. ECON. & MGMT. 55, 55 (1991) ("In global environmental problems, each country's own contribution to worldwide emissions is small, so there is little a country can do by itself.").

50. 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 76 Fed. Reg. 74,854 (proposed Dec. 1, 2011) (to be codified at 40 C.F.R. pt. 600).

51. *Id.* at 75,012.

52. 26 U.S.C.A. § 30D(b) (West 2013).

outcome is a form of “leakage” that has already been demonstrated in the context of other California vehicle regulations.⁵³ Fifth, by forcing automakers to sell more expensive vehicles that are cheaper to operate on a per-mile basis, the California ZEV program may actually exacerbate greenhouse gas emissions due to two perverse behavioral responses: some consumers will hold on to their old, high-emitting vehicles longer than they would have otherwise,⁵⁴ and those consumers who do purchase an expensive ZEV will drive it more miles each year because electricity is much cheaper than gasoline.⁵⁵

Even if these policy arguments are untrue or overstated and the ZEV program is necessary and appropriate for greenhouse gas reduction or smog control in California, it is highly unlikely that the program would receive a favorable cost-benefit analysis under the official technical guidance in OMB Circular A-4, which governs regulatory analysis in the federal government.⁵⁶ In December 2011, the staff of the California Air Resources Board (CARB) released a rudimentary analysis seeking to justify the tighter ZEV requirements for model years 2018 to 2025. The basic result of CARB’s analysis was that the energy savings provided by a ZEV over the vehicle’s lifetime are about equal to the additional \$10,000 cost of producing a ZEV.⁵⁷

The OMB did not review CARB’s analysis. Upon examination, we found that the CARB analysis is based on several analytical assumptions that would be unlikely to survive a careful review under OMB Circular A-4.

53. Lawrence H. Goulder et al., *Unintended Consequences from Nested State & Federal Regulations: The Case of the Pavley Greenhouse-Gas-per-Mile Limits* (Nat’l Bureau of Econ. Research, Working Paper No. 15337, 2009), available at <http://www.nber.org/papers/w15337>, [<http://perma.cc/0Pcrujx8Z2e>].

54. Howard Gruenspecht, *Zero Emissions Vehicles: A Dirty Little Secret*, RESOURCES, Winter 2001, at 8.

55. See Carl Bialik, *To Gauge Oil Savings, Economists Road Test the ‘Rebound Effect,’* WALL ST. J., May 27, 2009, <http://online.wsj.com/article/SB124338431100556717.html>, [<http://perma.cc/0HTxBvy968e>]; John Tierney, *When Energy Efficiency Sullies the Environment*, N.Y. TIMES, Mar. 7, 2011, http://www.nytimes.com/2011/03/08/science/08tier.html?_r=0, [<http://perma.cc/0oXZVT9ccZU>].

56. OFFICE OF MGMT. & BUDGET, CIRCULAR A-4, REGULATORY ANALYSIS (2003), available at http://www.whitehouse.gov/omb/circulars_a004_a-4, [<http://perma.cc/HY8D-9DEB>].

57. AIR RES. BD., CAL. ENVTL. PROT. AGENCY, *supra* note 45, at 65.

First, CARB assumes that the cost of producing ZEVs will decline by about forty percent between now and 2025 due to learning-by-doing and economies of scale in the manufacturing process.⁵⁸ The forty percent figure, however, is at the top of the range of estimates in the literature.⁵⁹ Furthermore, the battery advances necessary to satisfy consumer demand for a greater driving range are not meeting cost objectives and may cause the cost of future ZEVs to increase, not decline.⁶⁰ The CARB analysis also ignores the possibility of an increase in the prices of rare earth elements and lithium that may result from Chinese actions once the U.S. transport sector becomes significantly dependent on ZEVs. Rare earths and lithium currently account for a small percentage of the cost of producing a ZEV, but that percentage could rise significantly in ways that are difficult for the United States to control.⁶¹ Most recently, the Obama administration has joined with the E.U. and Japan in a World Trade Organization action against China to end China's rare earth export

58. *Id.* at 30–32.

59. DAVID A. BESANKO & RONALD R. BRAEUTIGAM, MICROECONOMICS: AN INTEGRATED APPROACH 334–37 (2002).

60. NAT'L RESEARCH COUNCIL, REVIEW OF THE RESEARCH PROGRAM OF THE U.S. DRIVE PARTNERSHIP: FOURTH REPORT 90–97 (2013) (reviewing limited progress in lithium ion battery technology and concluding that cost targets have not been met and need to be reset in light of technical realities and the need for further innovation).

61. See Jeff Johnson, *Ames Lab to Be Rare-Earth Hub*, 91 CHEMICAL & ENGINEERING NEWS 28 (2013) (noting that Department of Energy studies project critical shortages of five rare-earth metals, which may slow the commercialization of electric vehicles, and that the Department has allocated \$120 million over five years to Iowa's Ames Laboratory to search for possible solutions); Mark Rechtin, *Material costs threaten affordable green cars*, AUTOWEEK, June 15, 2010, <http://www.autoweek.com/article/20100615/green/100619925>, [<http://perma.cc/0iuUSZz6jX3>] (citing studies predicting that demand for rare-earth elements will outstrip supply within four years, causing the cost of producing electric drivetrains to rise significantly). See generally Keith Bradsher, *Supplies Squeezed, Rare Earth Prices Surge*, N.Y. TIMES, May 2, 2011, at B1, B7, available at <http://www.nytimes.com/2011/05/03/business/03rare.html>, [<http://perma.cc/WDA-8DUH>] (“China, which controls more than 95 percent of the market, has further restricted exports so as to conserve supplies for its own high-tech and green energy industries.”); Clifford Krauss, *The Lithium Chase*, N.Y. TIMES, Mar. 9, 2010, at B1, available at http://www.nytimes.com/2010/03/10/business/energy-environment/10lithium.html?_r=0, [<http://perma.cc/6T58-MRNZ>] (reporting that lithium demand will dramatically rise).

restrictions, alleging that the restrictions have artificially increased prices and pressured businesses to move to China.⁶²

Second, CARB assumes that ZEVs will last for an average of fourteen years and be driven for 186,000 miles.⁶³ These figures are on the high end of the range of estimates for average light-duty vehicle lifetime and mileage.⁶⁴

Third, CARB assumes that a five percent real discount rate is applied to future fuel savings to express them in present value.⁶⁵ A seven percent discount rate, however, is typically applied to future fuel savings under OMB guidance.⁶⁶ Changing this assumption alone is likely to reverse the conclusion of CARB's analysis.⁶⁷

Overall, based on the implausibility of CARB's multiple, optimistic assumptions, it is unlikely that a ZEV mandate would pass a cost-benefit analysis, at least not for ZEVs produced in the pre-2025 period. Consumers may be further disinclined to purchase ZEVs if federal and state tax incentives are reduced. California has already reduced its ZEV rebate from \$5,000 to \$2,500,⁶⁸ and Congress has reduced the tax credit for the costs of installing a charging system in one's home.⁶⁹

62. Don Lee & Christi Parsons, *U.S. opens trade case against China over rare earth export limits*, L.A. TIMES, Mar. 14, 2012, <http://articles.latimes.com/2012/mar/14/business/la-fi-obama-china-20120314>, [<http://perma.cc/Y2UT-5DL4>].

63. AIR RES. BD., CAL. ENVTL. PROT. AGENCY, *supra* note 45, at 65.

64. The National Highway Traffic Safety Administration estimates that the average passenger car has a lifetime mileage of 152,137 miles. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DOT HS 809 952, VEHICLE SURVIVABILITY AND TRAVEL MILEAGE SCHEDULES (2006), available at <http://www.nrd.nhtsa.dot.gov/Pubs/809952.pdf>, [<http://perma.cc/0ogxqKWbwPe>].

65. AIR RES. BD., CAL. ENVTL. PROT. AGENCY, *supra* note 45, at 65.

66. OFFICE OF MGMT. & BUDGET, CIRCULAR A-94, GUIDELINES AND DISCOUNT RATES FOR BENEFIT-COST ANALYSIS OF FEDERAL PROGRAMS 9 (1992), http://www.whitehouse.gov/omb/circulars_a094, [<http://perma.cc/0baJnNjhLy8>].

67. For example, a savings of \$100,000 in 2025 dollars would be approximately \$58,500 in 2014 dollars at a 5% discount rate and \$47,500 at a 7% discount rate, using the formula $PV = FV \div (1+r)^n$.

68. Nikki Gordon-Bloomfield, *California Running Out of Money for Electric Car Rebates*, FOX NEWS, June 8, 2011, <http://www.foxnews.com/leisure/2011/06/08/california-running-out-money-for-electric-car-rebates/>, [<http://perma.cc/0SwmDCjqwZJ>]; Press Release, Cal. Envtl. Prot. Agency, Clean Vehicle Rebates Prove Popular with California Consumers (June 7, 2011), <http://www.arb.ca.gov/newsrel/newsrelease.php?id=217>, [<http://perma.cc/CQE6-PX4W>].

69. Jim Motavalli, *E.V.'s Are Here, but Expect Wait for Charging Stations*, N.Y. TIMES WHEELS BLOG (Dec. 20, 2010), <http://wheels.blogs.nytimes.com/2010/12/20/>

If ZEVs prove to be losers in the eyes of consumers, automakers and dealers will have a difficult time selling them. The early commercial experiences with the Nissan Leaf and the Chevrolet Volt suggest that the commercialization of ZEVs will not be easy.⁷⁰ Moreover, surveys of consumers indicate that they are not willing to pay a large premium to obtain the advantages of a plug-in vehicle.⁷¹ Automakers are now slashing the list prices of plug-in vehicles in an effort to overcome consumer resistance, but progress is limited.⁷² Under these circumstances, either the ZEV mandate will have to be relaxed, as has occurred in the past, or automakers and dealers will have to cut ZEV prices, thereby incurring substantial losses on each ZEV that is sold, and then raise prices on non-ZEV products to cover the losses. In effect, the ZEV mandate would become a price increase on all new vehicles sold in the United States, a troubling scenario that is acknowledged but not fully analyzed in the CARB document.⁷³

If this perverse outcome occurs, the result could be fewer new vehicle sales throughout the United States, fewer jobs at plants where non-ZEV vehicles are produced, and fewer jobs at plants that supply materials and parts for non-ZEV vehicles. The job losses from the ZEV mandate are unlikely to occur in California because very few automotive suppliers and vehicle assembly plants are located there.⁷⁴ The mandate could, however, adversely impact plants throughout North America.

e-v-s-are-here-but-expect-wait-for-charging-stations/,
[<http://perma.cc/0dCD487xHSw>].

70. See Paul A. Eisenstein, *Chevrolet Volt Unplugged: GM Slashes Prices to Spur Sales*, THE DETROIT BUREAU, June 11, 2013, <http://www.thedetroitbureau.com/2013/06/chevrolet-volt-unplugged-gm-slashes-prices-to-spur-sales/>, [<http://perma.cc/SBT8-ECZX>].

71. See Charles Child & David Sedgwick, *Conti joins EV battery makers, aims to be among top 3*, AUTOMOTIVE NEWS, Jan. 23, 2012, <http://www.autonews.com/article/20120123/OEM02/301239990>, [<http://perma.cc/0zKxdtxeJBn>]; Joseph B. White, *Is Chevy's Cruze Dulling the Spark of its Volt?*, WALL ST. J., Feb. 9, 2012, <http://online.wsj.com/article/SB10001424052970204136404577208961537456068.html>, [<http://perma.cc/0G8BRDs7Sy2>]; Chris Woodyard, *Are electric cars losing their spark?*, USA TODAY, Dec. 20, 2011, <http://usatoday30.usatoday.com/money/autos/story/2011-12-20/electric-cars-problems/52131810/1>, [<http://perma.cc/04JnHRmv3v4>].

72. Jeff Bennett, *Volt Fails to Electric-Car Price War*, WALL ST. J., Aug. 6, 2013, at B1, available at <http://online.wsj.com/news/articles/SB10001424127887324653004578649951845301298>, [<http://perma.cc/UQKm3ynhC3H>].

73. See AIR RES. BD., CAL. ENVTL. PROT. AGENCY, *supra* note 45, at 55, 65.

74. See *id.* at 55.

Here are the busiest North American plants that assemble non-ZEV vehicles, measured by 2011 production levels, that may be adversely impacted by the mandate:⁷⁵

Production Facility	Production
VW: Puebla, Mexico	514,910
Ford: Kansas City, Missouri	460,338
Nissan: Aguascalientes, Mexico	410,693
GM: Oshawa, Ontario	380,149
Ford: Dearborn, Michigan	343,888
Hyundai: Montgomery, Alabama	342,162
Nissan: Smyrna, Tennessee	333,392
Ford: Hermosillo, Mexico	328,599
Toyota: Georgetown, Kentucky	315,889
Ford: Louisville, Kentucky	310,270

The CARB analysis does not make employment forecasts outside California with and without the ZEV regulation.⁷⁶ CARB does, however, forecast positive job impacts in California because many of the companies currently making recharging equipment for electric vehicles are located there.⁷⁷ If the employment analysis of the California ZEV mandate had been conducted under OMB review, however, it would have looked at other regions of the United States. California's ZEV program might have failed a cost-benefit analysis that considered the program's nationwide impact, rather than its impact on California alone.

In summary, the EPA, through its power to grant waivers under the Clean Air Act, has enabled California to promulgate

75. *10 busiest North American assembly plants*, AUTOMOTIVE NEWS, Jan. 12, 2012, <http://www.autonews.com/article/20120102/OEM01/120109999/10-busiest-north-american-assembly-plants#axzz2l82pZcV5>, [<http://perma.cc/0YGhv966vYe>].

76. See AIR RES. BD., CAL. ENVTL. PROT. AGENCY, *supra* note 45, at 55–71 (discussing impacts on consumers, manufacturing costs, business creation, and agency costs).

77. *Id.* at 68–69.

a costly ZEV mandate that may do little or nothing to prevent climate change. At the same time, the economic impacts of the California program are likely to be national in scope. A comprehensive cost-benefit analysis of the ZEV program has not been performed, yet the program is already on a clear path toward implementation.

Congress has the power to solve this problem in the future. When a federal agency allows state regulators to issue rules with national economic ramifications, the agency should be required to justify the decision with a cost-benefit analysis under OMB Circular A-4, and the waiver decision should be covered by routine OMB review procedures.

III. ISSUING HAZARD DETERMINATIONS WITHOUT SUFFICIENT SCIENTIFIC EVIDENCE

A federal agency determination that a chemical is hazardous can result in significant economic consequences for many industries and should only be made on the basis of adequate scientific evidence. Yet federal regulators often issue hazard determinations that are in tension with the scientific findings reported by committees of the U.S. National Research Council (NRC) of the National Academy of Sciences. Because hazard determinations are quasi-regulatory actions that trigger litigation, state regulation, and market distortions, a case can be made that they should be subject to OMB review. The review would ensure that basic sound-science and administrative procedures have been followed, but it would not be as extensive as a cost-benefit analysis.

The federal government's recent handling of a formaldehyde safety issue illustrates this problem: The EPA and the National Toxicology Program are moving forward with a declaration that formaldehyde causes leukemia, even though the scientific rationale for this position has been sharply criticized by the NRC. Formaldehyde is an industrial chemical that is widely used in activities ranging from housing construction to health care services.⁷⁸ Each year, sales of formaldehyde are worth about

78. *Formaldehyde*, OCCUPATIONAL SAFETY & HAZARD ADMIN. (Mar. 23, 2012), <http://www.osha.gov/SLTC/formaldehyde/>, [<http://perma.cc/0XtTJFnSQCz>].

\$1.5 billion, and products that use formaldehyde are linked to about four million jobs and \$145 billion in economic activity.⁷⁹ It is estimated that if formaldehyde had to be substituted in the U.S. economy, consumers would incur additional costs of about \$17 billion per year.⁸⁰

Multiple federal agencies already heavily regulate human formaldehyde exposure because high doses of formaldehyde are known to cause irritation of the respiratory system and a rare form of nasal cancer.⁸¹ In 2010, spurred by a provocative report from an international organization in Lyon, France,⁸² the EPA—through the Integrated Risk Information System (IRIS)—made a preliminary determination that formaldehyde exposure is known to cause leukemia as well as nasal cancer.⁸³

An official determination that formaldehyde exposure causes leukemia could result in a variety of adverse effects on industry, such as lawsuits and voluntary product withdrawals, even before any new federal regulation is adopted. State regulations and market distortions also result from the hazard determination.⁸⁴ Furthermore, the stigma of a hazard determination, once imposed, is difficult to erase, even if the technology or substance is completely exonerated through additional scientific research.⁸⁵

79. GLOBAL INSIGHT, ECONOMIC PRIMER ON FORMALDEHYDE 3, 5 (2006), http://s3.amazonaws.com/zanran_storage/formaldehyde.nclud.com/ContentPages/2470722899.pdf, [<http://perma.cc/0afSUFcjZt>].

80. *Id.* at 7.

81. *Office of Information and Regulatory Affairs: Federal Regulations and Regulatory Reform under the Obama Administration*, 112th Cong. 40 (2012) [hereinafter *Graham Hearings*] (statement of John D. Graham, Dean, Indiana University School of Public and Environmental Affairs).

82. Press Release, Int'l Agency for Research on Cancer, IARC Classifies Formaldehyde as Carcinogenic to Humans (June 15, 2004), <http://www.iarc.fr/en/media-centre/pr/2004/pr153.html>, [<http://perma.cc/0DLVeWRufTg>].

83. EPA, TOXICOLOGICAL REVIEW OF FORMALDEHYDE—INHALATION ASSESSMENT: IN SUPPORT OF SUMMARY INFORMATION ON THE INTEGRATED RISK INFORMATION SYSTEM (IRIS) 6-45 to 6-46 (2010).

84. See Alexander H. Tullo, *Chemistry Reduces Unhealthy Vapors From Wood Composites*, 91 CHEMICAL AND ENGINEERING NEWS 20 (Aug. 12, 2013) (describing the state regulatory and market forces operating against formaldehyde), available at <http://cen.acs.org/articles/91/i32/Chemistry-Reduces-Unhealthy-Vapors-Wood.html>, [<http://perma.cc/0qooboXFrFF>].

85. See Robin Gregory et al., *Technological Stigma*, 83 AM. SCIENTIST 220, 220–223 (1995). See generally Risk, Media and Stigma: Understanding Public Challenges to Modern Science and Technology (James Flynn et al. eds., 2001).

In this case, industrial scientists were skeptical of the EPA's preliminary determination because the epidemiological literature on formaldehyde is difficult to interpret with confidence and the biological mechanism for how formaldehyde causes leukemia is not clear.⁸⁶ They persuaded Congress to compel the EPA to subject its scientific evidence and reasoning to independent review by a panel of the NRC, which is an official scientific advisory group to the federal government.⁸⁷ In a critical report, the NRC panel raised serious questions about the EPA's theory that formaldehyde exposure causes leukemia while reaffirming the known link between formaldehyde exposure and respiratory cancer.⁸⁸ The NRC also raised broader questions about the credibility of the EPA's IRIS process methodology, as there is a pattern of deficiencies in the EPA's hazard determinations (for example, in the cases of dioxin and tetrachloroethylene).⁸⁹

Before the EPA could respond to the NRC report, an entirely different federal agency—the Department of Health and Human Services' National Toxicology Program (NTP)—included in its annual report to Congress an addendum on formaldehyde. The addendum made a strong claim about the formaldehyde-leukemia link, similar to the preliminary EPA claim.⁹⁰ The NTP made a limited effort to reconcile its view with the NRC's view, but ultimately acknowledged that it agreed with the NRC's view that it is not known—from a biological mode-of-action perspective—how formaldehyde causes leukemia.⁹¹ Nevertheless, the NTP took the position that

86. See Harvey Checkoway et al., *Critical review and synthesis of the epidemiologic evidence on formaldehyde exposure and risk of leukemia and other lymphohematopoietic malignancies*, 23 *CANCER CAUSES & CONTROL* 1747, 1763 (2012) (“Existing epidemiologic evidence does not provide convincing support that formaldehyde causes any of the LHMs, including myeloid leukemia.”).

87. *Graham Hearings*, *supra* note 81, at 8.

88. NAT'L RESEARCH COUNCIL, *REVIEW OF ENVIRONMENTAL PROTECTION AGENCY'S DRAFT IRIS ASSESSMENT OF FORMALDEHYDE* 145 (2011); see also Jeremy P. Jacobs, *NAS Reviewers Slam EPA's Formaldehyde Assessment*, N.Y. TIMES, Apr. 8, 2011, <http://www.nytimes.com/gwire/2011/04/08/08greenwire-nas-reviewers-slam-epas-formaldehyde-assessmen-83879.html>, [<http://perma.cc/0YusmQFByNk>].

89. See NAT'L RESEARCH COUNCIL, *supra* note 88, at 24.

90. NAT'L TOXICOLOGY PROGRAM, U.S. DEP'T OF HEALTH & HUMAN SERVS., *ADDENDUM TO THE 12TH REPORT ON CARCINOGENS 3* (2011).

91. *Id.* at 5–6.

a substance can be known to cause cancer even if the biological mode of action is unknown.⁹²

This situation raises a key question: Who in the federal government should be in charge of managing and resolving these issues? The actions of the EPA and the NTP may not appear to be “regulations,” but they are “science-policy determinations” that can have the same practical economic burdens as regulations by triggering costly litigation.

Before making hazard determinations, agencies should assess whether a significant economic impact may result. The impact determination should not be a cost-benefit analysis, but should be similar to the significance determinations that OMB and federal agencies already make under Executive Order 12,866 to determine whether OMB review is necessary.⁹³ If the impact is likely to be significant, the next step would be independent scientific review by an organization such as the NRC. Federal agency compliance with the NRC panel’s findings would be overseen by OMB or the White House Office of Science and Technology Policy (OSTP), in consultation with other interested federal agencies.

Congress should require OMB or OSTP to resolve disputes about hazard determinations, at least in cases where the NRC has made clear determinations. To play this role effectively, OMB and OSTP might need a modest increase in scientific staffing above their current levels. It is important, however, to recognize that the roles of OMB and OSTP are not to redo the agency’s hazard determination. Instead, the OMB and OSTP role is limited to deciding whether a hazard determination should be referred to the NRC and, if so, whether the agency has adhered to the NRC’s determinations in the agency’s final determination. OMB and OSTP should also supervise interagency discussions of these matters, as multiple federal agencies may have an interest. OMB and OSTP already play this role on a wide range of scientific and policy matters.⁹⁴

92. *Id.* at 2.

93. See Exec. Order No. 12,866, 58 Fed. Reg. 5911 (Jan. 22, 1993), *reprinted as amended in* 5 U.S.C. § 601 (2012).

94. See *The Mission and Structure of the Office of Management and Budget*, OFFICE OF MGMT. & BUDGET, http://www.whitehouse.gov/omb/organization_mission, [<http://perma.cc/0VzAKdNmY1G>]; *About OSTP*, OFFICE OF SCI. & TECH. POLICY,

IV. ENTERING INTO BINDING AGREEMENTS WITH LITIGANTS THAT
CALL FOR NEW RULEMAKINGS

Federal regulators, after being sued by pro- or anti-regulation activist groups, are entering into binding agreements with litigants that call for new rulemakings within specified deadlines. The rulemaking commitments are being made before any cost-benefit analysis or public comment and without OMB review. Sometimes the deadlines are set in a manner that ensures that cost-benefit analysis and OMB review will be compromised.

One of the co-authors (John D. Graham) experienced the consequences of “regulation by consent decree” on several occasions during his tenure at the OMB (2001–2006). For example, during the Clinton administration, the EPA entered into a litigation settlement that committed the agency to an expensive rulemaking aimed at reducing mercury emissions from coal-fired power plants.⁹⁵ When, during the George W. Bush administration, EPA staff briefed the author on the cost-benefit basis for the mercury rule, it became clear that many of the emissions reductions expected from the mercury rule were already to be accomplished by another rule aimed at reducing nitrogen dioxide emissions from coal plants.⁹⁶ According to EPA staff, the residual benefits of reducing elemental mercury were not sufficient to justify the entire cost of the mercury rule. Yet, the agency was legally committed to issuing a rule by a fixed deadline, and expectations for a rule had been established in the environmental advocacy community.⁹⁷

The EPA crafted a different rationale for the mercury rule based on the “co-benefits” resulting from simultaneous control

<http://www.whitehouse.gov/administration/eop/ostp/about>
[<http://perma.cc/0Dqrhijkxs6>] (last visited Nov. 28, 2013).

95. See *Mercury and Air Toxic Standards (MATS) for Power Plants: History*, EPA, <http://www.epa.gov/airquality/powerplanttoxics/history.html>, [http://perma.cc/0aQs4Sm38RF].

96. The EPA found that the same control technology used to reduce nitrogen dioxide also reduced oxidized, nonelemental mercury levels. See John D. Graham, *The Evolving Regulatory Role of the U.S. Office of Management and Budget*, 1 REV. ENVTL. ECON. & POL'Y 171, 184 (2007).

97. See *Mercury and Air Toxic Standards (MATS) for Power Plants: History*, *supra* note 95.

of a different pollutant, particulate matter.⁹⁸ The obvious counterargument to this position is that direct regulation of particulate matter from many sources (not just coal plants) might be a more cost-effective method of capturing those benefits, and that the EPA was already promulgating a suite of rules to reduce particle emissions from different sources, including electric utility plants. With a judicial deadline forcing its hand, OMB worked with the EPA to issue a mercury rule, but it had a weak cost-benefit justification. The rule was ultimately overturned by the D.C. Circuit for reasons unrelated to the cost-benefit issue.⁹⁹

The lesson from this example is that regulators may be tempted, during settlement negotiations, to commit themselves to rulemakings that have not yet been analyzed from a cost-benefit perspective. If policymakers are serious about evidence-based regulatory reform, this practice needs to be restrained. Congress should consider new legislation that constrains agency powers to enter into such settlements without first conducting appropriate analysis to determine whether a rule is necessary and desirable. A public comment process is also needed before the agency makes the commitment. Congress should require that ample time be made available for public comments as well as for routine OMB review of the matter.

V. CONCLUSION

OMB and cost-benefit review of significant regulatory activity by federal agencies began in the Ford, Nixon, and Carter administrations, was buttressed and codified during the Reagan and Bush administrations, and was retained and refined during the Clinton, George W. Bush, and Obama administrations.¹⁰⁰ From a political perspective, Presidents are accountable for the

98. Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606 (May 18, 2005) (“Significant Hg emissions reductions can be obtained as a ‘co-benefit’ of controlling emissions of SO₂ and NO_x; thus, the coordinated regulation of Hg, SO₂, and NO_x allows Hg reductions to be achieved in a cost-effective manner.”).

99. See *New Jersey v. EPA*, 517 F.3d 574, 577, 582–83 (D.C. Cir. 2008).

100. See Note, *OIRA Avoidance*, 124 HARV. L. REV. 994 (2011); *Office of Information and Regulatory Affairs (OIRA) Q&A's*, OFFICE OF MGMT. & BUDGET, http://www.whitehouse.gov/omb/OIRA_QsandAs, [http://perma.cc/3HQH-ADW7].

economy's performance, and thus the White House expects an opportunity to review regulatory proposals that will have a significant impact on vital sectors of the economy or the economy as a whole. It is difficult to envision how a President can have a coherent national economic policy without having control over the federal regulatory system.

In this paper, we have argued that Presidents often have less control than is commonly thought because a substantial amount of regulatory and quasi-regulatory activity occurs outside OMB and cost-benefit review. We have highlighted four types of activities that evade OMB review: (1) agency issuance of informal documents such as memoranda, policy statements, and guidance; (2) agency approval of costly state regulatory policies under federal laws that authorize selective waiver of federal preemption of state regulation; (3) agency issuance of hazard determinations that shape the regulatory environment for technologies, substances, and market practices; and (4) agency decisions to enter into settlement agreements that create duties to regulate.

For each of these types of regulatory and quasi-regulatory activity, federal agencies exert a significant economic impact on key industries (such as energy, housing, and automobiles) and, in some cases, on the national economy. These underappreciated powers allow agencies to act without the discipline of routine OMB review and cost-benefit oversight.

We are not arguing that federal agencies should be prohibited from issuing informal guidance, approving state regulations, issuing hazard determinations, or entering into settlement agreements with pro-regulation groups. Our claim is more modest. We are arguing that when these actions are likely to have a significant economic impact, they should be subject to routine OMB review and cost-benefit requirements. Congress can readily make this happen through targeted language in regulatory reform legislation.

Mr. KING. Thank you, Dean Graham, for your testimony.
And the Chair now recognizes Ms. Miller for her testimony.

**TESTIMONY OF SOFIE E. MILLER, SENIOR POLICY ANALYST,
REGULATORY STUDIES CENTER, THE GEORGE WASHINGTON
UNIVERSITY**

Ms. MILLER. Thank you, Chairman King, Ranking Member Cohen, and Members of the Task Force, for inviting me to share my expertise. Thank you also, Chairman Goodlatte and Ranking Member Conyers, for joining us today. I appreciate your attention to this issue. I appreciate the Task Force's interest in the rule-making process, including in retrospective review, and opportunities for Congress to improve it.

I am the senior policy analyst at the George Washington University Regulatory Studies Center, where I analyze the effects of regulation on public welfare and evaluate regulatory reforms, including the success of current and past retrospective review efforts. Through my research, I've identified ways to improve these initiatives.

Retrospective review is a bipartisan reform effort that can improve both the quality of existing rules and of future rules by learning what works well in a regulatory context and what doesn't. My remarks today include how retrospective review can be a powerful tool toward an effective regulatory process, how past and current reforms have fared, and ways to improve retrospective review to ensure that regulations are accomplishing their intended outcomes.

Retrospective review is a form of program evaluation that reviews the efficacy of a policy, in this case, a regulation, after implementation to evaluate whether it has had its intended effect and whether it should be continued or revised. These reviews can inform policymakers on how best to allocate limited resources to accomplish broad social goals, like improved environmental quality or better human health through regulation. Retrospective review can provide valuable feedback and learning that improves the design of future regulations.

While policymakers have the opportunity to revisit many Federal programs each time Federal funds are being appropriated, regulatory programs often exist in perpetuity without a statutory requirement to revisit them after the fact. Every year Federal agencies issue thousands of new regulations, but despite the pace of regulatory activity, regulators seldom look back at existing rules to consider whether they are accomplishing their goals and resulting in the estimated public benefits and costs. That's why President Obama in 2011, like Presidents before him, directed Federal agencies to review existing regulations and to "modify, streamline, expand, or repeal them in accordance with what has been learned."

Policies that apply retrospective review to regulations have a long history in the United States, dating back to the Carter administration and continued by every President since then. Despite 40 years of bipartisan reform efforts, agencies still do not conduct effective retrospective review of the rules.

More recent efforts to encourage this review, such as the three executive orders issued by President Obama, have not resulted in

a systematic culture of evaluation or large burden reductions for the regulated public. For example, an analysis I conducted of EPA's 2013 plan for retrospective review found that it did not include the unprecedented cost savings and burden reductions for the regulated public which many observers had hoped for. Only one-fifth of the regulatory actions in EPA's progress report were expected to reduce costs, and a number of actions actually increased burdens on the regulated entities.

One reason why agencies struggle to review the effects of their rules is because they don't design their rules at the outset to facilitate this measurement, despite existing recommendations from OMB that they do so. Writing rules to facilitate later retrospective review can ensure effective data collection and encourage regulators to clearly identify and think through how the proposed rule will address the policy problem at hand.

In 2014, our team at the G.W. Regulatory Studies Center examined high priority proposed rules to see whether they included components that would help the agencies review their effects after implementation. We found that not a single rule we evaluated contained a plan for review, and most rules didn't contain any quantitative metrics that could be used to measure whether the rule was successful. Independent agencies scored particularly poorly on these criteria. This suggests that the current review system, while headed in the right direction, is not sufficient to create the right incentives for effective evaluation.

Retrospective review is a key component of an effective regulatory review process because it allows agencies to review the effects of their existing rules and evaluate whether they are accomplishing their intended goals and determine what effect they have on the regulated public. Writing these rules at the outset to facilitate this measurement can improve regulatory outcomes and enable policymakers like yourselves to learn from what has worked and what hasn't.

Thank you all.

