AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

S. Hrg. 116–62

FEDERALLY INCURRED COST OF REGULATORY CHANGES AND HOW SUCH CHANGES ARE MADE

HEARING

BEFORE THE

SUBCOMMITTEE ON FEDERAL SPENDING OVERSIGHT AND EMERGENCY MANAGEMENT

OF THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

JULY 17, 2019

Available via http://www.govinfo.gov

Printed for the use of the Committee on Homeland Security and Governmental Affairs

U.S. GOVERNMENT PUBLISHING OFFICE
37–457 PDF WASHINGTON : 2019

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

RON JOHNSON, Wisconsin, *Chairman*

ROB PORTMAN, Ohio
RAND PAUL, Kentucky
JAMES LANKFORD, Oklahoma
MITT ROMNEY, Utah
RICK SCOTT, Florida
MICHAEL B. ENZI, Wyoming
JOSH HAWLEY, Missouri

GARY C. PETERS, Michigan
THOMAS R. CARPER, Delaware
MAGGIE HASSAN, New Hampshire
KAMALA D. HARRIS, California
KYRSTEN SINEMA, Arizona
JACKY ROSEN, Nevada

GABRIELLE D'ADAMO SINGER, *Staff Director*
DAVID M. WEINBERG, *Minority Staff Director*
LAURA W. KILBRIDE, *Chief Clerk*
THOMAS J. SPINO, *Hearing Clerk*

SUBCOMMITTEE ON FEDERAL SPENDING OVERSIGHT AND EMERGENCY MANAGEMENT

RAND PAUL, Kentucky, *Chairman*

RICK SCOTT, Florida
MICHAEL B. ENZI, Wyoming
JOSH HAWLEY, Missouri

MAGGIE HASSAN, New Hampshire
KAMALA D. HARRIS, California
KRYSTEN SINEMA, Arizona

GREG MCNEILL, *Staff Director*
HARLAN GEER, *Minority Staff Director*
ALLISON M. TINSEY, *Minority Counsel*
KATE KIELCESKI, *Chief Clerk*

CONTENTS

	Page
Opening statement:	
Senator Paul	1
Senator Hassan	3
Prepared statement:	
Senator Paul	23
Senator Hassan	25

WITNESSES

WEDNESDAY, JULY 17, 2019

James Broughel, Ph.D., Senior Research Fellow, The Mercatus Center, George Mason University	4
Thomas A. Berry, Attorney, Pacific Legal Foundation	6
Richard W. Parker, Policy Director, Center for Energy and Environmental Law, University of Connecticut School of Law	8

ALPHABETICAL LIST OF WITNESSES

Berry, Thomas A.:	
Testimony	6
Prepared statement	35
Broughel, Ph.D. James:	
Testimony	4
Prepared statement	26
Parker, Richard W.:	
Testimony	8
Prepared statement	49

FEDERALLY INCURRED COST OF REGULATORY CHANGES AND HOW SUCH CHANGES ARE MADE

WEDNESDAY, JULY 17, 2019

U.S. SENATE,
SUBCOMMITTEE ON FEDERAL SPENDING,
OVERSIGHT AND EMERGENCY MANAGEMENT,
OF THE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 3:03 p.m. in room 342, Dirksen Senate Office Building, Hon. Rand Paul, Chairman of the Subcommittee, presiding.

Present: Senators Paul, Scott, Hawley, and Hassan.

OPENING STATEMENT OF SENATOR PAUL[1]

Senator PAUL. I call this hearing to order, for the Federal Spending Oversight (FSO) Subcommittee. We are glad that you came. We are a little bit delayed because we got involved with voting, which comes up periodically, and we got that out of the way. But we are glad you are here.

When I think of the Federal Government I kind of think of Hal 9000, and the soothing voice. Unfortunately, the soothing voice kind of got out of control and there were not any rules, there were not any regulations on Hal, or the regulations on Hal failed, Hal got out of control, and there was no turning back. Government is a little bit that way in that it has sort of gotten out of control.

There has been a great deal of attention that has been paid to out-of-control government regulations and how they affect the private sector, but today we are going to talk about out-of-control, overzealous regulations, how these negative affects actually effect government, and actually make government more expensive.

This happens in many ways but Congress has and continues to create programs and agencies that promulgate regulations to implement programs. We often give broad definitions of who gets what benefit, leaving it up to the agency to fine-tune the regulation. I have often said, when we pass laws we pass outlines of laws. A good example is Obamacare. It was 1,500 pages and there were 1,500 references to, the Secretary of Health will, at a later date, decide this. We really did not write the law. We wrote a shell of a law and we gave it to the regulators and then they write the law.

[1] The prepared statement of Senator Paul appears in the Appendix on page 23.

This is too much power to give to unelected people who are not responsive to the people.

Where still Congress, though, gives agencies a blank check on appropriation, saying, often, such sums as are necessary. We have a bill like that on the floor today, on September 11, 2001 (9/11). They are saying, we have to give them more money and we have to give them money through 2092, but we are not sure so let us just give them as much as they can possibly spend until 2092.

The problem is that without congressional involvement any agency can expand the eligibility for a program and, in effect, increase government spending on their own, without a proper appropriation. Similarly, regulations can be used to alter programs and processes to reduce spending, but that does not seem to happen very often.

A flagrant example of a government agency expanding its mission and spending billions of dollars without congressional approval occurred when the Social Security Administration (SSA) expanded the disabled population to include those who were obese.

Also in the 1970s, disability insurance was extended to those who do not speak English. Really? It is a disability that requires a government program if you fail to speak English? We did not vote on that. Congress did not make it a disability. The agency did, and inevitably that added thousands and thousands of people to the disability rolls. Disability now consumes about 17 percent of the Social Security money. The Social Security Administration is $7 trillion in the hole, but we did not even decide to make obese people disabled. Some bureaucrat did.

Both of these expansions have been curtailed a little bit and rolled back, and I agree with the reforms but we still should do more. Whatever side you come down on, though, this causes government spending without Congress appropriating the money. Certainly such things were not envisioned when the disability program was created.

Administrations publish some of the budgetary impact of regulation but those are buried deep in the President's budgets. We have looked at this and have found that during the past three administrations—Trump, Obama, and Bush—there have been billions of dollars in Federal spending changes that have resulted from regulatory changes. I am told this might not even show the full scope of the regulatory spending.

It is also a question of checks and balances in two regards. First, Congress makes laws, and while we generally recognize that the Executive will make certain regulations to execute those laws, what constraints exist to prevent regulation above and beyond the intent of Congress?

Second, the Constitution reserves the right of appropriation to Congress. I believe we are failing in our duties when we appropriate such sums as are necessary. But Congress does this often, so what kind of checks and balances exist, or should exist? This is one of the questions this hearing will address.

