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From Creation to Reform, Part II: Congressional Roles in Regulation

INTRODUCTION

In the *Joint Economic Report 1979*, the Joint Economic Committee warned about "the growth of unnecessary, conflicting, and duplicative regulations" and noted that overregulation had been a contributing factor in the inflation crisis that had gripped the nation. The report stated, "Witnesses appearing before the Committee have provided examples of instances where compliance with one regulation requires violation of another" and that "deregulation can generate substantial consumer and business benefits."[1]

In 2016, 37 years later, the debate about the proper role of regulation in American society, as well as how the three branches of government interact with the regulatory process, continues. Twenty-nine states have brought suit against the Environmental Protection Agency, challenging its authority to implement President Obama's Clean Power Plan (CPP) under the auspices of the *Clean Air Act*, while the Waters of the United States (WOTUS) rule has sparked debate about the agency's expanding claims of jurisdiction to regulate "bodies of water" that include "ditches" and other small areas with water that critics argue are outside of the EPA's jurisdiction. A resolution of disapproval by Congress—the limited control Congress exercises under the *Congressional Review Act of 1996* (CRA)—regarding WOTUS was vetoed by the President, though the rule now is mired in judicial challenges that have enjoined enforcement for now.[2]

As regulatory agencies continue to expand regulatory prerogatives into all aspects of the economy, it is important to reflect on the sources of the agencies' authority and how they make rules with the force of law. As explained in the previous JEC analysis, "From Creation to Reform, Part I: The Process of Agency Rulemaking," though lawmaking power was originally granted to Congress, the vast majority of rules are written and implemented by the Executive Branch and its agencies, both with and without laws enacted by Congress containing explicit "enabling legislation" allowing agencies to issue rules.[3] Today, Congress has been left with less recourse for objectionable regulations. This requires an examination of the role Congress plays in the regulatory process, as well as how to elevate the most representative branch of American government, with whom lawmaking power constitutionally resides, in order to return to it primacy as a lawmaking body.

THE ROLE OF CONGRESS: THE CONGRESSIONAL REVIEW ACT

The CRA establishes a procedure that allows Congress to disapprove regulations issued by federal agencies. This disapproval takes the form of a joint resolution and, like other acts of Congress, requires a Presidential signature to take effect. In order to qualify, a disapproval resolution regarding a rule must be submitted within 60 calendar days of the date the Administration reported the final rule to Congress, not counting days on which either house of Congress is in recess for more than three days.[4] Once the resolution passes both houses of Congress and is signed by the President, the regulation is voided ("shall be treated as though such rule had never taken effect") and cannot be proposed again in a substantially similar form without new authorizing legislation. If the resolution of disapproval is vetoed, Congress must override the veto to block the rule. However, this has never succeeded due to the difficulty of assembling the supermajority vote (two-thirds in both the House and Senate) required to override a veto.[5]

An alternative 60-day period applies in the Senate to trigger expedited procedures for the resolution. Starting when a rule is received by Congress and printed in the *Federal Register*, the Senate has 60 session (not calendar) days during which special fast-track procedures apply. During this 60-day period, if a committee has received a disapproval resolution but not reported it to the full Senate for 20 calendar days, a petition signed by 30 senators will discharge the resolution from committee and make it eligible for a Senate vote. After the resolution is either discharged or reported by the committee to the full Senate, any senator may make a non-debatable motion to proceed to the consideration of the resolution. Because the motion is not debatable, it is therefore not subject to filibuster and can be approved by a simple majority rather effectively requiring the 60 votes normally needed to close debate on a measure.

