may be undermined, because the agencies will continue to be in a position to bias the estimates in their favor.

Agencies' monopoly power to score the costs and benefits of regulatory proposals presents a classic conflict of interest, because agencies have an obvious incentive to skew regulatory analyses to justify rules that expand the scale and scope of their power. As economists Randall Lutter and Richard Belzer point out:

> The same agencies that evaluate performance also design and administer the very regulatory programs they are evaluating. It is hard to understand why anyone should expect self-examinations to be objective and informative. Investors want businesses to be audited by analysts without financial conflicts of interest. Scientists reject research that cannot be replicated independently. Consumers flock to independent testing organizations rather than rely exclusively on sellers' claims. Only in the public sector, where bureaucracies are protected from the discipline of market forces, do we rely on self-evaluations of performance.[212]

Although citizens are free to submit comments on regulatory proposals and even offer alternative cost-benefit estimates, it is the agencies that ultimately decide which estimates are best.

The EPA's October 1997 report to Congress, *The Benefits and Costs of the Clean Air Act, 1970-1990*, required by Section 812 of the Clean Air Act, epitomizes the self-promotional extravagance in which agencies, shielded from competition, are currently free to indulge. The report presented a best estimate of net benefits of $22 trillion—roughly the aggregate net worth of all U.S. households in 1990. "We know of no professional economist who takes that estimate seriously," Lutter and Belzer comment.

Indur Goklany, formerly chief of the technical assessment division of the National Commission on Air Quality, points out several bizarre implications of EPA's net-benefits assessment:

> One such implication of EPA's estimate is that in 1990 the nation would be willing to pay 20 percent of GDP for just the health-related benefits of air pollution control despite the fact that it spent only 12 percent of GDP on all health care that year—an amount many thought excessive. Another implication is that the nation is or should have been willing in 1995 to spend 60 percent of its GDP on eliminating all existing cases of chronic bronchitis. A third implication is that the nation should pay hundreds of thousands of dollars to eliminate the loss of one life-year because of air pollution even though there are many underused medical procedures that could provide the same benefit at a tenth or a hundredth of that cost. That would be a recipe for poor public policy and wasteful spending.[213]

A key question for policymakers, then, is how to subject agency analyses to a reality check. For many years, reformers have been calling for new and tougher peer-review procedures to improve the quality of regulatory analysis, and OMB recently proposed a government-wide program of peer review for "information that is relevant to regulatory policies."[214] However, Belzer cautions, it is doubtful "whether agency-

sponsored peer review would ever be adequately independent, or genuinely effective in improving quality as long as agencies retain the discretion to adopt or reject the advice they receive." He elaborates:

> Independence is inherently problematic when the sponsor of peer reviews selects the reviewers and writes the charge. An agency can delegate these tasks to a contractor (including the National Academies of Science), but contractors that do not please their clients tend not to be rehired.[215]

A more effective approach, Belzer argues, is for Congress to remove the agencies' control over what information is finalized and disseminated. "The Regulatory Right-to-Know Act," he notes, "gives OMB the responsibility for informing Congress concerning the benefits and costs of federal regulation, but it doesn't give OMB any statutory authority to determine whose estimates are most reliable." Congress could remedy that asymmetry simply by authorizing OMB to make such determinations.

The agencies currently monopolize the power to score regulatory proposals, but they have no monopoly on regulatory expertise. Businesses, think tanks, universities, advocacy organizations, and state governments employ hundreds, perhaps thousands of competent professionals skilled in economic and scientific analysis. "Open the door to competition by creating a market for high-quality, policy-neutral, and independent regulatory analysis, and they will respond," says Belzer. "The agencies also will respond—first by trying to undermine the legitimacy of their competitors, and once that fails to work, by improving the quality of their own work to avoid being driven out of the regulatory analysis business."[216]

The agencies currently monopolize the power to score regulatory proposals, but they have no monopoly on regulatory expertise.

Under Belzer's proposal, OMB would invite the public to submit analyses of regulatory proposals, and then use a procedure known as "Final Offer Arbitration" (FOA) to select the best one. He explains:

> A restricted form of FOA is used by Major League Baseball to decide whether the player's or the team's estimate of market value is most reasonable. Unlike other forms of arbitration, in FOA the arbitrator cannot negotiate amongst contending parties or devise face-saving compromises intended to ensure that everybody "wins." Because arbitrators can easily and quickly discard extreme or flamboyant positions, FOA discourages competing parties from exaggerating the strengths of their own case and the weaknesses of the others'.[217]

In other words, FOA is a winner-takes-all system. OMB would not be allowed to split the difference between, or combine elements of, competing analyses. OMB would have to select one analysis and reject the rest. This would put pressure on all contenders to avoid submitting analyses that contain unsubstantiated cost and benefit estimates, fail to examine reasonable alternatives, rely on implausible scenarios, or conceal critical uncertainties and assumptions.

Thus, for example, to have a realistic chance of winning, EPA's analysis of a proposed environmental regulation would have to be at least as plausible as those submitted by experts in industry, the academy, think tanks, advocacy groups, and state-level agencies. At a minimum, EPA's analysis would have to conform to OMB's best practices and information quality guidelines.

Some might object that third parties should not prepare cost-benefit analyses, because rulemaking is an inherently governmental function. That objection is valid, however, "only if one believes that the purpose of regulatory analysis is not to inform decision making or the public, but to provide the legal or public justification for decisions that have already been made."[218] In other words, if performed by an outside party, the winning analysis should and presumably would inform further rule development, the final regulatory decision, and congressional review, but the agency would not be required to endorse the winning analysis or adopt it as its own.

Finally, some might object that authorizing OMB to determine whose analysis is best would simply transfer monopoly power from the agencies to OIRA, giving undue influence to the president or his appointees. That is a valid concern, but it is easily addressed. "If for whatever reason you do not have sufficient trust in OMB's judgment," says Belzer, "ask the General Accounting Office to evaluate the same information and reach its own conclusions. Even OMB can benefit from some competition."[219]

2. Extend Unfunded Mandate Relief Act Protections to the Private Sector

UMRA has had a damping effect on Congress's propensity to impose new regulatory burdens on state, local, and tribal governments. The Act has been a real (albeit limited) success because it embodies the principles of cost disclosure (CBO analysis of regulatory mandates) and accountability (point of order provisions facilitating congressional debate on regulatory costs). Congress should extend to the private sector the protections UMRA provides to the public sector. In fact, UMRA tacitly provides some private sector protection already, because private firms and households ultimately pay for all regulation, including unfunded intergovernmental mandates, which result in higher taxes, fees, and property assessments.[220]

Just as any member of Congress can now force the House or the Senate to debate and vote on whether to consider measures that would cost lower-level governments $50 million or more, so members should have the option to force Congress to debate and vote on whether to consider legislation containing $50 million mandates on the private sector, or $25 million mandates on small business.

3. Establish a Congressional Regulatory Office

To participate effectively in regulatory decisions, Congress needs its own independent expert analytic capability—a regulatory counterpart to CBO. Congress took a small step in that direction when it enacted the Truth in Regulating Act

(TIRA) in 2000. TIRA directed GAO to analyze major rules at the request of the committee of jurisdiction's chairman or ranking member, and authorized an additional $5.2 million over three years to expand GAO's regulatory analysis capability. As mentioned earlier, Congress declined to appropriate any funds to make TIRA operational, but the House, on May 18, 2004, overwhelmingly approved H.R. 2432, which would "make permanent" the authority of committee chairmen and ranking members to commission GAO analyses of major rules.

The basic idea behind TIRA remains sound. GAO already provides valuable independent perspectives on agency actions.[221] In some cases, GAO investigations have "disclosed inadequate data, methodologies, or assumptions, and in others disclosed noncompliance with statutory requirements or executive orders." Some GAO reviews have shown that the applicable analytic requirements were "narrowly tailored and had little effect on rulemaking," and others have shown that some regulations "considered burdensome by the regulated community were required by the statute being implemented." This is exactly the kind of information Congress must have to begin taking responsibility for regulatory outcomes.

OIRA is a watchdog in constant danger of becoming a rubber stamp. What's needed is a full-fledged Congressional Regulatory Office (CRO), which would foster a healthy ongoing competition between the agencies' experts and Congress's experts.