The Congressional Review Act (CRA), which is, in itself, an insufficient check, does allow Congress to disapprove of significant regulation. However, many regulations fly under Congress' radar and do not get reviewed. I think before this Administration we had actually never—we might have, one time before this, actually used

the Congressional Review Act to reverse regulations. It has been rarely used and this Administration, only when we got all three branches of government, were we finally able to repeal some regulations. Previously, divided government had never done so, or a government inside of the opposition party.

The only other check I know of is the advise and consent powers over nominees. At a minimum, Senators can question and get commitments from would-be regulators as to how they will execute their regulatory authority and hold them accountable. However, recent research indicates that an alarming number of regulations are finalized by career employees that are not confirmed by the Senate.

In other words, it appears that unelected career bureaucrats who enjoy civil service protections have the capacity to make what amount to laws and appropriate funds without any real accountability by Congress. That should trouble, certainly, Members of Congress, but more importantly, the Americans they represent.

With that I would like to recognize the Ranking Member, Senator Hassan.

OPENING STATEMENT OF SENATOR HASSAN[1]

Senator HASSAN. Thank you, Mr. Chairman, and good afternoon to our witnesses, and thank you for your patience as we went through three remarkably slow votes. I also want to thank the Chairman and say how much I appreciate your work, Mr. Chairmna, and your staff's work on this hearing. I also want to thank the witnesses for being here today, to provide their expertise on these issues.

As members of the Federal Spending Oversight Subcommittee, we have an obligation to examine all Federal spending in order to ensure that taxpayer dollars are used efficiently and effectively. Today's hearing focuses on how regulations drive Federal spending and how accountability within the regulatory process may prevent unnecessary or even wasteful spending.

I have long supported eliminating outdated and burdensome regulations that stymie economic growth and innovation, and I would be glad, Mr. Chairman, to work with you on that.

At the same time, I also believe that government's first job is to keep the people who we serve safe. Many regulations are intended to protect Americans from harmful products, infectious diseases, and financial exploitation. As we work to both foster innovation and also to protect the American people, today's hearing reminds us that we need to account for the costs of establishing any common-sense safeguards as well as the costs of failing to provide adequate protections.

Keeping track of regulatory-driven spending must involve strong congressional oversight, robust input from non-Federal stakeholders, and a thorough judicial review process. I look forward to hearing from our witnesses today about the adequacy of the checks and safeguards that exist to cut unnecessary or unlawful regulatory spending.

Most importantly, I hope our witnesses can help us identify ways to continue to improve this process in order to safeguard taxpayer

[1] The prepared statement of Senator Hassan appears in the Appendix on page 25.

dollars while ensuring basic protections of public safety and the quality of life that Americans hold dear.

Thank you again, Mr. Chairman, for holding this hearing, and to the witnesses, thank you for your attendance. I look forward to hearing from you. Mr. Chair.

Senator PAUL. Thank you. Our first witness is Dr. James Broughel. Dr. Broughel is a senior research fellow with the Mercatus Center at George Mason University. He has authored numerous policy briefs and reports on regulatory issues. His works have appeared in Harvard Journal of Law and Public Policy, the European Journal of Risk Regulation, and the Washington Post, among other outlets.

Dr. Broughel holds a BA and a master's degree, both in economics, from City College of New York, and a PhD in economics from George Mason University.

Dr. Broughel, you are recognized for your opening statement.

TESTIMONY OF JAMES BROUGHEL, PH.D.,[1] SENIOR RESEARCH FELLOW, THE MERCATUS CENTER, GEORGE MASON UNIVERSITY

Mr. BROUGHEL. Thank you, Chairman Paul, Ranking Member Hassan. It is great to be here with you today. Thank you for allowing me to offer this testimony on the cost of Federal regulations as it pertains to the Federal Government and the taxpayers.

My message today is simple. Much of what constitutes Federal policy is on autopilot. By this I mean, many government programs, including the amount of money spent on them, operate largely outside the annual appropriations process and the active management of legislators in Congress.

Now the true cost of leaving so many important policy decisions on autopilot remains largely unknown, but estimates of automatic mandatory spending and the total cost of Federal regulations are in the trillions annually. A simple reform could begin to shed light on some of these costs. Require the Congressional Budget Office (CBO) to analyze the fiscal effects of regulations. CBO could start with so-called budget regulations which primarily impact the Federal Government's budget.

Now as background, in 1969, 29 percent of Federal outlays consisted of mandatory spending, which does not require the same active management from legislators because it does not typically require an annual appropriation from Congress. By 2018, that number had risen to 61 percent, so from 29 percent to 61 percent. CBO projects that this will rise to 65 percent by 2029. In other words, a huge fraction of Federal spending is on autopilot, and this trend is getting worse over time.

Credible estimates put the annual cost of Federal regulation in the trillions. One estimate produced by the Mercatus Center is that the cumulative cost of Federal regulation was $4 trillion in 2012 alone. By comparison, total Federal outlays in 2018 were around $4.1 trillion. The costs of regulation are an invisible cost that does not receive an annual appropriation from Congress.

[1] The prepared statement of Dr. Broughel appears in the Appendix on page 26.

Now although much of Federal spending is not discretionary from the perspective of Congress, because it is mandatory, some mandatory spending is discretionary from the perspective of regulators. That is because some appropriations decisions are made by unelected regulators in the Executive Branch.

For example, budget regulations are rules whose primary impact is on the Federal Government's budget. These rules can come in a variety of forms. They might set physician fees for the Medicare program, counselor service fees, or broaden or narrow eligibility standards for agricultural disaster relief, to name just a few examples.

The Office of Management and Budget (OMB) estimates that major budget regulations in fiscal year (FY) 2016 imposed a net budgetary cost of about $5 billion that year. That may not sound like much money compared to the massive Federal budget, but this cost estimate comes from just 27 regulations. By comparison, roughly 3,000 to 4,000 final regulations are published in the Federal Register each year, so the OMB's cost estimate is very incomplete.

Regulations other than budget regulations also impact the Federal Government's finances, as any regulation that allows or restricts economic activity will have some kind of impact on tax collection. Now one reason we do not have more information about the budgetary costs of Federal regulations is because the quality of the Federal agency regulatory analysis tends to be quite poor, especially for budget regulations.

The Mercatus Center has conducted analysis of the quality of regulatory impact analyses, using a regulatory scorecard system, and a key finding from that project was that budget regulations have significantly lower quality analysis than other economically significant regulations.

A first step toward addressing these regulatory costs on autopilot is to task an agency, like CBO, with reviewing the fiscal impacts of regulations. CBO has a few specific advantages that make it well poised to take on this task. First is independence. Unlike regulatory agencies, which are run by political personnel with specific policy agendas they enter office looking to implement, CBO does not have an obvious stake in the outcome of regulations.