If the motion to proceed is approved, the resolution becomes the unfinished business of the Senate until disposed of (and thus the Senate can only move to another matter by unanimous consent). The CRA allows 10 hours of debate, split evenly between supporters and opponents of the joint resolution of disapproval. Immediately following this debate, the Senate proceeds directly to a vote on the resolution (following a quorum call, if requested).[6] Like the motion to proceed, only a simple majority vote is required to pass the resolution. No equivalent expedited procedure exists for the House of Representatives, though such a mechanism is not usually necessary to move legislation with majority support in the House.[7]

It is worth noting that if the rule is submitted to Congress within 60 days of session in the Senate or 60 legislative days in the House of the date Congress adjourns for the remainder of the session of Congress (known as *sine die* adjournment), the clock on passing a disapproval resolution resets when the next session begins. On the 15th day of session in the Senate or 15th legislative day in the House (whichever is later), the original 60-day period described above will start again.

This means that a significant number of rules finalized by the Obama Administration during the last half of 2016 may be vulnerable to CRA resolutions of disapproval, depending on the date of adjournment *sine die* of the 114th Congress.[8] Specifically, the Congressional Research Service has estimated that agency final rules submitted after June 2, 2016, would be subject to disapproval under the CRA if adjournment occurs on December 16, 2016, with no other unexpected changes to the House and Senate calendars.[9]

The greatest weakness of the CRA is the threat of a veto, as discussed earlier. Generally, a president would be expected to veto such a resolution, given that it is unlikely that regulations contrary to the desires of the administration would have been proposed in the first place. If the President vetoes the resolution, another 30-day period begins, after which the rule becomes law if the veto is not overridden. Again, an override requires a two-thirds vote of both houses of Congress, which is typically an impossible bar to reach without broad bipartisan support, especially considering that members of the president's party will likely support the regulatory initiative.

The situation is different when a new president is considering a resolution voiding a rule issued in the previous administration, particularly when the new president espouses different policy views that the previous president. Indeed, this is the scenario that produced the only successful use of the CRA since its enactment in 1996.[10] In November 2000, the Occupational Safety and Health Administration (OSHA) under President Clinton issued a controversial rule regarding workplace ergonomic standards. The full CRA review period did not expire prior to the 106th Congress' adjournment *sine die*, and so the clock reset. The 107th Congress then voted in early March to pass a resolution of disapproval, which was signed by President Bush.[11]

FIG. 1: OTHER REGULATORY REVIEW LAWS[12]

Regulatory Flexibility Act of 1980 (RFA)	Requires agencies to assess the impact of rules on small business and allows review by the Small Business Administration.
Paperwork Reduction Act of 1980 (PRA)	Established Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) to oversee paperwork and information-collection burdens imposed by regulations.
Unfunded Mandate Reform Act of 1995 (UMRA)	Requires agencies to consider the costs that their rules place on state, local, and tribal governments.
Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)	Enforces the requirements for small business impact analysis created under the Regulatory Flexibility Act of 1980.
Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999	Requires OMB to provide an annual report to Congress on the costs and benefits of regulations and to provide reform recommendations.
Truth in Regulating Act of 2000	Gives authority to Congress to request that the Government Accountability Office conduct independent evaluation of economically significant rules.
Information Quality Act of 2000	Required OMB to develop standards for the information used by agencies in the rulemaking process and for other purposes.

The acts listed in the table above have a mixed record of success. Susan Dudley, former Administrator of OIRA, stated in testimony before the Joint Economic Committee on June 26, 2013:

> *Agencies generally meet UMRA requirements with reference to regulatory impact analysis pursued pursuant to Executive Order 12866, but rarely do more. While pursuant to the RFA and SBREFA, courts have overturned regulations that fail to consider impacts on small business, agencies have successfully defended regulations that ignore the RFA requirements…*
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> *OMB reports annually to Congress on the costs and benefits of major regulations, but a 2001 CRS report observed that OMB's reports "have been incomplete, and its benefit estimates have been questioned." My own research corroborates those concerns, and shows that a large percentage of total reported benefit estimates are driven by a few questionable assumptions.*[13]