[The prepared statement of Ms. Miller follows:]*

***Note:** Supplemental material submitted by this witness is not printed in this hearing record but is on file with the Task Force, and can also be accessed in her statement at:

<http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=104981>

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

Prepared Statement of Sofie E. Miller

Senior Policy Analyst
The George Washington University Regulatory Studies Center

Hearing on

**The Federal Government on Autopilot: Delegation of
Regulatory Authority to an Unaccountable Bureaucracy**

Judiciary Committee Task Force on Executive Overreach

United States House of Representatives

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Introduction

Thank you Chairman King, Ranking Member Cohen, and Members of the Task Force for inviting me to share my research on the retrospective review of regulations, and how the review process can be improved. I am Senior Policy Analyst at the George Washington University Regulatory Studies Center, where I analyze the effects of regulation on public welfare and evaluate regulatory reforms. Recently, I researched the success of current and past retrospective review efforts and identified ways to improve these initiatives.

I appreciate the Task Force's interest in the rulemaking process, including retrospective review, and determining whether there are opportunities for Congress to improve it. My prepared statement includes the following points:

- A key component of an effective regulatory process is reviewing the effects of existing rules to evaluate whether they are accomplishing their intended goals, and to determine what effect they have on the regulated public. Retrospective review is a bipartisan reform effort that can improve both the quality of existing rules and of future rules by learning what works well in a regulatory context and what doesn't.
- Despite 40 years of bipartisan reform efforts, agencies still do not conduct effective retrospective review of their rules. More recent efforts to encourage *ex post* review have not resulted in a systematic culture of evaluation or large burden reductions for the regulated public.
- It is important to plan how to evaluate a rule at the outset of rulemaking: writing rules to facilitate later retrospective review can ensure effective data collection and encourage regulators to clearly identify (and think through) how the proposed rule will address the policy problem at hand. Agencies are not currently designing their rules at the outset to be measured, which compounds the difficulty of conducting effective retrospective review.

My recent working paper evaluating how well agencies design their rules for future review is attached as an addendum to this statement, as is my article with Susan Dudley in the *Administrative Law Review Accord* on retrospective review as a remedy for regulatory accretion.¹

¹ For additional perspectives on how retrospective review can address regulatory accretion, see Mandel & Carew, "Regulatory Improvement Commission: A Politically-Viable Approach to U.S. Regulatory Reform," Progressive Policy Institute, 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

An Introduction to Retrospective Review

Retrospective review is a form of program evaluation that reviews the efficacy of a program or policy after implementation. The purpose of retrospective review is to evaluate whether a policy—in this case, a regulation—has had its intended effect, and whether it should be continued or revised. By examining the effects of existing rules, these reviews can inform policymakers on how best to allocate limited resources to accomplish broad social goals, like improved environmental quality or better human health, through regulation. Retrospective review can provide valuable feedback and learning that improves the design of future regulations.

While policymakers have the opportunity to revisit many federal programs each time federal funds are being appropriated, regulatory programs often exist in perpetuity without a statutory requirement to revisit implementation. Every year, federal agencies issue thousands of new regulations that both benefit and harm Americans. Despite the pace of regulatory activity, regulators seldom look back at existing rules to consider whether they are accomplishing their goals and resulting in the estimated public benefits and costs. That’s why President Obama, like presidents before him, encouraged federal regulatory agencies to review existing regulations and to “modify, streamline, expand, or repeal them in accordance with what has been learned.”²

Regulations often receive critical analysis *before* promulgation, usually in the form of benefit-cost analysis. This prospective analysis describes the anticipated results of a proposed rule, including unquantifiable effects. However, regulatory agencies have a mixed record on *ex post* review despite their “long track record of prospective analysis of proposed regulations that can address these questions.”³

Past Retrospective Review Efforts

For almost 40 years, presidents and Congress have directed agencies to consider the effects of regulations once they are in place;⁴ however, such retrospective analysis has received much less attention and fewer resources than those directed at *ex ante* regulatory review.⁵ In 1978,

² Executive Order 13563. “*Improving Regulation and Regulatory Review*.” January 18, 2011. <https://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf>

³ Joseph Aldy. “Learning from Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy.” *A report for the Administrative Conference of the United States*. 2014. <https://www.acus.gov/report/retrospective-review-report>

⁴ Susan E. Dudley. “A Retrospective Review of Retrospective Review.” The George Washington University Regulatory Studies Center. May 2013. Page 1. <http://regulatorystudies.columbian.gwu.edu/files/downloads/20130507-a-retrospective-review-of-retrospective-review.pdf>.

⁵ Joseph Aldy. “Learning from Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy.” *A report for the Administrative Conference of the United States*. 2014. <https://www.acus.gov/report/retrospective-review-report>.

President Carter directed agencies to “periodically review their existing regulations to determine whether they are achieving ... policy goals.”⁶ President Reagan called on agencies to “perform Regulatory Impact Analyses of currently effective major rules,”⁷ and President Clinton’s Executive Order 12866 directs each agency to “periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated so as to make the agency’s regulatory program more effective in achieving the regulatory objectives, less burdensome, or in greater alignment with the President’s priorities and ... principles.”⁸

The law also mandates the retrospective review of certain regulations. The Regulatory Flexibility Act of 1980 requires agencies to review rules with significant economic impacts on small entities every ten years.⁹ Further, although less specific, the Regulatory Right to Know Act called on the Office of Management and Budget (OMB) to report annually on benefits and costs of regulation and make recommendations for their reform.¹⁰

More recently, President Obama issued no fewer than three executive orders directing agencies to conduct retrospective analysis of existing regulations.¹¹ These executive orders instruct agencies to submit regular plans for the retrospective review of their existing significant regulations “to determine whether any such regulations should be modified, streamlined, expanded, or repealed,” and encourage independent agencies to participate in the review process.¹²

⁶ Executive Order 12044, 43 Fed. Reg. 12661 (March 24, 1978). Revoked February 17, 1981 by Exec. Order No. 12291, <http://www.presidency.ucsb.edu/ws/?pid=30539>.

⁷ Executive Order 12291, 46 Fed. Reg. 13193 (February 19, 1981). Revoked October 4, 1993, by Exec. Order No. 12866, <http://www.archives.gov/federal-register/codification/executive-order/12291.html>.

⁸ Executive Order 12866 §5(a), 3 C.F.R. 638, 644 (1994). <http://www.archives.gov/federal-register/executive-orders/pdf/12866.pdf>

⁹ *Regulatory Flexibility for Small Entities Section 610 Reviews*, The United States Environmental Protection Agency (2015). <http://www.epa.gov/reg-flex/section-610-reviews>.

¹⁰ U.S. Office of Management and Budget. *Validating Regulatory Analysis: 2005 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*. (2005)

¹¹ Executive Order 13563. “*Improving Regulation and Regulatory Review*.” January 18, 2011. <https://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf>

Executive Order 13579. “*Regulation and Independent Regulatory Agencies*.” July 11, 2011. <https://www.gpo.gov/fdsys/pkg/FR-2011-07-14/pdf/2011-17953.pdf>

Executive Order 13610. “*Identifying and Reducing Regulatory Burdens*.” May 10, 2012. <https://www.gpo.gov/fdsys/pkg/FR-2012-05-14/pdf/2012-11798.pdf>

¹² Executive Orders governing regulatory oversight have generally not covered “independent regulatory agencies” (such as the Federal Communications Commission, the Securities and Exchange Commission, and the Consumer Product Safety Commission).

State of Retrospective Review

Despite these efforts, regulations continue to accumulate without adequate *ex post* examination¹³ and procedures for doing so have not been institutionalized to the extent that *ex ante* regulatory impact analysis has been.¹⁴ Even though policymakers within the Executive and Legislative Branches reveal a continuing interest in retrospective review of agency rules,^{15,16} such review is not an institutionalized aspect of the U.S. regulatory process, and reviews that have occurred are as likely to create new burdens as to ease existing ones.¹⁷

This is likely partly due to incentives; OMB serves a gatekeeper role for new regulations, which compels regulating agencies to present analysis consistent with executive order requirements before they can issue new rules. On the other hand, once a regulation is issued, the consequence of not conducting *ex post* analysis is less problematic from the agency's perspective in that the regulation will remain on the books. In addition, conducting such analysis can be difficult—especially because, as discussed later in this statement, agencies are not designing their rules at the outset to facilitate retrospective review. As noted by Reeve Bull in a recent *Administrative Law Review* article, the insights of behavioral economics may also help us understand why regulatory agencies may be reluctant to review and modify regulations once they are in place.¹⁸

Improving Existing Efforts

Ex post review makes it possible for the government and the public to measure whether a particular rule has had its intended effect. However, waiting until after a regulation is already drafted, finalized, and implemented can hamper retrospective review. For example, after a

¹³ Reeve T. Bull, "Building a Framework for Governance: Retrospective Review and Rulemaking Petitions." 67 *Administrative Law Review*. (2015).

¹⁴ Susan E. Dudley. *Reducing Unnecessary and Costly Red Tape through Smarter Regulations: Hearing Before the Joint Economic Committee*, 114th Congress (2013). https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/2013_06_26_Dudley_JEC_statement.pdf

¹⁵ In the Legislative Branch, for example, Sens. Heidi Heitkamp (D-N.D.) and James Lankford (R-Okla.) have proposed the Smarter Regulations Act of 2015 (S. 1817) on July 21, 2015, which would require agencies to draft their rules in a way to enable better review after the fact. Smarter Regulations Through Advance Planning and Review Act, S. 1817, 114th Cong. (2015), <https://www.congress.gov/bills/114th-congress/senate-bill/1817>.

¹⁶ Consumer Product Safety Commission, *Statement of Commissioner Joseph P. Mohorovic Regarding Retrospective Review in the Commission's Rulemaking Under Section 108 of the Consumer Product Safety Improvement Act of 2008 (CPSIA)* (2015), <http://www.cpsc.gov/en/About-CPSC/Commissioners/Joseph-Mohorovic/Commissioner-Mohorovic-Statement/Statements/Statement-of-Commissioner-Joseph-P-Mohorovic-Regarding-Retrospective-Review-in-the-Commissions-Rulemaking-Under-Section-108-of-the-Consumer-Product-Safety-Improvement-Act-of-2008-CPSIA/>

¹⁷ Sofie E. Miller. "EPA's Retrospective Review of Regulations: Will It Reduce Manufacturing Burdens?" *Engage: The Journal of the Federalist Society Practice Groups*, July 2013, page 4. <http://www.fed-soc.org/publications/detail/cpas-retrospective-review-of-regulations-will-it-reduce-manufacturing-burdens>

¹⁸ Reeve T. Bull, "Building a Framework for Governance: Retrospective Review and Rulemaking Petitions." 67 *Administrative Law Review*. (2015).

regulation has been in place for 10 years it may be too late to collect data crucial to evaluating its effect. In his report for the Administrative Conference of the United States, Harvard professor Joseph Aldy notes that while they are subject to rigorous *ex ante* analysis, economically significant rules “are not designed to produce the data and enable causal inference of the impacts of the regulation in practice.”¹⁹ This design flaw makes it difficult to evaluate rules after they are already in place.

Multiple government documents already instruct agencies to plan prospectively for retrospective review. In his implementing 2011 memo on retrospective review, then-Administrator of the Office of Information and Regulatory Affairs Cass Sunstein stated that “future regulations should be designed and written in ways that facilitate evaluation of their consequences and thus promote retrospective analyses and measurement of ‘actual results.’”²⁰ This emphasis is repeated in a memo Sunstein issued later that year, “Final Plans for Retrospective Analysis of Existing Rules.”

In its 2015 *Final Report to Congress on the Benefits and Costs of Federal Regulations*, OMB states that such retrospective analysis can serve as an important corrective mechanism to the flaws of *ex ante* analyses. According to that report, the result of systematic retrospective review of regulations

... should be a greatly improved understanding of the accuracy of prospective analyses, as well as corrections to rules as a result of *ex post* evaluations. A large priority is the development of methods (perhaps including not merely before-and-after accounts but also randomized trials, to the extent feasible and consistent with law) to obtain a clear sense of the effects of rules. In addition, and importantly, rules should be written and designed, in advance, so as to facilitate retrospective analysis of their effects, including consideration of the data that will be needed for future evaluation of the rules’ *ex post* costs and benefits.²¹

These recommendations are bolstered by the academic literature on program evaluation.^{22,23} Waiting until implementation to think about retrospective review may leave agencies without the

¹⁹ Joseph Aldy. “Learning from Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy.” *A report for the Administrative Conference of the United States*. 2014. Page 9. <https://www.acus.gov/report/retrospective-review-report>

²⁰ United States. Office of Management and Budget. Office of Information and Regulatory Affairs. *MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: Retrospective Analysis of Existing Significant Regulations*. By Cass Sunstein. April 25, 2011.

²¹ United States. Office of Management and Budget. *2015 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*. March 10, 2016. https://www.whitehouse.gov/sites/default/files/omb/inforeg/2015_cb/2015-cost-benefit-report.pdf

²² Paul J. Gertler, Sebastian Martinez, Patrick Premand, Laura B. Rawlings, and Christel M. J. Vermeersch. “Impact Evaluation in Practice.” *The World Bank*. 2011. http://siteresources.worldbank.org/EXT/HDOFFICE/Resources/5485726-1295455628620/Impact_Evaluation_in_Practice.pdf

resources and data they need to effectively review their rules. For these reasons it is necessary to think prospectively about retrospective review and, to that end, that agencies should design their rules to better aid measurement of actual results.

Prospectively Planning to Evaluate Regulation

In 2014, the George Washington University Regulatory Studies Center evaluated all high priority proposed rules issued that year to determine whether they were designed in a manner that would make their outcomes measurable *ex post*. As a part of this evaluation, the Center assessed whether agencies included a discussion of retrospective review as required by the President's executive orders and the Sunstein memoranda. We also submitted comments to the agencies providing suggestions on how best to incorporate plans for retrospective review at the time of each proposed rule's issuance.

Based on our review of the rules proposed in 2014, agencies are not designing their rules to facilitate *ex post* measurement, and are not prospectively planning for retrospective review at the outset of rulemaking: of all proposed rules examined, not one included a plan for retrospective review.

However, even without an explicit plan, proposed rules may contain elements that could facilitate *ex post* analysis. To evaluate whether the proposed rules were "designed and written in ways that facilitate evaluation of their consequences," we measured each one against five criteria:

- Did the Agency clearly identify the problem that its proposed rule is intended to solve, and do the policies that the Agency proposes address this problem?
- Did the Agency provide clear, measurable metrics that reviewers can use to evaluate whether the regulation achieves its policy goals?
- Did the Agency write its proposal to allow measurement of both outputs and outcomes to enable review of whether the standards directly result in the outcomes that the agency intends?
- Did the Agency commit to collecting information to assess whether its measurable metrics are being reached?
- Did the Agency provide a clear timeframe for the accomplishment of its stated metrics and the collection of information to support its findings?

In general, agencies were better at considering these elements that could support future evaluation of the effects of their rules. Agencies were best at identifying the problems that their

²³ Joseph Aldy, "Learning from Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy." *A report for the Administrative Conference of the United States*. 2014. Page 6. <https://www.acus.gov/report/retrospective-review-report>

rules were intended to address and worst at establishing timeframes for review and identifying linkages between proposed standards and their outcomes. Despite the importance of identifying how to measure the success of a rule, only 36% of rules included quantitative metrics, and only 22% included any plans to collect data that could be used to measure regulatory outcomes.

On all criteria, the Environmental Protection Agency, Department of Transportation, and the Department of Energy generally scored the best, and independent agencies (including the National Labor Relations Board, the Consumer Financial Protection Bureau, and the Federal Reserve Board) consistently scored the worst. While almost three quarters of executive branch rules identified a problem, only one quarter of independent agency rules did. Further, no independent agency rules met any of the other four criteria for prospectively planning for retrospective review. While the sample of independent agency rules was small, this finding—while it should be interpreted with caution—may be indicative of a broader trend for independent agency rules.²⁴

Recommendations

Based on these findings, agencies should strengthen their efforts to prospectively plan for retrospective review—especially independent agencies. In order to improve prospects for retrospective review, we recommend the following.

- Agencies should clearly identify and quantify the directional goals of their rules. Being clear about how to measure a rule's goals increases transparency by letting the public know which benefits to expect in return for the opportunity costs incurred by new regulation.
- Agencies should plan prospectively for information collection that will support *ex post* measurement, and make use of existing agency data to measure outcomes. Without data on key outcomes, there is no way to measure a rule's results. By planning ahead for information collection, agencies can pave the way for future review.
- Agencies should establish clear linkages between proposed standards and expected outcomes. Given the enormous benefits—and, sometimes, enormous costs—that are on the line, agencies should prioritize establishing how the standards it proposes causes the benefits that are meant to result.

These changes would provide agencies and the public with better information about the effects of regulation and how to structure future regulatory programs to achieve better results while reducing burdens on the regulated community.

²⁴ Arthur Fraas & Randall Lutter, "On the Economic Analysis of Regulations and Independent Regulatory Commissions," *Administrative Law Review*, Vol. 63 pp. 213 - 241, Special Edition. 2011.

Mr. KING. Thank you, Ms. Miller.
I now recognize the gentleman, Mr. Narang, for his testimony.

**TESTIMONY OF AMIT NARANG, REGULATORY POLICY
ADVOCATE, PUBLIC CITIZEN**

Mr. NARANG. Thank you. Chairman King, Ranking Member Cohen, and distinguished Members of this Task Force, thank you for the opportunity to testify today. I'm Amit Narang, regulatory policy advocate at Public Citizen's Congress Watch.

Public Citizen is a national public interest organization with more than 400,000 members and supporters. For more than 40 years, we have successfully advocated for stronger health, safety, consumer protection, and other rules, as well as for a robust regulatory system that curtails corporate wrongdoing and advances the public interest.

Public health and safety regulation has been among the greatest public policy success stories in our country's history. Regulations have made our air far less polluted and our water much cleaner, they've made our food and drugs safer, they've made our workplaces less dangerous, they have made our financial system more stable, they have protected consumers from unsafe products and from predatory lending practices, they've made our cars safer, they've outlawed discrimination on the basis of race and gender, and much more.

Although these regulations are now considered to be bedrock protections widely popular with the public, it is important to keep in mind that opponents of these regulations at the time predicted economic doom and gloom if they were adopted. None of these predictions came true, of course, and this is an important lesson when considering current doomsday predictions from opponents of new regulations.

In short, our regulatory safeguards are to be celebrated and emulated. Unfortunately, the state of our current regulatory system is a deep cause for concern. Our regulatory system is badly broken and in dire need of reform. The rulemaking process moves too slowly to protect the public, agency funding continues to stagnate or even decline, and the revolving door between regulated industry and Federal agencies continues to spin, leading to industry capture of our regulatory system.

Given the focus of this hearing, I will spend the rest of my time on the current crisis of regulatory delay. The sad truth is that nearly every major new piece of legislation that Congress enacts to protect the public takes far too long to result in regulations that actually do benefit and protect consumers and working families. Take these four laws passed on a bipartisan basis during President Obama's first term as an illustration: the Pipeline Safety Act of 2011, the Food Safety Modernization Act, the Family Smoking Prevention and Tobacco Control Act, and the Dodd-Frank Wall Street Reform Act.

All of these laws were passed by Congress to protect the public's health, safety, and financial security, and yet regulators have taken on average 4 to 6 years to develop and put in place important new regulations that implement and enforce each law. Astonishingly, three of the four laws still have not been fully imple-

mented. For all of these laws, Federal agencies miss statutory deadline after statutory deadline as if those deadlines were optional instead of mandatory.

It's the public that pays the price of regulatory inaction and delay: pipeline leaks that pollute the environment and make neighborhoods uninhabitable, increasing use of and addiction to e-cigarettes, continued reckless gambling on Wall Street, and frequent tainted food scandals. The unacceptable delays in implementing these laws are the rule, not the exception. As the breadth of these laws demonstrates, the crisis of regulatory delay extends across agencies and across regulatory sectors. The anecdotal examples are backed up by comprehensive empirical evidence of systemic regulatory delays.

Last year the conservative-leaning think tank, the R Street Institute, undertook a comprehensive study of how often Federal agencies are able to meet the statutory deadlines when enacting significant new regulations. The results are deeply troubling. Regulators missed congressional deadlines a shocking 50 percent of the time over the last 20 years.

What are causing these delays? The bulk of new regulations that are minor and technical in nature do not encounter significant delay. Rather, it is the most important regulations, sometimes termed "significant" or "major," that provide Americans with the greatest benefits, but also take the longest to finalize. This is because the rulemaking process for these rules has become inefficient at best and dysfunctional at worst.

When developing significant or major regulations, agencies are required to analyze not only the rule itself, but also multiple alternatives, even when alternatives are prohibited by statute. Agencies are required to conduct multiple cost-benefit analyses that are highly speculative yet demand enormous resources. Agencies are required to conduct at least one, and often more than one, public comment period and respond to the hundreds of thousands of comments submitted by stakeholders. Executive agencies must submit their significant rules to OIRA for review, an increasing source of delay, as OIRA reviews have taken longer under this Administration than any previous one.

Finally, all of these procedural requirements occur against the backdrop of a likely court challenge by regulatory opponents.

As the saying goes, protections delayed are protections denied. The regulatory process that disregards statutory deadlines, vetoes congressional mandates on the basis of flawed cost-benefit analysis, and is generally unable to fulfill congressional intent in protecting the public should be a high priority concern for all Members of Congress.

This Congress has been interested in streamlining inefficient regulatory processes that result in undue delay, such as legislation passed last year to expedite energy and infrastructure permit approvals by stripping away environmental cost-benefit analysis, imposing hard caps on public comment periods, and sharply reducing the ability for stakeholders to bring court challenges. It is disappointing, then, to see Congress propose essentially the opposite reforms for public health and safety regulations, adding more cost-

benefit analysis, longer comment periods, more OIRA review, and more opportunities for regulatory opponents to challenge in court.

Congress can and should fix our regulatory process, and it's long past time that it does. This is the kind of congressional accountability that is needed. Public Citizen stands ready to work with lawmakers on both sides of the aisle to make our regulatory system work effectively and efficiently for consumers, working families, and the public.

Thank you, and I'm looking forward to answering any questions you may have.

[The prepared statement of Mr. Narang follows:]

Written Testimony of

Amit Narang
Regulatory Policy Advocate, Public Citizen

before the

The Task Force on Executive Overreach,
U.S. House Judiciary Committee

on

“The Federal Government on Autopilot: Delegation of Regulatory Authority to an
Unaccountable Bureaucracy.”

May 24, 2016



Mr. Chairman King, Ranking Member Cohen, and Members of the Task Force,

Thank you for the opportunity to testify today on the importance of regulations to public health and safety. I am Amit Narang, Regulatory Policy Advocate at Public Citizen's Congress Watch. Public Citizen is a national public interest organization with more than 450,000 members and supporters. For more than 40 years, we have successfully advocated for stronger health, safety, consumer protection and other rules, as well as for a robust regulatory system that curtails corporate wrongdoing and advances the public interest.

Public Citizen co-chairs the Coalition for Sensible Safeguards (CSS). CSS is an alliance of more than 150 consumer, small business, labor, scientific, research, good government, faith, community, health and environmental organizations joined in the belief that our country's system of regulatory safeguards provides a stable framework that secures our quality of life and paves the way for a sound economy that benefits us all. Time constraints prevented the Coalition from reviewing my testimony in advance, and I write only on behalf of Public Citizen.

Over the last century, and through the Obama administration, regulations have made our food supply safer; saved hundreds of thousands of lives by reducing smoking rates; improved air quality, protected children's brain development by phasing out leaded gasoline; saved consumers billions by facilitating price-lowering generic competition for pharmaceuticals; reduced toxic emissions into the air and water; empowered disabled persons by giving them improved access to public facilities and workplace opportunities; guaranteed a minimum wage, ended child labor and established limits on the length of the work week; saved the lives of thousands of workers every year; protected the elderly and vulnerable consumers from a wide array of unfair and deceptive advertising techniques; ensured financial system stability (at least when appropriate rules were in place and enforced); made toys safer; saved tens of thousands of lives by making our cars safer; and much more.

To review the facts of how regulation has benefitted and strengthened our country, however, is not to suggest that all is well with the regulatory system. Indeed, our regulatory system is in need of reform, but not because there is too much regulation. Rather, under-regulation is the status quo and too little regulation is hurting the public.

The evidence of under-regulation includes both massive and dramatic disasters that catch the public's attention as well as daily tragedies that could have been easily prevented with regulatory standards in place. In both instances, the common link is a complete absence of any regulatory standards or ineffective and weak standards that do not protect the public. The costs of under-regulation are real and are borne by working families, consumers, taxpayers, and the public.

Regulations are Smart for our Economy

Regulation has led to some of the most important public health, safety, environmental and economic success stories in our country's history. Regulation has:

- Made our food safer.¹
- Saved tens of thousands of lives by making our cars safer.²
- Made it safer to breathe, saving hundreds of thousands of lives annually.³
- Protected children's brain development by phasing out leaded gasoline and dramatically reducing average blood levels.⁴
- Empowered disabled persons by giving them improved access to public facilities and workplace opportunities, through implementation of the Americans with Disabilities Act.⁵
- Guaranteed a minimum wage, ended child labor and established limits on the length of the work week.⁶
- Saved the lives of thousands of workers every year.⁷

¹ American Public Health Association. (2010, November 30). *APHA Commends Senate for Passing Strong Food Safety Legislation*. Retrieved 24 February, 2012, from

http://www.makourfoodsafes.org/tools/assets/files/APHA_Senate-Passage-Food-Act_FINAL2.pdf

² NHTSA's vehicle safety standards have reduced the traffic fatality rate from nearly 3.5 fatalities per 100 million vehicles traveled in 1980 to 1.41 fatalities per 100 million vehicles traveled in 2006. Steinzor, R., & Shapiro, S. (2010). *The People's Agents and the Battle to Protect the American Public: Special Interests, Government, and Threats to Health, Safety, and the Environment*. University of Chicago Press.

³ Clean Air Act rules saved 164,300 adult lives in 2010. In February 2011, EPA estimated that by 2020 they will save 237,000 lives annually. EPA air pollution controls saved 13 million days of lost work and 3.2 million days of lost school in 2010, and EPA estimates that they will save 17 million work-loss days and 5.4 million school-loss days annually by 2020. See U.S. Environmental Protection Agency, Office of Air and Radiation. (2011, March). *The Benefits and Costs of the Clean Air and Radiation Act from 1990 to 2020*. Available from: <<http://www.epa.gov/oar/sect812/feb11/fullreport.pdf>>.

⁴ EPA regulations phasing out lead in gasoline helped reduce the average blood lead level in U.S. children ages 1 to 5. During the years 1976 to 1980, 88 percent of all U.S. children had blood levels in excess of 10µg/dL; during the years 1991 to 1994, only 4.4 percent of all U.S. children had blood levels in excess of that dangerous amount. Office of Management and Budget, Office of Information and Regulatory Affairs. (2011). *2011 Report to Congress on the Benefits and Costs of Federal Regulations on Unfunded Mandates on State, Local, and Tribal Entities*. Available from: <http://www.whitehouse.gov/sites/default/files/omb/info/2011_cb/2011_cba_report.pdf>.

⁵ National Council on Disability. (2007). *The Impact of the Americans with Disabilities Act*. Available from: <<http://www.ncd.gov/publications/2007/07262007>>.

⁶ There are important exceptions to the child labor prohibition; significant enforcement failures regarding the minimum wage, child labor and length of work week (before time and a half compensation is mandated). But the quality of improvement in American lives has nonetheless been dramatic. Lardner, J. (2011). *Good Rules: 10 Stories of Successful Regulation*. Demos. Available from: <http://www.demos.org/sites/default/files/publications/goodrules_1_11.pdf>.

- Saved consumers and taxpayers billions of dollars by facilitating generic competition for medicines.⁸
- Protected the elderly and vulnerable consumers from a wide array of unfair and deceptive advertising techniques.⁹
- For half a century in the mid-twentieth century, and until the onset of financial deregulation, provided financial stability and a right-sized financial sector, helping create the conditions for robust economic growth and shared prosperity.¹⁰

Regulation continues to improve the quality of life for every American, every day. Ongoing and emerging problems as well as a rapidly changing economy require the continual issuance of new rules to ensure that America is strong, safe, healthy and economically prosperous. Below is a selective and small sampling of rules recently issued, pending, or under consideration:

- **Fuel efficiency standards.** Pursuant to the Energy Policy and Conservation Act, the Energy Independence and Security Act and the Clean Air Act, the National Highway Safety and Transportation Agency and the Environmental Protection Agency have proposed new automobile and vehicular fuel efficiency standards. The new rules, on an average industry fleet-wide basis for cars and trucks combined, establish standards of 40.1 miles per gallon (mpg) in model year 2021, and 49.6 mpg in model year 2025. The agencies estimate that fuel savings will far outweigh higher vehicle costs, and that the net benefits to society from 2017-2025 will be in the range of \$311 billion to \$421 billion. The auto industry was integrally involved in the development of these proposed standards, and supports their promulgation.
- **Food safety rules.** In 2010, with support from both industry and consumer groups, and in response to a series of food contamination incidents that rocked the nation, Congress passed the Food Safety Modernization Act. The Act should improve the safety of eggs,

⁷ Deaths on the job have declined from more than 14,000 per year in 1970, when the Occupational Safety and Health Administration was created to under 4,500 at present. See AFL-CIO. (2015, April.) *Death on the Job: The Toll of Neglect*. p. 1. Available from:

<<http://www.aflcio.org/content/download/154671/3868441/DOTJ2015Finalnobug.pdf>>. Mining deaths fell by half shortly after creation of the Mine Safety and Health Administration. Weeks, J. L., & Fox, M. (1983). Fatality rates and regulatory policies in bituminous coal mining, United States, 1959-1981. *American journal of public health*, 73(11), 1278.

⁸ Through regulations facilitating effective implementation of the Drug Price Competition and Patent Term Restoration Act of 1984 ("Hatch-Waxman"), including by limiting the ability of brand-name pharmaceutical companies to extend and maintain government-granted monopolies. Troy, D. E. (2003). *Drug Price Competition and Patent Term Restoration Act of 1984 (Hatch-Waxman Amendments)*. Statement before the Senate Committee on the Judiciary. Available from: <<http://www.fda.gov/newsevents/testimony/ucm115033.htm>>.

⁹ See 16 CFR 410-460.

¹⁰ See Stiglitz, J. E. (2010). *Freefall: America, free markets, and the sinking of the world economy*: WW Norton & Co Inc.; Kuttner, R. (2008). *The Squandering of America: how the failure of our politics undermines our prosperity*: Vintage.

dairy, seafood, fruits, vegetable and many processed and imported foods, but its effective implementation depends on rulemaking. Not so incidentally, food contamination incidents have major harmful economic impact on the agriculture and food industries and job creation and preservation in those industries.

- **Energy efficiency standards.** Pursuant to the Energy Security and Independence Act, the Department of Energy has proposed energy efficiency standards for a range of products, including Metal Halide Lamp Fixtures, Commercial Refrigeration Equipment, and Battery Chargers and External Power Supplies, Walk-In Coolers and Walk-In Freezers, Residential Clothes Washers.¹¹ The Department of Energy estimates the net savings from implementation of the Energy Security and Independence Act to be \$48 billion - \$105 billion (in 2007 dollars).¹²
- **Rules to avert workplace hazards.** By way of example, consider the case of beryllium, a toxic substance to which workers in the electronics, nuclear, and metalwork sector are exposed. The current OSHA beryllium standard, based on science from the 1950s, allows workers to be exposed at levels that are ten times higher than those allowed by Department of Energy for nuclear power plant workers. Public Citizen petitioned OSHA to update the standard in 2001. In response, the agency began a rulemaking in November 2002. It is a testament to major problems in the regulatory process that OSHA has still not issued appropriate rules. Issuance of a rule could avert thousands of cases of serious disease.¹³
- **Wall Street Accountability.** As discussed in more detail below, the 2008 financial crash was a direct result of regulatory failures. These failures including inadequate regulation of mortgages and other consumer financial products, on the one hand, and esoteric financial products and the markets on which they trade, on the other. Another critical failure was permitting the rise of too-big-to-fail financial institutions, traceable both to the failure to enforce existing rules and policies, and the repeal and nonissuance of important rules. While the Dodd-Frank Act is not perfect, it does include an array of very important reforms that will make our financial system fairer and more stable—if properly implemented through robust rulemaking.