Experience—since the mid 1970s, CBO has analyzed the fiscal impacts of legislation. They could do the same for regulations, which may be even easier to analyze as they are simpler. Democratic accountability—CBO is part of the Legislative Branch, which has direct accountability to voters.

To conclude, with more transparency about the budgetary impacts of regulations, the true costs of having so much of the government on autopilot could begin to reveal themselves.

Thank you for granting me the opportunity to speak today and I am happy to answer any questions you may have.

Senator PAUL. Thank you, Dr. Broughel. Our next witness is Thomas Berry. Mr. Berry is an attorney in the Pacific Legal Foundation's (PLF) D.C. Center. Prior to joining the Foundation, Mr. Berry was a legal associate in the Cato Institute's Center for Constitutional Studies. Mr. Berry is the co-author of the Pacific Legal

Foundation's report analyzing the rulemaking process at the Department of Health and Human Services (HHS).

Mr. Berry holds a bachelor's degree from St. John's College and a JD from Stanford Law School.

Mr. Berry, your opening statement.

TESTIMONY OF THOMAS A. BERRY,[1] ATTORNEY, PACIFIC LEGAL FOUNDATION

Mr. BERRY. Thank you, Chairman Paul and Ranking Member Hassan, for inviting me today to testify on rulemaking by unaccountable agency bureaucrats. Today I will make three points. First, this rulemaking practice has weakened the separation of powers and harmed political accountability. Second, this practice is rampant, including 98 percent of the Food and Drug Administration (FDA) rules. And third, this rulemaking is unconstitutional. I will conclude with potential solutions.

When Senators, like you and your colleagues, question nominees for agency leadership, you are well aware of the rulemaking power that those positions hold. For example, when Robert Califf was questioned at his 2015 confirmation hearing for FDA commissioner, he received several questions on what rulemaking judgments he might make if confirmed. Why, then, were the vast majority of rulemaking decisions during his tenure made not by Califf but by a low-ranking FDA employee who had never been nominated by the President or confirmed by the Senate, an employee who had been hired years before Califf and would stay on well after?

In such a system, the decisions this body makes to confirm or reject any nominee simply do not guarantee any effect on the rulemaking judgments made within an agency. Similarly, the President has never nominated, nor is he expected to even know of these low-ranking career bureaucrats. When rulemaking decisions are made by low-level employees, those rules are deprived of any ability to be traced back to the top and the people are thus deprived of democratic accountability in those rules.

This type of rulemaking has become rampant. The following numbers come from a recent first-of-its-kind study for the Pacific Legal Foundation that I co-authored with Angela C. Erickson. We collected all final rules from the Department of HHS going back to 2001, and the result was that 71 percent of these rules were signed by non-Senate-confirmed employees—that is nearly 2,100 rules—and within FDA it was 98 percent. This is not limited to minor rules like typo fixes. We omitted rules with small changes like technical corrections, and found that still 1,300 substantive rules were signed by non-Senate-confirmed employees. That is 63 percent. Looking only at rules deemed significant by the Office of Management and Budget, over 250 such rules signed by non-Senate-confirmed employees, or 34 percent. Those are rules with combined economic effects in the billions of dollars.

Finally, the constitutionality of this. The Supreme Court has explicitly held that the power to issue a final rule is an authority that can only be held by a duly appointed officer of the United States. The Constitution divided officers into two categories—principal and

[1] The prepared statement of Mr. Berry appears in the Appendix on page 35.

inferior—and the key difference between those two categories is that principal officers must be confirmed by the Senate before taking office, without exception. The Supreme Court has held that to be an inferior officer your work must be directed and supervised by a Senate-confirmed superior. In the absence of such supervision, Senate confirmation becomes a constitutional requirement.

The ability to issue a final rule without the approval of a superior means that such supervision is absent, and contrary to Professor Parker's testimony, the FDA has essentially conceded that for many rules that supervision is absent. That is why rules can only be issued by officers confirmed by the Senate. Rules issued in any other way are unconstitutional.

The bottom line is this. In just one department, thousands of rules have been issued, and continued to be issued by career employees who have no accountability, to the Senate or to the people, which subverts the system our framers designed.

Now potential solutions. The simplest would be a short bill requiring that every rule published in the Federal Register must be signed by a Senate-confirmed officer. Short of this sweeping solution, the individual organizational statutes for each department should be amended so that sub-delegating rulemaking authority is no longer permissible unless to a Senate-confirmed officer.

Congress can further bring attention to this matter through oversight, and hearings such as this can help encourage the Executive Branch to alter its rulemaking practices. Since some delegation is always made at the discretion of higher-ranking officers, the Senate can question nominees for agency leadership on this practice and ensure they commit not to sub-delegate rulemaking power below the level of Senate-confirmed officers.

As the body charged by the framers with vetting the character and judgment of Executive Branch officers, it is natural that the Senate would take a leading role in reining back this abusive end run around that system. Congress has several options at its disposal to restore the balance our framers designed and ensure that every rule binding on the public is made by a politically accountable officer.

Thank you again for allowing me to testify today and I look forward to your questions.

Senator PAUL. Thank you, Mr. Berry, for you testimony.

Our last witness today is Richard Parker. Professor Parker is a tenured professor at the University of Connecticut Law School. He teaches and writes in the fields of administrative and international environmental law. Mr. Parker serves on the Council of the American Bar Association's Administrative Law Section, where he chairs the Committee on Collaborative Governance and co-chairs the Committee on Environment and Natural Resources.

Professor Parker holds a bachelor's degree in public and international affairs from Princeton, a JD from Yale, and he received a doctorate of philosophy in politics from Oxford University, which he attended as a Rhodes Scholar.

Professor Parker, your opening statement.

TESTIMONY OF RICHARD W. PARKER,[1] POLICY DIRECTOR, CENTER FOR ENERGY AND ENVIRONMENTAL LAW, UNIVERSITY OF CONNECTICUT SCHOOL OF LAW

Mr. PARKER. Thank you, Mr. Chairman, Ranking Member Hassan, Members of the Subcommittee. Thank you for giving me this opportunity to testify today.

As an academic I am not required to espouse any particular point of view, but my recent research has focused on reviewing the claims of advocates of deregulation, like those you have heard from today.

I have reviewed, with particular interest, the Pacific Legal Foundation report, which I understand inspired this hearing. That report tells a story of unaccountable civil servants imposing exorbitant costs on the public through unconstitutional procedures. For reasons I will explain, I do not share that dark view of how things work in government, and I would like to explain why not.

To begin with, the report cites a recent study by the Mercatus Center, which Mr. Broughel mentioned earlier today, which alleges that Federal regulations are costing the U.S. economy $4 trillion per year. This exorbitant cost is cited as evidence of a regulatory State run amok that needs to be reined in.