If adequately staffed and funded, GAO's regulatory division could help provide a reality check on agencies' analyses. That is critical, because OIRA is a watchdog in constant danger of becoming a rubber stamp. Ultimately, what's needed is a full-fledged Congressional Regulatory Office (CRO), which would foster a healthy ongoing competition between the agencies' experts and Congress's experts. As AEI-Brookings scholars Robert Hahn and Eric Layburn explain:

> OIRA faces inherent limits in the scope of its review of individual regulatory proposals. The OIRA Administrator is nominated by the President, who also nominates the heads of the various regulatory agencies. Therefore, there is likely to be some implicit understanding that the head of OIRA is not to press the agencies excessively hard because he or she is part of the same Administration as the agency heads. The constraints on OMB are manifested in its annual report, in which it has, so far, simply accepted the benefit and cost estimates compiled by the agencies instead of providing any of its own assessments. A new office of regulatory analysis outside the executive branch would not have this conflict of interest and could more easily criticize the analysis done by federal regulatory agencies. Competition between agencies has the potential to enhance the analysis produced by OIRA and its independent competitor, much like competition between CBO and OMB has done in the budget arena.[222]

Opposition to a CRO may come from both sides of the political spectrum. Groups on the Left may oppose it, fearing it would increase the prominence of

economics and cost considerations in regulatory decisions. Politicians on the Right may oppose it, fearing it would create "another layer of bureaucracy."

On the other hand, the fact that Congress enacted TIRA by a voice vote and the House passed H.R. 2432 by an overwhelming majority demonstrates broad support for at least the rudiments of a CRO. Congress would at a minimum need to expand GAO's regulatory program if, as recommended above, it opens the market for regulatory analysis and tasks GAO to compete with OMB in selecting the best analyses of new regulatory proposals.

C. Long-Term Options

1. Require Congressional Approval before New Rules Are Effective

Congress would have much greater motivation to consider economic impacts when drafting regulatory statutes, and to insist that agencies consider low-cost and non-regulatory alternatives, if it has to approve final agency rules before they can take effect.

A 1999 Competitive Enterprise Institute survey found that 76 percent of Americans "agree that Congress should be required to approve regulations written by federal bureaucrats and administrators before they take effect."

The 1996 Congressional Review Act, which provides procedures for Congress to disapprove final rules, reflected Congress's growing recognition that it should take more responsibility for regulatory decisions. However, the CRA has severe limitations. To stop an unwise regulation, somebody must expend the effort and political capital to organize legislative majorities in both chambers. Moreover, if the president vetoes a resolution of disapproval, opponents of the rule must then assemble super-majorities in both chambers to prevail. Under conditions of divided government, in which the party that controls Congress does not control the White House, enacting a CRA resolution of disapproval is nearly impossible.

What is needed is a mechanism that deters agencies from proposing exorbitant rules in the first place, not one that makes it almost impossible to stop rules after agencies have finalized them. The Congressional Responsibility Act (H.R. 110), sponsored by Rep. J.D. Hayworth (R-AZ), would promote compliance with Article I §1 of the U.S. Constitution, which vests "all legislative powers" in Congress. The Act would require Congress to approve final agency rules before they can become binding on the public. As with any other legislative action, the president could veto Congress's approval of a regulation, and Congress, in turn, could override the president's veto. Under this arrangement, a simple majority in either chamber could stop an ill-advised rule just by declining to vote for it. Instead of opponents having to organize legislative coalitions to block a rule, proponents would have to organize legislative coalitions to enact a rule.

A 1999 Competitive Enterprise Institute survey found that 76 percent of Americans "agree that Congress should be required to approve regulations written by federal bureaucrats and administrators before they take effect."[223]

Such a plan is indeed more radical than most other regulatory reform proposals, but its radicalism lies in its fidelity to American principles of self-government. "No regulation without representation" clearly echoes the words and philosophy of those who signed the Declaration of Independence. No other regulatory reform proposal has as great a potential appeal to common-sense populism. Regulations are implicit taxes that have the force of law. To most Americans, it is obvious that nobody but their elected representatives should have the power to make laws or raise taxes.

An accountability regime would work best if combined with a system of competitive regulatory analysis. As long as agencies get to select which cost and benefit estimates inform decision-making or the public, they have the power to bias public discussion in their favor and manipulate congressional review.

"No regulation without representation" clearly echoes the words and philosophy of those who signed the Declaration of Independence.

Once the debate on regulatory reform is reframed as a debate on congressional reform, defenders of the status quo should find themselves at a disadvantage. After all, how many members of Congress will want to defend the proposition that they should continue to exercise "power without responsibility"? And how many public interest groups will want to defend the proposition that voters should have no one to hold accountable for regulatory decisions? How many will want to vouch for the moral and constitutional legitimacy of regulation without representation? Paradoxically, this bold reform proposal may ultimately be the most politically attractive.

a. Is Regulatory Accountability Feasible?

Status quo defenders may object that Congress could not manage the increased workload if it had to approve 4,000-plus new regulations ever year. Because there are only so many hours in a legislative session, a Congress constrained to debate and vote on agency rulemakings would very likely pass fewer laws and more carefully consider the regulatory provisions of laws it does pass. However, to those who think America suffers from a surfeit rather than a dearth of laws and regulations, the prospect of gaining a more deliberative Congress is an additional reason to support an accountability regime.

Be that as it may, there are various ways Congress could streamline a regulatory review process to ensure that it does not crowd out other essential business. Congress could limit the time allotted to debate individual rules, and limit the types of rules eligible to be debated. Congress could approve each agency's minor rules as a non-amendable package through an up-or-down vote—the procedure used to close and consolidate obsolete military bases. Administrative and other non-controversial rules could be bundled together and approved by a voice vote.

Congress could also implement an accountability regime in phases. This would allow for trial-and-error learning, and ensure manageable workloads in the early stages. For example, in the first two years, Congress would only review

economically significant rules—those likely to "have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities."[224]

There are various ways Congress could streamline a regulatory review process to ensure that it does not crowd out other essential business.

A little-known, twice-yearly publication called the *Unified Agenda of Federal Regulatory and Deregulatory Actions* depicts the total number of proposed and final federal rules on which action is anticipated within 12 months. The *Agenda* also presents actions recently completed, as well as a handful of regulations planned for the long term. The *Agenda* is a rough gauge of what is in the regulatory pipeline.

The Fall 2003 edition shows a total number of 127 economically significant regulations in various stages of development, including 22 "completed" actions.[225] Congress unquestionably could review 22 or even several dozen economically significant final rules per year without shortchanging other important business.

Under one possible incremental regime, OMB would transmit final economically significant rules to the relevant congressional committees, which would have the option—and incentive—to conduct hearings and oversight. For example, EPA's entry in the 2003 *Unified Agenda of Regulatory and Deregulatory Actions* lists 11 economically significant rules in the "final rule" stage.[226] The Senate Environment and Public Works Committee could undeniably find the time to hold hearings on a dozen or so key environmental rules per year. After receiving an economically significant final rule from OMB, Congress would have a specified period of time, such as 60 legislative days, within which to consider and vote on the rule. Shorter time periods could be set for rules responding to emergency situations.

In later years, as Congress becomes more familiar with the process, the threshold for review could be lowered to include rules imposing $50 million or more in costs on lower-level governments or the private sector, or $25 million or more on small business. All other rules—about 97 percent of the total—could be handled through various expedited procedures.

Ensuring the accountability of administrators to lawmakers, and of lawmakers to citizens is a central purpose of constitutional government.

Such a process would not guarantee the wisdom of any particular regulatory action. But, at least, Congress would take responsibility for regulations promulgated under the laws it enacts, the public would have someone to hold accountable at the ballot box for regulatory decisions, and agencies would be more careful to consider the costs imposed by their actions on the regulated public.

b. Is Regulatory Accountability Constitutional?

This question may seem odd, because ensuring the accountability of administrators to lawmakers, and of lawmakers to citizens is a central purpose of constitutional government. Also, as we have seen, the Constitution clearly vests "all legislative powers" in Congress, and nowhere authorizes Congress to delegate lawmaking authority to administrative agencies or regulatory commissions.

Nonetheless, the question is pertinent because the accountability regime outlined in this report is a type of legislative veto, and, according to the Supreme Court, not all legislative vetoes are constitutional.

Under a legislative veto, agency actions cannot go into effect, or remain in effect, unless Congress, or a part thereof, approves those actions, or does not disapprove them, within a specified time period.[227] In *INS v. Chadha*, 462, U.S. 919 (1983), the Supreme Court overturned a provision of the Immigration and Nationality Act allowing the House of Representatives to veto an attorney general's decision to suspend the deportation of aliens. In the process, the Court invalidated legislative veto provisions in hundreds of statutes enacted during the previous five decades. Is the legislative veto outlined in this report constitutional? Yes.

Chadha struck down a *unicameral* legislative veto—a provision authorizing the House, acting unilaterally, to overturn an otherwise lawful decision by an executive branch official. By implication, *Chadha* invalidated all similar provisions vesting veto authority in one chamber, a single committee, or an individual committee chairman.

Chadha'*s* argument may be summarized as follows. A legislative veto is a "legislative action." As such, it must conform to the Constitution's requirements for lawmaking. To make law, both the House and the Senate must pass a bill, they must then present the bill to the president for his approval or veto, and if he vetoes, two-thirds of both chambers must re-pass the bill. When the House vetoed the attorney general's decision to suspend the deportation of an alien, Mr. Jagdish Chadha, it did not obtain the approval of the Senate, nor did it present its decision to the President for his review. The Immigration and Nationality Act's veto provision violates the Article I §1 principle of "bicameralism" and the Article I §7 principle of "presentment" to the president. It is therefore unconstitutional.