THE ROLE OF CONGRESS: APPROPRIATIONS RIDERS

Given the weakness of the CRA, another popular way for Congress to block rulemaking is to include "limiting riders" on appropriations bills or other "must-pass" legislation that specifically defund the new rules and thus make them impossible to implement. The funding restriction also allows legislators to avoid congressional rules that prohibit legislating on appropriations bills, since the riders are structured to affect funding rather than policy. The approach is popular because it allows members of Congress to block rulemaking by inserting a provision in a larger measure the president is less likely to veto than a disapproval resolution or other targeted legislation affecting the same rule.[14]

One of the most famous of limiting riders is the Hyde Amendment. A perennial feature of the appropriations process since it was first introduced in 1976, the Hyde Amendment prohibits funds appropriated by the measure in which it is included from funding abortions except for cases of rape, incest, or when the life of the mother is at risk.[15] Another often-cited example of appropriations riders are the Boland Amendments, which were Defense Appropriations riders added between 1982 and 1984 to prohibit the funding of Contras for purposes of overthrowing the Nicaraguan government; attempts by executive branch officials to circumvent these restrictions led to the Iran-Contra affair.[16] While these examples were not targeting specific regulations, they demonstrate how Congress' power of the purse can affect Administration policy.

THE ROLE OF CONGRESS: DELEGATING LAWMAKING AUTHORITY

To an extent, Congress shares the blame for the extensive power of agencies in recent decades to make rules and laws without congressional input. Too often, Congress will pass authorizing legislation that is vague, sometimes intentionally so, to 'punt' the task of lawmaking to an executive agency charged with implementing the law. Perhaps the best example of this can be found in the *Dodd-Frank Wall Street Reform and Consumer Protection Act*.[17] The newly created Consumer Financial Protection Bureau (CFPB) was empowered by that law to regulate "unfair, deceptive, or abusive" lending practices.[18] The text of the bill includes delineation of what practices can be counted as unfair or abusive by the CFPB without actually providing any clear guidance as to where the line ought to be drawn. In addition, the law leaves it entirely to the agency to determine what, for example, is a practice that "takes unreasonable advantage of a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service" and thus can be regulated by the CFPB as abusive.[19] The director of the CFPB admitted in 2012 testimony before the House Committee on Government Oversight and Reform that the "term abusive in the statute is… a little bit of a puzzle because it is a new term."[20] Members of Congress can continue to expect their lawmaking powers to be supplanted by regulators and federal agencies so long as statutes continue to provide such broad and ill-defined delegations of rulemaking power.

ANOTHER DANGER: "REGULATORY DARK MATTER"

Part 1 of this series, "From Creation to Reform," discussed the informal notice-and-comment rulemaking process by which new rules are often created. As stated in that document, agencies are not required to publish notices of proposed rulemaking for interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice (among others).[21] According to Clyde Wayne Crews Jr. of the Competitive Enterprise Institute, as a result agencies increasingly use "non-binding" guidance documents, directives, and interpretive rules to steer policy in their preferred direction.[22] In a 2000 case, *Appalachian Power Co. vs. Environmental Protection Agency*, the D.C. Circuit Court noted:

> *The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. With the advent of the Internet, the agency does not need these official publications to ensure widespread circulation; it can inform those affected simply by posting its new guidance or memoranda or policy statement on its web site. An agency operating in this way gains a large advantage. "It can issue or amend its real rules, i.e., its interpretative rules and policy statements, quickly and inexpensively without following any statutorily prescribed procedures."*[23]

As Congress moves forward on mechanisms to reclaim lawmaking primacy, it is important to consider this phenomenon, frequently referred to as "regulatory dark matter," and take measures to ensure that the abuse of guidance documents and interpretive rules as an end-run around the prescribed rulemaking process is brought to a halt.