What you need to understand is that that figures comes from a single, unpublished study that derives its estimate not by actually measuring the cost of regulation but by constructing a hypothetical model of the economy which basically assumes what it ought to prove, that regulations always reduce growth, never promote growth, by, for example, keeping workers healthy, or avoiding market meltdowns that cause things like the 2008 recession.

Obviously, you can prove pretty much anything you want if you construct a hypothetical model that builds your conclusions into the premises of the model. I suggest we begin by setting that $4 trillion regulatory cost estimate to one side.

I then want to turn to the claim that the agencies are issuing all matter of unconstitutional rules, because, as you have just heard, they appear in the Federal Register over the signature of senior civil servants and not political appointees. This is a very novel and creative argument, but in my judgment it reads way too much into the name appearing at the end of the rule while ignoring how the administrative process actually works.

What I would like to suggest is that what matters to accountability in the rulemaking process is not who signs the rule but who signs off on the rule, and who is accountable for the rule and responsible for that rule before it can be issued.

Let us just take, as an example, the FDA rule to regulate vaping, which the PLF report uses as its prime example. That rule was, indeed, signed by Leslie Kux, a very senior and very capable civil servant. But what the PLF neglects to mention is that before the rule was issued it was reviewed multiple times by the Food and Drug Commissioner himself. In fact, I spoke with the FDA Commissioner who dealt with this rule, Dr. Robert Califf, by phone the other day, and he told me there were probably a dozen or so meetings in which he personally reviewed the vaping rule, or aspects of

[1] The prepared statement of Mr. Parker appears in the Appendix on page 49.

the vaping rule, and grappled with issues surround it. Her personally signed off on issuing it.

The rule then went to the HHS Secretary, who also personally reviewed the rule, and he had several meetings on the rule over the course of the rulemaking, with the Secretary, he tells me. The rule was then approved by the Office of Information and Regulatory Affairs (OIRA) in the White House, which is an OMB office that is again led by an appointed civil servant. Only after clearing these multiple levels of review by political appointees was the rule issued over the signature of Leslie Kux, career civil servant.

The point is that at the FDA and across government civil servants may have their name appear at the end of the rule, but any significant rule goes out if, and only if, their political overseers review and approve it. These overseers are accountable to Congress, to the President, and ultimately the taxpayers. The buck stops with them. The signature appearing at the end of the rule is, in my view, really beside the point.

The last thing I want to address is the worry that agency regulations are issuing forth under old delegations of authority that are broadly worded. Is this a bad thing? I do not think so, and let me offer you just a simple example to illustrate what I mean.

The Public Health Service Act, first passed in 1944, authorizes the detention and quarantine of, "any individual reasonably believed to be infected with a communicable disease in a qualifying stage." No one had heard of Ebola when this act was passed in 1944, but Ebola came along, and the question is, should the Center for Disease Control (CDC) have been required to go back to Congress and get a specific statutory authorization to address Ebola before responding to it? Clearly, no. They did the right thing by using the broad authority delegated to them in real time.

The problem is that most modern regulations, whether they take the form of regulation governing the conferring benefits kind, the regulation of procedures, are highly technical and complex, and those circumstances just do not favor congressional micromanagement of rulemaking. Agencies need broad delegations of authority to develop sensible regulation, and Congress does have tools to rein them in, through the appropriations process, through the oversight process, and through simple lawmaking as well as the Congressional Review Act, if they overstep their market.

I will leave it at that and I will be happy to address further questions in the question-and-answer period, if you are so inclined. Thank you.

Senator PAUL. Great. Thanks for your testimony.

I think in some ways, whether or not it is a Senate-approved person who signed off on it or a low-level thing is not as big a problem as that we have to either agree or disagree, do we have too much of an unelected bureaucracy writing rules. I think our Founding Fathers never imagined an enormous bureaucracy with millions of people in it. When they talked about the non-delegation doctrine, the idea that you cannot give away your powers. Even if you want to, Congress is not allowed to.

I do not think we adhere to that nearly as strictly as our Founding Fathers intended us to, and I think it is kind of hard to make the argument that there is not an overzealous nature to regulation

when they are telling us how many cherries need to be in a cherry pie. I just think probably no one is going to be losing their life whether there are 42 cherries or 41 cherries, and probably we could list 10,000 examples like that as you look through government.

I think there is a problem. The pendulum has gone way too far. I would love to go all the way back to where government was intended, but we may not get there. But for certain I think part of the hearing, and I think what should come forward here, is that the pendulum swung way too far in the direction of having unelected people make these decisions, often making decisions that could lead to $100 million worth of costs, major regulations for the economy, but not only for the economy but for the government.

I am not so sure I agree with, if we confirmed everybody, I have been here—it is hard to get to know all the nominees. It is hard enough just confirming the ones we confirm, to get validity to what the people are actually telling you. Most of the time you ask them to make a judgment, if they want to be head of the FDA, and they will say, "Well, I cannot comment on anything that is going to come before my committee." Same way the Supreme Court works, so it is very difficult.

What I would say is that the one thing that tends to work when you have people on both sides of things, that tends to find justice, is when you have advocates in the judicial system. There is an attorney for the defense, an attorney for the State, and the prosecution, and they battle, and we get a version of the truth by what comes forward.

One of the things I think would actually work is if we had a taxpayer advocate involved with regulation, or if we talked about the mandate. For example, the Fed has a mandate for price stability and employment. People always debate, what if we changed their mandate? What if we changed the mandate for regulators that it is not just to regulate but it is to regulate and, how we talked about some of these other ideas, that the cost would have to be part of it? I do not know if that is even part of their mandate.

I can tell you, as a physician, that over a 20-year career, day after day, year after year, there are always new regulations added. I cannot point to almost any of them that help with quality. Almost all of them are pushing paper. In fact, I think there is so much paper to push that it might distract you from actually missing something that you should not miss because you are not paying attention to the patient. Never does the Joint Hospital Association come and say, "You know what? We have gone too far, and this year we are going to take away a regulation."

This is the nature of the beast. Government gets bigger and bigger and bigger because nobody ever takes away from it. I have been an advocate and we put this forward. I think Senator Johnson and other people have put it forward. Repeal two for every one you add. Just force people to look and they would be, oh, that would be terrible. It would be so indiscriminate. You would get rid of something that is going to save people's lives.

We have hundreds of thousands of regulations. We have stupid ones, like how many cherries are in the cherry pie. For goodness sakes, let us review all of these things. I think the idea that we are too stupid to be involved with regulations, and that the sci-

entists and the regulators know better than us, they are not responsive to people, and they hear one side. I think it is a one-sided debate. I really think we do need a taxpayer advocate.