The Court's reasoning in *Chadha* poses no obstacle to the type of legislative veto outlined in this report. The bicameralism requirement is satisfied, because both houses would have to approve a regulation before it goes into effect. The presentment requirement is satisfied, because Congress would have to present a joint resolution to the president for his review.

c. Can Regulatory Accountability Restore Checks and Balances?

In his famous dissent, Justice Byron White argued that the Court's reasoning in *Chadha* was inconsistent with the legal premises of the administrative state as it has evolved—premises the Court had repeatedly affirmed. Congress often delegates legislative power to executive and independent agencies, which routinely issue rules with the force of law. In fact, Congress has even delegated legislative power to farmers—a private interest group—authorizing them to propose and vote on agricultural commodity marketing and production restrictions

issued by the Department of Agriculture. The Court has upheld such unquestionably legislative actions, even though the House and the Senate did not vote on them, and even though the president had no opportunity to sign or veto them. *Chadha's* reasoning "cannot be defended as consistent with the Court's view of the Article I presentment and bicameral commands."[228]

White did not consider the possibility that the earlier cases upholding bureaucratic and private lawmaking were wrongly decided. However, he implicitly affirmed the constitutional necessity for congressional review of agency actions. *Chadha*, he warned, would cripple Congress's ability to check and balance the administrative state:

> The prominence of the legislative veto mechanism in our contemporary political system and its importance to Congress can hardly be overstated. It has become a central means by which Congress secures the accountability of legislative and independent agencies. Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with the hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire political landscape, or in the alternative, to abdicate its law-making function to the executive branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role.[229]

Justice White did not consider the possibility that the earlier Supreme Court cases upholding bureaucratic and private lawmaking were wrongly decided.

"Unaccountable policymaking by those not elected to fill that role" is a fundamental defect of the modern administrative state. However, that defect did not begin with *Chadha,* and *Chadha* has not had much effect on the way Congress operates. As constitutional historian Louis Fisher documents, Congress frequently ignores *Chadha* or improvises around it. In the 16 months between *Chadha* and the close of the 98th Congress on October 12, 1984, Congress enacted 53 new legislative vetoes, mainly of the unicameral and single committee variety. From the day *Chadha* was decided, on June 23, 1983, to the end of 1997, Congress enacted more than 400 new legislative vetoes.[230] In addition, committee chairmen and agency heads reach informal understandings that function as de facto committee vetoes, "the only difference being that the congressional control is less public."[231] Notification requirements can also substitute for committee veto provisions, since few agency heads "will be willing to notify a committee, learn of its opposition, and proceed anyway."[232]

House and Senate rules provide another means of evading *Chadha*'s ban on unicameral and committee vetoes:

> Each house can stipulate that no funds may be appropriated for a particular purpose unless the authorizing committee has granted its approval by committee resolution. Since this procedure concerns the internal workings of Congress, the "committee veto" is directed at the appropriations committee rather than at the executive branch. To that extent it should create no problem under *Chadha*, even

> if this type of committee veto is the functional equivalent of the legislative veto declared invalid.[233]

What accounts for these evasions? *Chadha*, says Fisher, directs the political branches to follow an "impracticable and unworkable" lawmaking process:

Chadha has produced a "record of noncompliance, subtle evasion, and a system of lawmaking that is now more convoluted, cumbersome, and covert than before."

> Even with *Chadha*, the need for a quid pro quo between Congress and the executive branch remains. The conditions that spawned the legislative veto a half-century ago have not disappeared. Executive officials still want substantial latitude in administering delegated authority; legislators still insist on maintaining control without having to pass another law.[234]

Because *Chadha* effectively asks Congress to neglect a basic institutional interest and constitutional duty, the decision has produced a "record of noncompliance, subtle evasion, and a system of lawmaking that is now more convoluted, cumbersome, and covert than before. In many cases the Court's decision simply drives underground a set of legislative and committee vetoes that had previously operated in plain sight."[235]

Three questions—actually, three formulations of a single question—emerge from the foregoing discussion. Can Congress hold agencies accountable without resorting to covert practices that also weaken accountability to the public? Can Congress authorize agencies to develop rules, maintain control without having to amend the enabling statute, and respect the Article I requirements of bicameralism and presentment? Can Congress check and balance the regulatory agencies without putting new rents and tears in the constitutional fabric?

The answer to those questions is a resounding yes. Requiring Congress to approve final rules before they can go into effect, and to present joint resolutions of approval to the president for his signature or veto, would reconcile the practical necessity for bureaucratic rule development with Congress's constitutional duty to make law. Indeed, Congress might allow administrators more discretion in crafting rules, if it were clear that no emerging regulatory proposal could go into effect until and unless Congress votes to enact it.

Ending regulation without representation would by definition bring agency actions into compliance with the Article I bicameralism and presentment principles, and would likely improve Congress's compliance with *Chadha* as well. Congress would regularly deliberate on agency actions "in plain sight," and presumably would have less need or justification to employ covert forms of the legislative veto. Indeed, Congress probably could not end bureaucratic lawmaking without advancing *Chadha's* argument that all valid legislative actions must be approved by both chambers and presented to the president for his signature or veto.

d. Would Regulatory Accountability Impede Judicial Review?

Some policymakers worry that an accountability regime might preclude judicial review of agency rulemakings and preempt litigation to overturn or modify defective rules. New laws trump old laws. Consequently, these critics warn, if Congress enacts not only the regulatory statute but also the implementing rules, then any rule Congress approves must be legal even if the agency's rulemaking actions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

This is a serious concern, and an accountability regime worthy of the name should include safeguards to ensure that congressional review does not end up legalizing agency lawlessness.

As a reasonable precaution, every joint resolution of approval should include a standard clause affirming the unqualified force and effect of all existing statutory criteria and requirements for rulemaking. Such a clause might read: "This joint resolution of approval shall not be construed as superceding or weakening any procedural or substantive requirements for rulemaking, whether set forth in the rule's governing statute, other federal laws, or judicial decisions; nor shall the resolution be construed as impairing any rights of private action or judicial review."

2. Establish a Bipartisan Regulatory Reduction Commission

The reforms discussed so far in this report apply mostly to new rules. Since agencies promulgate thousands of new rules each year, with many more regulatory than deregulatory actions, even a congressional accountability regime combined with competitive regulatory analysis would only slow the growth of new regulatory burdens, leaving the existing mass of regulations untouched.

Every joint resolution of approval should include a standard clause affirming the unqualified force and effect of all existing statutory criteria and requirements for rulemaking.

As discussed earlier, Section 5 of E.O. 12866 and Section 610 of the RFA already require agencies to conduct periodic reviews of existing regulations and eliminate outmoded or inefficient rules, yet few rules are ever re-assessed. Two eminently doable measures, advocated by William Kovacs of the U.S. Chamber, would help rectify this situation.

- Congressional committees should put pressure on agencies under their jurisdiction to identify regulations due for a Section 610 review, notify Congress as to when the reviews will take place, and report to Congress the results of the reviews.

- The president should issue an executive order specifically requiring agencies to establish a program to review each economically significant rule it issues within 10 years of the rule's becoming effective. For each rule reviewed, the agency should determine "whether the initial cost and benefit forecasts were accurate, and assess the expected future costs and benefits of the rule, as well as feasible alternatives."[236]

Although these steps would be helpful, agencies will always prefer to look ahead rather than look back, and they will never be tough critics of their own handiwork. To reduce the mass of existing federal regulation, reformers must create a mechanism outside the agency-dominated rulemaking process.

A reasonable model for reviewing regulations already on the books is the military base closure and realignment process. Congress found that closing obsolete bases one at a time was politically impossible. It chose instead to close and consolidate bases via an up-or-down vote on a package of recommendations assembled by a bipartisan commission. Carrying the technique over to the regulatory arena, Congress should appoint a bipartisan Regulatory Reduction Commission to review agency regulations. The Commission would invite OMB, GAO, and the interested public to submit recommendations; hold hearings; and assemble a yearly package of proposed regulatory reductions. The package would be subject to an all-or-nothing vote, with no amendments allowed. Congress would send any package it approved to the president for his signature.

The process of holding hearings combined with the bundling of regulations from across the spectrum of government activity would make the Commission's recommendations difficult to oppose politically. As in the base closure model, everybody stands a good chance of getting "hit," but the Commission, not Congress, compiles the hit list. Thus, for members, the process provides political cover. The Commission could be kept active for as long as Congress deems necessary, and potentially could shave off large chunks of ineffective regulations over a number of years.

To reduce the mass of existing federal regulation, reformers must create a mechanism outside the agency-dominated rulemaking process.