Among many other important provisions are crucial consumer protections. Dodd-Frank created the Consumer Financial Protection Bureau, charging the agency with the single mission of protecting consumers and empowering it to issue new consumer protection

¹¹ List of Regulatory Actions Currently Under Review. Available from: <<http://www.reginfo.gov/public/jsp/EO/eoDashboard.jsp>>.

¹² U.S. Department of Energy. (2007). *Energy Independence and Security Act of 2007 Prescribed Standards*. Available from: <http://www1.eere.energy.gov/buildings/appliance_standards/m/eisa2007.html>.

¹³ U.S. Occupational Safety and Health Administration. (2007). *Preliminary Initial Regulatory Flexibility Analysis of the Preliminary Draft Standard for Occupational Exposure to Beryllium*.

rules. Given the very considerable extent to which the financial industry has constructed a business model around deception and unjust fees, CFPB rulemaking can afford consumer dramatic benefits. Such rules concern matters including: requiring mortgage lenders to consider borrowers' ability to pay; prohibiting banks from charging excessive overdraft fees or tricking consumers into opting in to unreasonable overdraft fee harvesting schemes; eliminating forced arbitration provisions in consumer financial contracts; banning unfair practices in the payday loan industry; prohibiting kickbacks to auto dealers who steer buyers into overpriced loans; stopping student loan companies from tricking students into taking high-priced private loans before they exhaust cheaper federal loans.¹⁴

- **Generic competition for biotech medicines.** An overlooked component of the Affordable Care Act was the creation of a process for the Food and Drug Administration to grant regulatory approval for generic biologic pharmaceutical products—essentially generic versions of biotech medicines. Because the molecular composition of biologic drugs is more complicated than traditional medicines, FDA had adopted the position that, with some exceptions, it could not grant regulatory approval for biologics under its previously existing authority. In an important provision of the Affordable Care Act—supported by the biotech industry—FDA was explicitly granted such authority. The provision wrongly grants extended monopolies to brand-name biologic manufacturers, but belated generic competition is better than none. Implementation of the new regulatory pathway for biogenerics, however, depends on issuance of rules by the FDA. Biogeneric competition will save consumers and the government billions of dollars annually.
- **Crib safety.** Pursuant to the Consumer Product Safety Improvement Act of 2008, the Consumer Product Safety Commission (CPSC) finalized updated safety standards for cribs that halted the manufacture and sale of traditional drop-side cribs, required stronger mattress supports, more durable hardware and regular safety testing. These new crib safety standards mean "that parents, grandparents, and caregivers can now shop for cribs with more confidence—confidence that the rules put the safety of infants above all else."¹⁵
- **The Physician Payment Sunshine Act.** This component of the Affordable Care Act requires the disclosure of payments and gifts by pharmaceutical and medical device companies to physicians and hospitals. The mere fact of disclosure is expected to curtail

¹⁴ National Consumer Law Center. (2010). *An Agenda for the Consumer Financial Protection Bureau: Challenges for a New Era in Consumer Protection*. Retrieved 24 February, 2012, Available from: <http://www.nclc.org/images/pdf/regulatory_reform/pr-cfpb-agenda.pdf>

¹⁵ Consumer Federation of America. (2011, June 28). *Senators, CPSC, Consumer Advocates Applaud Strong Crib Safety Standards to Prevent Infant Deaths and Injuries*. Available from: <<http://www.consumerfed.org/pdfs/crib-standards-press-release-6-28-11.pdf>>.

the improper influence of industry over research, education and clinical decision making. Putting the Act into place required implementing rules.¹⁶

- **Other examples.** The list of regulatory benefits is almost endless. Other recent examples from the wide spectrum include rules to address invasive species, require labeling of sourcing and origin in food, establishing standards for school lunch programs and specifying the migratory bird hunting season.

When viewed in the aggregate, regulations are overwhelmingly positive for the economy and reinforce the examples above. According to official government figures, the benefits that federal regulations provide to our country consistently dwarf the costs of those regulations. Every year, the Office of Management and Budget (OMB) analyzes the costs and benefits of rules with a major economic impact in a report to Congress. The most recent OMB report found that:

The estimated annual benefits of major Federal regulations reviewed by OMB from October 1, 2004, to September 30, 2014, for which agencies estimated and monetized both benefits and costs, are in the aggregate between \$261 billion and \$981 billion, while the estimated annual costs are in the aggregate between \$68 billion and \$103 billion. These ranges are reported in 2010 dollars and reflect uncertainty in the benefits and costs of each rule at the time that it was evaluated.¹⁷

This means that even by the most conservative OMB estimates, the benefits of major federal regulations over the last decade have exceeded their costs by a factor of more than two-to-one, and benefits may have exceeded costs by a factor of up to fourteen. This makes regulation one of the best returns on investment and one that rivals some of the top performing businesses.

Congress Deserves Credit for Protecting the Public

A simple but often overlooked fact is that Congress is the source of regulatory protections for consumers and working families even though federal agencies are the ones developing the regulations. In fact, agencies are not able to take action to protect the public unless Congress has delegated authority to the agencies to do so. The delegation of authority to federal agencies to implement laws is simply fundamental to the proper functioning of our government. Without the ability for Congress to delegate authority to agencies to implement the laws it passes, Congress will be restricted from using its power to address pressing public policy concerns, including

¹⁶ 42 CFR Parts 402 and 403, February 8, 2013.

¹⁷ Office of Management and Budget, Office of Information and Regulatory Affairs. (2015). Draft 2015 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities. p.1. available at: https://www.whitehouse.gov/sites/default/files/omb/inforeg/2015_cb/2015-cost-benefit-report.pdf

protecting the health and safety of the public. Before turning to the very serious practical consequences of preventing delegation of authority from Congress to federal agencies, it is important to make clear that the principle of delegation is fully grounded in the Constitution and the vision of the Founding Fathers rather than violating both as some incorrectly contend.

It is undeniable the Constitution bars the delegation of legislative power. The Vesting clause of Article I provides that “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.”¹⁸ Likewise, the President has a constitutional obligation to “take Care that the laws be faithfully executed.”¹⁹ Thus, when Congress validly enacts a statute that grants authority to the executive branch, that statutory grant of authority to the executive isn’t a *transfer* of legislative power but rather an *exercise* of legislative power that fully comports with the President’s constitutional duty to execute the law. In other words, executive branch agents acting within the terms of such a statutory grant are exercising executive power, not legislative power.

This constitutional principle in support of delegation has been re-affirmed repeatedly by the Supreme Court. For example, in *INS v. Chadha*,²⁰ the Court emphatically denied that an executive officer exercises legislative power when performing duties, including rulemaking, pursuant to statutory authorization. Creating rules pursuant to valid statutory authority isn’t lawmaking, but law execution. When delegations have been challenged, the Court has upheld the delegation in virtually every case, although in certain cases it has required delegations under statutory authority to be subject to an “intelligible principle.” Yet, even in these cases, the Court has not insisted on a high bar for what statutory language constitutes an “intelligible principle.”²¹

With respect to the Framers, the overall picture is that the founding era wasn’t concerned about delegation. A review of the records of the constitutional convention, the ratification debates, the Federalist papers, and early government legislation reveals very little to support misleading claims that the Framers believed delegation would result in the executive branch assuming authority intended for the legislative branch. Instead, the Framers’ clear concern was with legislative aggrandizement at the expense of other institutions rather than with legislative grants of statutory authority to the executive branch.²² A quick survey of the statutes enacted by the First or Second Congresses makes clear that those Congresses delegated enormous authority to the Executive with significant discretion to accomplish broad objectives related to military pensions, trade with Indian tribes, issuance of patents, and fines levied by the Treasury.²³ Claims

¹⁸ U.S. Const. Article 1, Section 1.

¹⁹ U.S. Const. Article 2, Section 3.

²⁰ See 462 U.S. 919 (1983).

²¹ See *Whitman v. American Trucking Associations*, 531 U.S. 457, 474 (2001) (“In short, we have “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”)

²² See James O. Freedman, *Delegation and Institutional Competence*, 43 U. Chi. L. Rev. 307, 309 (1976).

²³ See Harold J. Krent, *Delegation and Its Discontents*, 94 Colum. L. Rev. 710 (1994).

by originalists that the Founding Fathers opposed legislative delegation of authority to the Executive do not stand up to scrutiny of the historical record.

Beyond the fact that delegation of authority by Congress to federal agencies is firmly rooted in the Constitution and the Framers' vision, the ability of Congress to effect such a delegation is central to the functioning of our government as a practical matter. Just as CEOs of corporations delegate tasks and empower employees to perform those tasks using the employees' specialized skills and expertise, so does Congress empower federal agencies to carry out the laws Congress enacts using the agencies' institutional expertise. Thus, the relationship between Congress and federal agencies resembles that of the typical principal-agent model. The ubiquity of this model in private and public institutions explains the ubiquity of delegation in modern life.

Unfortunately, public discourse and rhetoric has increasingly but misleadingly framed federal agencies as the principals rather than as the agents. Claims that "unaccountable bureaucrats" are "making new laws" have grown commonplace despite being patently false. Federal agencies are anything but "free agents" when it comes to developing regulations under statutory authority. Agencies know full well that violating that statutory authority by exceeding it will result in a court challenge and potential reversal of the regulation. Federal agencies are ultimately accountable to Congress and subject to its oversight. Constant villainizing of agency officials and regulatory protections has led the public to believe that our regulatory system is somehow rogue and unaccountable. Nothing is further from the truth and it is past time to put this myth to bed.

In the absence of delegation, congressional power to enact public policy will be limited and result in a state of affairs that should be a concern to all members of Congress. If Congress is not able to delegate authority for federal agencies to "fill in the gaps" of statutes when applying those statutes to narrow and specific policy issues, federal agencies will resort to simply parroting the language of the statute in its regulations, no matter how vague or ambiguous the statutory language may be. This will make it much harder for businesses across the country who want to comply with regulations in good-faith but have little to no direction on how to do so. State and local regulators will be left on their own to determine how to implement and enforce federal regulations, resulting in widely varying and potentially conflicting approaches to what is intended to be a uniform national law. In turn, compliance with the regulation will be unpredictable and will result in increased enforcement actions for non-compliance.

For strong constitutional and practical reasons, broad delegations of authority to federal agencies to implement congressional mandates are not only appropriate, but also necessary for our government to function in the 21st century.

The Myth of Regulations Hurting our Economy

Sadly, false and misleading rhetoric propagates the myth that our country cannot have a strong economy without sacrificing bedrock public health, safety, environmental, and financial stability protections. There is simply no credible, independent, and peer-reviewed empirical evidence supporting the claim that there is a trade-off between economic growth and strong, effective regulatory standards. Experts from across the political spectrum have acknowledged that arguments linking regulations to job losses are nothing more than mere fiction. For example, Bruce Bartlett, a prominent conservative economist who worked in both the Reagan and George H.W. Bush administrations, referred to the argument that cutting regulations will lead to significant economic growth as “just nonsense” and “made up.”²⁴

Mr. Bartlett’s claims are backed up by a recent book entitled “Does Regulation Kill Jobs?”²⁵, a comprehensive empirical study conducted by numerous distinguished regulatory experts and academics that closely scrutinized the claim that regulations are linked to job loss and concluded that “to date the empirical work suggests that regulation plays relatively little role in affecting the aggregate number of jobs in the United States.”²⁶ The authors go on to definitively state that “the empirical evidence actually provides little reason to expect that U.S. economic woes can be solved by reforming the regulatory process.”²⁷

By contrast, the so-called “evidence” that regulations are killing jobs or ruining the economy comes from biased and partisan sources using methodology that is not peer-reviewed and doesn’t pass muster under scrutiny. For example, the *Washington Post* recently vetted a report entitled “the Ten Thousand Commandments” from the Competitive Enterprise Institute claiming that the annual regulatory burden adds up to \$15,000 for each household in America or 1.8 trillion for the whole country.²⁸ As the *Post* notes, the report foregoes any attempt at computing the benefits of the regulations it includes and the *Post* found that the report has “serious methodological problems” and deserved “two pinocchios” given that the report’s authors themselves admit that the report is “not scientific” and “back of the envelope.”²⁹ Reports using similar methodology

²⁴ Charles Babington, Bruce Bartlett, Ex-Reagan Economist: Idea That Deregulation Leads to Jobs ‘Just Made Up,’ Huffington Post, October 30, 2011, http://www.huffingtonpost.com/2011/10/31/gop-candidates-plans-on-economy-housing_n_1066949.html?view=print&comm_ref=false.

²⁵ CARY COGLIANESE & ADAM M. FINKEL & CHRISTOPHER CARRIGAN, DOES REGULATION KILL JOBS (2013).

²⁶ *Id.* at 7

²⁷ *Id.* at 10

²⁸ Glenn Kessler, *The Claim That American Households Have a 15,000 Regulatory ‘Burden’*, WASHINGTON POST (Jan 14, 2015), <http://www.washingtonpost.com/blogs/fact-checker/wp/2015/01/14/the-claim-that-american-households-have-a-15000-regulatory-burden/>

²⁹ *Id.*

and reporting similar trillion dollar cost figures have also been exposed as flawed and have been disavowed.³⁰

These latest implausible and unfounded claims about regulations hurting the economy follow a long history of business complaining about the cost of regulations and predicting that the next regulation will impose unbearable burdens. Yet, in a 2013 report,³¹ Public Citizen looked back at previous claims linking job losses to regulations, and found that none of them turned out to be even remotely accurate. Indeed, the disconnect between rhetoric and reality could not be more stark. In each case covered in the report, industry's claims look preposterous in retrospect. For instance, in the late-1970s, the petrochemical industry claimed that the phasing out of lead from gasoline would threaten an eye-popping 43 million jobs. Instead, the phase-out became an unmitigated public health and safety success story across the world. A 2011 study backed by the United Nations concluded that banning lead from gasoline had led to \$2.4 trillion in annual benefits and 1.2 million fewer premature deaths, annually. The technological hurdles to find a suitable substitute for lead to stop engine "knock" barely rated a speed bump. Similar success stories regarding fuel efficiency measures, banning of carcinogenic vinyl chloride, Clean Air Act pollution standards, and unpaid family leave regulations proved that apocalyptic predictions from industry had no empirical basis whatsoever.

Lack of Strong and Effective Regulations Hurts Americans and Our Economy

Under-regulation is a form of regulatory failure that costs lives, results in preventable injuries, harms the environment often irreversibly, leaves consumers vulnerable to unsafe products and abusive practices, and leads to instability and recklessness in our financial system. Under-regulation touches virtually every regulatory sector and agency. Below is a sample of recent and current instances of under-regulation and the costs borne by the public and our economy:

- 2008 Wall Street Crash: The rampant deregulation that led to the crash cost our economy anywhere from 6 trillion to 14 trillion dollars or 50,000 to 120,000 for every US household. In addition, 8.7 million Americans lost their jobs during or immediately following the crisis.³²

³⁰ Mark Drajem, *Rules Study Backed by Republicans 'Deeply Flawed,' Sunstein Says* (Bloomberg, June 3, 2011) available at <http://www.bloomberg.com/news/2011-06-03/rules-study-backed-by-republicans-deeply-flawed-sunstein-says.html>

³¹ <http://www.citizen.org/regulations-are-entirely-to-blame-report>

³² <http://ourfinancialsecurity.org/blogs/wp-content/ourfinancialsecurity.org/uploads/2012/09/Costs-of-The-Financial-Crisis-September-20142.pdf>

- Climate Change Inaction: Blocking or delaying new carbon emission rules from the EPA and other climate change measures will cost our country up to 150 billion dollars annually in economic damage in the future.³³
- Preventable Workplace Deaths and Injuries: Every day, an average of 150 workers die from job injuries or occupational diseases. Every year, the lack of effective workplace safety protections costs our country 250 billion to 330 billion dollars in injuries and illnesses.³⁴
- BP Oil Spill: This massive environmental disaster in the Gulf ended up costing more than 42 billion dollars. The oil spill harmed thousands of Gulf Coast residents and destroyed many local small businesses. BP has now been found “grossly negligent” in causing the disaster and faces up to 18 billion dollars in fines, some of which will go to Gulf Coast restoration projects.³⁵
- 2014 West Virginia Elk River Chemical Spill: those who were hurt by the damage caused by the spill are claiming 160 million in damages from the spill. These include small businesses in Charleston who were forced to shut down for days and the many thousands of residents who were forced to buy bottled water because of the severe water contamination.³⁶
- Oil Freight Train Explosions: Trains carrying highly explosive crude oil are traveling through communities every day without most of those communities even aware of the threat. In 2013, a massive oil train derailment and explosion in Canada killed 47 people. The Department of Transportation expects an average of 10 oil train derailments each year over the next ten years totaling over 4.5 billion dollars in damages.³⁷
- Lake Erie Algae Bloom: a half million Ohio residents were forced to buy bottled water because their water had become so badly contaminated from algae. In 2008, the government estimated algae blooms resulted in 82 million dollars annually in economic damages.³⁸ Algae Bloom damage to Lake Erie can be directly traced to successful attempts to roll back the Clean Water Act by special interests.³⁹

³³ <http://fortune.com/2014/07/29/white-house-inaction-on-climate-costs-150-billion-a-year/>

³⁴ AFL-CIO. (2015, April.) Death on the Job: The Toll of Neglect.,

<http://www.aflcio.org/content/download/126621/3464561/DOTJ2014.pdf>

³⁵ <http://www.edf.org/blog/2014/09/05/bp-oil-spill-ruling-could-jumpstart-gulf-coast-restoration-work>

³⁶ <http://www.insurancejournal.com/news/southeast/2014/08/12/337282.htm>

³⁷ <http://www.sfgate.com/nation/article/Oil-trains-forecast-to-derail-at-10-per-year-in-6095446.php>

³⁸ http://www.cop.noaa.gov/stressors/extremeevents/hab/current/econimpact_08.pdf the

³⁹ <http://www.foodandwaterwatch.org/blogs/the-toledo-water-crisis-wont-be-the-last/>

Regulatory Paralysis Is One of the Main Causes of Under-Regulation

It is true that the regulatory system is broken, but not because there is too much regulation. Rather the system is broken because the current regulatory process is too slow, too calcified, and too inflexible to respond to public health and safety threats as they emerge. As Public Citizen's striking visual depiction of the regulatory process shows,⁴⁰ the current process is a model of inefficiency, with a dizzying array of duplicative and redundant requirements interspersed throughout a byzantine network that is a virtual maze for agencies to navigate. This is the result of an accumulation of analyses and procedures that Congress and the Executive have imposed on agencies over the years leaving agencies in a state of "paralysis by analysis." Far from the popular conception of "regulators run amok," the reality is that agency delays are rampant, congressional and judicial deadlines are routinely missed or pushed back, and ample evidence exists that the situation is getting worse.

Although extended delay is arguably the defining feature of rulemaking, the extent, severity, causes and consequences of such delay are not well understood. I highlight several illustrative examples here to illuminate these matters. As is apparent, delay permeates all aspects of the rulemaking process, touching virtually all agencies and regulatory sectors.

1. Oil Train Safety

Last year, the U.S. Department of Transportation finalized new standards for trains transporting highly volatile oil, often through highly populated areas. The rule was a long-overdue response to the sharp increase in domestic oil production and rail shipment of oil and ethanol and a resulting series of deadly oil train disasters. In strengthening standards for oil tank car safety, requiring new braking standards, and designating new procedures for oil trains including notification to local government agencies, the rule should reduce the incidence oil train derailments and explosions.⁴¹

The final issuance of the rule followed justifiable bipartisan criticism that the Department of Transportation had taken too long to put new rules in place while multiple oil train derailments and explosions occurred across the country. These explosions and crashes have led to numerous deaths, and shaken up communities across the country. Elected officials rightly demanded action, and were furious about the delays in responsive rulemaking. Safety experts echoed the concern. "Federal requirements simply have not kept pace with evolving demands placed on the railroad

⁴⁰Public Citizen, *The Federal Rulemaking Process*, <http://www.citizen.org/documents/Regulations-Flowchart.pdf>.

⁴¹ <https://www.transportation.gov/bricfing-room/final-rule-on-safe-rail-transport-of-flammable-liquids>

industry and evolving technology and knowledge about hazardous materials and accidents,” testified the chair of the National Transportation Safety Board.⁴²

The Department itself shared frustration with the slow pace of its rulemaking. One of the regulators made clear why the Department was unable to move faster saying, “To be clear, I think we have to function in the regulatory process that exists. And it's not built for speed. I wish it was. And no one is more frustrated by our regulatory process and how long it takes than I am on occasion. But if we are trying to govern and regulate as quickly as we possibly can, the rulemaking process is not the way to do it.”⁴³

The Department could have expedited issuance of the rules by foregoing optional rulemaking steps that added to the regulatory delay. The Department’s decision to issue an advanced notice of proposed rulemaking (ANPRM) instead of directly proceeding to propose a draft rule, likely added a year or more to the oil train rulemaking process.

Unfortunately, the House has passed legislation this⁴⁴ this Congress that would mandate the extra procedural step of ANPRMs for all major rules such as the oil train rule. The oil train rule delay makes clear that there are real-world consequences – often a matter of life and death – to measures that delay the rulemaking process. It is a reminder as well that policymakers who support measures to slow and complicate the rulemaking process may find that, if they succeed, the required delays will boomerang to block regulatory action in areas of their priority concern.

2. Cranes and derricks.

The Occupational Safety and Health Administration's cranes and derricks rule, adopted in 2010, is designed to improve construction safety. By the late 1990s, construction accidents involving cranes were killing 80 to 100 workers a year. OSHA later estimated that a modernized rule would prevent about 20 to 40 of those annual tragedies. Worker safety advocates and the construction industry alike wanted an updated rule.

Nonetheless, it took a dozen years to get a final rule adopted. “During the dozen years it took to finalize the cranes rule,” a Public Citizen report summarized, “OSHA and other federal agencies held at least 18 meetings about it. At least 40 notices were published in the Federal Register. OSHA was required by a hodgepodge of federal laws, regulations and executive orders to produce several comprehensive reports, and revisions to such reports, on matters such as the makeup of industries affected by the rule, the number of businesses affected, and the costs and benefits of the rule. OSHA also was repeatedly required to prove that the rule was needed, that

⁴² Chris A. Hart, testimony before the Committee on Transportation and Infrastructure, U.S. House of Representatives, “Oversight of the Ongoing Rail, Pipeline, and Hazmat Rulemakings,” April 14, 2015, available at: <http://transportation.house.gov/uploadedfiles/2015-04-14-hart.pdf>.

⁴³ Sarah Feinberg, Acting Administrator, Federal Railroad Administration, U.S. House Transportation and Infrastructure Committee, Oversight of the Ongoing Rail, Pipeline, and Hazmat Rulemakings, April 14, 2015, available at: <http://transportation.house.gov/calendar/eventsingle.aspx?EventID=398734>.

⁴⁴ H.R. 185, The Regulatory Accountability Act (2015).

no alternative could work, and that it had done everything it could to minimize the effects on small businesses. The regulatory process afforded businesses at least six opportunities to weigh in with concerns that the agency was required to address."⁴⁵

3. Silica rule.

After more than a dozen years of delay, OSHA's life-saving silica dust standard is finally set to take effect this year. More than two million workers in the United States are exposed to silica dust, especially construction workers and others who operate jackhammers, cut bricks or use sandblasters. Inhaling the dust causes a variety of harmful effects, including lung cancer, tuberculosis, and silicosis (a potentially fatal respiratory disease). The rule will reduce the permissible exposure limit for silica to 50 micrograms per cubic meter (from the currently allowed 100) over an 8-hour workday. "OSHA estimates that the proposed rule would prevent between 579 and 796 fatalities annually—375 from non-malignant respiratory disease, 151 from end-stage renal disease, and between 53 and 271 from lung cancer—and an additional 1,585 cases of moderate-to-severe silicosis annually."⁴⁶

The new standard requires employers to measure exposures, conduct medical exams for workers with high exposures and train workers about the hazards of silica. It requires effective measures to reduce silica exposure, which "can generally be accomplished by using common dust control methods, such as wetting down work operations to keep silica-containing dust from getting into the air, enclosing an operation ('process isolation'), or using a vacuum to collect dust at the point where it is created before workers can inhale it,"⁴⁷ while giving businesses flexibility in choosing appropriate control methods.

OSHA has long acknowledged that its current silica dust standard, adopted in 1971, is obsolete.⁴⁸ The first concrete action it took to update the standard was in October 2003, when it convened a small business panel to review its proposed rule. In 2011, OSHA submitted to OIRA a draft proposed rule to reduce exposure to deadly silica dust. Although OIRA is supposed to complete reviews in three months, it took years for OIRA to complete the review. No explanation for this delay ever emerged. After OIRA finally released the rule, the rule remained stuck at OSHA.

Dating to OSHA's 1998 move of silica exposure standards to the pre-rule stage, the inexcusable delay in finalizing an updated health standard translates into the needless deaths of roughly

⁴⁵ Lincoln, T. and Mouzoon, N. (2011, April.) Cranes & Derricks: The Prolonged Creation of a Key Public Safety Rule. Public Citizen. p. 4. Available from: <<http://www.citizen.org/documents/CranesAndDerricks.pdf>>.

⁴⁶ OSHA. (2013). *Preliminary Economic Analysis and Initial Regulatory Flexibility Analysis: Supporting document for the Notice of Proposed Rulemaking for Occupational Exposure to Crystalline Silica*. Available at: https://www.osha.gov/silica/Silica_PEA.pdf.

⁴⁷ OSHA, OSHA's Proposed Crystalline Silica Rule: Overview, available at: https://www.osha.gov/silica/factsheets/OSHA_FS-3683_Silica_Overview.html.

⁴⁸ OSHA *Occupational Exposure to Crystalline Silica*, 75 Fed. Reg. 79,603 (2010, Dec. 20).

12,000 people. Inexcusable is really far too gentle a term; the industry-led obstruction of the rule cost thousands of lives – not statistical abstractions, but the lives of real workers.

Silica-related disease is not evenly distributed across the U.S. population. As a result, the benefits of the new rule will be felt most strongly among working class communities and communities of color. In Michigan, studies show the incidence of silicosis in African Americans is almost 6 times greater than that of Caucasians.⁴⁹ Latino workers now constitute 24 percent of the workforce in foundries, and almost 26 percent of the workforce in construction, are especially at risk for working jobs where silica dust exposure is paired with a lack of protection.

OSHA estimates the rule will provide average net benefits of about \$2.8 to \$4.7 billion annually over the next 60 years (benefits calculated by assigning a dollar value to each anticipated life saved and illness avoided).

4. Truck driver training.

In 1991, Congress passed a law requiring a rulemaking on training for entry-level commercial motor vehicle operators. More than 20 years, three lawsuits, and another statutory mandate later, the Department of Transportation still has not enacted regulations requiring entry-level drivers to receive training in how to drive a commercial motor vehicle. It now says it plans to complete the rule this year.⁵⁰

In the Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991, Congress required the Secretary of Transportation to report to Congress on the effectiveness of private sector training of entry-level commercial motor vehicle drivers by December 18, 1992, and to complete a rulemaking proceeding on the need to require training of all entry level drivers of commercial motor vehicles by December 18, 1993. The required report, which was submitted to Congress on February 2, 1996 (slightly more than three years later), concluded that training of new commercial motor vehicle drivers was inadequate; in an accompanying analysis, the agency determined that the benefits of an entry-level driver training program would outweigh its costs. It requested comments on the studies and held one public hearing on training entry-level drivers. In the next six years, however, the agency took no steps towards issuing a rule on entry-level driver training.

In November 2002, organizations concerned about motor vehicle safety filed a petition for a writ of mandamus in the DC Circuit Court of Appeals, seeking an order directing the Secretary of Transportation to fulfill his statutory duty to promulgate overdue regulations relating to motor

⁴⁹ Rosenman, K. and Reilly, M.J. (2014, July 1). 2012 *Annual Report Tracking Silicosis and Other Work-Related Lung Diseases in Michigan*, Michigan State University, available at: http://www.oem.msu.edu/userfiles/file/Annual%20Reports/Silica/2012Silicosis_OccLungDiseaseAnnRpt.pdf.

⁵⁰ A full account of this history is included in *In Re Advocates for Highway and Auto Safety: Petition for Writ of Mandamus*, September 18, 2014. Available from: <http://www.citizen.org/documents/in-re-advocates-for-highway-and-auto-safety-petition-for-writ-of-mandamus.pdf>.

vehicle safety, including the regulation on entry-level driver training. As part of a settlement agreement between the organizations and DOT, DOT agreed to issue a final rule on minimum training standards for entry-level commercial motor vehicle drivers by May 31, 2004.

On August 15, 2003, almost 12 years after ISTEA was enacted, DOT (through the Federal Motor Carrier Safety Administration, FMCSA) published a notice of proposed rulemaking on minimum training requirements for entry-level commercial motor vehicle operators, and on May 21, 2004, it published a final rule.

Although the agency expressly acknowledged that training for entry-level drivers was inadequate and stated its belief that a 360-hour model curriculum developed by the Federal Highway Administration that includes extensive behind-the-wheel training “represents the basis for training adequacy,” it proposed instead a weak rule that required only 10 hours of training.

Advocates for Highway and Auto Safety, among others, subsequently filed a petition for review of the final rule, arguing that the rule was arbitrary and capricious because it did not require entry-level drivers to receive any training in how to operate a commercial motor vehicle. The DC Circuit agreed, holding that the FMCSA had “adopted a final rule whose terms have almost nothing to do with an ‘adequate’ CMV [commercial motor vehicle] training program.”

On December 26, 2007, approximately two years after the court ruling, FMCSA issued a stronger proposed rule. But, four years after the comment period had closed, the agency still had not issued a final rule.

In 2012, Congress again directed DOT to conduct a rulemaking on the issue, requiring a final rule by October 1, 2013.

Yet instead of moving forward, the FMCSA published notice in September 2013 that it was withdrawing its proposed rule.

We still have no proposed rule. In September 2014, Public Citizen with Advocates for Highway Safety filed another lawsuit, on behalf of a number of parties, asking that the agency be ordered to issue a rule in compliance with the law. That case is now stayed, in reliance on an agency statement that it plans to issue a rule by September 2016.

More than 20 years have passed since Congress ordered the DOT to adopt an appropriate truck driver training rule, and there is still no rule. This is due in large part to the agency’s overly cozy relationship with the trucking industry. Congress has mandated a driver training rule—twice—out of the recognition that better driver training will save lives; and the two-decade-long refusal of the agency to comply with Congressionally imposed obligations means lives have been—and continue to be—lost needlessly.

5. Backover rule⁵¹

One night in 2002, Dr. Greg Gulbransen was backing up his SUV in his driveway when his two-year-old son Cameron darted out into the driveway behind the vehicle. Too small to be seen by his father using any of the vehicle's rearview or sideview mirrors, Cameron was struck by the moving car and killed. Dr. Gulbransen's tragedy is not an isolated case; each week, 50 children are injured, two fatally, in these "backover" crashes, that is, collisions in which a vehicle moving backwards strikes a person (or object) behind the vehicle. Each year on average, according to the Department of Transportation, backovers kill 292 people and injure 18,000 more—most of whom are children under the age of five, senior citizens over the age of 75, or persons with disabilities. Backovers generally occur when the victim is too small to be seen in the rearview mirror of the vehicle or too slow to move out of the way of the vehicle, even one moving at slow speed.

To prevent the injuries and deaths caused by backovers, in 2008 Congress passed and the President signed the Cameron Gulbransen Kids Transportation Safety Act. The Gulbransen Act directed DOT to revise an existing federal motor vehicle safety standard to expand the area that drivers must be able to see behind their vehicles. (This can be done through the use of rear-view cameras, or other technologies.) The Gulbransen Act mandated that DOT issue the final rule within three years of the law's enactment—by February 28, 2011. The Act also allowed DOT to establish a new deadline for the rulemaking, but only if the otherwise-applicable deadline "cannot be met."

When it prepared a draft final rule in 2010, DOT estimated that the proposed rule, which specified an area immediately behind each light vehicle that a driver must be able to see when the car is in reverse gear, would prevent between 95 and 112 deaths and between 7,072 and 8,374 injuries each year.

DOT failed to meet the February 2011 deadline. Instead, DOT repeatedly set a new "deadline," failed to meet it, and then set yet another "deadline," although the agency never made a showing that the statutory deadline could not be met.