The same goes for all of these things. The National Science Foundation (NSF), we print something probably once a week on crazy research. Are Japanese quail more sexually promiscuous on cocaine? Are people more or less likely to eat food if the person in front of them in the cafeteria line sneezes on the food? Two million bucks from the National Institute of Health (NIH). The one for the Japanese quail, $300,000. People say, "Well, Congress, you are not smart enough to decide who gets a grant." I think exactly the opposite.

What I would do for all the grant processes for scientists is if it is behavioral science I would make sure that every committee has someone representing the diabetes community of science, the cardiothoracic, the Alzheimer's, the cancer. I would have all of those on every committee, and I would have a taxpayer advocate. Right now, if you want a behavioral science, where is a lot of the crummy research comes from, the people reviewing it are the people who will then review you—they review you, you review them the next time. It is a small group of people all in the same field and the taxpayer is never really represented.

That is the way I feel for regulations as well. Maybe if we had an adversarial thing where there was an advocate for the marketplace, an advocate for arguing what is the cost of this regulation, should we do it?

But, Mr. Berry, what do you think of that idea? I am not saying I would vote against confirming more people. I am just not sure it gets to the point. But whether or not we actually got someone into the process who is an advocate, or maybe change the mandate of what we tell regulators to do.

Mr. BERRY. That seems like a very promising idea to me. It is sort of the first time I have heard of something like that. I think the key point is that, as you said, the Legislative Branch is not underequipped to sort of deal with these issues of lack of expertise that a lot of people often bring up. I think, in many cases, those blur the lines between advice and helping drafting versus final decisionmaking.

The system that was set up is that 535, yes, generalists in the legislature, who are not necessarily experts on quail or anything like this, would take in advice from many sides, including—I think it is a great idea to take in advice from a taxpayer advocate, and would synthesize those and ultimately come to a decision that synthesizes those. I would analogize it to Senate-confirmed judges, who are generalists, who are not experts in necessarily the medical issues that come before them in malpractice cases, but who we rely on to make the final decision based on the credibility of the experts that come before them.

I want to emphasize that our proposal, and I think your proposal also, does not say we should kick all the experts out of Washington. It simply says we should not allow them to have final decisionmaking authority that does an end run around the only people who are politically accountable.

Senator PAUL. You could even call the advocate that judges on grants or something to be a lay scientific graduate, someone with a science degree that comes from a lay perspective, as a generalist. But we have go to have more, because this stuff has been going on since the time of Proxmire. He complained about waste, there was a study of $50,000 try to study what makes people happy, and he made such fun of it in 1972. It is still going on. None of that has improved an iota since 1972, and it really because we give them more money, and the will not ever conserve their money, or spend it more wisely until they have less of it.

Dr. Broughel, do you want to comment on the thoughts of either a taxpayer advocate or a lay advocate, and also, do you think it is enough—you talked about having some reporting requirements, which I think might help, but I just wonder if it is enough to actually transform the situation.

Mr. BROUGHEL. When the Administrative Procedure Act (APA) was passed in 1946 it actually created two procedures for creating regulations. One is the way that we are used to—notice-and-comment rulemaking, agencies propose a rule, take comments from the public, and finalize them. Another is called formal rulemaking, which is actually not used very often but could be used, and it would establish trial-like procedures for regulations, where an agency would have to present its case, provide evidence, and provide witnesses. Those witnesses could be cross-examined, and someone like a taxpayer advocate——

Senator PAUL. Are you saying some of that exists already?

Mr. BROUGHEL. It is part of the Administrative Procedure Act. It is called formal rulemaking. It is just that it is rarely used.

Senator PAUL. Is it ever used in that fashion?

Mr. BROUGHEL. There are some specific agencies, like the Environmental Protection Agency (EPA) and Occupational Safety and Health Administration (OSHA), that use it in some cases, but as a general matter it is not used very often.

Senator PAUL. This is, I guess, my point, is that you get one side. The people appointed who want to become regulators want to regulate.

Mr. BROUGHEL. Right.

Senator PAUL. They do not become a regulator because they think the marketplace would handle this better. They already have the predisposition to thinking regulations work. Maybe if you had more of an adversarial process you would get market advocates saying, it may work but you may no longer have an industry, and talk about the ramifications of something in advance.

It is how you find truth. How do we find truth? I have facts on my side. Senator Hassan is going to have facts and opinion on her side. How do we find truth? By discussing it and then finally letting somebody vote on it.

But, no, that is good. Did you have a further point you wanted to make?

Mr. BROUGHEL. I would just say anyone who has submitted a comment to an agency, as part of the notice-and-comment process, knows it is very easy for them to dismiss you if they want to. As a general rule, it seems like they have made up their minds often before they have even proposed a regulation. It is very hard to see

regulations change. It is hard for just a member of the general public to make a difference. If there was more of an adversarial process that could make it more possible.

Senator PAUL. Senator Hassan?

Senator HASSAN. Thank you, and I see that Mr. Parker would like to respond to a couple of these things, but if I could ask a couple of questions first, Mr. Parker, and then I think we will have the opportunity for discussion.

I do want to point out that there is a significant regulatory process that some might argue is significantly more transparent than the process Congress uses to make laws. There are comments that come in on regulations, supporting, for instance, net neutrality, but Congress went ahead and overruled those comments and withdrew the net neutrality regulation. I am not sure that all of the problems here rest with the regulatory process.

I want to start with a couple of questions to Mr. Parker, because I believe sometimes it is necessary and appropriate for agencies to update their rules to reflect new information or other changes that come to light from the outside world.

Mr. Parker, could you provide an example—you talked about Ebola—of how agencies have updated their rules within their existing statutory authority to address current issues that have emerged?

Mr. PARKER. Sure. I think if you go through that Code of Federal Regulations (CFR) you will find that the vast majority of rules that are issued are either very minor rules, like rules having to do with opening and closing of the quail season, or drawbridge times, or else they are revisions to prior rules. They are updated all the time. They are modified all the time. It is very cumbersome to modify them, actually, because of the notice-and-comment rulemaking process and analytical requirements that have been imposed on it.

Whether it is emissions standards for vinyl chloride, or whether it is eligibility standards for a benefits program, you will find that rules modify rules all the time. The only way that any rule can be modified is by issuing another rule. People need to understand that. When you talk about 3,000 or 4,000 rules issued a day, a year, many of them are rules that just changed other rules, and make them better, in response to comment from the public and problems raised by the public.

Senator HASSAN. OK. That is helpful. Following that point, I think it is important to acknowledge the agencies do work that Congress cannot, namely crafting policies with a level of expertise that is outside the scope of what we do on the Hill, and reacting to emerging threats to health and safety.

In many circumstances the benefits of regulations outweigh the costs. Can you just give us an example or two—you started to—on the benefits, Mr. Parker, of agency rulemaking to the American people?