VIII. Regulatory Budgeting

Once Congress begins to take responsibility for regulatory decisions, it will face political pressures to limit the economic burdens regulations impose. Agencies, in turn, will be motivated to develop less costly rules in order to obtain congressional approval. That is desirable, because: (1) the resources available to protect public health and safety are limited; (2) regulations that reduce employment, incomes, and innovation can subtly but significantly harm public health and safety; and (3) agencies left to their own devices do not always select the most cost-effective alternatives.

As noted above, competitive regulatory analysis should inform congressional review. As long as agencies determine which cost and benefit estimates inform regulatory decisions, Congress may literally have no idea what it is voting on.

But is congressional review based on high-quality analysis an optimal accountability and cost control regime? Or should Congress in addition, place statutory limits on the costs agencies may impose the private sector and lower-level governments?

The ultimate goal of regulatory reform is to make regulators and legislators act more like households. However devoted to the health and safety of their members, households face inexorable tradeoffs in the use of their resources and, consequently, have strong incentives to set priorities and economize. For example, a single working mother may decide to keep her reasonably safe older vehicle rather than spend $50,000 for the safest new car on the market, because doing so would mean she could not afford to purchase health insurance, save for her daughter's college tuition, or own a house in a "safe" neighborhood. She acts responsibly when she weighs and balances competing goals and does not indulge the fantasy that no expense is too high a price to pay for auto safety. Whether consciously or intuitively, the household budget guides and constrains her choices. A similar decision framework should—but does not—inform regulatory choices.

Because government appropriates other people's resources, its natural tendency is to spend as if the sky is the limit and money is no object. In the fiscal arena, the illusion of free money is tempered somewhat by a budget process that forces policymakers to consider the impacts of total taxes and spending on the economy, set spending targets for the government as a whole and its various components, and thus make tradeoffs among competing agencies and programs. What is most critically lacking in the regulatory arena is a budget mechanism forcing elected officials to make explicit choices about the size of regulatory burden in relation to the economy, and about the allocation of scare resources among the myriad of regulatory objectives.

Congressional review informed by competent analysis is a consummation devoutly to be wished. Nonetheless, we would never accept such a regime as adequate for making tax and spending decisions. Consider the following thought experiment, suggested by former OMB economist Jim Tozzi:

The ultimate goal of regulatory reform is to make regulators and legislators act more like households.

> In particular, suppose that individual agency budgets are subject to Congressional approval but that, in place of the overall budget for the Executive Branch, agencies are required to submit each of their programs to a rigorous cost-benefit analysis. Apart from other considerations, this system would have two major economic flaws. First, the costs or benefits of a program are sometimes dependent on features of another program, and these relationships could not be handled without moving away from the completely decentralized mechanism hypothesized. Second, the value of public goods [such as national defense, workplace safety, and environmental quality] is not revealed in any market, but must be established through the political process. The decentralized system assumed would not present the relevant choices [about alternate uses of the same resources] where a budget system can do so.[237]

In the fiscal arena, we do not ask Congress and the president to maximize the net benefit of each program one at a time, in isolation from decisions about other programs, and without regard to the effects of total spending on the economy. But that is roughly what the current regulatory system asks agencies to do—assure the wisdom

of each rule, considered one at a time, without regard to the impacts of other rules, or to the cumulative burden of all rules on the economy.

Regulatory costs are, in a word, *unbudgeted*. That is the central defect of the modern regulatory state, and it would persist even under a system of congressional review based on rigorous cost-benefit analysis. However, congressional review combined with competitive analysis could evolve into a *regulatory budget*—the capstone of regulatory reform in the opinion of several policy thinkers.[238]

A. What Is a Regulatory Budget and How Would It Work?

Although the details of regulatory budget proposals can be complex, the basic idea is simple. Under a regulatory budget, agencies would be required, in advance of proposing rules to meet a particular statutory objective, to obtain authority from Congress to spend private sector resources via regulation. Regulatory spending authority could be doled out by major rule, by regulatory program, by regulatory function, or by agency. For example, Congress could enact limits on compliance burdens resulting from (a) EPA's non-road diesel engine rule, (b) all of EPA's clean diesel programs, (c) all air quality regulations, or (d) all EPA rules. Conceivably, a regulatory budget could cover all compliance costs resulting from federally promulgated rules.

Regulatory costs are unbudgeted. That is the central defect of the modern regulatory state, and it would persist even under a system of congressional review based on rigorous cost-benefit analysis.

Presumably, the process for setting a regulatory budget would work much like the process for setting the fiscal budget. Each agency would estimate both the cost of its existing rules and the incremental costs of rules it plans to issue in the next fiscal year, and submit to OMB a request for authority commensurate with the estimated combined costs of its existing and planned rules. OMB along with the president and his aides would review the agencies' requests, and make adjustments in light of the president's priorities. Ideally, the president's regulatory budget would propose caps not only for individual agencies and programs (or regulatory functions), but also for the government as a whole. The president would annually submit his regulatory budget, and Congress would make whatever modifications it desires. Congress would then pass the budget and send it to the president for his signature or veto.

Congressman Doug Ose (R-CA) and former OMB Director James Miller argue that the spending appropriations process provides a rough model for how Congress would organize itself to develop and approve annual regulatory budgets:

> First, the congressional leadership would establish a regulatory appropriations committee, comprised of members with interest and expertise in regulatory matters. The committee would then divide itself into several subcommittees—perhaps environmental (including EPA), other health and safety (FDA, OSHA, NHTSA, USDA, etc.), and economic (FCC, FTC). The goal would be a logical grouping of regulatory

goals and approaches, and covering the whole gamut of federal regulatory efforts.

> Each year, along with the spending budget, the administration would send Congress a proposed regulatory budget, detailing the major programs and the costs it proposes the federal government to impose for the fiscal year, by agency. Congress would then establish, by concurrent resolution, an overall limit for regulatory costs, and then divide this total among the regulatory appropriations subcommittees. Like their spending counterparts, these subcommittees would approve regulatory appropriations for consideration by the full committee and then the respective chambers and the president.[239]

Regulatory budgeting is not a new idea.[240] Robert Crandall of the Brookings Institution first mentioned the use of "shadow budgets" for expenditures required of the private sector in 1978.[241] In 1979, Jim Tozzi produced a report for OMB on regulatory budgeting.[242] In both the 95th and 96th Congresses, Senator Lloyd Bentsen (D-TX) sponsored legislation to establish a regulatory budget.[243] The Contract with America included a regulatory budget proposal, and Rep. Lamar Smith (R-TX) introduced regulatory budget bills in the 103rd and 104th Congresses. The Paperwork and Regulatory Improvements Act (H.R. 2432), sponsored by Rep. Doug Ose (R-CA) in the 107th and 108th Congresses, would require OMB to undertake pilot projects in regulatory budgeting, and report to Congress on the feasibility and advisability of establishing regulatory cost caps as part of the president's annual budget.

The spending appropriations process provides a rough model for how Congress would organize itself to develop and approve annual regulatory budgets.

What are the potential benefits and perils of regulatory budgets? And is regulatory budgeting feasible?

B. What Are the Potential Benefits of Regulatory Budgets?

In theory, formal cost caps on private and public expenditures to comply with federal regulations would yield several important benefits.[244]

Regulatory caps would make hidden costs visible. Regulation is in some cases a substitute for more visible forms of government intervention. For example, Congress can provide for environmental cleanup, workplace safety improvements, or worker training programs either by levying taxes and appropriating funds for those purposes, or by authorizing agencies to issue rules compelling private entities to accomplish those objectives at their own expense. If Congress opts for taxes and spending, the costs are visible and the public has an opportunity to weigh them against the putative benefits. However, if Congress opts for regulation, the benefits, at least to the general public, will appear to be free, even though the rules may increase consumer prices, reduce employment, or make U.S. firms less competitive. Consequently, citizens will tend to demand or tolerate more intervention than they would if the costs were visible and paid for with taxes.

Because regulatory costs are hidden, regulation has long been a preferred intervention strategy of both special interests pursuing competitive advantage and ideological groups pursuing their particular visions of the public interest. As the

federal deficit soars and pressures mount to control spending, politicians may be increasingly tempted to use hidden regulatory taxes to accomplish their goals. A regulatory budget would make the cost of rules as visible as the cost of taxes, discouraging regulation's use as a tool of fiscal legerdemain.

Caps could constrain the overall size and cost of government. Regulatory budget ceilings would encourage policymakers to confront and make explicit choices about the total cost of government. Today, regulatory costs are mostly invisible to the public, and largely escape congressional review. Congress would be more likely to consider and limit governmental costs if it had to debate and approve annual authorizations for federal regulatory expenditures.

Caps could encourage agencies to target the most urgent risks, choose the most cost-effective alternatives, and terminate under-performing rules. Regulatory agencies bear no clear opportunity costs for the decisions they make. Unlike spending agencies, they do not use up their authority in the act of exercising it. They face no risk that imposing large burdens today will limit their ability to act tomorrow. They face no pressure to share—and, thus, divide—their control of private resources with other regulatory agencies.