In light of the extent of the delay, the repeated self-granted extensions, and the hundreds of preventable deaths and thousands of preventable injuries that will occur while the public waits for the final rule, Public Citizen filed a petition with the United States Court of Appeals for the Second Circuit seeking a writ of mandamus compelling DOT to issue the rule within 90 days. The petition was filed September 25, 2013 on behalf of Dr. Gulbransen, Sue Auriemma (another parent who backed into her own child), and the consumer safety groups Advocates for Highway

⁵¹ A full account of this history is available from *In Re Dr. Greg Gulbransen: Petition for a Writ of Mandamus*, September 25, 2013. Available from: <<http://www.citizen.org/documents/in-re-gulbransen-backover-petition.pdf>>.

and Auto Safety, KidsAndCars.org, and Consumers Union. On March 31, 2014, one day before the Second Circuit was scheduled to hear argument in the case, DOT issued the rear visibility safety standard that petitioners sought.

In this case, much remains unknown about the cause of the protracted delay. The department had been on track to issue a rule by or near the Congressional deadline, but then pulled back. It is widely believed that the rule was delayed by OIRA out of concern about the agency's cost-benefit analysis—the auto makers predictably made unrealistic claims about potential cost—or by political intervention from high officials in the White House.

Whatever the cause, that delay led to the pointless deaths of hundreds and tens of thousands of injuries. What a horrible tragedy it is for a parent to live with the knowledge that he or she ran over their child. But what a monstrous outrage for those tragedies to perpetuate because corrective action was delayed due to inappropriate political influence.

6. Executive pay ratio rule.

Section 953(b) of the Dodd Frank Act requires companies to disclose the ratio of CEO-to-median workers' pay. This is perhaps the simplest of Dodd Frank required rules. Companies already disclose their CEO compensation. Basic accounting requires them to know what they pay their employees, and determining the median pay for all employees is a simple enough determination. Figuring out the ratio between the two is a simple enough arithmetic calculation. Somehow, however, the nation's biggest firms have proffered the view that such a disclosure requirement and calculation would be incredibly burdensome. This hard-to-swallow claim, apparently, paralyzed the Securities and Exchange Commission. It proposed a rule in September 2013 with a standard 60-day comment period; but the final rule was not issued until August 2015. This is a modest measure to be sure—though it will provide important information to both investors and employees—but precisely because of its simplicity, the SEC should have been able to issue a rule expeditiously.⁵²

7. Blowout Preventers

The April 20, 2010 explosion aboard the Deepwater Horizon in BP's Macondo Prospect killed 11 people and ultimately spewed 5 million barrels of oil directly into the Gulf of Mexico until the Coast Guard finally certified that efforts to permanently plug the well succeeded after 5 months.

The disaster was the result of cascading failures by all parties involved: BP, the manager of the operation; Transocean, the owner of the semi-submersible oil exploration platform; Halliburton, the company in charge of the oil well cementing; and Cameron International Corp., the Houston supplier of the failed blowout preventer. Cameron ended up agreeing to pay BP \$250 million in

⁵² See Naylor, B. (2015, June 2.) Mary Jo Wait. Huffington Post. Available from: <http://www.huffingtonpost.com/bartlett-naylor/mary-jo-wait_b_7494336.html>.

December 2011 to settle the company's legal liabilities associated with the failures of its blowout preventer.⁵³

Cameron's blowout preventer was a five-story, 400-ton device that sat on the ocean floor, connected to the wellhead, that was supposed to "contain pressure within the wellbore and halt an uncontrolled flow of hydrocarbons to the rig,"⁵⁴ known as a blowout. A blowout preventer features a number of different components to allow deep water drillers to maintain well control, including the device's last line of defense, a blind shear ram, that cuts the drill pipe to seal the well in the event of a blowout. But all of Cameron's blowout preventer features failed on April 20 and in the days afterward.

Subsequent independent investigations detailed the failures of blowout preventers to be properly designed and tested to successfully prevent blowouts in deep sea drilling operations.

President Obama created the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling one month after the explosion.⁵⁵ The Commission's final report, issued in January 2011, faulted the industry's reliance on self-testing by blowout preventer manufacturers and well operators, and the fact that these tests were done on land, rather than under pressure deep underwater. In addition, the Commission recommended "design modifications" in blowout preventers to ensure they are "equipped with sensors or other tools to obtain accurate diagnostic information."⁵⁶

This self-certification that failed to replicate actual operating conditions was one reason that the U.S. Department of Interior proposed new rules governing just the testing blowout preventers on September 30, 2010,⁵⁷ including a new requirement for "independent third party verification that the blind-shear rams are capable of cutting any drill pipe in the hole under maximum anticipated surface pressure," minimum personnel training requirements for blowout preventer operators, and additional required testing once the blowout preventer is installed on the seafloor.⁵⁸ While

⁵³ Tom Fowler, "Cameron Will Pay BP to Settle Spill Claims," Wall Street Journal, December 17, 2011, available at www.wsj.com/articles/SB10001424052970204466004577102050498485784.

⁵⁴ National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Final Report, January 11, 2011, p. 114, available at: <http://cybercemetery.unt.edu/archive/oilspill/20121211005636/http://www.oilspillcommission.gov/sites/default/files/documents/FinalReportPartII.pdf>.

⁵⁵ www.whitehouse.gov/the-press-office/2011/01/11/11-11-11

⁵⁶ National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Final Report, January 11, 2011, p. 35, available at: <http://cybercemetery.unt.edu/archive/oilspill/20121211005636/http://www.oilspillcommission.gov/sites/default/files/documents/FinalReportPartII.pdf>.

⁵⁷ www.doi.gov/news/pressreleases/Salazar-Announces-Regulations-to-Strengthen-Drilling-Safety-Reduce-Risk-of-Human-Error-on-Offshore-Oil-and-Gas-Operations.

⁵⁸ www.doi.gov/sites/doi.gov/files/migrated/news/pressreleases/upload/093010_Fact-Sheet_Drilling-Safety-Rule.pdf.

first proposed in September 2010, the rule for third-party, independent, real-condition testing of blowout preventers did not become final until August 2012.⁵⁹

While third-party, independent, real-condition testing is important, investigations concluded that a bigger challenge was that blowout preventers needed to be redesigned to actually work effectively.

A December 2011 report by the National Academy of Engineering concluded that blowout preventer systems “are neither designed nor tested to operate in the dynamic conditions that occurred during the accident” and should be “redesigned, rigorously tested, and maintained to operate reliably.”⁶⁰

Similarly, on April 12, 2016, the U.S. Chemical Safety and Hazard Investigation Board released a draft report on the Deepwater Horizon disaster, with one of their primary conclusions: “Testing limitations masked latent failures of the Deepwater Horizon BOP, affecting its operation on the day of the incident, *and these latent failures will continue to exist for similarly designed blowout preventers unless modifications are made to current standard industry testing protocols*”⁶¹ (emphasis added).

The origins of the latest blowout preventer rule, designed to overhaul the design of blowout preventers, began with a technical conference hosted by the Bureau of Safety and Environmental Enforcement in May 2012,⁶² with then-Deputy Interior Secretary David Hayes claiming a proposed rule would come by September 2012.⁶³

But the Bureau of Safety and Environmental Enforcement didn’t send its proposed rule to the Office of Information and Regulatory Affairs until December 11, 2014.⁶⁴ The proposed rule wasn’t published in the Federal Register until April 2015.⁶⁵ The final rule wasn’t released until April, 2016.

It is unfathomable that the primary regulatory response to the worst environmental disaster in U.S. history took six years. Indeed, “unfathomable” was the very term used to describe the delay

⁵⁹ Final Rule, available at: [www.bsee.gov/uploadedFiles/BSEE/Regulations_and_Guidance/Recently_Finalized_Rules/Final_Drilling_Safety_Rule/AA02%20FR%20publication%20\(08-22-12\)%20\(1\).pdf](http://www.bsee.gov/uploadedFiles/BSEE/Regulations_and_Guidance/Recently_Finalized_Rules/Final_Drilling_Safety_Rule/AA02%20FR%20publication%20(08-22-12)%20(1).pdf).

⁶⁰ National Academy of Engineering, Macondo Well-Deepwater Horizon Blowout, December 14, 2011, available at: www.nae.edu/Publications/Reports/53926.aspx.

⁶¹ U.S. Chemical Safety and Hazard Investigation Board, “Drilling Rig Explosion and Fire at the Macondo Well,” April 20, 2010, p. 8, available at: www.dropbox.com/s/oadxm7mc0xhdg9/20160412%20Macondo%20Full%20Exec%20Summary.pdf.

⁶² www.bscc.gov/BSEE-Newsroom/Press-Releases/2012/Secretary-Salazar,-BSEE-Director-Watson-to-Kick-Off-Technical-Forum-on-Next-Generation-Blowout-Preventer-and-Control-Systems/

⁶³ Paul Voosen, “Regs for blowout preventers imminent,” Greenwire, May 22, 2012.

⁶⁴ Phil Taylor, “White House reviewing rule to reduce blowout threats,” E&E Reporter, December 15, 2014.

⁶⁵ Final Rule, www.bscc.gov/uploadedFiles/BSEE/Regulations_and_Guidance/Recently_Finalized_Rules/Well_Control_Rule/2015-08587.pdf.

by S. Elizabeth Birnbaum, the head of the Minerals Management Service at the time of the BP oil blowout – a full two years before the final rule was issued!

It's unfathomable that the administration has failed to act on the findings of the December 2011 report of the National Academy of Engineering, which gave us some very bad news about Deepwater Horizon's blowout preventer.

Its massive cutting blades were supposed to slice through the drill pipe to stop the flow of gushing oil. But it turned out that these huge pieces of equipment were not adequately engineered to stop emergency blowouts in deep water.

The academy's report was detailed and damning. Deepwater Horizon's blowout preventer "was neither designed nor tested for the dynamic conditions that most likely existed at the time that attempts were made to recapture well control," the report said. More troubling, the shortcomings of Deepwater's equipment "may be present" at other deepwater drilling operations, the report said.

Administration officials promised an immediate response to the N.A.E. report, including regulations to set new standards for blowout preventers by the end of 2012. Today, 16 months after that deadline and four years after the blowout, we still have not seen even proposed rules. Deepwater drilling continues in the gulf. New leases are being offered by the government and sold to energy companies each year. Yet the N.A.E. report warned that a blowout in deep water may not be controllable with current technology.⁶⁶

We may have escaped another BP-style disaster as a result of this unconscionable regulatory delay, but if so, it has merely been a matter of luck. The American people deserve better.

8. Pipeline Safety

Oil and gas pipeline spills have long been a concern for the public but the situation has deteriorated significantly since 2010. Major pipeline incidents have occurred in communities across the country, including Marshall, Michigan; San Bruno, California; Allentown, Pennsylvania; Sissonville, West Virginia; Harlem, New York; Mayflower, Arkansas; two spills into the Yellowstone River, in South Dakota a few days ago; and too many more. In response, Congress passed a critical new pipeline safety bill in 2011 that required the Pipeline and Hazardous Materials Safety Administration (PHMSA) to produce dozens of new pipeline safety rules. Unfortunately, after almost 5 years, the law has yet to make any pipelines safer or prevent any future pipeline spills. This is because a broken regulatory process has left PHMSA unable to finalize a single new major safety rule despite strict deadlines set out by Congress in the law.

⁶⁶ S. Elizabeth Birnbaum and Jacqueline Savitz, "The Deepwater Horizon Threat," New York Times, April 16, 2014, available at: http://www.nytimes.com/2014/04/17/opinion/the-deepwater-horizon-threat.html?_r=0.

As Cal Weimer of the Pipeline Safety Trust told the House Committee on Transportation and Infrastructure, there are several factors that have made PHMSA's rulemaking process dysfunctional and ineffective. Most important is that PHMSA must meet a demanding and rigid cost-benefit analysis standard when producing new safety rules. This requirement stems from the 1996 re-authorization of the pipeline safety program and was part of a broader and concerted effort in the mid-1990s to codify Executive Order requirements from Presidents Reagan and Clinton regarding regulatory cost-benefit analysis. Twenty years later, the results of this effort are clear: rather than improving rulemaking at PHMSA, cost-benefit analysis has led to regulatory paralysis at the agency. Specifically, pipeline operators control the information PHMSA requires to meet its cost-benefit requirement and are reluctant to agree to new reporting requirements that would provide this information to PHMSA. This put PHMSA in the "catch 22" of not being able to fix pipeline safety problems because it does not have the information to understand what and where the problems are at the outset. Making matters worse, PHMSA needs more resources and staff to meet its stringent cost-benefit requirement and often encounters delays entirely outside its control when its rules undergo excessively lengthy reviews at the Office of Information and Regulatory Affairs (OIRA).⁶⁷

To illustrate the problems PHMSA encounters in meeting its cost-benefit mandate, one only has to look at PHMSA's inability to regulate rural natural gas gathering lines. These pipelines pose many of the same risks as transmission pipelines, but because they are located in rural areas outside of the jurisdiction of any federal or state pipeline safety jurisdiction, there is little to no collection of information with respect to these pipelines. Thus, it is nearly impossible for PHMSA to pass regulations on rural natural gas gathering lines because PHMSA is unable to determine, much less quantify, the costs and benefits of the regulation.

Four years ago, Public Citizen conducted an analysis of public health and safety rulemakings with congressionally mandated deadlines.⁶⁸ Our analysis showed that most rules are issued long after their deadlines have passed, needlessly putting American lives at risk. Of the 159 rules analyzed, 78 percent missed their deadline. Federal agencies miss these deadlines for a variety of reasons, including having to conduct onerous analyses, dealing with politically motivated delays, inadequate resources or agency commitment, and fear of judicial review.

Unreasonable delay extends to almost all aspects of the rulemaking process. The consequences of delay are serious. As opposed to issuance of new rules, delay creates the regulatory uncertainty that many business spokespeople denounce. Delay also means that lives are

⁶⁷ Cal Weimer, Pipeline Safety Trust, testimony on "Reauthorization of DOT's Pipeline Safety Program, before the Subcommittee on Railroads, Pipelines and Hazardous Materials of the Committee on Transportation and Infrastructure, February 25, 2015, available at: <http://transportation.house.gov/uploadedfiles/2016-02-25-weimer.pdf>.

⁶⁸ Mouzoon, N. (2012). *Public Safeguards Past Due: Missed Deadlines Leave Public Unprotected*. Public Citizen. Available from: <<http://www.citizen.org/documents/public-safeguards-past-due-report.pdf>>.

needlessly lost, injuries needlessly suffered, environmental harm needlessly permitted, consumer rip-offs extended, and more.

Remedies: There needs to be much more Congressional oversight of rulemaking delay. The agencies appear to treat Congressionally mandated deadlines for the issuance of new rules as suggestions rather than duties; it is up to Congress to hold them accountable.

The problem of industry exercising inappropriate influence at regulatory agencies, or even through the White House, is not easily cured. One important step to help would be new legislation to slow the revolving door between regulatory agencies and regulated parties. When agency officials and staff slide back-and-forth between working for the public and working on behalf of regulated parties, it's only natural that they will be overly sympathetic to industry when in public service, more deferential to requests for delay and less urgent in their advocacy for the public interest. The revolving door is a fundamental feature of the regulatory state. A recent report from the Project on Government Oversight (POGO) highlighted the pervasiveness of the problem at one agency, the Securities and Exchange Commission, finding that "from 2001 through 2010, more than 400 SEC alumni filed almost 2,000 disclosure forms saying they planned to represent an employer or client before the agency." And those disclosures, POGO notes, "are just the tip of the iceberg, because former SEC employees are required to file them only during the first two years after they leave the agency."⁶⁹

Appropriate statutory reform would require longer cooling off periods before ex-agency staff can lobby their former agency for pecuniary purposes, broader definitions of what constitutes lobbying activity, strong rules against the reverse revolving door (persons moving from regulated industry employment to regulating agencies) and with high standards for any exceptions.

OIRA-caused delay is a less significant problem than earlier in the Obama administration, but reforms are necessary to ensure the agency does not contribute to delay or inappropriately weaken rules. OIRA processes are closed and non-transparent.⁷⁰ What is known is that OIRA meetings with outside parties are dominated by regulated industries (with industry meetings five times more prevalent than those with public interest groups), and that meetings correlate with changes in rules.⁷¹ If OIRA is going to continue to its current function, it must be subject to much more transparency requirements. For example, agencies should put in the rulemaking docket all documents submitted to OIRA, and all changes and comments that they receive on proposed and/or final rules from OIRA or other agencies.

⁶⁹ Project on Government Oversight. (2013, February 11.) *Dangerous Liaisons: Revolving Door at SEC Creates Risk of Regulatory Capture*. Available from: <<http://pogoarchives.org/cbooks/20130211-dangerous-liaisons-sec-revolving-door.pdf>>.

⁷⁰ Government Accountability Office. (2009, April.) *Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews*. Available from: <<http://www.gao.gov/new.items/d09205.pdf>>.

⁷¹ Steinzor, R., Patoka, J. and Goodwin, J. *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety and the Environment*. Center for Progressive Reform. 2011. Available from: <http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf>.

Most importantly, Congress must not act to make the problem of regulatory delay worse. In recent years, there have been numerous legislative proposals to further hinder agencies' abilities to do their jobs, imposing vast new analytic requirements on agencies and increasing the scope of OIRA authority. To review the record of persistent regulatory delay—and to recognize the degree to which current analytic requirements are responsible for that delay—is to understand how misguided these proposals are, and how serious would be their consequences. Many of these proposals would require agencies to perform new and additional cost-benefit analyses, a particularly flawed approach which I discuss in more detail below.

Strengthening Regulatory Enforcement

In general, it is fair to say that the inspection agencies are understaffed and under-resourced.

Nowhere is the shortfall of inspectors more glaring than in the workplace safety and health area. "The federal Occupational Safety and Health Administration (OSHA) and the state OSHA plans have a total of 1,882 inspectors (8947 federal and 1,035 state inspectors) to inspect the 8 million workplaces under the OSH Act's jurisdiction," according to an AFL-CIO analysis. "This means there are enough inspectors for federal OSHA to inspect workplaces once every 140 years, on average, and for state OSHA plans to inspect workplaces once every 91 years."⁷² Our nation's workers deserve better.

To take another example among many, there is general agreement that the Food and Drug Administration (FDA) does not have sufficient resources to meet its statutorily mandated responsibilities to ensure the safety of drugs and medical products, including through inspection of overseas plants. "Our current examination of FDA's resources confirms that the agency's ability to protect Americans from unsafe and ineffective medical products is compromised," the GAO recently found.⁷³ GAO explained that "[t]he structure of the agency's funding—its reliance on user fees to fund certain activities, particularly those related to the review of new products—is a driving force behind which responsibilities FDA does and does not fulfill. The approval of new products has increasingly become the beneficiary of the agency's budget, without parallel increases in funding for activities designed to ensure the continuing safety of products, once they are on the market."

Of course, the issue with adequate enforcement is not solely a matter of resources. Many agencies do an inadequate job of enforcing rules due less to resource limitations than issues

⁷² AFL-CIO. (2015, April.) *Death on the Job: The Toll of Neglect*. p. 1. Available from: <<http://www.aflcio.org/content/download/154671/3868441/DOTJ2015Finalnobug.pdf>>.

⁷³ Government Accountability Office. (2009, June.) *Food and Drug Administration: FDA Faces Challenges Meeting Its Growing Medical Product Responsibilities and Should Develop Complete Estimates of Its Resource Needs*. p.34. Available from: <<http://www.gao.gov/new.items/d09581.pdf>>.

involving allocation of resources, prioritization and/or insufficient rigor. The 2013 fungal meningitis outbreak, for example, could and should have been prevented by FDA. The agency issued a warning letter to the New England Compounding Center in 2006, instructing the company to stop manufacturing-scale operations. However, FDA failed to follow up adequately. For whatever reason, whether inattentiveness or lack of compliance and legal resources, by not aggressively enforcing the regulations related to drug manufacturing and interstate commerce, the FDA allowed the company to continue its wide-scale manufacturing and interstate distribution operation of multiple high-risk drugs, including injectable steroids. The eventual result was the meningitis outbreak and 48 deaths.⁷⁴

The GM ignition switch debacle provides another example of regulatory failure—resulting in at least 111 deaths, and climbing. What is unique here is that the agency, now under new leadership, acknowledges its failures. A recent NHTSA report blames GM for its horrible misconduct, but also assigns major responsibility to NHTSA itself.⁷⁵ The report's major findings:

- GM withheld critical information about engineering changes that would have allowed NHTSA to more quickly identify the defect.
- NHTSA did not hold GM accountable for providing inadequate information.
- Neither GM nor NHTSA completely understood the application of advanced air bag technology in GM vehicles.
- NHTSA did not consider alternate theories proposed by internal and external sources.
- NHTSA did not identify and follow up on trends in its own data sources and investigations.

Remedies: The agency resource problem is easily solved with sufficient political will, though budget tightening efforts have cramped rather than expanded enforcement budgets. This is surely a penny wise but pound foolish approach. In areas where regulators are able to apply stiffer penalties, they may be able to bring more money into the treasury than they expend. Far more important is the social cost accounting: the economic benefits of properly enforced laws vastly exceed costs. This is most obviously true in the financial sector, as the discussion earlier regarding the Great Recession and regulatory failure elaborates, but it is true in virtually all areas. The economic benefits of reducing food contamination through inspection and regulatory enforcement, for example, vastly exceed costs. Indeed, if regulatory budgets were set based on the kind of cost-benefit analyses that are applied to new regulation, they would be dramatically larger.

⁷⁴ See Carome, M. and Wolfe, S. (2012, October 24.) Letter to Secretary of Health and Human Services Kathryn Sebelius. Available from: <<http://www.citizen.org/documents/2080.pdf>>.

⁷⁵ Department of Transportation (2015). NHTSA's Path Forward. Available from: <<http://www.nhtsa.gov/About+NHTSA/Press+Releases/nhtsa-forming-new-safety-teams>>.

Ensuring a sufficiently robust enforcement culture at regulatory agencies is not a problem that lends itself to a simple solution, though and stronger Congressional oversight of agency enforcement would go a long way. The NHTSA example of critical self-reflection in the wake of horrendous failure—a major change for the agency—should be monitored, studied and, assuming it does generate a change in the culture and practice at the agency, emulated.

An Appropriate Role for Cost-Benefit Analysis

Whatever the benefits of cost-benefit analysis as a tool to assist in regulatory decision-making, it should be recognized that cost-benefit analysis is highly imperfect and, at least as implemented in the real world, suffers from a set of flaws that tend to systematically skew in favor of regulated parties and against the broader public interest, by overestimating costs and underestimating benefits. Even ardent supporters of cost-benefit analysis, such as Cass Sunstein, the former OIRA administrator, argue that cost-benefit analysis is more appropriate as a guidance tool for agencies, rather than as a definitive metric directing agencies into a particular course of action.⁷⁶ As such, it would be a mistake to require any additional cost-benefit analysis in the regulatory system, or to give it a more prescriptive role in regulatory decision making.

The problems with cost-benefit analysis are legion.

First, regulated industry typically has an undue influence over cost estimates, in large part because it controls access to internal corporate information, as well as because of its ability to commission studies that tend to support the interest of their funders. This information asymmetry is a significant problem in the conduct of cost-benefit analysis, including because businesses may not provide important cost information or disclose methodological assumptions in their submitted cost estimates.⁷⁷

It should not be controversial to recognize that corporations have a natural bias to overestimate cost of rules that may affect the way they conduct business. As a result, while there is a long history of industry claiming that the next regulation under consideration would unreasonably raise the cost of doing business, those claims routinely prove to be overblown.

There is a long list of examples from the last century—including child labor prohibitions, the Family Medical Leave Act, the CFC phase out, asbestos rules, coke oven emissions, cotton dust

⁷⁶ U.S. Senate Comm. on Homeland Sec. and Governmental Affairs, Pre-hearing Questionnaire for the Nomination of Cass R. Sunstein to Be Administrator of the Office of Information and Regulatory Affairs, p. 5. Available from: <http://www.ombwatch.org/files/regs/PDFs/Sunstein_questions.pdf>. (“[C]ost-benefit analysis is a tool meant to inform decisions: it should not be used to place regulatory decisions in an arithmetic straightjacket”).

⁷⁷ Ruttanberg, R. (2004). Not Too Costly, After All: An Examination of the Inflated Cost Estimates of Health, Safety and Environmental Protections. Available from <<https://www.citizen.org/documents/ACF187.pdf>>.

controls, strip mining, vinyl chloride⁷⁸—that teach us to be wary of Chicken Little warnings about the costs of the next regulation.

Second, cost-benefit analyses tend to include static estimates of cost, based on existing technologies and business systems. But industry and our national economy is characterized by technological dynamism, and compliance costs regularly fall quickly once new rules are in place. Many of the examples above—from benzene to air bags—illustrate this point, and there are many other examples. Indeed, regulation spurs innovation and can help create efficiencies and industrial development wholly ancillary to its directly intended purpose.

Looking at a dozen emissions regulations in 1997, Hodges found that early estimates of cost were at least double subsequent estimates or actually realized costs. (Interestingly, the Hodges study found that while emissions reductions estimated or actual costs fell dramatically over time, costs for clean-up typically exceeded estimates—underscoring the case for preventative regulation.)⁷⁹

“Part of the reason for the error” of repeated overestimations of regulatory cost,” Hodges found “is that, over time, process and product technologies change. An estimate of the cost of compliance with a particular regulation might be based on one technology while actual compliance costs are based on another.” Once business must respond to implemented regulations, they stop bemoaning them and work to do so as efficiently as possible; technological innovation, learning by doing, and economies of scale routinely cut costs far below initial estimates.⁸⁰

A decade ago, in a detailed report prepared for Public Citizen, Ruttenberg cited a series of factors that explained how technological dynamism led to actual costs far below those estimated in cost-benefit analysis:

- Cost-benefit analyses routinely exhibit inaccurate assumptions about the compliance path industry actually follows once new standards are in place;
- Cost-benefit analyses regularly fail to consider new adaptations of existing technologies to meet new standards;

⁷⁸ *Regulation Issue: Industry's Complaints About New Rules Are Predictable -- and Wrong*; Hodges, H. (1997). *Falling Prices: Cost of Complying With Environmental Regulations Almost Always Less Than Advertised*. Economic Policy Institute. Available from: <<http://www.epi.org/publication/bp69>>; Shapiro, I., & Irons, J. (2011). *Regulation, Employment, and the Economy: Fears of job loss are overblown*. Economic Policy Institute. Available from: <<http://www.epi.org/files/2011/BriefingPaper305.pdf>>.

⁷⁹ Hodges, H. (1997). *Falling Prices: Cost of Complying With Environmental Regulations Almost Always Less Than Advertised*. Economic Policy Institute. Available from: <<http://www.epi.org/publication/bp69>>

⁸⁰ Hodges, H. (1997). *Falling Prices: Cost of Complying With Environmental Regulations Almost Always Less Than Advertised*. Economic Policy Institute. Available from: <<http://www.epi.org/publication/bp69>>

- Cost-benefit analyses generally do not consider the positive effects of learning by doing and economies of scale;
- Cost-benefit analyses often fail to considering adaptations to technology already in place in other industries; and
- Cost-benefit analyses typically fail to account for new innovations that follow from new regulatory standards.⁸¹

Ruttenberg highlights the case of vinyl chloride as an illustrative case study. When OSHA began developing a new health standard to reduce the risk of workers developing liver cancer, the industry claimed that the new standard threatened to “shut down” the industry and estimated costs on the order of \$65-90 billion. Once the standard was in place, industry quickly implemented six technological changes—ranging from improved housekeeping to reduce exposures to new computerized production processes that reduced exposures and saved money—within 18 months. Retrospective analyses of costs placed them at far below 1 percent of industry’s pre-rule analyses, with actual costs placed at between \$25 million to \$182 million, depending on how costs are calculated.⁸²

Third, although numerous business trade association papers suggest to the contrary, capital-intensive compliance costs do not continue to accumulate in perpetuity. When a new standard is in place, industry invests in improvements or new capital equipment to comply with new rules, after which costs are generally not recurring. (There are, to be sure, ongoing compliance costs in some instances, notably for ongoing reporting requirements, but those typically do not involve costs at the scale of regulations requiring significant capital investments.) One piece of evidence in this regard is that while industry regularly and aggressively contests new rules, at least in the health, safety and environmental areas, it does not continue to complain about rules once they are well established.⁸³

Fourth, claims of precision notwithstanding, cost-benefit analysis is open to bizarre and second- and third-order accounting, in practice especially on the cost side. One deeply troubling example of bizarre cost-accounting is the “lost pleasure principle,” an application of “consumer surplus” theory. Under this theory, when a regulation takes away an option from consumers or makes it less likely they will choose an option they would have in the absence of the regulation, cost-benefit analysis should take into account the resulting “lost pleasure.” This is not the kind of

⁸¹ Ruttenberg, R. (2004). Not Too Costly, After All: An Examination of the Inflated Cost Estimates of Health, Safety and Environmental Protections. Available from <<https://www.citizen.org/documents/ACF187.pdf>>. pp 22-32.

⁸² Ruttenberg, R. (2004). Not Too Costly, After All: An Examination of the Inflated Cost Estimates of Health, Safety and Environmental Protections. Available from <<https://www.citizen.org/documents/ACF187.pdf>>. pp 32-33.

⁸³ Lincoln, T. (2014, September 16.) Streamlining the Rules-Making Process. The Hill. Available from: <<http://thehill.com/blogs/congress-blog/the-administration/217751-streamline-the-rules-making-process>>.

factor that proponents of cost-benefit analysis would normally factor on the benefit side, to say the least, as I discuss further below. But they urge it be considered on the cost side. And the value they attribute to this purported cost can be extraordinarily high, since they impute the price that consumers were willing to pay for the product pre-regulation as the cost (multiplied by number of purchases).⁸⁴

Confoundingly, some economists have even argued for application of the lost pleasure principle when regulations lead consumers to make new choices simply based on new information; one would actually anticipate that consumer welfare increases when consumers are better informed and make choices accordingly, with no diminution in consumer “pleasure.” If I choose to eat apples instead of apple pie because nutrition labeling has educated me on the health impact of eating too much apple pie, it hardly makes sense to say a regulation has cost me pleasure. I’ve made my own choice, based on regulation helping me better understand my choices.

Yet actual economists doing cost-benefit analysis that helps establish new government rules have employed exactly this Through-the-Looking-Glass logic. They have done so even in the case of an addictive product, cigarettes,⁸⁵ where there is a new layer of absurdity because most adult users actually say they would like to stop using it.⁸⁶

Against all measures of common sense, these economists for a time succeeded in applying the lost pleasure principle to food labeling and tobacco regulations. After an ensuing public controversy—and deep concern expressed by a number of Senators, including on this committee—the Department of Health and Human Services scaled back, at least for now, use of the lost pleasure principle.⁸⁷ Thus, it appears that the ongoing outrage of the lost pleasure principle interfering with proper standard setting—at least in the consumer health area—has been alleviated, for now. But the serious suggestion of such an approach, which was held to reduce benefits by as much as 70-90 percent in some cases, shows how easy it is to manipulate cost-benefit analysis, and underscores the massive imprecision in cost-benefit exercises.

⁸⁴ See Ashley, E., Nardinelli, C. and Lavaty, R. (2015.) Estimating the Benefits of Public Health Policies that Reduce Harmful Consumption. 24 *Health Economics* 5, 617-624.

⁸⁵ See Begley, S. (2014, June 2.) FDA Calculates Costs of Lost Enjoyment if E-cigarette Rules Prevent Smoking. Reuters. Available from: <<http://www.reuters.com/article/2014/06/02/us-fda-tobacco-insight-idUSKBN0ED0A620140602>>.

⁸⁶ See Chaloupka, F. et. al. (2014, December 30.) An evaluation of the FDA’s Analysis of the Costs and Benefits of the Graphic Warning Label Regulation. *Tobacco Control*. 10.1136/tobaccocontrol-2014-052022; Song, A., Brown, P., Glantz, S. (2014, May 30). Comment on the Inappropriate Application of a Consumer Surplus Discount in the FDA’s Regulatory Impact Analysis, Docket No. FDA-2014-N-0189. Available from: <<https://tobacco.ucsf.edu/sites/tobacco.ucsf.edu/files/u9/FDA-comment-consumer-surplus-May30-%201jy-8cdp-qb60.pdf>>.

⁸⁷ Begley, S. and Clarke, T. (2015, March 18.) U.S. to Roll Back “Lost Pleasure” Approach on Health Rules. Reuters. Available from: <<http://www.reuters.com/article/2015/03/18/us-usa-health-lostpleasure-idUSKBN0ME0DD20150318>>.