Mr. PARKER. I think to understand the benefits of rulemaking to the American people you have to go back to what the world looked like, and what the United States looked like before the expansion of the administrative state really began in earnest. President Trump made news by saying he wanted to return the Code of Federal Regulations to the size that it was in 1960, when it was about

one-tenth the size that it is now. Well, in 1960, EPA did not exist. The Occupational Safety and Health Administration did not exist. The air was so filthy that killer smogs were killing people in a matter of days and weeks, months and years. The Cuyahoga River was so polluted it caught on fire in 1969 and helped inspire the Clean Water Act of 1972.

Regulations have had a huge impact in promoting health, safety, and protecting the environment. Yes, they are complex, but they have accomplished an awful lot.

Let me just say that there is a tendency to think of agencies as the sort of "father knows best" or "mother knows best," the know-it-all experts. In my experience, working with agencies—and in my consulting capacity I have actually led rulemaking exercises for agencies, negotiated rulemaking exercises—what I have found is that agencies do not have the expertise to make good rules in these complex areas, like vinyl chloride standards or auto safety standards. They rely on industry, and they work collaborative with industry to get the information that they need. Industry is very much consulted, throughout the rulemaking process, and it is just not true that industry and the regulated community have no say in how the rule reads.

In fact, what I teach in administrative law is case after case where the agency ignored an agency comment and then was then reversed for failing to do that. One classic example is a case involving the regulation of smoked whitefish, the Nova Scotia case, where an agency did issue a bad rule. They did not take into account the industry comments. When the case came to court, the court said, "You did not respond to the comments. You did not listen to this industry. This rule is arbitrary and capricious," and the court throws it out.

Agencies worry about that, and as a result they do listen, and that is one of the things that makes them—we always say that agencies are not accountable and Congress is, but this fear of judicial review, this fear of judicial oversight is a real check on agency powers that makes them, that forces them to listen to industry when the speak, and to other stakeholders when they speak.

Senator HASSAN. OK. Thank you for that, as well.

I wanted to touch on one more thing before my times is up, and then we can move back to the Chairman. I think we should also acknowledge Congress' role in holding agencies accountable to the statutes we enact, and we have several ways of doing that. With that in mind, I would like to turn, Mr. Parker, to the Pacific Legal Foundation's article on the role of career civil servants at the Food and Drug Administration in the rulemaking process.

I have profound respect for Federal employees and the work that they do, but I agree that it is imperative that we have accountability in the rulemaking process, and you just talked about the judicial oversight providing part of that. What role would a career civil servant, rather than a political appointee, serve in that process? Why might a career civil servant's name ultimately end up on the final rule?

Mr. PARKER. That is a great question, and I actually asked that question of Commissioner Califf when I talked to him on the phone, and he said, "Well, there is a sort of tradition of putting the

name at the bottom." I think of it as something like the person who packs the parachute has to jump with their own parachute every so often. It is a way of saying this is the person who was responsible for coordinating this rule and for putting it together. It is the Associate Commissioner for Policy—that has been the tradition. It is a way of sort of honoring them, recognizing them, holding them accountable.

I do not think it is meant to say that it is their authority which authorizes the rule. It is not to say that they were solely responsible for issuing that rule. This is an FDA rule that goes out and it has to be reviewed and approved by the FDA, and the FDA political appointees and the FDA itself is responsible for every single rule that they issue.

Senator HASSAN. OK. Thank you very much, Mr. Chairman.

Senator PAUL. I agree with Senator Hassan that a lot of the problem—there is congressional responsibility that we have abdicated, so ultimately it is our fault. We do not do our job, and particularly with writing legislation. The legislation is very loose and then people are surprised. Oh, my goodness, they are doing this and we had no idea that we even gave them power to do this.

It happens not just in environmental regulations. It happens in regulations of your privacy as well. For example, when the Patriot Act passed, James Sensenbrenner, in the House, was a big advocate for it and one of the authors of it, and pretty much thought it was a good thing. Then when, all of a sudden, Snowden revealed that billions of people were having their phone calls recorded by the government under the pretense of that he says, "No. That is not what we intended at all."

Not only that, the intelligence community (IC) at that time really closed its ranks, and really probably even bigger and worse than all of the sort of business and environmental regulations are the things that happen in our intelligence community that no rank-and-file Senator is ever told about.

I think there is a great abuse of congressional authority, but once again, we could write stricter rules and we could do it. In the end, what happens and what comes forward is Congressmen are lazy and they say, "Oh, it is to fight terrorism, so you do not care about civil liberties. We are going to fight terrorism," so everything just flows on and it gets worse and worse.

Examples of how people get kind of crazy crossways with regulations, there was another one in our State. We had a lake where the earthen dam was possibly going to fail, so we decided to repair it, and they dropped the lake by 40 feet. Some enterprising environmentalists went into the area where the lake was lowered and, lo and behold, they found some dusky darters there. They then hypothesized that if we put the lake water back in the lake we might hurt the dusky darter.

The government created the lakes and we had a big fight over the government taking property in the 1930s, but we kind of decided that one, it is over. We have a lake. Now we have these marinas. The environmentalists are saying, "Oh, you cannot fill the lake back up because you might hurt the dusky darter," to which I responded, "Well, don't they live in water? Won't they like more water?"

You can see the craziness that you can kind of get into on some of this stuff. Fortunately, saner heads did prevail, but we have a lot of stuff like that.

I will give you another example from endangered species. We have the pocketbook mussel that is supposedly endangered, and people say, "Well, you are just a Senator and you know nothing of science and you should not get involved with this at all."

They studied the population of it probably, 30 years ago, in about five places, and said, there is a shortage of them, or they are endangered. Since that time there have been 20 more studies and everywhere you look you find one of these things. They are everywhere. If you have ever seen mussels propagate, I have a pond behind my house and you cannot stop mussels. They come in on the birds. They come in from everywhere. There are mussels everywhere.

There is no shortage of this mussel. It has been found in 30 other places. We cannot get it off the endangered species list because, really, those people do not work for us. They are sort of in charge of it, or we just abdicate and we fail to tell them it is time to take the pocketbook mussel off.

But it is a big racket too. What happens is any time you want to build something in any State that has supposedly the pocketbook mussel, you have to get a consultant. It is almost always approved, but it costs you $100,000 for the consultant. It is a huge racket. They are all in league with this, and the consultants love the regulators because they have a whole racket going on this. We have archaeology consultants and pocketbook mussel consultants. They always have to be paid.

Another example of how you pay the regulators. Bats. We say that the Indiana bat—there is a shortage of Indiana bats. They are rare or whatever. It is really hard, even for scientists, to tell the difference between that and a brown bat, which there are a gazillion brown bats. They say you cannot cut down your tree. Oh, no, no, you can cut down your trees if you pay us. It is like, really? If cutting down the trees is going to hurt the bat, why wouldn't you just say we cannot cut them down? You just have to pay the government money. It is not really about the bat. It is about exchanging money.