A regulatory budget would make the cost of rules as visible as the cost of taxes, discouraging regulation's use as a tool of fiscal legerdemain.

In contrast, opportunity cost is an ever-present reality for spending agencies. In the fiscal arena, debate swirls around the question of whether an agency (say, the Department of Defense) could better advance its objectives by spending more in category A (say, a new air mobile division) than in category B (say, a new battleship). DoD will, of course, fight for the highest possible budget, but it does so within the context of a larger debate over whether the defense budget as a whole is too high, too low, or just about right. It is clear in advance to defense planners that they must make some effort to economize, make tradeoffs among competing programs, and cede to other agencies some part of the spending authority they would like to have. Even though they spend other people's money, they are constantly reminded by opportunity costs that there is no such thing as a free lunch.

Regulatory budgets could introduce into agency deliberations a whole new calculus of opportunity cost. Suddenly an agency would need to rank risks and target the most pressing ones first, if it did not want to exhaust its authorization before accomplishing anything important. Regulating one hazard or alleged market failure would impinge on its ability to regulate others. There likely would be fewer such irrational cases as the EPA's program to remove asbestos from buildings even though the risk ranked low on a scale of peril.[245] Without a budget, only the regulated entities face costs. With a budget, an agency's own choice will constrain it in the future, which may help induce it to make wiser choices.

Caps could force agencies to compete for regulatory authority, fostering innovation and excellence. During every regulatory budget cycle, Congress would have an opportunity to ask, "What are the most lethal hazards facing

Americans, and which agencies are best suited to address those risks?" Budgeting would force regulators, regulatory programs, or even entire agencies to compete with one another for the right to impose burdens on the American people. Each would have an incentive to find and expose the weaknesses in others' cost and benefit estimates. Each would have an incentive to find smarter ways to serve the public in order to justify its requests for budget authority.

With a budget, an agency's own choice will constrain it in the future, which may help induce it make wiser choices.

Suppose a single regulatory budget were developed for all programs addressing health, safety, and environmental risks. The tighter the budget, the more regulators would be constrained to compete on the basis of the most meaningful bottom line: each agency would want its least effective mandates to save more lives per dollar than the rules of another agency. Under an (obviously unachievable) ideal regulatory budget, any reshuffling of agency budget allocation could not save more lives.[246] A more competitive system would likely not only be more economical but also spur agencies to invent more effective ways to protect public health and safety.

C. What Are the Potential Perils of Regulatory Budgets?

Regulatory reform is a political process and, as such, subject to the "law of unintended consequences."[247] Depending on its design and other factors, a budget could conceivably make regulation less accountable and/or more costly, if it:

1. Allows agencies to expand their authorizations by offsetting costs with benefits;
2. Creates a bias in favor of rules, such as product bans, with small direct compliance costs but large indirect effects on consumer prices, efficiency, or profits;
3. Encourages agencies to produce false and misleading cost estimates;
4. Spends political capital needed to accomplish other reforms; or
5. Significantly increases paperwork burdens on regulated entities.

If a spending agency attempted to squeeze more spending authority out of OMB or Congress by offsetting program costs with benefits, it would be laughed out of court.

Perils 1-4 are discussed immediately below. Peril 5 is discussed later, in the subsection on the tracking of regulatory compliance costs.

Net cost trickery. Agency officials and public interest groups typically abhor the idea of placing explicit monetary limits on an agency's capacity to issue rules. However, some might be willing to countenance a budget that allows agencies to offset costs with benefits to arrive at a net-cost of regulation. In their view, leaving benefits out of budget calculations would present a one-sided picture of regulatory impact, creating a bias against the public interest in regulatory safeguards.

This criticism is unwarranted. Neither the president's budget submission nor Congress's budget resolution includes benefit estimates for federal mandatory and discretionary spending programs. Yet, with the deficit now approaching half a trillion dollars, no one would claim that the fiscal budget process is biased against spending. If a spending agency attempted to squeeze more spending authority out of OMB or Congress by offsetting program costs with benefits, it would be laughed out of court.

Allowing agencies to offset costs with benefits would defeat a regulatory budget's central purpose—cost control. In fact, a net-cost "budget" would be a license to spend. Agencies inevitably believe that their regulations, at least in the aggregate, generate net benefits. Thus, if an agency is allowed to regulate as long as it achieves a net benefit, it will never run out of budget authority, no matter how costly its rules.

If spending agencies were allowed to use net-cost calculations to develop their budgets, fiscal responsibility would be utterly destroyed. For example, the monetary benefit of preventing a full-scale military attack on the United States, and of being able to win such a war if it occurred, is larger than any expenditure we might make on military programs. Thus, if we allowed DOD to offset costs with benefits in its annual budget request, defense spending could easily be multiples of what it is today. To describe such profligacy as budgeting would be an abuse of language.

Indirect cost explosion. Regulations have both direct and indirect costs. Direct costs are the expenditures—for capital equipment, operating systems, paperwork, and R&D—that entities specifically make to comply with a rule. The indirect costs are all the other costs to producers and customers as a consequence of regulation, including higher consumer prices, inefficiencies, lower profits, and reduced innovation. A case can be made that just as a fiscal budget applies solely to direct dollar outlays, not to the economic repercussions of such outlays, so too a regulatory budget should cover only direct compliance expenditures. A budget's main purpose is to control spending, and, as Tozzi points out, "indirect costs do not show up as identifiable expenditures required by regulation." Rather, indirect costs are effects of regulation on pricing, investment, and employment, and "their measurement typically requires use of complex economic models," not the types of accounting tools used, for example, to calculate a firm's taxable income.[248]

But excluding indirect costs has risks. Indirect costs may in some cases be larger than the direct costs of regulation. And, as Wayne Crews cautions, if a budget system overlooks rules with large indirect costs, agencies will have an incentive to increase production of such rules:

> Imagine a regulatory budget were established that addressed only direct costs of regulations—such as the engineering costs of controlling an emission. But suppose outright input or product bans are not regarded as direct costs for budgeting purposes [because not purchasing an input or not selling a product is not an identifiable expenditure], and therefore not counted in the budget. Under that structure, nearly every environmental regulation could be expected to entail a ban so that regulators would avoid exhausting their budgets. The incentives set up by this sort of budget would be disastrous.[249]

To avoid an indirect cost explosion under a regulatory budget, Crews recommends that Congress "forbid just those types of regulatory activities—such as product bans—most likely to produce indirect costs." But what if a product or input ban is the only feasible way to address an urgent health or safety hazard? In such cases, advises Crews, the rulemaking agency should be required to assess the indirect costs, and Congress should have to approve the ban before it can go into effect.

Analysis: from bad to worse. Budgets could exacerbate agencies' perverse incentives to produce regulatory analyses with inflated benefit estimates and deflated cost estimates. As Belzer explains:

> As it stands now, an agency's incentive to understate costs is largely driven by the fact that high costs (irrespective of the magnitude of benefits) generate bad public and Congressional relations. But an enforced regulatory budget would limit what regulations an agency could issue….Agencies would respond to a regulatory budget much like they do to the Information Collection Budget—by reducing their estimates as necessary to make them fit under the allowable ceiling, not by reducing the paperwork burdens they impose.[250]

Rather than limit regulatory spending, budgets might simply intensify agencies' incentives to low-ball regulatory costs.

On the other hand, regulatory budgets might improve agencies' estimation of both costs and benefits, because there would be a much greater demand for reliable information. Under a budget, agency analyses would receive far greater scrutiny than they do today, and regulatory accounting would be held to higher standards of accuracy, consistency, and verifiability.

Political capital costs. In his multi-country review, *Constraining Government Regulation*, economist Bryce Wilkinson, although sympathetic to proponents' goals, suggests that regulatory budgeting is a cul-de-sac:

> Currently, we are unaware of any country that has successfully implemented this approach. The practical difficulties look formidable. There appears to be a risk that implementation difficulties would absorb too much time and goodwill that could be put to better use in making an assault on regulations that are obviously causing disturbing outcomes and whose rationale is unclear if not decidedly dubious.[251]

The same advocacy groups that torpedoed regulatory reform in the 104th, 105th, and 106th Congresses abhor regulatory budgets. Indeed, groups like OMB Watch and Public Citizen oppose cost-benefit tests, OMB's annual regulatory report, and an independent Congressional Regulatory Office, partly because such initiatives are steps toward the creation of regulatory budgets.[252] Regulatory budget advocates would have to spend much time and political capital battling such groups, perhaps jeopardizing other more attainable reforms.

On the other hand, as recent experience suggests, anti-reform forces will mobilize against any proposal to rein in regulatory costs, however timid or ineffectual, so reformers might as well aim high. Indeed, reformers are unlikely to advance their agenda unless they are prepared to fight for dominance of the moral high ground, and advocacy of a budget would allow them to directly challenge the moral legitimacy of the status quo.