Fifth, cost-benefit analysis systematically underestimates benefits. New regulatory costs can—and should—also be considered benefits in many cases. That is, costs to regulated businesses are not the same as social costs. New productive capital investment helps create new demand, creates new jobs, and helps spur new technology. These benefits are rarely captured in cost-benefit analyses, in part because they are uncertain, in part because they appear to be second-order effects (even though they are the mirror image of direct costs). Yet these benefits are significant, which is why the actual impact on employment of consumer, health, safety and environmental regulation is far less than anti-regulatory forces claim and in many cases may well register a net zero or positive impact.

Cost-benefit analysis also systematically underestimates benefits because of its insistence on, or at least strong bias in favor of, monetization. Yet health, safety, consumer, environmental, employment and similar regulatory protections yield benefits that are not easily monetized; and attempts to translate these benefits into monetary terms almost always fall short of capturing the full range of improvements they afford to our standard of living. The benefits of not losing an arm, of not choking for air when breathing, of not dying a painful and early death from cancer, of not feeling the stress of debt collector calls or the prospect of losing your home go far beyond what can be captured in a dollar figure. So too many other benefits of regulation—enhanced privacy, dignity, equality, freedom and liberty, fairness, community, a functioning democracy and many others—evade easy capture by a dollar figure.

What is the price tag on the pain a parent feels when they back their car over their child? That's not easily answered, but surely the benefit of preventing that pain is real. But such considerations generally do not merit inclusion in official cost-benefit analyses.

When Congress directs the Department of Justice to eliminate prison rape but to avoid “substantial additional costs,” should the government also conduct a cost-benefit analysis reliant in part on what victims would be willing to pay to avoid rape? It is common sense that the answer is no, but this actually occurred. Morally revolting on its face, Georgetown University Professor Lisa Heinzerling lays bare the logic of this exercise: “In the strange logic and twisted morality of cost-benefit analysis, the victim—not the perpetrator—must be willing to pay up to avoid the crime.” She adds, pointedly, that “rape is a serious crime, not a market transaction” and “that framing rape as a market transaction strips it of the coercion that defines it.”⁸⁸

Last, and related to the previous point, while perhaps it is unavoidable in some areas of public policy, the idea of placing a dollar value on a human life should, at minimum, be approached with great humility—an attribute one would not normally associate with the practitioners of cost-benefit analysis.

⁸⁸ Heinzerling, L. (2012, June 14.) Cost-Benefit Jumps the Shark: The Department of Justice's Economic Analysis of Prison Rape. Available from: <<http://www.progressivereform.org/CPRBlog.cfm?idBlog=EB3B070D-F7A0-1489-B361DA6B35ABC16E>>.

Two years ago, 8 men and women were killed in an Amtrak crash near Philadelphia.⁸⁹ The National Transportation Safety Board says that crash could have been prevented if Positive Train Control technology had been in place, as the NTSB has long advocated. Yet although the NTSB has urged adoption of the technology since 1970, and although Congress in 2008 mandated that all railroads deploy the technology by December 31, 2015, this objective will not be met. (Amtrak appears to be ahead of most railroads in deployment.) There are plainly many factors accounting for the delay in meeting the Congressional mandate. But it may be that one reason for that regulatory delay was that some officials believed that the regulatory standard was not cost effective.⁹⁰

That was easy enough to say when the deaths averted were just statistical abstractions. Now, with the horrible and apparently preventable deaths of identifiable human beings, things are dramatically different. The cost-benefit-analysis-influenced delay of the implementation of Positive Train Control technology now seems callous, cruel and fundamentally wrong—and it was. But all that has changed is we now replace statistical abstractions with human compassion.

Remedies: Decision makers should recognize that cost-benefit analysis is a flawed analytic tool that may be of some assistance on some occasions, but not one that should be determinative in the rulemaking process. At bare minimum, Congress should not act to impose new cost-benefit analytic requirements on agencies, or to make cost-benefit determinations more controlling.

Imbalanced and Inappropriate Judicial Review

Judicial review of agency action is an important and necessary part of our administrative process and general system of checks and balances, but judicial review of rulemakings has gone awry. Most major rules are challenged in court upon issuance, and lengthy challenges by regulated parties are standard. One significant problem is that there is a major imbalance in the ability of regulated parties and the public to challenge rules (or the failure to issue rules) on procedural or substantive grounds. A second major problem is the misguided importation by courts of cost-benefit requirements into review of agency action. There are other problems related to judicial review of agency action, notably an overly expansive view of corporate First Amendment speech rights that are beyond the purview of this testimony, but worth noting.

⁸⁹ AP. (2014, May 14.) All 8 Fatal Victims in Amtrak Crash Identified. Available from: <<http://6abc.com/news/all-8-fatal-victims-in-amtrak-crash-idd/719973>>.

⁹⁰ See Mann, T. (2013, June 17.) Rail Safety and the Value of a Life. Wall Street Journal. Available from: <http://www.wsj.com/articles/SB10001424127887323582904578485061024790402>; Freedman, D. (2015, May 18.) Obama Official Once Said Train-Safety Cost Outweighed Benefit. Connecticut Post. Available from: <<http://www.ctpost.com/local/article/Obama-official-once-said-train-safety-cost-6271486.php>>.

Imbalanced rights to challenge agency action: the standing problem.

On behalf of consumers and the public whom all regulation is ultimately intended to benefit, Public Citizen has brought numerous challenges to agency regulations during our almost 45-years of work. The challenges are an important tool for ensuring that agencies adhere to statutory requirements and make rational decisions based on the available information. Over the past 20 or so years, however, a series of unduly narrow standing decisions have impeded our ability, and the ability of litigants representing the broad public interest, to obtain judicial redress for unlawful agency action that will cause them injury.

The Supreme Court's and DC Circuit's standing decisions aim to confine the federal courts to their legitimate function of resolving "actual cases or controversies" and "to prevent the judicial process from being used to usurp the powers of the political branches."⁹¹ But in too many cases, a court has denied standing to parties who are threatened with "certainly impending" injuries that are "fairly traceable" to an agency's action,⁹² —even action that they claim violates a clear statutory limit on the agency's authority. In these cases, to dismiss the case for lack of standing constitutes an abdication of the judicial function of deciding cases. That abdication is all the more serious when, as has happened in several cases, it prevents adjudication of a legal issue that has profound national consequences.

To be sure, "generalized grievances" are not a basis for standing.⁹³ And we do not suggest that the fact that a regulation or policy may be harmful means that the particular parties challenging it necessarily have standing. By the same token, the fact that a policy causes concrete harms to a many members of the public does not mean that each of those persons do not have standing to challenge it.⁹⁴

For example, in one case, the DC Circuit's very narrow view of standing barred litigation of challenge to a NHTSA rule setting the standard for tire pressure monitoring systems that Congress directed the agency to make driving safer. Although the standard was intended for the benefit of the public, that court held that Public Citizen did not have standing to challenge it on behalf of our members (all at some point vehicle owners, drivers, passengers, or pedestrians) unless we could show statistically that the agency's rule presented a substantially increased risk of harm to consumers and that the ultimate risk is substantial. In addition, the court said that because the injury alleged was based on the government's regulation of automakers, not regulation of Public Citizen members, to demonstrate standing we had to show that causation did not depend on choices made by the automakers. Specifically, we were instructed to show that automakers would not voluntarily exceed the safety standard that NHTSA adapted; that drivers would not seek to prevent injury to themselves or to other people by manually checking their

⁹¹ *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013).

⁹² *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143 (2013).

⁹³ *Lance v. Coffman*, 549 U.S. 437, 439 (2007).

⁹⁴ See *Federal Election Comm'n v. Akins*, 524 U.S. 11, 24-25 (1998).

tires and then inflating them properly; and to show that drivers will pay attention to the warning light that will be installed in cars. Not only had two of these topics had been addressed specifically in the Federal Register notices that accompanied issuance of both rules, but the court's instruction effectively questioned the conclusions of Congress in enacting the law requiring NHTSA to require these monitoring devices.

When Congress has addressed the matter that is the subject of our suit and the agency failed to do what Congress asked it to do, the courts are an appropriate and proper place to hold the executive branch accountable for failure to abide by the law. It is simply not practicable or desirable to expect Congress to revisit the issue each time the agency does not live up to the legislative mandate. Congress, through the Administrative Procedure Act and statutes that authorize judicial review of agency actions, has confirmed that courts can and should entertain such suits. That does not mean that a plaintiff or a petitioner does not need to have stake in the case, because, after all, the case or controversy requirement comes from the Constitution, not from Congress. Once Congress has spoken, however, and the agency has acted, the courts have an important role to play.

What is crucial to emphasize is that judicially created standing doctrine does not affect all parties evenly; instead, it creates a structural advantage for the corporate sector. In general, the courts typically hold that regulated parties have standing to challenge agency action. In contrast, organizations and individuals seeking to realize rights and protections conferred by Congress face much greater difficulties; under the case law, it is not uncommon that no person or individual is deemed to have standing to enforce agency compliance with congressional directives.

Judicially imposed requirements of cost-benefit analysis.

The relationship between Congress, the regulatory agencies and the courts is a complicated one, not subject to simple formulaic rules about appropriate level of judicial deference to agency action. On the one hand, it is appropriate for the courts to ensure agencies are faithful to Congressional directives. On the other hand, the courts need show deference to the technical expertise of agencies, which are designed to convert broad Congressional directives into concrete rules. Judges should not abrogate well-crafted rules, nor invent requirements for rules to be justified by cost-benefit tests that are not statutorily required.

Yet as cost-benefit analysis has intruded deeper into the rulemaking process, courts have begun to subject these analyses to scrutiny, or to impose their own cost-benefit requirements on agency decision making. Because of the inherent imprecision of cost-benefit analysis, and because of relative institutional strengths, courts should subject agency cost-benefit analyses to no or exceedingly deferential review and should not impose cost-benefit requirements on agencies.

*Business Roundtable v. SEC*⁹⁵ is a case that highlights the concern about courts and cost-benefit analysis. In *Business Roundtable*, the D.C. Circuit struck down rule 14a-11 (the "proxy access rule"). Adopted by the SEC pursuant to authority under the Dodd-Frank Act, the rule would have allowed long-term shareholders to include nominees for the board of directors in a publicly traded company's proxy statement. Without such a right, shareholders in most instances have no realistic means of running candidates for director against management-selected candidates.

The D.C. Circuit held that the SEC had failed to meet its "unique obligation"⁹⁶ to analyze rules for their impact upon "efficiency, competition, and capital formation"⁹⁷ under Section 3(f) of the Exchange Act,⁹⁸ thereby rendering the SEC's promulgation of the rule "arbitrary and capricious."⁹⁹ Yet, nothing in the relevant legislative history indicates that Congress intended for the SEC's economic analyses relating to "efficiency, competition, and capital formation" to be akin to full blown cost-benefit analysis or take precedence over the SEC's primary mission to protect investors.¹⁰⁰ Nonetheless, in a string of recent cases,¹⁰¹ the D.C. Circuit has interpreted this language as imposing a duty on the SEC to fully assess the costs and benefits of their regulations and determine, in some instances, that the regulation yields a "net benefit."¹⁰² In the *Business Roundtable* opinion, the D.C. Circuit lambasted the SEC for "having failed once again ... adequately to assess the economic effects of a new rule"¹⁰³ by having "inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgment; contradicted itself; and failed to respond to substantial problems raised by commenters."¹⁰⁴

Several features of the decision are remarkable. First, the SEC was acting pursuant to specific Dodd-Frank-conferred power, which authorized the agency to adopt a rule requiring "that a solicitation of proxy, consent, or authorization by (or on behalf of) an issuer include a nominee submitted by a shareholder to serve on the board of directors of the issuer."¹⁰⁵ This fact was unmentioned in the court's decision, and earned the agency no deference. Second, the court failed to address the fact that the benefit of advancing shareholder democracy is inherently non-quantifiable. Third, the extraordinarily intrusive review of agency decision-making included a challenge to the benefit of shareholder democracy—a value that one might think speaks for

⁹⁵ *Business Roundtable v. SEC* 647 F.3d 1144 (D.C. Cir. 2011).

⁹⁶ *Business Roundtable v. SEC*, 1148.

⁹⁷ *Business Roundtable v. SEC*, 1148.

⁹⁸ 15 U.S.C. §§ 78c(f), 78w(a)(2), 80a-2(c).

⁹⁹ *Business Roundtable v. SEC*, 1155.

¹⁰⁰ See Generally James D. Cox and Benjamin J.C. Baucom, *The Emperor Has No clothes: Confronting the D.C. Circuit's Usurpation of SEC Rulemaking Authority*, 90 Tex. L. Rev 1811 (2012).

¹⁰¹ *Chamber of Commerce v. SEC*, 412 F.3d 133 (D.C. Cir. 2005); *American Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010).

¹⁰² *Business Roundtable v. SEC*, 1153.

¹⁰³ *Business Roundtable v. SEC*, 1148.

¹⁰⁴ *Business Roundtable v. SEC*, 1148-49.

¹⁰⁵ Section 971.

itself, but in any case was clearly the underlying objective of Congress in authorizing the SEC to issue a proxy access rule.¹⁰⁶

Remedies: *Business Roundtable* has cast a shadow over Dodd-Frank and other agency rulemaking, making agencies fearful and reluctant to proceed with rulemakings. Congress should act to establish clearer and more deferential standards of judicial review where agencies are acting in response to specific Congressional directives, and as regards cost-benefit analysis, and should make clear that courts are not to impose their own cost-benefit tests on agency action.

Regulation to Assist Small Business and Promote Competitive Markets

Much of the regulatory policy debate over the last couple years has misleadingly focused on the impact of regulation on small business, with regulation critics claiming that regulation poses unreasonable burdens on small business. In surveys and poll data, small businesses generally do not agree with their purported advocates. They cite inadequate demand and economic uncertainty as their biggest problems.¹⁰⁷ And regulatory law is replete with special and intentional protections for smaller firms, which are exempt from many rules.

What has been missing from the regulatory policy debate is a focus on the ways that regulation does—or should—assist small business in creating a level playing field.

First, as a preliminary matter in this area, policymakers concerned about aiding small business might fruitfully focus on the issue of regulatory compliance. Small firms may on occasion have difficulty discerning what standards apply to them and what they must do to meet their obligations under various rules. There may be value in legislation encouraging agencies to conduct more outreach, education and compliance assistance to small businesses on their regulatory obligations. Agencies with Small Business Ombudsman offices could be tasked with ensuring that those offices are conducting effective regulatory outreach and education to small businesses. “Best practices” guidelines for federal agencies could be established, including those with Small Business Ombudsman offices, to follow when working to ease regulatory compliance for small businesses.

¹⁰⁶ *Business Roundtable v. SEC*. (“By ducking serious evaluation of the costs that could be imposed upon companies from use of the rule by shareholders representing special interests, particularly union and government pension funds, we think the Commission acted arbitrarily.”)

¹⁰⁷ Small Business Majority. (2011). *Opinion Survey: Small Business owners Believe National Standards Supporting Energy Innovation Will Increase Prosperity for Small Firms*. Available from: <http://smallbusinessmajority.org/energy/pdfs/Clean_Energy_Report_092011.pdf>. Similarly, in a 2011 informal survey, McClatchy/Tribune News Service found no business owners complaining about regulation. Hall, K. G. (2011, 1 September). *Regulations, taxes aren't killing small business, owners say*. McClatchy Newspapers. Available from: <<http://www.mcclatchydc.com/2011/09/01/122865/regulations-taxes-arent-killing.html>>.

A larger area of Congressional focus should aim to address the problem that leading sectors of the economy are highly concentrated, and that widespread anti-competitive conduct unfairly disadvantages small business, while also hurting consumers and overall economic efficiency.

Congress and regulators should look to reinvigorate antitrust and competition policy. Action across a broad range of areas would very meaningfully advance small business success, and ensure smaller companies are not unfairly exploited, disadvantaged or eliminated by larger rivals.

- Large banks receive a massive implicit government subsidy thanks to the widespread market perception that these institutions are "too big to fail"—in other words, that protestations to the contrary, the government will in times of crisis bail out these giant banks to prevent a financial system meltdown. Because the market judges these institutions too big to fail, the giant banks are able to access capital at costs significantly below that are available to regular banks, as well as obtain other implicit subsidies. Various analysts place this benefit as ranging from tens of billions of dollars annually to more than \$100 billion, with the scale of the subsidy varying over time.¹⁰⁸

Remedies: This subsidy plainly disadvantages smaller banks and credit unions, and is itself a compelling reason—there are many other such reasons—to break up the giant banks. At bare minimum, this goliath bank subsidy emphasizes the imperative of a financial sector competition policy that removes the unfair advantage giant firms obtain.

- Patent enforcement by patent acquiring entities—often known colloquially as "patent trolls"—imposes a significant tax on innovation, especially by small business. Enforcement actions and license fees by these entities are skyrocketing, now costing almost \$30 billion a year, with researchers finding only a quarter of this total flowing back to innovation.¹⁰⁹

Remedies: Stronger rules should protect small business innovators, and innovative large corporations as well, from improper patent enforcement actions.

- Anticompetitive practices are widespread in the energy industry, including in electricity markets. "Anticompetitive agreements between sellers in regional wholesale electricity

¹⁰⁸ See Federal Reserve of Minneapolis. (2013, November 18-19). Workshop: Quantifying the Too Big to Fail Subsidy. Available from: <<https://www.minneapolisfed.org/publications/special-studies/too-big-to-fail/quantifying-the-too-big-to-fail-subsidy>>. Bloomberg. (2013, Feb 20.) *Why Should Taxpayers Give Big Banks \$83 Billion a Year*. Available from: <<http://www.bloomberg.com/news/2013-02-20/why-should-taxpayers-give-big-banks-83-billion-a-year.html>>.

¹⁰⁹ See Leibowitz, J. (2012, Dec. 10.) Patent Assertion Entity Workshop: Opening Remarks. Federal Trade Commission. Available from: <<http://www.ftc.gov/specsches/leibowitz/121210paeworkshop.pdf>>; Skitol, R. (2012, Dec. 14.) FTC-DOJ Workshop on Patent Assertion Entity Activities: Fresh Thinking on Potential Antitrust Responses to Abusive Patent Troll Enforcement Practices. Available from: <[http://www.antitrustinstitute.org/~antitrust/sites/default/files/PAE%20Workshop%20\(3051321_1\).pdf](http://www.antitrustinstitute.org/~antitrust/sites/default/files/PAE%20Workshop%20(3051321_1).pdf)>.

markets have forced consumers to pay hundreds of millions of dollars more for electricity than they would have in the absence of such conduct," notes the American Antitrust Institute's Diana Moss. "In these markets, which are structurally vulnerable to the exercise of market power, anticompetitive agreements spanning even a short time can result in large wealth transfers from consumers to suppliers."¹¹⁰ Those consumers include small business.

Recently, enforcement against anticompetitive conduct by the Federal Electric Regulatory Commission has picked up considerably, with FERC notably suspending companies found to have lied to regulators and engaging in anticompetitive actions. However, the deregulated structure of electricity markets creates the potential for anticompetitive activity, and suggests the need for new rules to ensure competitive benefits are actually accruing.

Last year, for example, Public Citizen filed an emergency complaint at FERC¹¹¹ alleging that Houston-based Dynegy, Inc. may have intentionally withheld several of its power plants from a power auction conducted by the Midcontinent Independent System Operator (MISO), the results of which were announced on April 14, 2015. The auction was intended to procure adequate supplies through 2016 for most of downstate and midstate Illinois. The bidding strategies of Dynegy and other suppliers, combined with the rules under which the auction was conducted, pushed auction prices up for much of Illinois from \$16.75 per megawatt-day last year to \$150 this year, an increase of 800 percent. Even if illegal manipulation did not occur, the dramatic spike—resulting in a rate for Illinois that is more than 40 times that in neighboring states despite abundant generating capacity in Illinois—indicates a violation of the Federal Power Act's fundamental requirement that rates be just and reasonable. These are the sort of market abuses that impact small business and demand a regulatory response.

Remedies: New rules should be created to ensure transparency standards apply to the non-governmental agencies, known as Regional Transmission Organizations, charged with running deregulated electricity markets. New rules should be established to ensure consumer, small business and state government representation in their decision-making processes. Additionally, legislation or perhaps new regulation is needed to overturn the "filed rate doctrine," which can immunize electricity traders from antitrust liability where conduct involves regulated, filed rates.

- Private antitrust enforcement—an important tool for small firms victimized by unfair practices from larger competitors—has become increasingly difficult. One notable obstacle to effective private enforcement are unreasonably high pleading standards,

¹¹⁰ Moss, D. (2013, Jan. 10.) *Collusive Agreements in the Energy Industry: Insights into U.S. Antitrust Enforcement*. American Antitrust Institute. p. 6. Available from: <http://www.antitrustinstitute.org/~antitrust/sites/default/files/AAI%20Working%20Paper%2013-2_%20Section%201%20Energy.pdf>.

¹¹¹ Public Citizen, Inc. v. Midcontinent Independent System Operator, Inc.. Emergency Section 206 Complaint of Public Citizen, Inc. And Request For Fast Track Processing, May 28, 2015, Available from: <<http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=5533>>.

which require victimized plaintiffs to make evidentiary showings that they frequently cannot make before undertaking discovery.

Remedies: Congress should act to overturn the ruling in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), as well as *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

- Forced arbitration provisions in contracts are denying small businesses and consumers effective access to justice on a large scale. These provisions also often unfairly treat small business franchisees, which are often victimized by forced arbitration provisions in their franchise agreements.

In recent years, the Supreme Court has issued a series of rulings holding that the pro-arbitration preference of the Federal Arbitration Act preempts state rules designed to ensure consumers access to traditional civil courts, as well as state rules protecting consumers' rights to join together in class actions. As a result, large corporations are able to include forced arbitration provisions in standard form contracts; and to insert anti-class action language into their arbitration provisions as a way to block collective actions that are often critical to addressing wrongdoing that affects large numbers of people in a small way.

The Supreme Court's 2013 decision in *American Express v. Italian Colors Restaurant* illustrates the potential stakes for small business.¹¹² In this case, American Express sought to enforce an arbitration agreement that prohibits merchants that accept its charge cards from filing class actions or otherwise sharing the cost of legal proceedings against it. The merchants aimed to hold American Express liable for a tying arrangement that allegedly violated antitrust laws (American Express insists merchants accept its unpopular credit cards if they want to accept its popular charge cards), but because expensive expert testimony was required to prove the claims, the cost of arbitrating an individual case would dwarf any possible recovery. Even in this case, where the arbitration agreement and class action ban concededly made it impossible for a small business to bring an antitrust lawsuit against a large company, the Supreme Court held that the arbitration agreement was controlling. It did not matter to the Court that this was a case where a large company used its market power to force on small business a provision that prevents them from seeking a remedy to an abuse of market power.

Remedies: Congressional remedies to these problems should include a prohibition on forced arbitration provisions in consumer, employment and civil rights cases¹¹³ and a restoration of states' authority to enforce their contract and consumer protection laws.

¹¹² *American Express v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013).

¹¹³ See the Arbitration Fairness Act, S. 1133, introduced by Senator Al Franken.

Conclusion: Strengthening the System of Regulatory Protections to Strengthen America

There is much to celebrate in our nation's system of regulatory protections. It has tamed marketplace abuses and advanced the values we hold most dear: freedom, safety, security, justice, equality, competition and sustainability. We should celebrate the achievements of regulatory protections.

But in its current form, the regulatory system is failing to meet its promise. Rather than looking at how to scale back or hinder the regulatory system, Congress should look to reforms to strengthen the rulemaking process and regulatory enforcement which would address under-regulation that costs lives and our economy and would lead to new opportunities for minority populations.

Mr. KING. Thank you, Mr. Narang.
The Chair now recognizes Ms. Heriot for her testimony.

**TESTIMONY OF GAIL HERIOT, PROFESSOR OF LAW,
UNIVERSITY OF SAN DIEGO SCHOOL OF LAW**

Ms. HERIOT. Good afternoon, Chairman King, Ranking Member Cohen, and distinguished Task Force Members. Thank you for this opportunity to testify on this important topic. I should note I'm here as an individual member of the Commission on Civil Rights and not on behalf of the Commission as a whole.

I will be brief, although I should say, that's not so easy, since there's plenty to talk about here. I will thus be focusing my remarks on the Department of Education's Office for Civil Rights, though there are many other government agencies that would also be worthwhile to discuss.

To put it plainly, OCR is out of control. Its pronouncements are in no way tethered to the actual law. OCR officials have shown again and again that they're not interested in what the statutes they're charged with enforcing really say. They are pushing their own agenda.

Congress is supposed to be the one who makes the laws. Composed of the people's representatives, Congress is the one that's supposed to make decisions about policy. OCR is supposed to implement those. Somehow our system of representative democracy is not working.

The best, but by no means the only, example is the recently announced transgender guidance requiring schools across the country to allow intact anatomically male, that is, boys, who psychologically identify with girls, to share toilet, locker room, and shower facilities with actual girls.

Congress intended no such thing when it passed Title IX back in 1972. That statute prohibits sex discrimination by federally funded schools, colleges, and universities, plain and simple. It makes an exception for separate living facilities, which was crystalized in a rule promulgated in 1975 which explicitly authorizes separate toilet, locker room, and shower facilities based on sex, actual sex, not the sex we might desire to be.

To claim back in the 1970's, that the 92nd Congress intended or that the American people understood Title IX to require schools to allow anatomical boys who view themselves as girls to use the girls' room would flunk the laugh test. Indeed, OCR doesn't even claim it. Instead, OCR's argument, insofar as it has one, is that it just noticed, surprise, that a 1989 Supreme Court case, Price Waterhouse versus Hopkins, requires this result. Well, no, it doesn't.

Price Waterhouse concerned a woman who allegedly had not been promoted because she was perceived as too aggressive. The Court reasoned that if a male employee with the same aggressive personality would have been promoted, that she was indeed discriminated against on account of her sex within the meaning of Title VII. Fine. But let's try that same line of reasoning in connection with the transgender guidance.

Suppose a school had a student who was anatomically male, but who identifies psychologically as female. Would a female student

with the same psychological identification be permitted to use the girls' room? Well, yes, of course. But that's very different from Price Waterhouse versus Hopkins, because Title IX and its implementing regulations explicitly permit schools to "provide separate toilet, locker room, and shower facilities on the basis of sex."

More important, note that applying this line of reasoning proves too much. Consider instead an anatomically male student who identifies as male, that is, the more typical male. It is still true that if his female counterpart, an anatomical female, who identifies as male, she would have been permitted to use the girls' locker room, yet we know that schools are explicitly authorized to have separate toilets, locker rooms, and shower facilities for each sex. This takes the case outside of the Price Waterhouse situation.

Note that in my testimony so far I haven't argued whether OCR's transgender guidance is good or bad policy. For the record, I think it happened to be bad policy, at least when it's shoved down the throats of schools, colleges, and universities. Far better to allow these institutions to make their own choices on these matters.

You can ask me about the underlying policy issue in the question-and-answer period if you so desire, but right now my point is more limited. This is not what Title IX actually requires. OCR's actions are lawless.

In my written testimony, I discussed a few ideas about how to get OCR and other agencies back on track. The simplest recommendation is stop giving them more money. Last year the Obama administration asked for a huge budget increase for OCR. I wrote a long epistle to Republican appropriations leaders saying, please don't do it, and explained why, but Congress gave it to OCR anyway; not quite as large as the Administration had asked for, but nevertheless very large. We are now experiencing the results of that decision.

I have two somewhat more complex proposals in my written testimony, but I see that I'm running out of time. So I would be very glad to talk about those ideas during the question-and-answer period or with your staff after the hearing.

The bottom line is that the Framers of the Constitution knew that they had to structure the institutions they were creating to get the incentives right. That work did not stop with them. The incentives of administrative agencies have to be carefully structured as well, and I would urge this Congress to do that.

[The prepared statement of Ms. Heriot follows:]

TESTIMONY OF GAIL HERIOT¹

Thank you for this opportunity to testify before you, the distinguished members of the Task Force on Executive Overreach. My name is Gail Heriot, and I am here in my capacity as an individual member of the United States Commission on Civil Rights and not on behalf of the Commission as a whole. It is an honor to be able to testify before you about this important issue.

I will focus most of my testimony on the Department of Education's Office for Civil Rights ("OCR"), which I believe has often gone far beyond what Congress intended in the enforcement of legislation. In particular I will emphasize OCR's controversial policies on sexual assault on campus and transgender use of toilet, locker room and shower facilities. I should add that the story is similar at many other agencies charged with enforcing civil rights legislation. Overreach is the rule and not the exception.

No doubt the officials who have controlled OCR and other civil rights agencies thought they were doing what was best for the country. But I believe what is best for the country is for it to be a well-functioning representative democracy where significant policy decisions are made by the people's directly-elected representatives, not by bureaucrats. We need to do our best to achieve exactly that.

Note that it is not my intention to lay the blame entirely at the feet of executive branch agencies. Sometimes the courts, by being excessively deferential, have helped make that overreach possible. Sometimes Congress itself has helped make it possible by generously funding agencies that are out of control and by ignoring issues that need to be addressed by legislation. But no matter who is to blame for how we got here, Congress has a special responsibility to get us back. Without Congress's active efforts, no progress along these lines is possible.

I. The Non-Delegation Doctrine and Beyond

Section 1 of Article I of the U.S. Constitution states, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." This language was deliberate. "All" was

¹ Professor of Law, University of San Diego, Member, U.S. Commission on Civil Rights.

indeed meant to mean “all.”² As John Locke—a political philosopher the founders were very familiar with and admired—put it:

The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands.”

John Locke, *Second Treatise of Government* (1690).

Locke was not unrealistically rigid in his thinking about the function of government. He well recognized the need for the executive to have what he called “power to act according to discretion.” William Blackstone similarly noted that the crown could issue “binding” proclamations that are grounded in the idea that while “the making of laws is entirely the work of ... the legislative branch ... , yet the manner, time, and circumstances of putting those laws into execution must frequently be left to the discretion of the executive magistrate.” William Blackstone, *Commentaries on the Laws of England* (1765). Like Locke, Blackstone would have been very familiar to the founders. See also Philip Hamburger, *Is Administrative Law Unlawful?* (2014).

But while the Constitution certainly permits Congress to endow executive branch personnel with a certain level of discretion, there are limits to Congress’s authority to do so. The classic formulation of the doctrine in this area was articulated in *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928), a tariff-setting case, and is generally known as the intelligible principle standard. As the Court in *J.W. Hampton, Jr. & Co.* put it:

If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.³

I express no opinion today as to whether this standard was ever adequate to protect the fundamental principle of representative democracy.⁴ As the nation has

² See *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001) (“In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, § 1, of the Constitution vests “[a]ll legislative Powers herein granted... in a Congress of the United States.”)

³ *J.W. Hampton Jr. & Co.*, 531 U.S. at 409.

grown larger and particularly as its government has grown to regulate more and more, Congress has succumbed to the temptation to confer more discretion on executive branch agencies. At this point, even if the intelligible principle standard was once adequate to protect representative democracy, it has come to be meaningless. Virtually anything short of “We the Members of Congress are going fishing, so please cover for us” will be approved by the courts.⁵

What is important to note is that just because the courts might approve it, that doesn’t mean Congress should confer such broad discretion on an agency. I would urge that in future legislation Congress be much more clear about what it wants administrative agencies with rule-making power to do with that power.

That said, only a little of the executive overreach we see today is the result of Congress’s having conferred too much rule-making power on an administrative agency. Even when Congress has stoutly withheld such authority, some agencies have come up with ways to take it anyway. For example, the Equal Employment Opportunity Commission (“EEOC”) doesn’t even have substantive rule-making authority under Title VII of the Civil Rights Act of 1964.⁶ Yet it has managed to

⁴ I do note that Chief Justice Taft, a former President himself, justified the Court’s decision upholding executive power to set tariffs by noting that “[i]f Congress were to be required to fix every rate, it would be impossible to exercise the power at all.” It should be noted, however, that the founders wanted legislation to be hard to pass. They would not have agreed that the more pies Congress can stick its fingers into, the better.

See also *Whitman v. American Trucking Association, Inc.*, 531 U.S. 457, 487(2001)(Thomas, J., concurring)(“I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than “legislative”).