But this goes on throughout government. We could spend days and days and days talking about regulations that have run amok, but we really have to figure out the conclusion of where we are on the spectrum of belief of whether the government is too big or too small. I do not think it is zero government versus totalitarianism, but I would say that the pendulum has been gradually growing and growing and growing for more unelected rules and laws, and we do need to do something about it.

I like the idea of looking at the regulatory mission, mandating cost analysis, maybe confirming more of the regulators. I am not sure if it will work or not. I really like the idea of maybe utilizing some of the trial processes that we have and see if there is a way to do that and bring in the adversarial nature to it. Some of that would probably just taken an executive who chooses to police the Executive Branch that way.

But any other suggestions on the idea of trial process, or does anybody know anything more about how we actually do use a trial process? Any of you?

Mr. PARKER. Yes. Administrative lawyers are familiar with a time when that form of rulemaking was actually used and tried. There is a famous story about how it took 12 years how to label peanut butter, using formal rulemaking.

Senator PAUL. My guess is the marketplace figured it out before that.

Mr. PARKER. The problem with trial-type procedures applied—and I am going to take issue with your idea, and then I am going to offer a constructive alternative, which is of a similar nature. The problem with trial-type procedures applied to rulemaking is that there are many different actors. There are many different industry positions in any given rules. There are many different ways of doing things, many different production process that produce different kinds of pollution, etc. In my work, in convening negotiating rulemaking exercises, I have discovered that industry is not just one thing. There are many different actors in the regulated community, many different beneficiaries as well.

You cannot have everybody cross-examining everybody else. It is not like a trial. It just does not work that way. This is a polycentric exercise. The idea of a rule is it is of general applicability and future effect.

So how do you get this? But you are right that these folks need to be consulted. They need to be consulted for their expertise and they need to be consulted for the legitimacy of the process.

One way that I think could capture a lot of what you are trying to do is through greater use of negotiated rulemaking, which I have personal experience with. Full disclosure—I have been paid for doing it so I like it, but I am not pushing for me to do this. I am saying this is a process that really works.

Negotiated rulemaking is another way of coming up with a proposed rule or a revision to a rule: it requires that the industry be at the table. It also requires that the public interest community be at the table, and that regulators be at the table. It is presided over by a neutral facilitator or convener, which is what I did. But everybody is heard. At the same time it is a wonderful fact-checker a magnificent B.S. detector. Because if you say something that is wrong in a negotiated rulemaking, you will be called out by other experts and other stakeholders around the table right then and there.

Senator PAUL. I think it does——

Mr. PARKER. That might be something that you could explore and that would be doable.

Senator PAUL. No, we are open to that and we will look at that. I think that the other thing that has to come into this is every regulation cannot be looked at through either an adversarial process or even this kind of process. We set dollars limits or whatever and we figure out—and certain of them will be, and the more important ones, absolutely should be.

You mentioned industry a couple of times, and I think it is important from the understanding that I do not consider myself to be an advocate of any industry or for industry in general. I am an ad-

vocate for capitalism and the marketplace, for people who are mostly being left alone if they do not hurt others.

What I would say is my experience up here has found that most industry loves regulation. Big banks love all the regulation, all the compliance, because there is a compliance cost, they can absorb the compliance cost and the new guys cannot. Small banks do not like the regulations. Big banks do not care. They have already hired it. They have baked it into the pie, and so often you get that.

The other thing that is particularly infuriating to me is the businesses are coming up here all the time, saying, "We hate California's regulations. Please regulate us nationally." Every business group comes to me and wants to be regulated now, and I say, "Beware. You do not know who the next President is going to be. You do not know who the next Congress will be, and then with a flip of the switch the national rule will become California's rule."

But it is all this getting away from there being, places where you can seek refuge, the States to seek refuge from the Federal Government, and I think that is a big mistake.

Dr. Broughel, do you have any comment on industry, business actually promoting or actually liking regulation to keep out competition?

Mr. BROUGHEL. Absolutely. There is a well-known phenomenon in the economic literature known as regulatory capture, which is the idea that regulatory agencies tend to get captured by the industries they regulate, and serve their interests.

When I made that comment earlier about being ignored in the public commenting processes, I was not referring to industry. I was referring to members of the ordinary public who really have trouble making a difference. The reason is very often because regulatory agencies have sat down with industry, before they have even proposed a regulation, hashed out some kind of deal or arrangement with them, and it is only at that point that they propose a regulation and the public has an opportunity to chime in.

Senator PAUL. I think it is hard because people do not look forward to the unintended consequences of it. Right now everybody is up in a roar about surprise billing in medicine, so we are going to regulate what people can charge, and they have to accept a certain rate. Five years from now we are going to come back and say, oh, my God, I cannot believe we did this. We have now regulated maybe 75 percent of the medical transactions, because it is going to be everyone associated with a hospital. Over half the doctors are associated with hospitals now, so it is not just going to be ER doctors. It is going to be doctors, and then as that increases it is going to be every transaction.

Then we are going to find out that we have shortages because people are going to say, "I am not even in the network. Why should I offer a discount?" Now I have to take the discount and all of the power will devolve to the insurance companies, and all the complaints we have about big insurance are going to be worse, but nobody realizes that because nobody is thinking through the end result of that.

Senator HASSAN. I just have to say that I think we are trying to address that very issue in diversion of the surprise medical bill because there has been a good back-and-forth. I do not want to turn

this into a HELP hearing, but I do want you to know that that is being hashed out.

Senator PAUL. Because it is sort of the inadvertent result is that people say, insurance companies are getting too big. Tech is getting too big. We attempt to regulate it but we make it worse. Doctors are small potatoes in this. Hospitals are fairly small potatoes compared to the insurance companies. When we do something that the insurance companies all love, we should be a little bit wary. We are also getting involved in the marketplace. We are going to dictate what the rates are for medicine, and who can join and who cannot join networks.

The thing that is not really discussed is some doctors want to be in the network and are excluded for it because it is a monetary thing, and then some doctors say, "Well, they are only offering me $50. Why should I be in the network?" They do not take the $50, and guess what? They promote and now they are going to say, well, you have to take the $50. You are stuck. You do not get in the network and you are going to be stuck with the $50. If you are in the trucking business or selling carpet, pens, or glasses, would you want the government to tell you how much you can sell things? I think it is a terrible disaster that is going to unfold from all of this.

Senator HASSAN. Again, not wanting to turn this into a Health, Educator, Labor, and Pensions hearing, which Senator Paul and I both serve on.