Groups like OMB Watch and Public Citizen believe that agencies should be required to adopt the most protective regulations, not the most cost-effective or least burdensome. In their view, it is immoral to cap private expenditures for such priceless things as children's health, worker safety, or environmental quality. But although this health-at-any-cost dogma may seem like a moral suit of armor, it is actually an Achilles heel. In a world of scarcity, ignoring costs means ignoring the unavoidable tradeoffs between alternate uses of the same resources; it means ignoring the health and welfare benefits that regulatory burdens diminish or preclude. As Tozzi points out:

> A myriad of national goals are all competing for a share of our limited resources. The dollars spent on passive restraint systems for automobiles could be spent by the government on cancer research, by private citizens on housing, or by anyone on anything from smoke detectors to skateboards. The question is what is the correct size of the regulatory budget—how much of our national income should we devote to regulatory purposes?[253]

No one scolds households for attempting to budget their expenditures. Since the costs of regulation ultimately fall on households, shouldn't those costs, too, be subject to budget discipline?

DOD military procurement programs, National Institutes of Health AIDS programs, and Federal Aviation Administration aviation safety research and development programs all contribute to the safety or health of the American people. A case can be made moreover, that defense programs, by deterring nuclear and other attacks on the people and territory of the United States, protect the environment. Yet no responsible policymaker would argue that Congress should not set budgets for weapons procurement, AIDS programs, or aviation safety research, or that it is immoral to consider the economic impacts of the taxes required to pay for those programs.

Households also spend money for many worthy purposes. In fact, most household- spending is for goods and services that sustain life, enhance health and safety, and develop human capital. Yet no one scolds households for attempting to budget their expenditures. Since the costs of regulation ultimately fall on households, shouldn't those costs, too, be subject to budget discipline? Moreover, if Congress has a duty to deliberate on how much of the household's resources spending agencies should control, doesn't it also have a duty to deliberate on how much regulatory agencies should control?

The regulatory status quo is a system of special privilege. Regulatory actions are outside the system of checks and balances—the annual appropriations

process—in which defense contractors, AIDS researchers, and households seeking tax relief compete for shares of limited resources. The unbudgeted character of regulation means that some policy agendas—and their partisans—are *more equal* than others.

D. Is Regulatory Budgeting Feasible?

Estimation, tracking, and enforcement are essential functions of any budget process. Can policymakers develop the information and tools needed to reasonably estimate, accurately track, and credibly enforce limits on regulatory expenditures?

1. Estimation Issues

The first phase in developing a fiscal budget is cost and revenue estimation. Similarly, cost estimation would be the first step in preparing a regulatory budget, whether for an individual rule, a regulatory program, or an agency as a whole. As we have seen, agencies often fail to meet minimum standards of regulatory accounting, and a budget could intensify perverse incentives to overestimate benefits and underestimate costs.

On the other hand, a budget would increase the demand for and value of reliable cost information, and the market might respond by increasing the supply and quality of regulatory analysis. Just as environmental rules that set goals beyond current technological capabilities can sometimes be "technology forcing" (spur development of new capabilities),[254] so regulatory budgets could be "information forcing" (spur development of new and better systems to collect and analyze cost data).

Initial estimates of regulatory burden might be quite crude. But estimation errors should be no more fatal to regulatory budgeting than they are to expenditure budgeting. OMB and CBO seldom reach the same projections for federal revenues and outlays, and both agencies periodically revise their estimates in light of new information. Moreover, fiscal budget estimation is an art that has developed over many decades and continues to evolve. Time and experience would similarly improve regulatory cost estimation, especially as regulated entities begin to track and report their expenditures to comply with federal rules.

Tozzi, writing in 1979, noted more than a dozen studies, surveys, and sources policymakers at the time could use to estimate the direct costs of federal air and water pollution controls.[255] For example, from 1973 to 1994, and then in 1999, the Census Bureau conducted an annual survey of about 20,000 manufacturing plants to estimate expenditures for pollution abatement and control.[256] Similarly, from 1973 to 1994, the Bureau of Economic Analysis (BEA) surveyed thousands of entities to estimate private and public spending for pollution abatement.[257] Census also produced separate reports on expenditures for public sewage treatment plant and sewer line construction, and on operating expenditures for sewage treatment, solid waste collection, and solid waste disposal. Congress would need to commission similar studies if it decides to explore the feasibility of regulatory budgets. At a minimum, it would also have to crack

down on agencies that fail to provide monetized cost estimates for new economically significant or major rules.

Estimating indirect regulatory costs can be highly speculative, depending on "huge, complex and often proprietary models of the economy."[258] However, this poses no problem if the budget caps apply only to direct compliance costs. As noted earlier, indirect costs are not identifiable expenditures and, thus, are not easily integrated into an accounting framework or budget process.

Most of the costs of economic regulations—rules dealing with business decisions such as pricing, entry, and investment—are indirect. Thus, a case can be made that economic rules should not be included in a regulatory budget. As Tozzi explains:

> The economic thinking behind the use of a budget as an allocation mechanism doesn't work so well for economic regulation; i.e., control of prices, entry, exit, and service levels. Economic regulation rarely presents choices of the degree or cost of spending, involved in some reasonably well-defined goal. Typically, the costs of economic regulation appear to be by-products of policies adopted for a variety of reasons and…the issue is often whether the regulation is needed at all. In these circumstances, it is not clear what would be the point of attempting to impose a budget constraint.[259]

Although Congress seldom succeeds in balancing the federal budget, it has little difficulty preventing agencies from spending in excess of their annual appropriations.

If policymakers believe economic regulations produce more cost than benefit, the appropriate response is not to try to cap the indirect effects on consumer prices or producer profits, but to eliminate the rules altogether.

To be sure, social regulations mandating direct expenditures to meet specific health, safety, or environmental objectives may also entail indirect costs. In cases where indirect costs are likely to be as large as or larger than the direct costs, agencies could be required to estimate both direct and indirect costs. Again, however, one way to keep estimation responsibilities manageable is to prohibit those types of social rules—such as input or product bans—likely to have substantial indirect costs.

2. Tracking Issues

Although Congress seldom succeeds in balancing the federal budget, it has little difficulty preventing agencies from spending in excess of their annual appropriations. Ever since 1870, a provision that later became the Antideficiency Act has made it illegal for agencies to commit or spend more money than Congress previously made available.[260] Under the Act, agencies may not enter into contracts that exceed the enacted appropriations for the year, purchase services and merchandize before appropriations are enacted, or pay bills when there is no cash in the appropriation or fund account.[261] The Act also establishes penalties for spending violations. For example, an official convicted of willfully and

knowingly over-obligating or over-expending agency funds may be fined up to $5,000 and imprisoned for up to two years.[262]

The Antideficiency Act works—i.e., prevents agencies from exceeding their annual appropriations—because it is relatively easy to determine when an agency spends its last allowable dollar. Tracking regulatory compliance expenditures is more difficult. Literally thousands of entities spend billions of dollars to comply with federal rules, and few currently maintain separate accounts to track such expenditures. However, many firms might track compliance expenditures if they believed OMB and Congress would use the information to limit regulatory costs. Firms would surely do so if required by law to institute regulatory accounting and reporting systems. If Congress decides to explore the feasibility of regulatory budgets, it should probably start with regulations affecting a relatively small number of easily identified and closely monitored entities, such as steam electric generating units.

To determine when a regulatory agency had exhausted its budget authority, firms would need to monitor their compliance expenditures and report the information to the agency and/or OMB. Tozzi points out that current law already includes a provision for tracking compliance costs, albeit on a limited scale:

> Section 120 of the Clean Air Act establishes a noncompliance penalty program. This program levies penalty on any firm that violates emission requirements established pursuant to the Clean Air Act. The penalty is calculated as the incremental expenditures—beyond those currently being expended—needed to bring the source into compliance.[263]

The Section 120 penalties apply to *any* owner or operator of a major stationary source in noncompliance with *any* emission limitation, emission standard, or other requirement established under *any* of the Act's regulatory programs. "Obviously," Tozzi comments, "the ability of the Federal Government to perform an accurate calculation of the compliance costs resulting from the imposition of a Federal regulation on a private sector source is a key element of this program." Even though no regulatory budget exists, Congress, in Section 120, has adopted a "statutory requirement to estimate compliance costs for a major sector of the economy." Moreover, because the penalty equals the incremental cost of compliance, "there is considerable incentive to develop accurate estimates of compliance cost. The higher the estimates of compliance costs—the higher the penalty."

If it is possible to track compliance costs for the purpose of penalizing a firm, then in principle it is also possible to track compliance costs for the purpose of determining when an agency runs out of regulatory authority. The record keeping and accounting systems required to implement a regulatory budget would, of course, be far more extensive than those required to assess Section 120 noncompliance penalties. Compliance costs would have to be calculated not only for a few errant firms, but also for all firms subject to the rule or regulatory program for which a budget was enacted.