⁵ See, e.g., *Whitman v. American Trucking Association, Inc.*, 531 U.S. 457 (2001)(holding that Congress may give the EPA rulemaking authority to set “ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on... criteria... and allowing an adequate margin of safety, are requisite to protect the public health”); *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946)(holding that Congress may give the SEC the power to reject corporate reorganizations that “unduly or unnecessarily complicate the structure” or “unfairly or inequitably distribute voting power among security holders.”); *NBC v. U.S.*, 319 U.S. 190 (1943)(holding that Congress may grant the FCC the power to allocate broadcasting licenses in “the public interest, convenience, and necessity”).

⁶ For a discussion of the legislative history of Title VII, especially Sen. Everett Dirksen’s role in attempting to ensure that the EEOC would not become too powerful and would limit itself to mediating cases between complainants and employers, see Daniel Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964*

transform what was supposed to be a limitation on its power into a greater power. Rather than promulgate rules pursuant to a notice and comment procedure—rules that could be challenged in court—it exercises its massive control over workplace practices by issuing “guidances,” which are devilishly difficult to challenge in court. Especially when combined with the power to conduct long and expensive investigations followed by equally long and expensive litigation, most employers get the message that it is better to knuckle under to the EEOC’s sometimes-fantastical “interpretations” of Title VII. Resistance is usually futile.

If Congress wants to rein in the power of bureaucrats to make law, it will need to address not just over-delegation, but also the ability of bureaucrats to “legislate” through guidances.

II. OCR’S Enforcement of Title VI and Title IX

The Department of Education is charged with enforcing Title VI of the Civil Rights Act of 1964, which prohibits race, color and national origin discrimination in federally-funded programs or activities, and also with enforcing Title IX of the Education Amendments of 1972, which prohibits sex discrimination in federally-funded education programs or activities. The Department of Education has the power to issue rules pursuant to both Title VI and Title IX. All such rules must be specifically approved by the President.

Both Title VI and Title IX prohibit only actual discrimination (a/k/a “disparate treatment”). The Supreme Court has explicitly rejected the argument that Title VI was intended by Congress to cover situations of disparate impact in

Civil Rights Act and Its Interpretation, 151 U. PENN. L. REV. 1417, 1490 (2003). See also Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy* 97-99 (1990). In view of the EEOC’s later history, Dirksen’s efforts must be labeled a failure. Indeed, the EEOC’s own web site hints at how it was able to exercise more power than had been expected from examining Title VII itself:

Because of its lack of enforcement powers, most civil rights groups viewed the Commission as a ‘toothless tiger.’ Nevertheless, EEOC made significant contributions to equal employment opportunity between 1965 and 1971 by using the powers it had to help define discrimination in the workplace.

See EEOC 35th Anniversary: 1965 - 1971: A “Toothless Tiger” Helps Shape the Law and Educate the Public, available at <http://www.eeoc.gov/eeoc/history/35th/1965-71/index.html>

Alexander v. Sandoval.⁷ There is no good reason to suppose Congress had something different in mind for Title IX.

As the Supreme Court noted (but did not decide) in *Alexander v. Sandoval*, this does not necessarily mean that an agency charged with rulemaking authority cannot issue rules that are grounded in a theory of disparate impact. Suppose, for example, OCR learns that some medical schools require applicants to pass a strength and endurance test in order to be admitted as a student, and they do this precisely because they hope to exclude as many female applicants as possible. Such would be a clear violation of Title IX. On the other hand, suppose that a much smaller number of other medical schools also require a strength and endurance test that tends to exclude more female than male applicants, but they do it because they sincerely believe, not wholly without evidence, that physicians who lack that strength and endurance do not make as good doctors as those who have it but may have marginally less stellar academic credentials. Such would not be a violation of Title IX. I nevertheless believe that if OCR were to determine, based on substantial evidence, that it could not without risk of substantial error distinguish the violations of Title IX from the non-violations, it would have the authority to promulgate a rule prohibiting the use of strength and endurance tests in medical school admissions.

In a perfect world, such a rule would be unnecessary, since we would be able to distinguish with ease bad motivations from good. But we are not in such a world. Sometimes the most effective way to enforce prohibitions on badly-motivated behavior is to prohibit a bit of behavior known to be associated with bad motivations, even if doing so will occasionally sweep innocent actors in with the wrongdoers. It is on this principle that legislatures commonly prohibit the possession of burglary tools in addition to prohibiting burglary.

There must be limits to such authority. I can think of two very important ones. First, such “over-inclusive” rules—which I might loosely call prophylactic or remedial rules—must indeed be *rules*, subject to all the procedures, including notice and comment, that rules are subject to under the Administrative Procedure Act. In the case of rules promulgated pursuant to Title VI and Title IX it also includes the requirement of Presidential approval.

Under the Administrative Procedure Act, “general statements of policy” and so-called “interpretative rules” (the two categories often collectively called “guidances”) are exempt from the notice and comment procedure. But neither applies to efforts to transform Title VI and Title IX into disparate impact prohibitions and hence cannot help OCR to expand its authority in that way. A

⁷ 532 U.S. 275 (2001.)

general statement of policy can only alert regulated persons how an agency intends to exercise its discretionary authority in enforcing the underlying statute (or a rule lawfully promulgated pursuant to the statute). It essentially identifies the agency's enforcement priorities. But since neither Title VI nor Title IX supports statutory disparate impact liability, OCR cannot alert regulated persons that it intends to give priority to violations that don't exist. Similarly, an interpretative rule can only interpret the text of the statute (or the text of a rule lawfully promulgated pursuant to the statute). OCR cannot transmogrify Title VI and Title IX into disparate impact statutes through the issuance of an interpretative rule.

The bottom line is that a mere guidance cannot impose new duties on regulated persons not contained in the original statute (or rule lawfully promulgated pursuant to the statute).⁸ That can only be done, if at all, by rule.

Second, even when acting by rule, there are serious limits on the ability of OCR to simply adopt its own policy preferences, whether in the form of liability for disparate impact or otherwise. The same limits that are applied to Congress's power under Section 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions of this article" must apply here as well.

In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court held unconstitutional the Religious Freedom Restoration Act ("RFRA") as it applied to states. RFRA prohibited states (among others) from substantially burdening religious exercise except in those cases when the burden is in furtherance of a compelling governmental interest and is the least restrictive means for furthering that interest. As it applies to states, Congress relied as its authority under Section 5 of the Fourteenth Amendment for its power to enact RFRA.

The Court stated that it is the province of the judiciary to define what is and what is not a violation of the Equal Protection Clause of the Fourteenth Amendment and that while Section 5 gives Congress maneuvering room to enact prophylactic or remedial legislation to deal with such violations, the legislation must be "congruent and proportional" to the violation. RFRA as it applied to states was not. The same principle works well here too.

A rule promulgated pursuant to Title VI or Title IX would have to be "congruent and proportional" to an actual violation of those enactments. OCR cannot simply promulgate a rule prohibiting disparate impact in all contexts. That would increase the scope of those statutes by several orders of magnitude—all

⁸ See, e.g., *Chamber of Commerce v. Dept. of Labor*, 147 F.3d 206 (D.C. Cir. 1999).

without evidence that of actual discrimination that cannot be remedied through ordinary disparate treatment liability.

If it wants to promulgate a “congruent and proportional” disparate impact rule, the rule would have to be highly contextualized and backed up by evidence that actual discrimination is going on that cannot be otherwise controlled. For example, suppose that following the promulgation of Title VI, previously discriminatory private colleges and universities in overwhelmingly white states, like Maine, Iowa and Vermont had hurriedly adopted strong preferences for in-state applicants. Suppose further when asked why, college and university officials were evasive and self-contradictory, causing OCR to conclude that their real motivation was to avoid admitting African American students. Under the circumstances, if OCR were to respond by promulgating a rule (not a guidance) prohibiting private colleges and universities from adopting preferences for in-staters, it would likely be regarded as a congruent and proportional response to the problem. On the other hand, if it were to include public colleges and universities in that rule, given their long tradition of giving preferential treatment to in-staters on the ground that their parents were likely taxpayers who help finance these schools, I suspect it would fail the “congruent and proportional” test.

All of this is by way of background. The fundamental point is that OCR routinely issues guidances that that are untethered to any plausible violation of Title VI or Title IX or to any rule lawfully promulgated pursuant to those statutes. The Obama Administration cannot be blamed for this alone. It has been going on for a long time.

For example, in December of 2000, just at the close of the Clinton Administration, OCR issued a guidance document in connection with its Title VI enforcement duties entitled, “The Use of Tests as Part of High-Stakes Decision-Making for Students: A Resource Guide for Educators and Policy-Makers.” In that document, OCR states that the use of exams like the SAT can constitute a violation of Title VI.

But anyone familiar with these tests knows how much effort is made to ensure that they do not give any unfair advantage to members of the racial majority or to national origin groups that are otherwise considered advantaged. There is virtually no chance that OCR could plausibly prove that a college or university is using a standardized test like the SAT in order to exclude African Americans or any other racial group from admissions. Indeed, it is much more plausible that a college or university that elects to forgo these tests is motivated by race than it is that one

that elects to retain them is so motivated. One doesn't have to love the SAT to acknowledge that it isn't a tool of racism.

More recent examples of the OCR's guidances untethered to any actual Title VI or Title IX requirement are abundant.⁹ But for simplicity's sake I will concentrate on just two—its Dear Colleague Letter issued on April 4, 2011 (hereinafter “the Sexual Violence Guidance”) and related documents¹⁰ and its very recent Dear

⁹ For my critique of the Dear Colleague Letter, dated October 26, 2010 from Russlynn Ali, Assistant Secretary for Civil Rights, U.S. Department of Education (the Bullying Guidance”), see Dissenting Statement of Commissioner Gail Heriot, With Which Commissioners Peter Kirsanow and Todd Gaziano Concur in U.S. Commission on Civil Rights, Peer-to-Peer Violence + Bullying: Examining the Federal Response 181 (September 2011). For my critique of the underlying policies of the Dear Colleague Letter, dated January 8, 2014 from Catherine E. Llamon, Assistant Secretary for Civil Rights, U.S. Department of Education and Jocelyn Samuels, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice (the School Discipline Guidance”), see Statement and Rebuttal by Commissioner Gail Heriot in U.S. Commission on Civil Rights, School Discipline and Disparate Impact 97 (April 2012). Note that I was writing about the school discipline issue after OCR had initiated its policy, but before the actual School Discipline Guidance was issued.

See also Letter dated February 26, 2015 from Commissioners Gail Heriot and Peter Kirsanow to the Honorable Thad Cochran, the Honorable Roy Blunt, the Honorable Hal Rogers and the Honorable Tom Cole (discussing OCR policies and guidances and recommending against increasing OCR's budget).

¹⁰ E.g., Questions and Answers on Title IX and Sexual Violence (April 29, 2014); Know Your Rights: Title IX Requires Your School to Address Sexual Violence (April 29, 2014); Resolution Agreement among the University of Montana-Missoula, the U.S. Department of Justice, Civil Rights Division, Educational Opportunities Section and the U.S. Department of Education, Office for Civil Rights (May 2013).

OCR originally labeled the University of Montana agreement as a “blueprint for colleges and universities throughout the country to protect students from sexual harassment and assault.” Letter of May 9, 2013 from Anurima Bhargava, Chief, Educational Opportunities Section, Civil Rights Division, Department of Justice and Gary Jackson, Seattle Office Regional Director, Office for Civil Rights, Department of Education to Royce Engstrom, President, and Lucy France, University Counsel, University of Montana at 1, available at <http://www.thefire.org/departments-of-justice-and-department-of-education-office-for-civil-rights-joint-findings-letter-to-the-university-of-montana/>. OCR has since sometimes backed away from its characterization of this document as a national model, although its signals to regulated universities about the Montana Agreement's intended effect have been mixed. After months of national criticism of this document, Assistant Secretary for Civil Rights Catherine Lhamon said in a letter to FIRE that “the agreement in the Montana case represents the resolution of that particular case and not OCR or DOJ policy.” Letter from Catherine E. Lhamon, to Greg Lukianoff, President, Foundation for Individual Rights in Education, Nov. 14, 2013, available at <http://www.thefire.org/letter-from-department-of-education-office-for-civil-rights-assistant-secretary-catherine-e-lhamon-to-fire>. But a few

Colleague Letter dated May 13, 2016, jointly issued by OCR and the Civil Rights Division of the Department of Justice (hereinafter the “Transgender Guidance”).

a. The Sexual Violence Guidance

The Sexual Violence Guidance has received lots of criticism.¹¹ I almost hesitate to pile on. But when members of the law faculties of both Harvard University¹² and the University of Pennsylvania¹³—hardly bastions of conservative

months after that, at a June 2, 2014 roundtable on sexual assault hosted by Senator Claire McCaskill, Acting Assistant Attorney General for Civil Rights Jocelyn Samuels repeatedly offered the terms of the University of Montana resolution agreement as a national model. Testimony of Greg Lukianoff Before the U.S. Commission on Civil Rights at 8, July 25, 2014.

More recently, OCR sent a letter to the University of New Mexico summarizing the findings of its investigation into UNM’s policies and practices for handling sexual harassment and assault. The letter demanded that UNM adopt a definition of sexual harassment very similar to the one contained in the much-criticized Montana Agreement. See Letter to Robert G. Frank, President of the University of New Mexico, April 22, 2016, available at <https://www.justice.gov/opa/file/843901/download>; Hans Bader, “Justice Dept. demands censorship at the University of New Mexico,” April 23, 2016, available at <http://libertyunyielding.com/2016/04/23/justice-department-demands-censorship-university-new-mexico/>.

¹¹ See Anonymous, “An Open Letter to OCR,” Inside Higher Ed, October 28, 2011, available at <https://www.insidehighered.com/views/2011/10/28/essay-ocr-guidelines-sexual-assault-hurt-colleges-and-students>; Laura Kipnis, “My Title IX Inquisition,” The Chronicle of Higher Education, May 29, 2015, available at <http://laurakipnis.com/wp-content/uploads/2010/08/My-Title-IX-Inquisition-The-Chronicle-Review-.pdf>; Jacob E. Gersen, “How the Feds Use Title IX to Bully Universities,” Wall Street Journal, January 24, 2016, available at <http://www.wsj.com/articles/how-the-feds-use-title-ix-to-bully-universities-1453669725>; Jessica Gavora, “How Title IX Became a Political Weapon,” The Wall Street Journal, June 7, 2015, available at <http://www.wsj.com/articles/how-title-ix-became-a-political-weapon-1433715320>; Anemonia Hartocollis, “Professors’ Group Says Effort to Halt Sexual Harassment Has Stifled Free Speech,” The New York Times, March 24, 2016, available at <http://www.nytimes.com/2016/03/24/us/professors-group-says-efforts-to-halt-sexual-harassment-have-stifled-speech.html>; and George Will, “The legislative and judicial branches strike back against Obama’s overreach,” The Washington Post, February 19, 2016, available at https://www.washingtonpost.com/opinions/the-legislative-and-judicial-branches-strike-back-against-obamas-overreach/2016/02/19/15f403b8-d672-11e5-be55-2cc3c1e4b76b_story.html.

¹² See Rethink Harvard’s Sexual Harassment Policy, Boston Globe (October 15, 2015) (letter signed by 28 members of Harvard law faculty) (noting that “large amounts of federal funding may ultimately be at stake,” the signatories nevertheless took the position that “Harvard University is positioned as well as any academic institution in the country to stand up for principle in the face of funding threats” and should do so), available at <http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html>.

thought—express deep misgivings over the sexual harassment policies their respective institutions were forced by OCR to adopt on account of this guidance, it is clear that something is wrong.

To be crystal clear: I regard sexual violence as deplorable. The question is not whether it should be tolerated on campus. There is no question that it should not be. The only question relevant that should be relevant to OCR is “What does *Title IX* require colleges and universities to do to prevent it?” Much of the task of keeping women (and men) safe on campus must be done by local police and prosecutors. The rest is largely done by colleges and universities themselves. If OCR has a role, its role is limited to ensuring that colleges and universities do not deliberately root out and punish sexual assault less aggressively than similar crimes because they wish to disadvantage women relative to men (or vice versa).

The Sexual Violence Guidance raises serious concerns. First of all, it has required many universities to change the burden of proof used in sexual harassment disciplinary proceedings.¹⁴ Before that, many universities used the “clear and convincing” standard instead of the “preponderance of the evidence” standard that OCR now requires.¹⁵ Yet nowhere in the text of Title IX (or in OCR rules) can such a requirement be found. It is simply a case of OCR imposing its own policy preferences in the name of enforcing Title IX. Given the importance of safeguarding the rights of accused students, the “clear and convincing” standard would seem to be the more appropriate one in at least some situations.¹⁶ Further, “Questions and

¹³ See Open Letter from Members of the Penn Law School Faculty, Wall Street Journal Online (February 17, 2014) (letter signed by 16 members of University of Pennsylvania law faculty) (“Although we appreciate the efforts by Penn and other universities to implement fair procedures, particularly in light of the financial sanctions threatened by OCR, we believe that OCR’s approach exerts improper pressure upon universities to adopt procedures that do not afford fundamental fairness”), available at http://online.wsj.com/public/resources/documents/2015_0218_upenn.pdf.

¹⁴ Sexual Violence Guidance at 11.

¹⁵ At a Commission briefing the subject on July 25, 2014, Ada Meloy of the American Council of Education said that in her experience, the clear and convincing standard was much more common than the preponderance of the evidence standard. U.S. Commission on Civil Rights Briefing Transcript at 202 (July 25, 2014), available at http://www.usccr.gov/calendar/trnscrip/CommissionBriefingTranscript_July-25-2014_%20final.pdf.

¹⁶ See Hans Bader, “Education Department Changes Burden of Proof in Sexual Harassment Cases Under Title IX,” April 11, 2011, available at <https://cei.org/blog/education-department-changes-burden-proof-sexual-harassment-cases-under-title-ix>.

Answers on Sexual Violence" discourages cross-examination of accused students by their accusers.¹⁷ Yet one federal district court has held that cross-examination is constitutionally required on due-process grounds when an accuser's credibility is an important issue in a disciplinary proceeding.¹⁸

First Amendment issues loom large in this area. Defining "sexual harassment," as OCR's official materials do, to include students' "telling sexual or dirty jokes," spreading "sexual rumors" (without any limitation to false rumors), "circulating or showing e-mails or Web sites of a sexual nature," or "displaying or distributing sexually explicit drawings, pictures, or written materials"¹⁹ can easily cover speech protected by the First Amendment, according to testimony of UCLA law professor Eugene Volokh presented at a Commission briefing.²⁰ Nonetheless, risk-averse colleges and universities have jumped to adopt the vague harassment standards set forth by OCR.²¹

OCR has pushed past the limits of its legal authority in addressing sexual assault and harassment on college and university campuses. Congress has a duty to exercise its oversight responsibilities and bring enforcement activities conducted in the name of Title VI and Title IX back under control.

b. The Transgender Guidance

¹⁷ Questions and Answers about Sexual Violence at 38, available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

¹⁸ *Donohue v. Baker*, 976 F. Supp. 137 (N.D.N.Y. 1997); see also Hans Bader, White House Task Force Attacks Due Process and Cross-Examination Rights on Campus, *Washington Examiner*, May 1, 2014, available at <http://www.examiner.com/article/white-house-task-force-attacks-cross-examination-due-process-rights-on-campus>.

¹⁹ OCR, *Sexual Harassment: It's Not Academic*, <http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.html>; OCR, *Dear Colleague Letter*, Oct. 26, 2010, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

²⁰ Written Statement of Eugene Volokh Before the U.S. Commission on Civil Rights at 1 (July 25, 2013).

²¹ Sexual Harassment Briefing Transcript at 182 (Ada Meloy, a representative from the American Council on Education, testified that the colleges and universities are redoubling their efforts to prevent sexual harassment and assault in response to OCR's flurry of activity), available at http://www.usccr.gov/calendar/transcript/CommissionBriefingTranscript_July-25-2014_%20final.pdf.

The guidance that everybody is talking about these days is the Dear Colleague Letter dated May 13, 2016, jointly issued by OCR and the Civil Rights Division of the Department of Justice (hereinafter the “Transgender Guidance”).

It would be an understatement to say that the Transgender Guidance goes beyond what Title IX, which was passed in 1972, actually requires. If someone had said in 1972 that one day Title IX would be interpreted to force schools to allow anatomically intact boys who psychologically “identify” as girls to use the girls’ locker room, he would have been greeted with hoots of laughter. OCR is simply engaged in legislating.

Let’s not forget what Title IX actually states. Its key prohibition is as follows:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance

20 U.S.C. § 1681(a).

That key prohibition is subject to a number of exceptions, including this one:

Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.

20 U.S.C. § 1686.

Based on those sections, the then-existing Department of Health, Education and Welfare (predecessor to the Department of Education) promulgated the following implementing rule, which President Gerald Ford approved on May 27, 1975:

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

34 C.F.R. § 106.33.

So far, so good. Note that the terms “gender,” “gender identity,” and “transgender” do not appear anywhere in Title IX or its implementing rules. Title IX prohibits discrimination on the basis of sex and sex only. If it isn’t sex

discrimination, it isn't prohibited. And if it isn't sex discrimination, no exceptions for situations where "discrimination" may be permissible are needed.

In the 1970s, nobody would have thought that a girl and an anatomical boy who thinks of himself as a girl were members of the same "sex." They would have said the girl was a girl, and the boy, no matter how feminine he might be, was a boy. This is not to say that they would not have cared about such a student's welfare or that they would not have recognized that his "gender dysphoria" (as it is called in DSM-5²²) might sometimes require that special provisions be made. But they never would have said that such a student was in fact "a girl" or that if a school failed to group him with the actual girls for the purposes of "separate toilet, locker room, and shower facilities" organized "on the basis of sex" that it was misclassifying him.

OCR has not pointed to a single case in which *anyone* during the 1970s used the statutory terms "sex" or "discrimination," in a manner consistent with the Transgender Guidance. I have diligently searched for such a usage in a newspaper, magazine or legal source to no avail. I do not believe any such usage existed at the time, but if it did, it would have been very rare.

Instead what I found is that the term "transgender" was coined specifically to contrast with the term "transsexual" and was intended to describe individuals who had adopted the habits and traits of the opposite sex *without having actually attempted to cross over into "becoming" a member of the opposite sex* (such as through surgical alteration of the body). In 1969, Virginia Prince, an anatomical male who dressed as a woman and who preferred, but did not insist on, feminine pronouns, wrote in the underground magazine *Transvestia*, which she edited:

"I, at least, know the difference between sex and gender," she wrote, "and have simply elected to change the latter and not the former. If a word is necessary, I should termed 'transgenderal.'"

Virginia Prince, *Change of Sex or Gender*, 10 *Transvestia* 53, 60 (1969), quoted in Richard Elkins & Dave King, *The Transgender Phenomenon* 82 (2006).

Prince's term did not catch on for decades. Neither the *Washington Post* nor the *New York Times* used the term "transgender" or "transgenderal" between January 1, 1960 and December 31, 1979. The *Compact Oxford English Dictionary* (2d ed. 1991) did not contain any form of the term. It first appeared in the *Westlaw*

²² Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013). The International Statistical Classification of Diseases and Related Health Problems, 10th ed. (or "ICD-10"), uses the term "gender identity disorder."

database for law review articles in 1993, when it appeared in an article in the New York Law School Law Review.

But over the years, the concept of “gender” has been used, particularly in the LGBT community, specifically as a contrast with the concept of “sex.” While “sex” is seen as a biological term, “gender” is seen as a term that refers to various cultural traits associated with sex, but separate from sex itself. Nothing highlights the fact that the two concepts are different better than the term “cisgender,” which had to be coined in the 1990s in order to describe those individuals whose gender and sex match.²³

For OCR to turn around and suddenly claim that when Congress used the word “sex” in Title IX, it was understood or intended to really mean “gender” would thus be far-fetched—so far-fetched that OCR doesn’t claim it. Instead, its argument—insofar as it has one—is constructed on two Supreme Court cases—*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998).²⁴ The Transgender Guidance—at least in its more lucid passages—appears to be arguing that the logic of those cases, if played out in the cases involving “separate toilet, locker room, and shower facilities” requires that boys who identify as girls be grouped with actual girls.

OCR is wrong on that. Start with *Price Waterhouse*: It concerned a woman who allegedly had not been promoted because she was perceived as having an overly aggressive personality. The court reasoned that if a male employee with the same aggressive personality would have been promoted, then she was indeed discriminated against on account of her *sex* within the meaning of Title VII.

Fine. But let’s try that same line of reasoning in connection with the Transgender Guidance: Suppose a school has a student who is anatomically male, but who identifies psychologically as female. Would a female student with the same psychological identification been permitted to use the girls’ locker room? Yes, of course. But that’s very different from *Price Waterhouse v. Hopkins*, because Title IX and its implementing regulations actually permit schools to “provide separate toilet,

²³ Google definitions defines “cisgender” as “denoting or relating to a person whose self-identity conforms with the gender that corresponds to their biological sex; not transgender.”

²⁴ OCR also relies on *G.G. v. Gloucester County School Board*, No. 15-2056, 2016 WL 1567467 at *8 (4th Cir. Apr. 19, 2016). But *G.G.* came out as it did only because the panel majority (over a vigorous dissent) considered itself to be bound by Supreme Court precedent to defer to OCR. OCR is attempting to bootstrap that into an actual substantive endorsement of its interpretation.

locker room, and shower facilities on the basis of sex.” More important, applying the *Price Waterhouse* line of reasoning ends up proving too much. ***Consider instead an anatomically male student who identifies as male. It is still true that his female counterpart—an anatomical female who also identifies as male—would have been permitted to use the girls’ locker room. Yet we know that schools are explicitly authorized to have separate toilets, locker rooms and shower facilities for each sex.*** This takes these cases outside the *Price Waterhouse* situation.

Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998), is just more of the same.²⁵ Applying its logic to the Transgender Guidance would force the conclusion that sex-specific “toilet, locker room and shower facilities” are a violation of Title IX—until one remembers that they are explicitly authorized by 34 C.F.R. § 106.33.

If anything, *Price Waterhouse* and *Oncale* demonstrate the perils of making up law on the fly. If Title IX really forbids gender identity discrimination, that will not always work to the benefit of transgender students. Suppose a student who is anatomically female, but who identifies as male feels uncomfortable using the girls’ restroom at a school. The school therefore arranges for her to use the faculty’s restroom, which accommodates only a single person at a time, and she is pleased with this arrangement. But now the other anatomical females are envious. They

²⁵ The plaintiff in that case was a male roustabout on an oil platform in the Gulf of Mexico. He alleged that on several occasions he had been sexually harassed and even threatened with rape by his fellow male crew members. A unanimous Supreme Court held that he nevertheless could sue for sexual harassment under Title VII and that the crucial factual issue was “whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.” 523 U.S. at __ (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). Hence plaintiff *Oncale* need only to prove that a similarly-situated female would not have been treated as badly as he was. If one tries to apply the same logic to the Transgender Guidance, it again fails to support the Guidance. It’s true that an anatomically female student who identifies as female is permitted to use the girls’ rest room, while an anatomically male student who identifies as female is not. But that’s because separate toilet facilities for each sex are explicitly authorized by the law. Attempting to cram the *Price-Waterhouse/Oncale* line of reasoning in this hypothetical only results in a dead end: If the boys who identify as boys were girls who identify as boys, they would be allowed to use the girls’ restroom too. That means that separate restrooms must be a violation of Title IX generally—until we shake ourselves and remember that separate restroom facilities for each sex are explicitly authorized by the law. *Oncale* and *Price-Waterhouse* are both about cases in which the employees suffered an actual disadvantage on account of their sex. The Transgender Guidance tries to apply this where what’s at stake is simply which of two equal groups the individual students will be assigned to.

want to use the single-user faculty restroom too. Each one of them can make the claim that if she were of the opposite gender identity, she would be permitted to use a private restroom. And they will be right. They would in fact have been better off if their gender identity had been male. Yet the school is just trying to accommodate the needs of its transgender student.²⁶

Given the inapplicability of *Price Waterhouse* and *Oncale*, the only way I see to justify the Transgender Guidance is to show that an anatomical male student who “identifies” as female really is a girl in some relevant sense. But at that point we are entering an Alice-in-Wonderland world.

Don’t get me wrong. There is no reason in the world that any federal, state or local government should be telling anyone that he or she needs to conform to the expectations of others regarding members of his or her sex. That’s what freedom is all about. But it’s one thing to butt out of an individual’s decision to dress and behave like a member of the opposite sex and it is quite another to declare that this makes that individual an actual member of the opposite sex and mandate that every federally-funded school in America act accordingly.

We are teaching young people a terrible lesson. If I believe that I am a Russian princess, that doesn’t make me a Russian princess, even if my friends and acquaintances are willing to indulge my fantasy. Nor am I a Great Horned Owl just because—as I have been told—I happen to share some personality traits with those feathered creatures. I should add that very few actual transgender individuals are confused in this way. They understand perfectly that their sex and their gender do not align. Some choose surgery to make their bodies better align with their gender. Most choose not to.

Note that my overriding point has thus far been that OCR is not enforcing Title IX and that it is instead enforcing its own concept of what the law *should* be. That is in keeping with the theme of this hearing. The Transgender Guidance is fundamentally anti-democratic. Not only is it at odds with what the 92nd Congress intended when it passed Title IX, it is at odds with what the American people want in 2016. For example, when a Houston ordinance that, among other things, banned

²⁶ Note that I agree with OCR that *Price Waterhouse* is valid precedent for its conclusion that transgender students cannot be *penalized* for their gender non-conforming personality traits and actions. Suppose, for example, an anatomically female student who identifies as male is made to stay after school, because her loud, aggressive manner is considered “unladylike” and a boy with the same traits would not have been subjected to the same penalty. Such a case would fit neatly into the *Price Waterhouse* decision, since unlike the cases involving restrooms, locker rooms, etc., there is no explicit exception to the ban on sex discrimination that permits this particular form of disparate treatment.

discrimination on the basis of gender identity came up for a vote last November, it was defeated 61% to 39%, precisely because many voters thought it would lead to restroom and locker room rules like those promoted in the Transgender Guidance. When Target stores announced that they would welcome anatomically male shoppers in the women's room, 1,258,306 individuals pledged to boycott (as of May 18, 2016). We are being governed by unaccountable bureaucrats rather than by our elected representatives.

For the record I should add that the Transgender Guidance is likely bad policy (and not simply because it is anti-democratic and goes against the public's wishes). It is usually a mistake to force a one-size-fits-all solution onto a situation where views and circumstances differ and may be subject to change over time. It has always been perfectly legal for federally-funded schools to have separate restrooms based on gender identity if that is what they want to do. For that matter, it has always been perfectly legal (though idiotic) for these schools to have separate restrooms based on social security number or number of letters in students' surnames. Neither Title IX nor Title VI outlaws such discrimination. The law does not ban something just because it's silly. If separate restrooms by gender rather than sex are a good idea, perhaps we would have evolved in that direction if OCR has not pre-empted such evolution by issuing the Transgender Guidance.

Here's why I doubt that evolution would result in restrooms uniformly separated by gender rather than sex (although many individual schools and businesses might adopt such a practice). First of all, not all transgendered individuals prefer that solution—at least not at all times. Toilet, locker room, and shower facilities are not places where one goes to commune with people whose traits are similar to one's own. It's a place one goes to relieve nature's call, etc. Toilet facilities in particular are configured to respond to anatomy, not one's taste in clothing. Put more pointedly, some anatomically males who identify with the feminine gender may nonetheless prefer to use the urinal in the men's room. It's quicker.

Second, sex is binary; one is either male or female with precious few exceptions. Gender, on the other hand, is multi-faceted and much more variable. It will be difficult to contain it in binary toilet, locker room and shower facilities. According to the National Transgender Discrimination Survey conducted by UCLA's Williams Institute, 31% of transgender respondents identified either strongly (10%) or somewhat (21%) with the identity "Third Gender," while 38% identified either strongly (15%) or somewhat (23%) with the identity "Two Spirit." See Ann P. Haas, Philip L. Rodgers & Jody L. Herman, *Suicide Attempts Among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination*

Survey 6 (January 2014). See also Sam Escobar, *I'm Not Male I'm Not Female: Please Don't Ask Me About My Junk*, *Esquire* (March 31, 2016); Ernie Grimm, *My Gender is Bunny*, *San Diego Reader* (March 25, 2009). If gender rather than sex is to control toilet, locker room and shower facility use, we eventually are going to need more than just two sets of facilities.