PATHS FORWARD: REGULATORY BUDGETING

Congress has a number of solutions yet to consider in returning rulemaking power to the legislative branch and rein in excessive growth of regulation. One of those solutions includes the practice of "regulatory budgeting." Regulatory budgeting is not a recent innovation; in the 95th Congress, Senator Bentsen of Texas introduced "A Bill to amend the Congressional Budget Act of 1974 to require the Congress to establish, for each fiscal year, a regulatory budget for each Federal agency which sets the maximum costs of compliance with all rules

and regulations promulgated by that agency…" (S. 3550).[24] The bill would have established a regulatory budget, and the proposal was introduced again as S. 51 in the 96th Congress.[25] Similar legislation has been introduced but failed to gain traction in the 113th and 114th Congresses as well. The basic premise of a regulatory budget is that it would establish a cap on the compliance costs that the executive branch could impose through regulation on the private sector or on other governmental units.[26]

A JEC report from 1979 titled "The Regulatory Budget as a Management Tool for Reforming Regulation" notes that:

> *[R]egulation claims scarce resources for government use. Sound management practice would require that decisions on regulation take into account all resources so claimed. This would help set a limit on the total amount of resources used and induce decision-makers to allocate the total to the most effective uses. It would further cause regulatory officials to consider costs in selecting specific targets of regulation and discipline them to choose the least-cost ways of attaining given regulatory objectives.*[27]

Under the current system, the federal government is only accountable for a small fraction of regulatory costs: the costs of administration and enforcement. Compliance costs, especially for non-reviewed "economically insignificant" regulations, go unmonitored. A regulatory budget, like a fiscal budget, would limit the costs that regulatory agencies can pass on to the economy. In addition, the report indicates a regulatory budget would incentivize agencies to prioritize regulation to focus on the most economically efficient solutions, challenge them to regulate in innovative ways to address issues in the least burdensome way possible, and would provide a strong incentive to eliminate duplicative, ineffective, or inefficient regulations that may currently be in effect.[28]

In practice, a regulatory budget would likely mimic a fiscal budget in many important regards. Each year, Congress would approve regulatory cost limits, apportioned among the various federal agencies. The agencies would then have to constrain their regulatory edicts within the caps established by the regulatory budget during the time period the budget was in force.[29] A major challenge, of course, would be ensuring that agencies appropriately forecast the actual costs.

PATHS FORWARD: THE REINS ACT

The *Regulations from the Executive in Need of Scrutiny Act of 2015* (REINS Act) is legislation proposed by Congressman Todd Young and Senator Rand Paul that also seeks to improve legislative oversight over the rulemaking process. The act, unlike a regulatory budget, would not dictate a cap on the total regulatory burden, and thus would not require any retroactive action to trim regulations. Instead, the REINS Act would require that Congress pass a joint resolution of *approval* before any major agency rulemaking can take effect. Under the bill,

the rule could not be implemented unless Congress approves it within 70 session or legislative days. Congress would have much greater authority over rulemaking under this structure than under CRA, since major rules would require affirmative congressional action.[30]

Like CRA, the REINS Act also establishes expedited procedures under which those resolutions of approval must be considered. The bill would allow the most representative of the three branches of government, the United States Congress, to weigh in directly on new major rulemaking by federal agencies and claw back some of the power that has gradually diffused from the Congress to the Executive Branch and its administrative agencies.[31]

The Obama Administration consistently opposed measures like the REINS Act. OMB declared that a previous version of the proposal from the 113th Congress (H.R. 367) would be "a radical departure from the longstanding separation of powers…" and "thwart implementation of… duly-enacted laws." The House passed the REINS Act of 2015, but it did not progress in the Senate.

PATHS FORWARD: THE BRITISH COLUMBIA MODEL

An example of how to successfully confront overregulation can be found in our northern neighbor, Canada. The experiences of the Canadian province of British Columbia (BC) provides a fascinating case study of regulatory reform that has proved successful.