To keep both reporters and agencies honest, Congress may need to create a new IRS—an Internal Regulatory Service. There is a risk that a regulatory budget could spawn paperwork burdens, fines, and criminal penalties akin to those associated with tax preparation, filing, and auditing.

At some point Congress would also have to provide for a system of regulatory audits. Under a budget, firms would have an incentive to report higher costs than they actually incur both to justify demands for regulatory relief and to deplete more rapidly agencies' authority to regulate. By the same token, agencies would have an incentive to low-ball costs to delay exhausting their budget authority. Compounding this problem is the fact that some investments may have more than one possible explanation. For example, electric technologies such as infrared paint drying, ultrasonic metal cleaning, and microwave disinfection of medical wastes can reduce toxic emissions and other waste products.[264] EPA regulations may be a factor in a firm's decision to purchase such technologies, but so might state regulations, threats from the tort system, or a desire to improve the firm's performance and efficiency. It would not be surprising if the firm and EPA take different views as to whether, or to what extent, the firm's expenditure should count against EPA's budget.

To sort out such issues and keep both reporters and agencies honest, Congress may need to create a new IRS—an Internal Regulatory Service. Like the Internal Revenue Service, the regulatory audit agency would need to promulgate rules to standardize accounting procedures and reporting requirements. The audit agency would also need the power to penalize firms for non-compliance with such procedures, and to prosecute firms for fraudulent reporting of regulatory cost information. There is a risk that a regulatory budget could spawn paperwork burdens, fines, and criminal penalties akin to those associated with tax preparation, filing, and auditing.

3. Enforcement Issues

A budget worthy of the name must be enforceable. That a regulatory budget could be as enforceable as a fiscal budget seems doubtful, because it will always be easier to count the dollars federal agencies spend than to monetize the resources thousands of firms invest to comply with federal rules. However, a regulatory budget would not need to be air tight to accomplish its central purpose: compel elected officials to make explicit choices about how much money regulated entities are to spend, and what they are to spend it on.

Moreover, we should bear in mind that the federal fiscal budget is far from a perfect system of spending control. At first glance, the enforceability of the federal budget may seem absolute.[265] Under the Antideficiency Act, agencies are forbidden to spend more money than Congress has appropriated. However, as is widely known, annual appropriations control only about one-third of all federal expenditures in a typical year. Most spending is governed by so-called permanent authorizations—laws authorizing agencies to spend money without first obtaining an annual appropriation from Congress.

Permanently authorized expenditures include interest payments on the public debt and spending for several entitlement programs, such as Social Security,

Medicare, Medicaid, unemployment insurance, and federal employee retirement.[266] Under those programs, any person meeting the eligibility criteria is entitled to a payment from the Treasury, and spending grows on autopilot along with the number of eligible beneficiaries. Such "mandatory" spending is "uncontrollable," at least on a year-to-year basis. Congress could but does not cap entitlement programs, which are projected to double in cost over the next 10 years.[267] Washington's red ink nightmare is, however, a reason to reform the fiscal budget process, not an excuse to keep regulatory expenditures unbudgeted.

Regulations often take years to implement, and this, too, raises questions about how regulatory spending caps would be enforced. The annual costs of a particular rule may begin small, increase dramatically as compliance deadlines kick in, and then decline sharply after the regulated industry has made the necessary adjustments. At what point in its implementation should a rule be reviewed to determine if compliance costs are within or beyond the cap? If compliance burdens are variable over time, should the budget include annual caps or multi-year caps? Review of a multi-year cap might be more accurate than review of an annual cap, but it might also be less useful. The longer Congress or OMB waits to assess a rule's cumulative costs, the harder it will be to keep costs within the cap by modifying the rule.

Moreover, modifying an existing rule is seldom easy or quick. To do so, an agency must propose a new rule and go through the APA-governed public notice and comment process, which can drag on for years. In addition, if the rule is mandated by statute or court order, agency actions to modify the rule could become bogged down in litigation.

A regulatory budget would not need to be air tight to accomplish its central purpose: compel elected officials to make explicit choices about how much money regulated entities are to spend, and what they are to spend it on.

It should be recognized, however, that fiscal programs often fund multi-year projects with variable annual costs, yet that does not prevent policymakers from setting and enforcing budget caps. Weapons procurement programs, highway construction programs, and other public works programs all fund multi-year projects whose annual costs may vary considerably and whose cumulative costs may not be known until completion of the project. Furthermore, there is a remedy for budget-busting cost overruns: scale back appropriations in future years. As Tozzi comments:

> The absence of a corrective mechanism in the year the actual expenditures exceed estimated expenditures is not to suggest the absence of a corrective mechanism in future years. In fact, corrective mechanisms are developed—in the fiscal budget—as a result of the information gained during the budget year. There is a large array of such corrective mechanisms—these range from requesting less funds in future years to developing better models for the expenditure of funds.[268]

Similar mechanisms could be developed to enforce regulatory spending caps. For example, if after full implementation, the cost of a rule exceeds the agency's budgeted authority by $100 million, Congress would reduce the agency's regulatory budget for the next fiscal year (or multi-year period) by $100 million.

Since regulatory budgeting is uncharted policy territory, development of regulatory budgets should be seen as an experiment, and should proceed by small steps.

To arouse public ire against Congress and overturn its regulatory spending caps, an agency might pursue a variant of the Washington Monument ploy, claiming it must rescind its most essential rules in order to stay within budget. Congress could preempt such gamesmanship by requiring that regulatory budget cuts fall first on rules with the least benefits per dollar, on discretionary rules before statutorily prescribed rules, or on newer rules before longstanding rules.[269]

E. Next Steps

Since regulatory budgeting is uncharted policy territory, development of regulatory budgets should be seen as an experiment, and should proceed by small steps. It might be best to start with an industry that is already closely monitored for regulatory purposes, and types of regulation for which large amounts of cost data are already available. Thus, Congress might experiment with a budget for new air quality controls on steam electric generating plants. Such a budget could be run as a simulation exercise to test its feasibility and reveal the potential accounting, reporting, and enforcement problems policymakers would need to address in designing statutory limits on regulatory compliance burdens.

If Congress finds the simulation promising, it would need to take several steps to implement a budget, including: (1) commission statistical agencies such as the Census Bureau, the Bureau of Economic Analysis, the Bureau of Labor Statistics, the Bureau of Transportation Statistics, and the Energy Information Administration to survey regulatory compliance costs in various industries; (2) require the pertinent regulatory agency or agencies to estimate the compliance costs of existing and new regulations; (3) require the affected industry or industries to track and report compliance cost information; and, (4) establish a committee structure and legislative process for setting regulatory cost caps. As the slow evolution of the federal expenditure budget over several decades suggests, the development and implementation of regulatory budgets could take many years.

As the slow evolution of the federal expenditure budget over several decades suggests, the development and implementation of regulatory budgets could take many years.

F. Relationship between Regulatory Budgeting and Congressional Review

As indicated above, congressional review combined with competitive analysis of regulatory costs and benefits could evolve into a budgeting system, because high-quality cost estimates would continually inform Congress's decisions to approve or not approve agencies' final rules. As also noted, congressional review could be implemented incrementally, with Congress at first voting only on completed economically significant rulemakings—a relatively small number (two to three dozen annually). There are too many minor rules for Congress to review one-at-a-time. It was suggested earlier that each agency's minor rules could be bundled into a package subject to an up-or-down vote. A budget process would provide an alternative and probably superior form of review.

Under a budget system, instead of voting on an agency's minor rules as a package, Congress would vote on program-wide or agency-wide cost caps for all rules, major and minor. Congress would still take full responsibility for regulatory decisions, because the caps would be set through a regulatory appropriations process modeled on the spending appropriations process. Congress would set the caps only after proper review of the president's regulatory budget proposal by the relevant committees and subcommittees.

Several options are possible. If the budgeting system evolves from a system of congressional review informed by competitive regulatory analysis, Congress might elect to retain targeted, case-by-case, review of economically significant rules, and review all other rules in the context of agency- or program-wide budget caps. On the other hand, Congress might opt for a pure budget system in which authority for all rules, major and minor, is granted when lawmakers enact the overall budget for an agency or program. When approving an agency or program budget, Congress might allow the agency broad flexibility to develop and adopt rules within the specified caps. Alternatively, Congress might insist (through appropriations and report language) that the agency stick to a fairly detailed regulatory agenda.

IX. Summary and Conclusion

What (or who) caused the recession of 2001 and the slow recovery of subsequent years will likely remain a hotly debated issue for some time. The dot.com crash, the September 11 terrorist attacks, and weak export markets all played a part in killing the 1990s economic boom. However, the regulatory-induced telecom crash also contributed to and prolonged the recession. The Telecommunications Act inflicted price controls and infrastructure socialism on a key high-tech industry. A regulatory system in which non-elected officials not only draft but also enact regulations allowed the FCC to subsidize entry into local telephone markets, creating an unsustainable bubble.