Third, because anyone can claim to be transgender, separating by gender rather than sex encourages pranksters and voyeurs. It will never be possible to gainsay a voyeur who enters a restroom for nefarious reasons claiming to be transgender unless he is caught red-handed peeping at or even assaulting his victims. Who will be able prove that he is a liar? Indeed, there have already been cases in the news that suggest what lies ahead. Last year, a man dressed as a woman was caught in a woman's room at a mall peeping into stalls. This was not his first arrest for such conduct. But what if it had been? Police would surely shy away from prosecuting him, since his presence alone would have been insufficient to prove his intent.²⁷

III. Some Thoughts on Solutions

One might ask why schools, colleges, and universities pay any attention to OCR. The answer, of course, is they do it for the money. OCR has control over their federal funding, the loss of which would be devastating to most educational institutions' finances. They can't take any chances. Whatever OCR wants them to do, they'd better do it, since it is very difficult for them to turn to the courts for protection. The Administrative Procedure Act does not provide a cause of action, since the issuance of a guidance is not ordinarily considered a final agency action (although it is possible that a court would find that, under certain circumstances, an action for a declaratory judgment is available.) Even if OCR never follows through with a threat to withdraw funds, an OCR investigation is very costly for the institution involved. The better part of valor is usually just to do what OCR wants.

I do not believe Congress can get OCR (or any other civil rights agency) back on track merely by chastising its leaders for going beyond what the law authorizes

²⁷ *Man Dressed as Woman Arrested for Spying into Mall Bathroom Stall*, *Police say*, *NBCWashington.com* (Nov. 17, 2015). See also M. Diworth, *Palmdale Man Arrested for Videotaping in Women's Bathroom*, *The Antelope Valley Times* (May 14, 2013); Sam Pazzano, *Predator who Claimed to be Transgender Declared Dangerous Offender*, *Toronto Sun* (Feb. 26, 2014)(man falsely claiming to be transgender to get access to shelter in order to sexually assault women).

them to do. If Congress wants to send a message, agency budgets will have to be reduced significantly.

Even reducing agency budgets, however, will likely be not enough. In a blog post at the Library of Law and Liberty website, my colleague at the University of San Diego Professor Michael Rappaport has written that the root of the problem at OCR may be the large sums of money at stake for each institution. I quote his suggestion in full:

Lawlessness at the Office for Civil Rights—and How to Address It

By Michael Rappaport

One of the areas of alleged lawlessness by the Obama Administration has been the Office for Civil Rights of the Department of Education (OCR). OCR has been pushing the agenda of a rape culture on college campuses. OCR has used guidances and “Dear Colleague” letters to effectively impose a series of questionable practices on colleges, such as depriving the accused of fair procedures.

There are numerous problems with this agenda. Some of them are substantive, such as the muddying of the definition of consent. Some of them are procedural, such as depriving the accused of procedural rights. But a third set of problems are legal. The problem is that the rules that OCR is imposing are questionable as a matter of law and have not been tested in the courts.

This is hardly an accident. The Office strategically imposes these standards through guidances because it knows that it is much more difficult for the guidances to be challenged in court ahead of time.

Instead, OCR uses the threat of a loss of federal funds to force universities to conform to its wishes – a threat that has worked even against the likes of Harvard University, one of the most powerful institutions in the country. If the a college does not conform to the Office’s interpretation of Title IX, the college risks losing large amounts of federal funds.

While the Office’s decision is subject to judicial review, if the college loses on judicial review, then the college can lose all federal funding. For most colleges, this is a devastating result – one that they would not risk. Therefore virtually all colleges cave, agreeing to the Office’s views. As a result, there are virtually no adjudications of whether OCR’s determinations are legal. The risk of all federal funds being eliminated is simply too much for colleges to bear.

But there is a way to change the law that would allow judicial review

without such a threat. Congress should pass a statute that provides that when a college does not follow an OCR interpretation, and that interpretation has not been judicially reviewed by the relevant Circuit Court, the college will only lose a limited amount in federal funds, such as \$5000. In this way, OCR cannot coerce colleges into following its interpretation of the law without judicial review.

It is hard to see how one might oppose this reform – unless of course one believes that the executive branch should be able to operate without judicial supervision. People who believe this should be forced to acknowledge it in public.

It is possible that some version of this idea could be made to work. It is a proposal that deserves serious consideration. It may be necessary, for example, that an irrebuttable presumption will be necessary that OCR is acting pursuant to a guidance when it has an extant guidance that is applicable to the facts of the case. That would prevent OCR from arguing that it is acting only pursuant to the statute itself and not in any way pursuant to its guidance (and hence not subject to the \$5000 limit).

Even this proposal won't cover all the problems of overreach by OCR (or by the EEOC or other similar agencies). One problem that arises with some regularity is the seemingly interminable investigation. These investigations impose huge costs on the regulated party. Even without the threat that OCR can cut off funds pursuant to Title VI or Title IX, just the expense of the investigation can cause schools to knuckle under.

Here is my suggestion: Perhaps there needs to be a point in these investigations at which enough is enough. At that point—call it the “outside point”—schools (or in the case of the EEOC and Title VII, employers) should be able to recoup their expenses—at least if it is ultimately determined by a court that the school (or employer) did not violate the law.

Congress could accomplish this by creating a statutory remedy and cause of action in federal court for this purpose. After the “outside point”, the school (or employer) would be able to take the initiative by filing an lawsuit. The agency could then counterclaim for a determination that the school (or employer) violated the law. The court could then determine liability. In the absence of liability, it could award the regulated party all expenses incurred in dealing with the investigation past the “outside point.”

There are difficulties in drafting such legislation. How should the “outside point” be defined? What kinds of expenses should be allowed? How can we ensure that the expenses will be taken out of the agency's enforcement budget rather than out of some other part of the agency's budget? But I do not believe that they are insurmountable difficulties. Tackling those difficulties strikes me as likely superior to the status quo.

Mr. KING. Thank you, Ms. Heriot, for your testimony, and each of the witnesses.

I now recognize myself for 5 minutes of questioning.

I'd turn first to Dean Graham and ask you the question this way: that you heard in my opening statement that no business, I suppose this to be true, in the United States has a banner on their home page that says, notice, we are in compliance with all Federal regulations. Could you think that it's possible to be in compliance with all—just all Federal regulations?

Mr. GRAHAM. I don't know for sure, but I do know that colleges and universities are also heavily regulated sectors of the American economy, and we don't have any such statements on our Web sites, that I'm familiar with.

Mr. KING. And when you talked about some of the ways, guidance, notices, advisories, and could you speculate as to how difficult it might be just to be aware of all the regulations, let alone being in compliance with them?

Mr. GRAHAM. Yes. It's a little easier with rulemakings and regulations, because we have accounting mechanisms in the Federal Government to count them. But for these other types of stealth regulations, I call them, guidance documents, enforcement notices, there's actually no centralized method to even count how many there are in various agencies in the Federal Government as a whole. So it's very hard to get your arms around the magnitude and the trends.

Mr. KING. Do you recall, it seems to me that I do, about a second or third tier U.S. Treasury Web page that issued a regulation on ObamaCare 2 or 3 years ago? Does that ring a bell, Mr. Graham?

Mr. GRAHAM. Well, I'm aware of several of them. The one—it was addressing the employer mandate and the delay in the employer mandate. And if you remember, the context for a lot of that, obviously quite understandably, the Administration was trying to address a very difficult situation. But we insist upon the idea that when you're going to make changes in major programs like that, that you go through a standard rulemaking process. So it was highly—a highly unusual situation.

Mr. KING. I thank you, Mr. Graham.

I'd turn to Ms. Miller. And in your testimony, you commented that President Obama post-inauguration of his first term directed a review to modify, streamline, or expand regulations. Do you have a judgment on what actually happened? Was there modifying, streamlining, or was it expansion that we witnessed?

Ms. MILLER. That's a good question. So what we saw a lot of through the agencies' progress reports is that they listed rules that they were already conducting and planning to conduct as part of the retrospective review programs. I don't know how many of those actions were initiated as a result of the executive order. I would guess that most of them they were planning to do already and decided to categorize as retrospective review so that it could look as if they were complying. But my research did find that many of these retrospective review actions did increase burdens on the regulated public, and that was as a result of recategorizing large rules, such as EPA's tier three, as regulatory actions pursuant to the President's executive order.

Mr. KING. Thank you, Ms. Miller.

And I turn to Mr. Narang. And in your testimony, you mentioned the likely court challenge by a regulatory opponent. That would likely be a business that was affected by those regulations, it seems to be the most likely. And can you tell me if, say, if you're a business and there's a regulation that emerges in one of these unreviewed—say an unreviewed regulation that has the force and effect of law, and a business is disadvantaged by that, and they appeal through this process. You heard Chairman Goodlatte's opening statement about the convoluted way by which one seeks justice from outside the commission, I believe, was the language that was used in that, and you end up appealing back to the very agency that has issued the rule in the first place without an opportunity for a de novo review, how then does a person in America receive justice?

Mr. NARANG. So the guidance documents, I believe, are the type of regulatory actions that you're referring to that could result in enforcement actions. I don't think that's a proper characterization of the legal effect of binding—of guidance documents. Guidance documents are not legally binding. Noncompliance with guidance documents can result in other types of sanctions. For example, you know, an entity is receiving Federal funding for compliance with regulations—

Mr. KING. But the question was about without a de novo review, how does a person ever achieve justice if they're appealing back to the same agency that has created the regulation that they claim that the individual's in violation of?

Mr. NARANG. Sure. So, generally speaking, and I'll use the SEC and their administrative adjudication as an example as a case study. But generally speaking, the rates for—essentially, the rates at which litigants win within administrative education tribunals and rates that litigants win in Article III courts are roughly similar. In fact, sometimes agency tribunals result in increased rates of victories for legal—

Mr. KING. We conclude that it's about as difficult as understanding how.

And I think that my time is nearly out, but I would like to ask a concluding question to Ms. Heriot, because you put the most provocative testimony out here in front of this panel. And I'm trying to—I don't really want to visualize this order that—or this directive that the President has issued, but the girls that are in the shower when the anatomically intact male comes in, how do they determine the gender of that anatomically correct male?

Ms. HERIOT. It's what he says it is. They're not—a transgender person is not required to provide—

Mr. KING. Does that shock those girls any less?

Ms. HERIOT. I feel that the girls are going to be shocked regardless of what the evidence is of transgender status. One problem, though, is given that no proof is required, this—this causes a greater likelihood of pranksterism, of voyeurism, and such, because who's to challenge someone who says that they're transgender? Nobody's going to want to be in that position, and therefore, we can expect to see some foolishness going on here.

I think most schools have a great deal of sympathy for those who are in the transgender status, but by forcing these schools to engage in a one-size-fits-all, here's how we're going to deal with it, I think that's a big mistake. And for the Department of Education to do that, given that Title IX in no way requires this, particularly to do it through a guidance, is utterly inappropriate.

Mr. KING. This turns, in my opinion, on the difference between immutable characteristics and mutable characteristics, and I think that's when we went down the wrong path.

I thank all the witnesses.

And I'd now yield to the gentleman from Tennessee for his 5 minutes.

Mr. COHEN. Thank you, Mr. Chair.

The American Association of University Women and Know Your IX, a group empowering students to stop sexual violence, have got a letter, so I'd like to introduce into the record. The Know Your IX particularly takes great exception to Professor Heriot's testimony and suggests that much of it is factually in error, let alone questioning some of her legal theories. And then the AAUW just as some general. So without objection, we'd like to enter these into the record.

Mr. KING. Hearing no objection, so ordered.

[The information referred to follows:]



May 23, 2016

Dear Representative,

On behalf of the more than 170,000 bipartisan members and supporters of the American Association of University Women (AAUW), I would like to thank you for the opportunity to weigh in regarding the work of the U.S. Department of Education's Office for Civil Rights for the House Judiciary Committee's hearing, "The Federal Government on Autopilot: Delegation of Regulatory Authority to an Unaccountable Bureaucracy."

AAUW has long identified the need to ensure all students are able to learn in an environment free from sex discrimination regardless of their gender or gender identity and to end sexual harassment and violence in schools. Our own research revealed that nearly two-thirds of college students experience sexual harassment, and lesbian, gay, bisexual, and transgender students are more likely to be harassed.¹ A 2007 campus sexual-assault study by the U.S. Department of Justice found that around 20 percent of women are targets of attempted or completed sexual assault while they are students.² And just this year, a national poll found that one in five women said they have been sexually assaulted in college.³ This issue impacts men and women, students from all walks of life, and students at all types of schools.⁴

Efforts to diminish the work of the U.S. Department of Education's Office for Civil Rights (OCR) by undermining their authority to issue regulations, guidance, and technical documents, are a distraction from the real problems of sex discrimination, including sexual harassment and violence that students face every day. These efforts are also a distraction from the real need schools have expressed for guidance and technical assistance to ensure students can learn free from sex discrimination. OCR's actions to provide the information schools need, through guidance, and the remedies students need, through enforcement, are critical.

Title IX

Title IX of the Education Amendments of 1972 is the federal law that prohibits sex discrimination in federally funded education programs. It covers all aspects of sex discrimination – from the well-known inclusion of women in athletics programs, to the rights of pregnant and parenting students, and of course sexual harassment and violence. Title IX applies to students throughout their time in school – from elementary school through their postsecondary education. Since Title IX's passage in 1972, all federal agencies with educational programs have developed and issued regulations to implement and support the statute. In addition, the U.S. Department of Education has regularly provided technical assistance and guidance to support schools in their compliance with the law.

Title IX protects students from sex discrimination in all of a school's programs or activities, whether they take place in the facilities of the school, at a class or training program sponsored by the school at another location, or elsewhere. Title IX is a gender-neutral law, protecting students,

faculty and staff from sex discrimination.⁵

Title IX Guidance is Critical to Supporting Schools

In order to ensure schools understand their responsibilities under Title IX, the federal government has developed supporting documents. In recent years, this has included Dear Colleague letters, “questions and answers” documents, and a resource guide to support and inform Title IX coordinators.⁶ These types of documents have been developed throughout the years, over the course of Republican and Democratic administrations, to reflect and answer the variety of questions from schools across the country, and the Supreme Court has confirmed that agencies may act to provide this type of guidance.⁷

OCR’s Guidance Reiterate Prior Guidance, Explain Regulations

Specifically, OCR’s Dear Colleague letters from 2010 and 2011 provide additional information to schools about what policies and practices would lead OCR to initiate proceedings against the school under existing regulations. These guidance documents reiterate prior guidance and explain the construction of the regulation OCR administers and enforces.⁸ For example, in the 2010 letter OCR again reiterated what constitutes unlawful sexual harassment under Title IX. Many of the examples used are from prior guidance documents and the standards for identifying the conduct date back to 1997.⁹ In addition, in its 2011 letter OCR explains that, as has been the case during multiple Administrations, Title IX and its regulation require “equitable” proceedings, which necessitates the use of the preponderance of the evidence standard.¹⁰

Title IX Protects All Students from Sex Discrimination

Title IX has a long history of supporting all students against sex discrimination. AAUW stands by OCR’s guidance to schools which states clearly that for purposes of Title IX enforcement schools must treat a student’s gender identity as the student’s sex.¹¹ This interpretation is supported by courts’ and other agencies’ interpretations of federal laws prohibiting sex discrimination. It also goes well beyond bathroom and locker room use, to include to participate on athletic teams and names on official records. But to be clear, we agree with hundreds of organizations that work with survivors of sexual violence every day that the myth that protecting transgender people’s access to restrooms and locker rooms endangers the safety or privacy of others. Assaulting another person in a restroom or changing room remains against the law in every single state.¹²

Fights to undermine the important work of the U.S. Department of Education’s Office for Civil Rights are a distraction from the real issue at hand – sex discrimination in schools. We look forward to continuing to work with you to support the civil rights of students. If you have any questions or need additional information, feel free to contact me at 202/785-7720, or Anne Hedgepeth, government relations manager, at 202/785-7724.

Sincerely,



Lisa M. Maatz
Vice President of Government Relations

¹ AAUW. (2005). Drawing the Line: Sexual Harassment on Campus. history.aauw.org/aauw-research/2006-drawing-the-line

² Christopher P. Krebs, Ph.D.; Christine H. Lindquist, Ph.D.; Tara D. Warner, M.A.; Bonnie S. Fisher, Ph.D.; Sandra L. Martin, Ph.D. (December 2007). The Campus Sexual Assault (CSA) Study, Final Report. NIJ Grant No. 2004-WG-BX-0010. www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf.

³ Washington Post. (2015). *Poll: One in 5 women say they have been sexually assaulted in college.* www.washingtonpost.com/graphics/local/sexual-assault-poll/

⁴ Washington Post. (2015). *Poll: One in 5 women say they have been sexually assaulted in college.* www.washingtonpost.com/graphics/local/sexual-assault-poll/; Bureau of Justice Statistics. (2016). Campus Climate Survey Validation Study Final Technical Report. www.bjs.gov/content/pub/pdf/ccsvsfr.pdf

⁵ U.S. Department of Education. (September 2008). Sexual Harassment.

www2.ed.gov/about/offices/list/ocr/docs/ccrshpam.pdf

⁶ AAUW members and activists have taken action to deliver these resources to over 700 schools across the country.

AAUW. (2015). Deliver New Title IX Resources to Your Local Schools. www.aauw.org/resource/titleixdelivery/

⁷ Letter from Assistant Secretary for Civil Rights, Catherine Lhamon, to Senator James Lankford. (February 17, 2016). chronicle.com/items/biz/pdf/DEPT.%20oP%20EDUCATION%20RESPONSE%20TO%20LANKFORD%20LETTER%202-17-16.pdf

⁸ Letter from Assistant Secretary for Civil Rights, Catherine Lhamon, to Senator James Lankford. (February 17, 2016). chronicle.com/items/biz/pdf/DEPT.%20oP%20EDUCATION%20RESPONSE%20TO%20LANKFORD%20LETTER%202-17-16.pdf

⁹ U.S. Department of Education, Office for Civil Rights. (2010). Dear Colleague Letter: Sexual Harassment.

www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html

¹⁰ U.S. Department of Education, Office for Civil Rights. (2011). Dear Colleague Letter: Sexual Violence.

www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html

¹¹ U.S. Department of Education, Office for Civil Rights. (2016). Dear Colleague Letter: Transgender Students.

www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf

¹² National Taskforce to End Sexual and Domestic Violence Against Women. (2016). National Consensus Statement. www.scribd.com/doc/309946430/National-Consensus-Statement-of-Anti-Sexual-Assault-and-Domestic-Violence-Organizations-in-Support-of-Full-and-Equal-Access-for-the-Transgender-Commun

KNOW YOUR IX

Empowering students to stop sexual violence

May 24, 2016

Via electronic mail to james.park@mail.house.gov

Chairman Steve King
Executive Overreach Task Force
House Judiciary Committee
2210 Rayburn Office Building
Washington, DC 20515

Ranking Member Steve Cohen
Executive Overreach Task Force
House Judiciary Committee
2404 Rayburn Office Building
Washington, DC 20515

Chairman King, Ranking Member Cohen, and Members of the Task Force:

On behalf of Know Your IX's hundreds of student members across the country, we write to correct significant factual errors and misrepresentations regarding the administrative enforcement of Title IX in Professor Gail Heriot's written testimony for the Executive Overreach Task Force Hearing on Federal Regulatory Agencies.¹

As young people whose educations have been imperiled by gender violence in school, we know firsthand just how critical the Education Department's work has been in the protection of women and other students' access to educational opportunities, consistent with the clear objective of Title IX.² Equally important, the Department's enforcement work has fit squarely within its existing mandate and authority.

Courts have long affirmed the Department's authority—and responsibility—to issue and enforce requirements that effectuate Title IX's nondiscrimination mandate.³ In accordance with this authority, the Department's Office for Civil Rights (OCR) issued guidance in 1997 and 2001 that underwent notice-and-comment. These documents explain that a school is liable under Title IX if it fails to take "immediate and appropriate corrective action" for sexually harassing conduct about which it knows or should have known and which is "sufficiently severe, persistent, or pervasive to

¹ *The Federal Government on Autopilot: Delegation of Regulatory Authority to an Unaccountable Bureaucracy Before the H. Comm. on the Judiciary*, 114th Cong. (2016) (testimony of Gail Heriot, Member, U.S. Commission on Civil Rights), <https://judiciary.house.gov/wp-content/uploads/2016/05/HHRG-114-JU00-Wstate-HeriotG-20160524.pdf> [hereinafter Heriot Testimony].

² See Education Amendments of 1972, Pub. L. No. 92-318, tit. IX, 86 Stat. 235, 373-75 (codified as amended at 20 U.S.C. §§ 1681-88 (2012)) ("No person in the United States shall, on the basis of sex, be . . . subjected to discrimination under any education program or activity receiving Federal financial assistance . . .").

³ *Gebser v. Lago Vista Indep. Sch. Dist.* 524 U.S. 274, 292 (1998) (tasking the Department of Education with "administering and enforcing Title IX, see 20 U.S.C. § 1682").

limit a student's ability to participate in or benefit from an education program or activity.⁴ OCR names several kinds of corrective action schools might employ in order to satisfy their legal obligations under the statute to preserve the educational access of a student who experiences sexual harassment (including sexual violence): placing the victim and accused student in separate classes, altering housing arrangements, providing tutoring, offering reimbursement for counseling, or making tuition adjustments.⁵

Let us not forget why sexual harassment, including sexual violence, falls firmly within the purview of Title IX. One in five women, as well as many men and gender nonconforming students, will experience sexual violence during their time in college.⁶ As courts have long recognized, this violence limits—and often outright precludes—victims' ability to learn.⁷ Many survivors go to great lengths to avoid their perpetrators on campus, skipping shared classes,⁸ avoiding shared spaces, or hiding in their dormitory rooms. Others struggle with post-traumatic stress disorder (PTSD), depression, eating disorders, anxiety, flashbacks, and nightmares,⁹ even attempting suicide or engaging in self-harm.¹⁰ Without support and accommodation, formerly successful students watch their grades drop as they struggle to participate in, or even attend, their classes.¹¹ In short: Sexual violence, which is based on sex, limits its victims' ability to access education; accordingly, under Title IX, schools receiving federal funding must take action to address this violence and remedy its

⁴ Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,038-39 (Mar. 13, 1997), <http://www.gpo.gov/fdsys/pkg/FR-1997-03-13/pdf/97-6373.pdf> [<http://perma.cc/DP2Z-CC43>].

⁵ *Id.*

⁶ See DAVID CANTOR, ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT, Westat 13-14 (2015), <http://ow.ly/XOL15>; see generally B.S. Fisher, L.E. Daigle, & F.T. Cullen, *Unsafe in the Ivory Tower: The Sexual Victimization of College Women* (2010); Christopher P. Krebs et al., *The Campus Sexual Assault (CSA) Study*, NAT'L INST. JUST. 5- 3 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> [<https://perma.cc/W6MP-X7VE>].

⁷ *Gebser v. Lago Vista Indep. Sch. Dist.* 524 U.S. 274, 292 (1998).

⁸ See Rebecca Marie Loya, *Economic Consequences of Sexual Violence for Survivors: Implications for Social Policy and Social Change* 96 (June 2012) (unpublished Ph.D. dissertation, Brandeis University) (on file with Know Your IX) ("Probably like 95% of the time, students will skip class for one reason or another. And, I mean, the reasons are because the perp's in the class, because the perp's friends are in the class, because, sometimes schoolwork just gets to be too much, again in the aftermath of the assault. Sometimes, they've come out to the professor as a survivor, and the professor hasn't . . . been particularly supportive, so they won't go back to the class. Sometimes it's because they know that on their way to the class, they'll see the perp because of their schedules or whatever. Sometimes they might be in different majors with different course studies, but they'll have like a 101 class together, so that something will intersect, so they'll stop going to the 101 class. So they won't stop their studies on their own plane, but they'll stop the ones that intersect with the perp." (quoting a legal services provider)).

⁹ *Id.* at 25-28

¹⁰ See NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 1 (2011), http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf [<http://perma.cc/FM4N-UPZW>]; see also Loya, *supra* note 3, at 25-28.

¹¹ See Loya, *supra* note 7, at 94; Cari Simon, *On Top of Everything Else, Sexual Assault Hurts the Survivors' Grades*, WASH. POST: POST EVERYTHING, (Aug. 6, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/08/06/after-a-sexual-assault-survivors-gpas-plummet-this-is-a-bigger-problem-than-you-think> [<https://perma.cc/2VXN-BE75>].

effects.¹² Unfortunately, as students have made clear time and time again, too few schools live up to their legal (and moral) obligations to do so.¹³

Over the last five years, OCR has helpfully continued its efforts to advise schools and students alike of institutions' specific responsibilities under Title IX to eliminate a hostile environment, prevent its recurrence, and remedy its effects. The 2011 Dear Colleague Letter, as well as the 2014 "Questions and Answers," echo OCR's earlier guidance,¹⁴ providing clarification to students on just what kinds of services and accommodations they might access in the wake of violence, and to schools on the kinds of circumstances in which they should take action to remedy violence's impacts. This collection of guidance documents, coupled with student activism, has proven widely transformative in allowing survivors en masse to learn their rights and begin, at long last, to enjoy the educational benefits of the law's enforcement.

Far from "grow[ing] dramatically"¹⁵ in recent years, OCR's staff levels are at half what they were thirty years ago, despite the fact that OCR now receives nearly triple the number of complaints.¹⁶ The increased number of OCR investigations is directly tied to the dramatic increase in complaints from discrimination victims—complaints that OCR must investigate in accordance with its enforcement mandate. With a budget far below what is needed to handle such a substantial caseload,¹⁷ OCR is struggling to keep up: Due to severe underfunding and understaffing, many of its investigations have remained open for upwards of three or four years,¹⁸ with significant consequences for discrimination victims.

In her written testimony, Heriot claims that OCR has overstepped its authority specifically through its articulation of the preponderance of the evidence standard as the appropriate standard of proof in campus sexual misconduct adjudications. This is untrue. Indeed, far from arbitrarily "imposing its own policy preferences,"¹⁹ OCR's guidance merely reminds schools that the preponderance standard *is* the established standard in civil and civil rights proceedings (including in claims brought

¹² *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998) (tasking the Department of Education with "administering and enforcing Title IX, see 20 U.S.C. § 1682").

¹³ See *U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations*, U.S. DEP'T EDUC., (May 1, 2014), <http://perma.cc/LH9D-Q8FA>; see also Tyler Kingkade, *Harvard Forced Sexual Assault Victim to Live By Abuser, Lawsuit Claims*, HUFFINGTON POST (Feb. 17, 2016), <http://huff.to/1oqH9is>; W. Bogdanich, *A Star Player Accused, and a Flawed Rape Investigation*, N.Y. TIMES (Apr. 16, 2014), <http://www.nytimes.com/interactive/2014/04/16/sports/errors-in-inquiry-on-rape-allegations-against-fsu-jameis-winston.html>.

¹⁴ As the Supreme Court unanimously affirmed in March 2015, under the Administrative Procedure Act agencies may issue such guidance without notice-and-comment procedures—and frequently do. See generally *Perez v. Mortgage Bankers Ass'n*, 575 U.S. (2015).

¹⁵ *The Federal Government on Autopilot: Delegation of Regulatory Authority to an Unaccountable Bureaucracy Before the H. Comm. on the Judiciary*, 114th Cong. (2016), <https://judiciary.house.gov/hearing/federal-government-autopilot-delegation-regulatory-authority-unaccountable-bureaucracy>.

¹⁶ See CS Staff, *Report: Complaints to OCR Have Doubled Since 2005*, CAMPUS SAFETY (May 5, 2016), http://www.campusafety.com/article/report_complaints_to_ocr_have_doubled_since_2005#.

¹⁷ See Office for Civil Rights, *Fiscal Year 2016 Budget Request*, U.S. DEP'T EDUC., at AA-7 (2015), <http://www2.ed.gov/about/overview/budget/budget16/justifications/aa-ocr.pdf> [<http://perma.cc/U8CS-G54E>].

¹⁸ *Id.* at AA-11, AA-15.

¹⁹ Heriot Testimony, *supra* note 1, at 10.

under Title VI, the statute on which Title IX was modeled). As Professor Nancy Cantalupo succinctly explains:

Allowing schools to adopt a criminalized standard of proof such as “clear and convincing” evidence or “beyond a reasonable doubt,” . . . would also create legal and administrative barriers for student survivors of gender-based violence that do not apply to the vast majority of comparable populations involved in civil or civil rights proceedings, all of which use the preponderance standard. To name just a few, these groups include: other students alleging other kinds of sex discrimination; students alleging discrimination based on other protected categories, like race or disability; gender-based violence survivors seeking protection orders in civil court; students alleging other forms of student misconduct; and students accused of sexual or any other misconduct who sue their schools in civil court. In reality the preponderance standard is used in the vast majority of cases, not only in internal disciplinary proceedings but also in other administrative or civil court proceedings and under other civil rights statutes that protect equality . . . Indeed, separating out sexual violence victims for different procedural treatment would enact a new kind of damaging “exceptionality [for] rape,” as Michelle Anderson discusses . . . Using anything more stringent than a preponderance standard would symbolize that we as a society are comfortable with giving one group of women and girls, as well as men and boys who are gender-minorities and victimized because of it, *unequal* treatment when compared to everyone else.²⁰

Further, Heriot’s suggestion that the preponderance standard was not widely in use *prior* to the issuance of OCR’s 2011 guidance²¹ is patently misleading. Of the schools that identified a standard for Title IX complaints pre-2011, the vast majority had independently and voluntarily adopted the preponderance standard.²²

Heriot goes on to suggest that OCR’s interpretation of Title IX infringes upon the rights of accused students. In reality, the opposite is true. Title IX, as interpreted by OCR, guarantees accused students *greater* protections than are otherwise provided to them under federal law or policy. By mandating fairness and equity in campus sexual misconduct proceedings, Title IX affords accused students the right to prompt investigations, regular updates, notice of rights, and trained adjudicators.²³ In so doing, Title IX provides students accused of sexual assault far more procedural protections than are enjoyed by students accused of other disciplinary infractions, like perpetrating simple assault or selling drugs out of a dorm room.

²⁰ Nancy Chi Cantalupo, “For the Title IX Civil Rights Movement: Congratulations and Cautions,” 125 *YALE L.J.F.* 281 (2016).

²¹ See Heriot Testimony, *supra* note 1, at 10.

²² See Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 *B.U.L. REV.* 945, 1000 (2004); Heather M. Karjane et al., *Campus Sexual Assault: How America’s Institutions of Higher Education Respond* 122 tbl.6.12(2002), <http://www.hhd.org/sites/hhd.org/files/mso44.pdf> [<http://perma.cc/9Z57-PHR5>].

²³ Alexandra Brodsky, *Fair Process, Not Criminal Process, Is the Right Way to Address Campus Sexual Assault*, *THE AMERICAN PROSPECT* (Jan. 21, 2015), <http://prospect.org/article/fair-process-not-criminal-process-right-way-address-campus-sexual-assault>.

Finally, Heriot lambasts the recent joint Justice Department and Education Department guidance on transgender students' rights, declaring that "[i]f someone had said in 1972 that one day Title IX would be interpreted to force schools to allow anatomically intact boys who psychologically 'identify' as girls to use the girls' locker room, he would have been greeted with hoots of laughter."²⁴ Heriot's glib dismissal of transgender students' gender identities as nothing more than "psychological" choices dangerously ignores the high rates of discrimination and sexual violence transgender students face in schools, and glosses over the ways that anti-trans bills limit students' educational access. Furthermore, the Fourth Circuit recently afforded deference to the federal government's interpretation of Title IX, stating that "[t]he Department's interpretation resolves ambiguity [in regulation] by providing that in the case of a transgender individual...the individual's sex as male or female is to be generally determined by reference to the student's gender identity."²⁵

* * *

Over four decades since the passage of Title IX—during which time inequality in education has remained firmly entrenched—we are beginning, at long last, to see promising steps towards change. Thanks to the Education Department's courageous acceptance of its mandate, institutions are finally beginning to address long-held inequities, even as mounting sexist opposition would have us return to the days when women and other marginalized students were *de facto*, if not explicitly, excluded from higher education.

After so many years of inaction, it would be deeply inadvisable to condemn the Department for enforcing the law that Congress has entrusted it to oversee—not the least because, without it, pervasive gender violence will continue to cost students their educations and their futures.

If you have any questions, please do not hesitate to contact me at dana@knowyourIX.org.