In 2001, responding to rampant regulation and corresponding negative economic effects, the BC government announced a bold new initiative: they would work to reduce the number of regulatory requirements by one-third, within three years.[32] Regulatory requirements are defined as "an action or step that must be taken, or piece of information that must be provided in accordance with government legislation, regulation, policy or forms, in order to access services, carry out business or pursue legislated privileges."[33] This benchmark cut a middle ground between the complex counting and measurement required under regulatory budgeting, while obtaining a more accurate measure of regulatory burden than could be obtained by simply counting the number of regulations on the books (each of which could contain a sizeable and varying number of regulatory requirements).

The province exceeded its 3-year goal, and by 2004 had reduced the number of regulatory requirements by 37 percent compared to the 2001 baseline. At the beginning of the 3-year goal, there was a requirement that two regulatory requirements be removed for every new one imposed; the ratio was changed to one-to-one in 2004, after the red-tape reduction goal was achieved.[34]

Another plus of BC's specific implementation was its simplicity. The entire policy, including definitions, forms, and examples, was only seven pages long. The policy required, in a straightforward manner, that ministers certify that any new rules fulfill a number of

standards, including that they are evidence-based, cost-effective, developed transparently, and support BC's economy and small businesses.[35] The result of the policy, beyond red-tape reduction, was a change in regulatory culture in BC's agencies that changed the role of public officials from "regulation makers to regulation managers."[36]

The pace of economic growth concurrent with the reforms' implementation was staggering. Between 1994 and 2001, BC was one of the economically worst-performing provinces in Canada, with a growth rate 1.9 percentage points below the Canadian average. However, after the reforms, the results were dramatically different. From 2002 to 2006, GDP growth in BC was 1.1 percentage points *higher* than the Canadian average. Business creation also soared, business bankruptcy declined drastically, and per capita disposable income rose from below the national average to third-highest among Canadian provinces. Admittedly, these improvements came concurrently with other economic reforms, including a substantial reduction in taxation on both income and capital. Anecdotal evidence suggests that both red-tape reduction and the tax reform measures contributed significantly to the economic turnaround BC experienced.[37]

CONCLUSION

There is more than one path that the United States can take to improve Congressional oversight of federal rulemaking agencies; regulatory budgeting, the REINS Act, or a more novel approach such as that taken by BC could all prove beneficial in improving America's business climate, boosting job creation and wages, and reducing red tape's general drag on the American economy. The costs of bad regulation, even if eventually overturned in court or invalidated by the legislature, can still be a substantial burden on American small businesses and other job creators. As the original holder of legislative authority under the Constitution, it is the responsibility of Congress to take steps to reclaim its primacy and conduct timely and effective oversight of regulatory actions to protect the American people from ever-expansive regulatory creep.

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See Also:

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[4] Carey, Maeve, Christopher Davis, and Alissa Dolan, "The Congressional Review Act: Frequently Asked Questions," Congressional Research Service, April 17, 2015. http://www.crs.gov/reports/pdf/R43992

[5] *Ibid.*

[6] 5 U.S. Code 802

[7] Carey, CRS

[8] Crews, Clyde Wayne, "Donald Trump and the 115th Congress Could Get Rid of These 140 Obama Regulations," Forbes, November 14, 2016. http://www.forbes.com/sites/waynecrews/2016/11/14/donald-trump-and-the-115th-congress-could-get-rid-of-these-140-obama-regulations/#33d1411f6457

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[10] Carey, CRS

[11] Ibid

[12] Dudley, Susan and Jerry Brito, "Regulation: A Primer," Pages 45-47, Mercatus Center, August 14, 2012. https://www.mercatus.org/publication/regulation-primer

[13] Dudley, Susan, "Prepared Statement of Susan E. Dudley," Page 4, June 26, 2013. http://www.jec.senate.gov/public/_cache/files/f61eebb7-333c-40e6-a110-44c20d97eaa1/dudley-testimony.pdf

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[15] Ibid

[16] "Boland Amendment," The Gilder Lehrman Institute of American History. https://www.gilderlehrman.org/history-by-era/age-reagan/timeline-terms/boland-amendment

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[33] *Ibid.*
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[35] *Ibid.*
[36] *Ibid.*
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