Those entrusted with stewardship of the U.S. economy should begin now to review the serious defects of the current regulatory process and develop a reform agenda for the future. Delegation of legislative powers to non-elected bureaucrats violates Article I of the U.S. Constitution and creates an unaccountable system in which decision-makers have no incentive to control regulatory costs. Allowing agencies to pass final judgment on the analytical basis of their regulatory proposals creates an obvious conflict of interest and is bound to skew policymaking in favor of regulatory activism. The unbudgeted character of federal rules creates a system of special privilege in which agencies and their allies control enormous resources without having to compete for the authority to do so.

Regulatory reform is difficult, but it need not be a pipedream. Although many interests profit from the status quo, few will be comfortable attacking reforms that clearly aim to replace monopoly privilege with competition, bureaucratic lawmaking with democratic accountability, and hidden costs with cost control.

Although many interests profit from the status quo, few will be comfortable attacking reforms that clearly aim to replace monopoly privilege with competition, bureaucratic lawmaking with democratic accountability, and hidden costs with cost control.

This report has outlined numerous options to make federal regulation more affordable, effective, and accountable. A concise summary follows:

- ***Amend the Telecommunications Act.*** Make clear that the goal is to deregulate the telecom industry; set clear schedules to phase out price controls and forced-access regulation; establish regulatory parity for telephone, cable, and wireless carriers by removing, not increasing, regulatory burdens; and, prohibit state and local governments from balkanizing information networks and telecom markets.

- ***Publish an Annual Regulatory Report Card.*** OMB should produce an annual Report Card consolidating vast amounts of quantitative information already available in agency databases. Congress and the interested public would be able to see at a glance whether the number of rules affecting small businesses and localities is going up or going down, whether any significant deregulation is occurring, the minimum cost of recently adopted major rules, and whether regulatory activity at the top rulemaking agencies is primarily driven by statute or agency initiative.

- ***Create New Categories of Major Rules.*** OMB (or Congress) should require the use of new rankings or categories (Category 1, 2, 3, etc.) in official publications to better convey the full costs of the major or economically significant rules that agencies propose or adopt.

- ***Make the Rule Reform Nominations Process More Transparent.*** There currently exists no up-to-date information clearinghouse on what actions, if any, agencies are taking on public nominations of rules to be reviewed and modified or rescinded. The lack of timely information discourages the public from submitting nominations and following up on agency performance. OMB should post all nominations it receives on its Web site, and provide timely status reports about them. Further, OMB should post any items slated for OIRA or agency review in the Unified Agenda, with a hyperlink to the OMB Web site list.

- ***Extend OMB Review to Independent Agency Rulemakings.*** Several statutes—the Paperwork Reduction Act, the Information Quality Act, the Regulatory Flexibility Act, and the Regulatory Right to Know Act—create regular opportunities for OMB to review and offer comment on independent agencies' regulatory activities. Independent agencies would be under no legal obligation to heed OMB's views, but they would risk public disapprobation for ignoring good advice, failing to address reasonable criticism, or refusing to correct significant errors.

- ***Uphold Information Quality Standards.*** OMB should insist that all agency-disseminated information be held to high standards of objectivity and utility. It should also affirm that the Act's petition process applies to

rulemaking information, and that agency responses to information correction petitions are subject to judicial review.

- ***SBREFA: Clarify Key Terms and Compensate Winning Plaintiffs.*** To prevent agencies from evading the duty to perform regulatory flexibility analyses, Congress should authorize SBA's Office of Advocacy to define "significant impact on a substantial number of small entities" via a notice-and-comment rulemaking. To level the legal playing field between agencies and the small entities they regulate, Congress should authorize winning small business plaintiffs to collect compensation for damages and full reimbursement for all reasonable attorneys fees. Congress should also overturn the Supreme Court's *Buckhannon* decision so that small business plaintiffs once again qualify as prevailing and, thus, entitled to recover legal expenses if they prompt an agency to change its conduct or policy, whether or not the change is ordered by a court.

- ***UMRA: Shrink Regulatory Impact Assessment Loopholes.*** Agencies avoid preparing regulatory impact assessments (RIA) of intergovernmental mandates simply by claiming to have a good cause to skip the usual notice-and-comment process. An agency should not be allowed to use the good cause exception unless it publishes an explanation in the *Federal Register* at least 30 days before issuing the rule, and invites public comment. Agencies should also have to perform an RIA for major intergovernmental mandates even if the rule's requirements are specifically set forth in law. The public has a right to know how much it will be paying whether the rule is discretionary or statutorily prescribed.

- ***Make Agencies Compete for the Right to Score Regulatory Impacts.*** Agencies enjoy an exclusive right to score the impacts of their regulatory proposals. This creates a classic conflict of interest, because agencies have an obvious incentive to skew regulatory analyses to justify their predetermined preferences and agendas. OMB (and GAO, if Congress approves) should hold a contest to determine which analysis of each major regulatory proposal is best, reviewing the rulemaking agency's cost-benefit analysis plus those submitted by experts in industry, state agencies, and the non-profit sector. Unless the rulemaking agency's analysis visibly conforms to OMB's best practices and information quality guidelines, it would have zero chance of winning. Agencies would have to clean up their analytical acts or lose credibility as regulatory experts.

- ***Extend UMRA Protections to the Private Sector.*** Just as any member of Congress can now force the House or Senate to debate and vote on whether to consider measures that would cost lower-level governments $50 million or more, so members should have the option to force Congress to debate and vote on whether to

consider legislation containing $50 million mandates on the private sector, or $25 million mandates on small business.

- ***Establish a Congressional Regulatory Office.*** OMB is a watchdog in constant danger of becoming a rubber stamp, because the OMB director and the heads of various rulemaking agencies work for the same administration and serve at the pleasure of the president. To participate effectively in regulatory decisions, and effectively check both OMB and the agencies, Congress needs an independent analytic arm—a regulatory counterpart to CBO. At a minimum, Congress will need to expand GAO's regulatory program if, as recommended above, it tasks GAO to compete with OMB in selecting the best analyses of regulatory proposals.

- ***Require Congressional Approval before New Rules Are Effective.*** Congress will have much greater motivation to consider economic impacts when drafting regulatory statutes, and to insist that agencies consider low-cost and non-regulatory alternatives, if it has to approve agencies' final rules before they can take effect. Regulations are implicit taxes that have the force of law. To most Americans, it is obvious that nobody except their elected representatives should have the power to make laws or raise taxes. Policymakers should end the current system of regulation without representation and replace it with a system of regulatory accountability.

- ***Establish a Bipartisan Regulatory Reduction Commission.*** To reduce the mass of existing federal rules, Congress should appoint a bipartisan Regulatory Reduction Commission. The Commission would review agency regulations; invite OMB, GAO, and the interested public to submit recommendations; hold hearings; and assemble a yearly package of proposed regulatory reductions. The package would be subject to an all-or-nothing vote, with no amendments allowed. Congress would send any package it approved to the president for his signature. The Commission could be kept active for as long as Congress deems necessary, and potentially could shave off large chunks of ineffective regulations over a number of years.

- ***Conduct Pilot Projects to Test the Feasibility and Desirability of Establishing Regulatory Budgets***. The ultimate goal of regulatory reform is to make agencies act more like households. However devoted to the health and safety of their members, households face inexorable tradeoffs in the use of their resources and, consequently, have strong incentives to set priorities and economize. Whether consciously or intuitively, a household budget guides and constrains the typical family's spending decisions. A similar decision framework should—but does not—inform regulatory choices. What is most critically lacking in the regulatory arena is a budget process enabling elected officials to make explicit choices about the size of regulatory burden relative to the economy, and about

the allocation of scarce resources among the myriad of regulatory objectives. Congress should authorize OMB to conduct pilot projects to explore the estimation, tracking, and enforcement issues policymakers would need to resolve before setting statutory limits on regulatory costs.

Regulatory reform is an enterprise fraught with political risk. However, the regulatory status quo is itself a source of considerable risk, as the regulation-induced telecom meltdown and its economic repercussions show. If war is too important to be left to the generals, then regulation is too important to be left to the regulators. Elected officials should take more responsibility for regulatory decisions, and agency analyses should have to compete for public approval with analyses prepared by non-agency experts. If spending agencies are not above being constrained by budget caps on the costs they may impose, then regulatory agencies should not be either.

Those who flinch at the thought of challenging the regulatory status quo should remember: "Noble things are hard."

Those who flinch at the thought of challenging the regulatory status quo should remember: "Noble things are hard."[270] No guts, no glory. Alexander Hamilton, the nation's first Treasury Secretary, called "love of fame" "the ruling passion of the noblest minds."[271] If even a few policymakers seek the honor of renewing America's constitution of liberty, regulatory reform may yet have a political future.

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