Sincerely,



Dana Bolger
Executive Director
Know Your IX

²⁴ See Heriot Testimony, *supra* note 1, at 12.

²⁵ G.G. v. Gloucester Cnty. Sch. Bd., No. 15-2056 (4th Cir. Apr. 19, 2016).

Mr. COHEN. Thank you.

Ms. Heriot, you've got a phenomenal background, resume, obviously a very smart woman. I thank you for dedicating some of your work here to the Office of Civil Rights. You are on the Civil Rights Commission. Is that correct.

Ms. HERIOT. That's correct.

Mr. COHEN. Appointed by President—reappointed by President Obama?

Ms. HERIOT. No. I was appointed by the Senate. I am Senator McConnell's nominee to the—

Mr. COHEN. Oh, I see. What are some of the things that you have done on the civil rights—to promote civil rights?

Ms. HERIOT. What have I done to promote civil rights? Everything we do promotes civil rights.

Mr. COHEN. What have you done? I mean, what have you done to help voting rights, for instance? Have you done things to help get people—extend the right to vote, because—

Ms. HERIOT. The Commission doesn't go out and register people to vote. What we do—

Mr. COHEN. I'm hip to that.

Ms. HERIOT [continuing]. Is issue reports.

Mr. COHEN. Yeah. And have you issued some reports that suggest that maybe some of the activities that have taken place in recent—with photo IDs and other things might be barriers to voting and tried to find ways to maybe suggest we should find ways to encourage people to get the—

Ms. HERIOT. I don't think we've done one on voter ID in particular, but we have done voter fraud and voter suppression reports in the past.

Mr. COHEN. Okay. And what are some of the things that you've found that has extended civil rights that may be that your work on the Commission has—you've been most proud of?

Ms. HERIOT. Well, let's see. Most proud of. That's kind of a difficult question. I am quite interested in our eminent domain report that we did recently. I like that—

Mr. COHEN. How about something a little bit closer—

Ms. HERIOT. We have a religious liberty report that's coming out soon that I think is quite a good report. I'd be very happy to furnish you with copies of those reports.

Mr. COHEN. Religious liberty. Is that—tell me what the perspective is on that.

Ms. HERIOT. It's a very complex subject. You don't want to spend your time on that. We could go on forever and ever and ever.

Mr. COHEN. Well, then thank you.

Ms. HERIOT. Absolutely. I will make sure that you get a copy as soon as it comes out.

Mr. COHEN. Thank you. We've had—you know, there's different perspectives on religious liberty, and some, you know, see it one way and some another. I mean, it's all—

Ms. HERIOT. Yeah. Our report is not limited to one aspect of it. Our report has—deals with lots of different aspects of religious liberty.

Mr. COHEN. Mr. Narang, you suggest in your testimony that there are some problems because we don't get the rules adopted

quickly enough? Is that because we don't have—our budgeting process and we don't have enough people there, or is it—is that the problem?

Mr. NARANG. So some of it is, you know, claims that the Federal workforce has increased dramatically since the 1960's. There's some needed context there. It's true that the Federal workforce has increased. I think the GAO pointed out in a recent report that about over the last 10 years, 94 percent of that increase is DHS, DOD, and the VA. So the public health and safety agencies, the agencies that oversee and regulate Wall Street, they are not getting massive funding or staffing increases, and at the same time, they're getting quite a few more responsibilities with respect to public health and safety and financial security.

Mr. COHEN. Thank you, sir.

Ms. Miller, I want to congratulate you. I understand you just graduated, right? Did you just graduate?

Ms. MILLER. I'm sorry?

Mr. COHEN. Or get a master's degree?

Ms. MILLER. Oh, I have a master's degree, yes.

Mr. COHEN. Did you just get it?

Ms. MILLER. I did. In May. Thank you.

Mr. COHEN. Good. Congratulations.

Ms. MILLER. Thank you.

Mr. COHEN. In your report, there was something here about some of your work had to do with airline passenger protections. What are the—what airline passenger protections have we had lately? I mean, we—

Ms. MILLER. I think in the report, what that might be referencing—are you talking about my bio or about the—

Mr. COHEN. Oh, it's in your bio.

Ms. MILLER [continuing]. Testimony?

Mr. COHEN. It says that you submitted public comments establishing, among other things, airline passenger protections.

Ms. MILLER. Generally, what those were were passenger protections for consumers, such as transparency in—

Mr. COHEN. Ticketing?

Ms. MILLER [continuing]. Ticket purchasing and things like that and other transparency measures for consumers while riding on airlines.

Mr. COHEN. I got you. Nothing about getting seats a little bit more further apart.

Ms. MILLER. No, sorry to say.

Mr. COHEN. No. That—I would miss that if it was the case.

Did you—do you agree with Mr. Narang that we don't have enough money allocated to get these regulations approved quickly enough?

Ms. MILLER. That's a good question. The G.W. Regulatory Studies Center does an annual report that tallies the amount of money that's budgeted to Federal agencies to conduct regulation, and we do find that the budget adjusted for inflation has been increasing steadily over time. So it seems that the—there are resources there. I think there are enough resources to be able to promulgate rules sufficiently.

One issue that I've heard when speaking with regulators is that sometimes the deadlines that are established in statute are a bit ambitious, and it's difficult for them to conduct a very thorough analysis and make good decisions within those time frames.

Mr. COHEN. Thank you. And I don't have any time left, but I would to comment that Dr. Graham has got a marvelous vitae as well, and he's been praised by Senator Moynihan and he had the wisdom to live in Santa Monica, so I can't really ask him anything.

Mr. KING. The gentleman's time has expired.

And I now recognize the Ranking Member of the full Committee, Mr. Conyers of Michigan.

Mr. CONYERS. Thank you, Chairman King. And I thank the witnesses.

I want to talk with Mr. Narang for a few minutes about the 2008 financial crisis that we're still coming out of. Was that a result of too much or too little regulation, or did it play any part at all?

Mr. NARANG. Thank you, Congressman. Definitely too little regulation and oversight of Wall Street.

Mr. CONYERS. Anybody else want to venture a response to that question?

Mr. GRAHAM. Yeah. I guess I would have said both, because we also had the problem of putting a lot of expectations on lenders to make loans into households and communities that were not in a position to actually pay back those loans. So those kinds of expectations, and much of that was in government policy but not necessarily in formal regulation. So I would say both played a role.

Mr. CONYERS. Mr. Narang, some of your fellow witnesses at the table suggest that Federal agencies use various means, including the issuance of guidance documents to circumvent various checks on agency rulemaking authority, including the Administrative Procedure Act and OIRA. Is that a possibility or reality in the present circumstances we find ourselves in?

Mr. NARANG. Sure. Thank you. So I think it is too simplistic a claim and it ignores the fact that, for example, I note a claim was made that a third of rules don't go through the notice and comment process. That's often because those rules are needed for urgent circumstances, like national security. It's often because Congress itself, has told the agency explicitly, you're not supposed to go through notice and comment rulemaking. Please issue an interim or direct final rule. So with respect to those rules, it's that context is necessary.

And I'd also say with respect to guidance documents, there's well-developed authority for agencies to pursue guidance documents when needed. It's interesting to note that, you know, a subset of guidance documents are no-action letters, and businesses often request those no-action letters expediently and want clarity as to whether a certain business practice is outlawed and will be—will result in an enforcement action against them. I don't hear similar concerns from the Committee or from my fellow witnesses that those no-action letters go through insufficient process and don't result in notice and comment.

In fact, Public Citizen actually has been advocating for a notice and comment process for the CFPB's newly enacted no-action letter process. Unfortunately, the CFPB has declined to undergo notice

and comment where Public Citizen could comment on the results of a no-action letter issued by the CFPB. And so that is disappointing in that sense, you know, it—public comment, if it's only applied to guidance documents, will result in, you know, a basically unfair system with respect to guidance that prioritizes one form of guidance over another.

And I would say the last point I make is that I've gone through the various reasons why our regulatory process for notice and comment rulemaking is dysfunctional. It's hard to blame agencies for not wanting to go through that process. Although I don't agree that you can just assume that's the intent when agencies issue guidance or—

Mr. CONYERS. Finally, let me ask you, why does Congress, in your view, delegate broad authority to administrative agencies in the first place?

Mr. NARANG. Well, thank you, Congressman. You mentioned it earlier. For practical reasons, delegation makes a lot of sense. Congress is not able to come up with the minutiae and technical details to determine what will be an effective regulation that protects the public. Congress gives broad direction. Delegation is—

Mr. CONYERS. Inevitable.

Mr. NARANG [continuing]. Is a model that's followed by the corporate world. It's not surprising that it's followed by our government.

Mr. CONYERS. Thank you, Mr. Chairman. And I thank the witness and I appreciate all of your testimony.

Mr. KING. I thank the Ranking Member from Michigan.

I now recognize the gentleman from New York, Mr. Nadler, for his 5 minutes.

Mr. NADLER. No Republican here? All right, thank you, Mr. Chairman. I was waiting for someone on the other side of the aisle to have his 5 minutes or her's, but—okay.

Mr. Narang, you stated that regulatory agencies, especially in the more important one, in the more important regulations often miss statutory deadlines. How should we enforce statutory deadlines? Should Congress change the way we write the laws or is there some other way we should enforce them?

Mr. NARANG. So that's a great question. Thank you, Congressman. Oversight is probably the most immediate and easiest means for Congress to ensure compliance on the front end with statutory deadlines and then to ensure that agencies are doing their best to get regulations out when they've missed those statutory deadlines. There are other ways that Congress can allow, essentially, private or third-party enforcement of missed statutory deadlines. This is an important way for citizens.

Mr. NADLER. We would have to put that in the underlying statute to start with.

Mr. NARANG. Yes. That could be the—that would generally be the case. That's right. But this is one of the best ways for our government to be responsive to citizens that expect the government to protect them.

Mr. NADLER. Okay. Let me ask you one question. Give me a brief answer because I have some questions for other witnesses. When these agencies typically miss the statutory deadlines, is it because

they don't like the underlying policy and they are delaying or is it because you're making impossible conditions for them?

Mr. NARANG. I'm sorry, can you repeat the second case?

Mr. NADLER. Well, the second case is, is it because it's impossible for them to meet the unrealistic statutory deadlines that we set up in the first place?

Mr. NARANG. Well, I would say that it depends on the agency. It depends on the circumstances. It's totally justifiable for Congress to want agencies to meet ambitious statutory deadlines for public health and safety issues that are of urgent concern, and there are many of those. And agencies should do their best to prioritize and meet those statutory deadlines.

Mr. NADLER. Thank you.

Ms. Heriot, you said—you didn't really go into the policy behind the recent guidance on transgender students. But you lambasted the alleged lack of authority in this and similar instances by the Department of Education to issue those guidances. I'm quoting now from a letter. I'm going to paraphrase, rather, from a letter from a group called Know Your IX, meaning Title IX, and it quotes from your testimony. It says you lambaste the recent joint Justice Department and Education Department guidance on transgender student rights declaring that, "If someone had said in 1972 that one day Title IX would be interpreted to force schools to allow anatomically intact boys who psychologically, 'identify,' as girls to use the girls' locker room, he would have been greeted with hoots of laughter." "Heriot's glib dismissal of transgender students' gender identity as nothing more than psychological choices dangerously ignores the high rates of discrimination and sexual violence transgender students face in schools and glosses over the ways that antitrans bills limit students' educational access."

So that's—my first question of two is, comment on that, please. But my second is, you said that—well, you questioned, and the quote I just read, obviously, questions the authority, but the Fourth Circuit recently afforded deference to the Federal Government's interpretation of Title IX stating, "In the Fourth Circuit decision, the Department's interpretation resolves ambiguity in regulation by providing that in the case of a transgender individual, the individual's sex as male or female is to be generally determined by reference to the student's gender identity."

In other words, the Fourth Circuit said—approved the Department's transgender regulation, in effect, on the basis of Title IX. And you said that Title IX gives no—that this is far beyond the power vested by Title IX.

Ms. HERIOT. Okay. On the Fourth Circuit, number one, the Fourth Circuit got where it did by saying it was deferring to the Department of Education. That's not something Congress is supposed to do. Congress is actually supposed to be looking at this from the standpoint of what the—

Mr. NADLER. Now, wait a minute. Congress writes laws. Congress writes laws. The departments interpret laws. Courts can defer to their interpretation or can say your interpretation is so far out of line that we're not going to defer to it. They're going to knock it down. The Fourth Circuit here says your interpretation is not so far out of line. It's within your—the permissible parameters of your

interpretation—of your interpretive authority, and therefore, we will accede to it. That’s what the—

Ms. HERIOT. And that’s what the dissent said was the case, that this was—

Mr. NADLER. Dissent? No, that’s what the case said.

Ms. HERIOT. Yeah, but the dissent says that this is, in fact, in this certain interpretation of Title IX, I would agree with that.

Mr. NADLER. Okay. So your argument is that the Fourth Circuit is wrong, you agree with the dissent.

Ms. HERIOT. I agree with the dissent, but I nevertheless say that the Fourth Circuit only could get where they got by deferring to OCR. They’re not saying that this is, in fact, the correct interpretation of Title IX.

Mr. NADLER. All right. But deferring, deferring—when we write a statute, and of necessity the executive agency charged with enforcing that statute has to interpret what it means, which it does all the time, the court can say one of three things: the court can say, well, this is obviously right, or the court can say, well, no, this is so out of line that it’s obviously wrong, or the court can say, well, this is close enough so that we will defer to the agency’s authority to interpret, which is what the Fourth Circuit said here.

Now, the dissent says, I gather from your quote, because I haven’t read the dissent, the dissent says, I gather, that it is so far out of line that we shouldn’t defer, that it’s just wrong. Okay. So you agree with the dissent, which is your privilege, but to say that the department is so out of line that it’s ridiculous, which is the gist of your testimony, the Fourth Circuit found otherwise.

Mr. KING. The gentleman’s time has expired, but the gentlelady witness will be allowed to answer.

Ms. HERIOT. I got lots of pieces here that I have to get to first. Let me just get to some of the other points that were made here. The violence issue and the danger of reading into Title IX something that isn’t there. But one way that schools have tried to deal with the transgender issues, and I know of no school that has not been sympathetic to the problem here, is by allowing a student in that situation to have some special dispensation; for example, to use the faculty bathroom if that’s necessary.

Mr. NADLER. And thus—

Ms. HERIOT. The trouble here is by—

Mr. NADLER. And thus, single that person out.

Ms. HERIOT.—Title IX so that it will treat gender identity as if that is what is prohibited by the statute will make an action like that illegal. Because students—for example, let’s say you’ve got a female student who identifies male and is being given a difficult time by the other female students, gets to use the faculty bathroom because it’s thought that this is simply better for that student. A student now of the same sex but a different gender identity has a reason to object to that and regard that as a violation of Title IX.

So what happens is, in dealing with the violence issue, you may, in fact, have this backfire. You’re going to have more possible solutions that are now illegal under Title IX, less discretion by the schools in order to deal with the subject the way they think is best. And so you’ve got to be careful what you wish for here.

You start extending Title IX to include categories that it was never intended to include, and rather than deal with the problem you're trying to deal with, you're going to end up with the problem of more problems, more difficulty in resolving the very issues that you're trying to resolve.

Mr. KING. And now the witness' time has expired. Thank you.

And I now recognize the gentlelady from California, Ms. Lofgren, for 5 minutes.

Ms. LOFGREN. Thank you, Mr. Chairman. I, because there's been so much discussion about the Office of Civil Rights' guidance on transgender students, I actually—it caused me to, rather than read the newspaper articles, to read the guidance, which was very instructive. And it really was issued in response to requests for guidance from schools all over the United States and I think is very measured in tone. But one of the things it says is, on page 2 or 3, that the departments treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations.

Now, there's a whole line of Federal cases that basically have found the same thing, that—and I'm not going to go into them now. But I'll just say this: You know, I don't usually call out witnesses, but here's what the written testimony says, and this is Mrs. Heriot. "We are teaching young people a terrible lesson. If I believe that I am a Russian princess, that doesn't make me a Russian princess, even if my friends and acquaintances are willing to indulge my fantasy. Nor am I a great horned owl just because, as I have been told, I happen to share some personality traits with those feathered creatures."

I've got to say, I found this rather offensive. And it says to me that the witness really doesn't know anything and probably has never met a transgender child who is going through, in almost every case, a very difficult experience of finding themselves. And I believe that the Department's guidance will help schools all over the United States in preventing the kind of violence and harassment that these transgender kids find too often. So that's all I'm going to say on that. You know, I think it's very regrettable that that comment was put into the record and I think it's highly offensive.

Now, I'd like to ask you a question, Mr.—

Ms. HERIOT. Well, could I comment on that, please?

Ms. LOFGREN. No, it's just my opinion. You have stated your opinion.

Ms. HERIOT. I think you'll find that many people find it very offensive that the Department of Education thinks that they can be—

Ms. LOFGREN. I think you're a bigot, Lady. I think you are an ignorant bigot. I think you are an ignorant bigot and anti—

Mr. KING. The gentlelady from California will suspend. You are out of order.

Ms. LOFGREN. She's out of order. It's my time, Mr. Chairman.

Mr. KING. We don't call names in this Committee. And you'll not be recognized to do that.

Ms. LOFGREN. Mr. Chairman, it is my time and I would just like to say that we allow witnesses to say offensive things, but I cannot

allow that kind of bigotry to go into the record unchallenged. Now, I don't want to get into a debate about it.

Ms. HERIOT. Does that mean you think I am a Russian princess?

Ms. LOFGREN. I have no idea. I'd like to ask a question of Mr. Narang.

I'd like to ask you, sir, you have agreed, I think, that Congress is ill-equipped to engage in the kind of work that agencies perform in these very technical and complex areas. I'm wondering if you have suggestions on how the Congress might approach some of these items, for example, in the science area, that are so complex and yet have a greater direction than has been complained of here today by some?

Mr. NARANG. Sure. Thank you, Congresswoman. Science is essential to grounding strong and effective regulation. I think that Congressman—congressional staffers should generally defer to the consensus, the clear consensus on scientific issues where there's ambiguity. I think that there, you know, generally is left—is better left to the agency experts, especially the agency scientists to make the—you know, to make the best determinations grounded on the most up-to-date and comprehensive science and scientific findings.

So I think there's a role there for both Members of Congress and their staff to pay close attention to what the consensus of scientific findings are. But at the same time, it's—we need to rely on agency scientists when it comes to the difficult questions that require that kind of expertise.

Ms. LOFGREN. I would just note that I think it's not limited to science. I recently had occasion to reread section 1201 of a statute, the DMCA. And at the end of the statute, we go on in some precision about beta, and VCRs, and Betamax, and magnetic strips. And you look at it now, it seems laughable that we would have put that in the statute about piracy. Obviously, people are opposed to piracy, but we would have been so much better off had we established goals and then allowed, instead of technology, that became dated and now looks ludicrous.

Mr. NARANG. So I entirely agree. If Congress wants to enact statutes that will stand the test of time that will be able to address emerging regulatory issues as they emerge, it's better left to the agency experts and it's better that Congress allow for those gaps to be filled by the experts as circumstances require.

Ms. LOFGREN. I yield back, Mr. Chairman.

Mr. KING. The gentlelady's time has expired and she yields back the balance.

And the Chair recognizes the gentleman from Georgia, Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

Ms. Heriot, I think we can agree that the Framers of the Constitution were careful not to consolidate government power, or governmental power within any one of the three branches of government. Isn't that correct?

Ms. HERIOT. Uh-huh.

Mr. JOHNSON. And we would also agree that the Framers prevented consolidation of power into any one branch of government by separating or dividing governmental functions between the three branches of government. Isn't that correct?

Ms. HERIOT. That, and checks and balances. So there's a mixture of powers as well as a separation of powers, but not a perfect separation of powers.

Mr. JOHNSON. It's actually a diffusion of power between the three branches of government. Wouldn't you agree?

Ms. HERIOT. In a sense.

Mr. JOHNSON. Yeah. It's a check and balance.

Ms. HERIOT. Checks and balances, yes.

Mr. JOHNSON. So no particular power is too concentrated into any one particular branch so as to adhere to the concept of separation of powers. Correct?

Ms. HERIOT. With checks and balances.

Mr. JOHNSON. That's right. And so the checks and balances have been in place since the founding of this great Nation, or at least since the passage of the Constitution. You would agree?

Ms. HERIOT. Some of them don't work so well anymore and that's part of why we're here. I think the need to—

Mr. JOHNSON. Yeah, but—

Ms. HERIOT [continuing]. Design institutions that have the same sort of checks and balances that the Framers envisioned and, for example, I think that we—

Mr. JOHNSON. Well, hold on 1 second. Hold on 1 second. I'm asking the questions. I would like for you to respond—

Ms. HERIOT. I thought I was doing that.

Mr. JOHNSON [continuing]. To my questions. So are you arguing that we need a constitutional convention or a constitutional amendment to reign in executive overreach? Is that what you are arguing?

Ms. HERIOT. No. I think we can do it a lot more easily than that.

Mr. JOHNSON. Okay. We can do it with the powers that the Framers have invested in this branch of government. Isn't that correct?

Ms. HERIOT. And I have some proposals for you.

Mr. JOHNSON. I would hope that one day we would get to your proposals as opposed to having show hearings out of Task Forces created for political purposes.

Ms. HERIOT. My proposals are in my written testimony.

Mr. JOHNSON. Well, I'm not so much arguing with you.

Ms. HERIOT. I'd love to talk about them.

Mr. JOHNSON. I'm arguing with the body, with the—with my Republican friends who control this body. I mean, I view it as unnecessary to have a Task Force on Executive Overreach when the legislative branch has the very power to check and balance any perceived overreach by the executive branch.

Ms. HERIOT. And I've got some ideas for you.

Mr. JOHNSON. Well, do you agree with me that this hearing seems to be unnecessary?

Ms. HERIOT. Well, if you turn—

Mr. JOHNSON. I'll put it like this: What would be a better use of our time is perhaps marking up one of the legislative proposals that are outlined in your testimony? Isn't that correct?

Ms. HERIOT. I would love to work on that with you. What I would like to do is try and get—

Mr. JOHNSON. What we are doing today—what we are doing today is basically wasting time. Aren't we?

Ms. HERIOT. Well, you see, the thing is, what I think is going on here is that we're talking past each other.

Mr. JOHNSON. Well, we are wasting time is what we're doing.

Ms. HERIOT. Some of the Democrats are talking about regulations, about rules, and the people that have been invited by the Republicans are talking less about the rules and more about the guidances. The notion that we have certain kinds of methods by which administrative agencies make law, in a sense, through rule.

Mr. JOHNSON. Ms. Heriot, you are a Republican yourself, are you not?

Ms. HERIOT. And As Mr. Narang was saying, maybe—

Mr. JOHNSON. Are you a Republican?

Ms. HERIOT [continuing]. The procedures are a little gummed up. So what's happening is everything is being bypassed—

Mr. JOHNSON. Are you a Republican, Ms. Heriot?

Ms. HERIOT [continuing]. With guidances, and we need to put some limits on guidances.

Mr. JOHNSON. Okay. All right. So, Ms. Heriot, I want to move from you and ask Mr. Narang to answer my question.

Are we wasting time here, sir?

Mr. NARANG. My response would be that if Congress has a particular problem with a guidance that's not going through rule-making, pass a law to make that guidance go through rulemaking. If Congress has a particular problem with a regulation, pass a law to repeal that regulation. That is well within the powers of Congress and would be a clear direction to agencies.

Mr. JOHNSON. Well, and would you discuss Congress' power of the purse as it bears on the issue of alleged executive overreach?

Mr. NARANG. There are many mechanisms at Congress' disposal, the power of the purse, and many mechanisms within Congress' dispensing of appropriations to control perceived executive overreach.

Mr. JOHNSON. Is congressional gridlock a contributing factor to any executive overreach that may be claimed?

Mr. NARANG. I think it could be.

Mr. JOHNSON. Do you think it is in this, given the paucity of legislative action by this particular Congress, compared to other Congresses? This one has been known as a do nothing Congress, if not the most do nothingest Congress in the history of the Nation. Would that bear upon this issue of alleged executive overreach?

Mr. NARANG. So if Congress has passed a law, that law delegates authority, in most circumstances, to agencies. Agencies use that authority. If subsequently Congress—a congressional inaction occurs, then those agencies are still more than allowed to use the congressional authority they have to issue regulations that protect the public's health and safety.

Mr. JOHNSON. Well, Ms. Heriot, I would love to ask you that question, but I know that you will take it off wildly in a different direction.

So at this point, I will waive—I will yield the balance of my time.

Mr. KING. The gentleman from Georgia returns the balance of his time.

And this concludes today's hearing. And I want to thank all the witnesses for attending.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

I thank the witnesses and I thank the Members and the audience, and this hearing is now adjourned.

[Whereupon, at 4:27 p.m., the Task Force was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

Written Statement of
David Stacy
Government Affairs Director
Human Rights Campaign

To the
United States House of Representatives Judiciary Committee
Executive Overreach Task Force
Delegation of Regulatory Authority to an Unaccountable Bureaucracy
May 24, 2016

Mr. Chairman and Members of the Committee:

My name is David Stacy, and I am the Government Affairs Director for the Human Rights Campaign, America's largest civil rights organization working to achieve lesbian, gay, bisexual transgender, and queer (LGBTQ) equality. On behalf of our 1.5 million members and supporters nationwide, I appreciate the opportunity to submit this statement into the record. We recognize the importance of a robust balance of powers as designed by our nation's founders, and the very real threats posed by a potential breach of these procedural safeguards. While we acknowledge the potential risk for overreach, by any branch, it is critical that calls for reform be founded in response to real threats and be tempered by a sincere commitment to good government rather than an opportunistic effort to undermine sound—albeit politically unpopular—executive actions that have been faithful to the process set forth by Congress itself in the Administrative Procedures Act and monitored by the courts.

The Administrative Procedures Act (APA) establishes a clear set of guidelines for federal agency rulemaking regarding the requirements for formal notice-and-comment rulemaking. Significantly, the APA also provides a categorical exemption of interpretive rules from this requirement.¹ This statutorily created exemption coupled with current jurisprudence equips administrative agencies with strong and seemingly well-settled authority to publish guidance interpreting their own regulations without engaging in notice-and-comment. These pieces of guidance are in no way “stealth regulations”² as some have deemed them, but rather examples of valid exercise of authority and streamlined implementation of existing regulations.

Despite the recent outrage regarding executive overreach and the Administration's use of subregulatory guidance, namely by this Task Force, I would like to take this opportunity to note that the Obama Administration's use of informal guidance and Executive Orders to further policy goals is not only far from excessive, but is actually significantly less than any other two-term President in recent history. To date, President Obama has issued 242 Executive Orders.

¹ 5 U.S.C. 553(b)(A).

² See generally John D. Graham & James W. Broughel, *Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act*, 37 HARV. JL. & PUB. POL'Y 30 (2014).

This number of executive orders seems modest in comparison to his predecessors including President Reagan who signed 381 Executive Orders, President Clinton's 364, or even the second President Bush's 291.³ To argue that President Obama has abused his office's authority to publish these actions is simply put – factually wrong. Under President Obama, the Executive Branch has been respectful of the balance of powers, while also clear in implementing policies within its authority. Too often, we have seen disingenuous attacks on the failure of the agencies to follow the administrative process when the substance of the policy is not universally popular.

One such example, which has also been raised today, is the recent guidance from the Department of Education Office of Civil Rights regarding access to appropriate restrooms and facilities for transgender students under Title IX of the Education Amendments of 1972 (Title IX). While members of the public—and this Task Force—are welcome to express their displeasure with the substance of this guidance, the legality of the guidance or the underlying agency authority to publish it is beyond doubt. For well over half a century, courts have granted strong deference to administrative actions that interpret existing ambiguous regulations. This deference was developed in the Supreme Court case *Bowles v. Seminole Rock & Sand Co.* in 1945⁴ and affirmed in the 1997 case *Auer v. Robbins*.⁵

The *Auer* test requires three steps—that the underlying regulation be ambiguous, that the agency's interpretation not be plainly erroneous or inconsistent with the regulation, and finally that the agency exercise fair and considered judgment.⁶ It is clear that the recent Department of Education guidance satisfies each. Recently, the 4th Circuit Court of Appeals has provided a thorough analysis of the Title IX regulation in question and the legality of the Department's interpretation of "sex" to include gender identity or transgender status in *G.G. v. Gloucester County School Board (Grimm)*.⁷ As the 4th Circuit determined in *Grimm*, the regulations implementing Title IX were promulgated in 1975 and have gone unchanged since. There is no mention of transgender students or a definition of "sex" provided in Title IX. The 4th Circuit therefore concluded that the regulation was sufficiently ambiguous.

The 4th Circuit next concluded in *Grimm* that the agency's interpretation of sex to include transgender status was in fact consistent with the regulation and was not plainly erroneous. Given the court's conclusion in *Grimm* and the consistence with Departmental policy regarding gender identity and transgender status since 2010, it is clear that this guidance also meets this

³ See White House, Presidential Executive Orders, <https://www.whitehouse.gov/briefing-room/presidential-actions/executive-orders> (last visited June 7, 2016); Gerhard Peters & John T. Woolley, The American Presidency Project, (May 20, 2016) <http://www.presidency.ucsb.edu/data/orders.php>.

⁴ 325 U.S. 410, 413–14 (1945) (stating that for "an interpretation of an administrative regulation . . . the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.")

⁵ 519 U.S. 452 (1997).

⁶ *Auer* 519 U.S. at 461–62; see also *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467, at *4 (4th Cir. Apr. 19, 2016).

⁷ *Grimm* 2016 WL 1567467, at *1.

second requirement. As the court concluded in *Grimm*, the Department’s issuance of guidance regarding transgender students is a product of fair and considered judgment and was not put forth as a convenient litigation strategy or a “post hoc rationalization.” It was in fact in response to direct requests from school districts across the country confronting these challenges every day. Although this interpretation and the subsequent guidance are unprecedented, as the *Grimm* court cited “novelty alone is no reason to refuse deference.”⁸ Given this seemingly clear-cut case for deference in *Grimm*, it is difficult to accept critics of the Department’s recent actions as anything but substantively, rather than procedurally opposed.

Some opposed to the Department of Education’s guidance and other similar executive actions undertaken by the Obama Administration have argued for a brand of textual originalism in rulemaking that is neither required by the APA nor a sensible best practice. As the first line of policy-making, statutes are designed to be long-lasting, and modern courts have allowed them to evolve in response to changing times. The evolution and expansion of protections under Title VII of the Civil Rights Act of 1964—which serves as the foundation for the interpretation of Title IX’s definition of “sex”—is a classic example of this flexibility. Following the decision in *Price Waterhouse v. Hopkins*,⁹ courts began to refine the understanding of the legislative intent of Title VII and the appropriate role it should play in determining whether discrimination on bases beyond the “traditional notions of ‘sex’” is cognizable under the Act.¹⁰

As described in *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court recognized that the scope of Title VII could not have been fully understood by Congress at the time it was passed.¹¹ Rather than limit Title VII to its express meaning and a general understanding of “sex” supported by its legislative history, the Supreme Court broadened the scope of Title VII protections to a previously unrecognized class because doing so was consistent with Title VII’s purpose, to prohibit employment discrimination on the basis of sex, among other characteristics.¹² Accordingly, discrimination on the basis of gender identity may not be the “principal evil” Title IX sought to remedy, but a “comparable evil” reasonably within its scope.¹³

As Chief Justice Rehnquist so acutely noted in *Motor Vehicle Manufacturers Association v. State Farm*, an agency “is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.”¹⁴ Under President Obama, the executive agencies have done just that. They have fairly and consistently implemented existing regulations and statutes through a lens that promotes civil rights and individual opportunity that is undeniably faithful to

⁸ *Grimm* 2016 WL 1567467 at *7 (citing *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 64 (2011)).

⁹ 490 U.S. 228 (1989).

¹⁰ *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329 (9th Cir. 1979) (quoting *Holloway v. Arthur Andersen & Co.*, 556 F.2d 659, 662 (9th Cir. 1977)) (concluding that “Congress had only traditional notions of ‘sex’ in mind” when the 1964 Civil Rights Act was passed).

¹¹ 523 U.S. 75 (1998).

¹² *See id.* at 79.

¹³ *Id.*

¹⁴ 463 U.S. 29, 59 (1983).

the vision of liberty our founders had in mind. This is not executive overreach. This is leadership.

I appreciate the opportunity to offer this testimony today.