I am going to have to go in a minute so I just wanted to thank all of you very much for your testimony, for your attention to this. I would look forward to continuing this discussion, both with the Chairman and with all of you, because I actually thought I heard some levels of agreement among the three of you, including that there is a role of judicial oversight that is important here, and there is a role, obviously, of congressional oversight. There are also some really good ideas and some really, I think, joint and common concerns about how we make sure that members of the public actually really have a voice in the regulatory process, something hard to do in a capitalist democracy, but we are a capitalist democracy so that is where regular people are supposed to come in. It is a reminder to Members of Congress that we are supposed to be taxpayer advocates too.

I would look forward to that continued discussion. I am sorry, I have to go to another meeting, but thank you all for very illuminating testimony and for your fine work.

Senator PAUL. Thank you, Senator Hassan, and we will keep working with your office to try to find common ground, to find reform type of legislation that we can sign onto from some of these ideas, and I know our staffs are continue to talk.

At this point, being the libertarian that I am, I am going to say, is there anything else you want to say? But you have to keep it under about 2 minutes or so apiece. Mr. Berry.

Mr. BERRY. Sure. Thank you. I just wanted to briefly comment on what Professor Parker brought up about Commissioner Califf's claim that these procedures really, they always go up to the top and that the name on the brief does not matter so much.

The FDA, in litigation against the deeming rule, where I represent some clients who sued against it, conceded that the Asso-

ciate Commissioner for Policy was the one who issued the rule, and they conceded that it was under her rulemaking authority that had been sub-delegated by the FDA Commissioner. When they attempted—and so the entire crux of the case is not whether she issued the rule—they admit she did—it is whether she was validly appointed as an inferior officer and whether inferior officers, in her case, can constitutionally issue rules.

The second interesting thing is that they cited every statute they could for supervision, but they did not have one that essentially showed that the FDA Commissioner has to sign off on these rules. They had one that said the FDA Commissioner can also issue rules, but that is sort of obvious. They have concurrent authority. The only oversight they cited was one that said highly significant public policy question rules can be reviewed by the HHS Secretary, but presumably do not have to. Given that only about 2 percent of FDA rules have the signature of the FDA Commissioner or HHS Secretary, it seems like that is a pretty small number of them.

Also, given what we have said about political accountability and how people want to know that their comments are at least being heard by someone, I do not think it is just a formality whose name appears on the rules. I think that is what the general public is going to look at. When these things are done behind the scenes, higher-ups can play it both ways. If a rule becomes popular then can say, "Oh yes. I was very closely involved in that," and if it is not popular they can say, "My name is not on it."

Senator PAUL. Anybody else? Professor Parker?

Mr. PARKER. I will just say that when the public or a member of the public sues to challenge a rule for being arbitrary and capricious or a violation of law, the lawsuit does not read "So-and-So versus Leslie Kux." The law reads, "So-and-So versus the FDA" or "the FDA Commissioner," right? The lawsuit, it is the Commissioner who is ultimately responsible.

Senator PAUL. It was sovereign law or something where you have to sue to government or not?

Mr. PARKER. I do not know, but the agency is ultimately responsible in court, and to you, accountable to you for every rule that goes out over the FDA's signature. I do not think anybody from the FDA has ever come to you and said in an oversight hearing, "Well, I do not know about that rule. Leslie Kux issued that rule. I do not defend that rule."

Senator PAUL. I think the bigger question is not really actually on who, individually, it is, whether it is higher up or the middle management or the lower management. It is a little disconcerting if it is a huge rule and lower management is doing the rule. I think the bigger concern is are we involved with too many rules in our world or too few?

I just find it hard to believe that the evidence is not overwhelming that our government has gotten too big and too involved, and like I say, there are lists of thousands of ridiculous things, like how many cherries in a cherry pie, how many apples in an apple pie. We finally, with the current Administration, got rid of some of that stuff and threw it out. But those things have been on the books for decades and decades and decades.

I think we do have to consider whether we do too many things or too few things, and I do not think anybody is arguing for no regulations. We are arguing for whether you want more or less. It is sort of the argument we have here in government for taxes. Do you want more or less? Nobody is arguing for zero. Nobody is arguing for 100 percent. With corporate taxes it is very clear there is a division between the parties. One party wanted to keep a 35 percent corporate rate and the other party wanted a 21 percent, and it was a clear demarcation, more versus less.

Mr. PARKER. I would just say one thing, that you are absolutely right that the Founding Fathers did not contemplate the growth of the modern administrative state.

Senator PAUL. We can definitely agree on that.

Mr. PARKER. We can agree on that. They also did not contemplate modern aviation or modern cars, or the explosion of—the proliferation of toxic chemicals, none of which existed. These are all manmade chemicals, none of which existed in their day.

Senator PAUL. I would probably take an argument with that in the sense that they did have significant pollution back then. They had airborne things, probably, in many ways, more than we have now. The air of London was worse in the time of our Founding Fathers than it is today. This is a lot of things that people do not realize about the environment. The EPA has published that of the six main pollutants in our environment, they have been reduced by 70 percent over the last 40 or 50 years. The real bad pollution that we had in our history was when everybody burned their own fossil fuels in their fireplace.

Mr. PARKER. Yes.

Senator PAUL. By concentrating on utilities, actually the air is much cleaner than it actually used to be.

Dr. Broughel, a final comment?

Mr. BROUGHEL. I would just add that I think the idea of pursuing more negotiated rulemaking sounds like an interesting idea. I believe that formal rulemaking can work and has worked in the past. Some critics have said it takes too long, but I think that the evidence is——

Senator PAUL. That sounds like, to me, an advantage, that it might take a long time to get a new regulation?

Mr. BROUGHEL. It is also just not true, for example, the peanut regulation. It was not formal rulemaking that dragged that process on and on for years. It was other factors. It just happened that that rule also went through formal rulemaking.

I am also serving on a negotiated rulemaking right now for the Department of Energy, and I am the consumer representative on this working group. It is an interesting experience. I would not say it works perfectly. It would be nice if there were more, if there were more people like me on that working group, because I am essentially—there are—well, lots of representatives are industry, there are lots of representatives for the energy efficiency activists, but there are not really more representatives for just the people.

If you had a taxpayer representative or more consumer representatives that could balance that out I think that would be a good thing.

Senator PAUL. I think that is a good idea. We will send you a summary of what we think are some of the ideas we have discussed. Feel free to comment back to us if you have ideas, in general, in the future. Always feel free to communicate with us, because we do consider you to be experts on various sides of the issue and we would like to hear from you.

But thank you all for coming. Meeting adjourned.

[Whereupon, at 4:04 p.m., the Subcommittee was adjourned.]

APPENDIX

Opening Statement of Chairman Rand Paul, M.D.
Federal Spending Oversight Subcommittee

Federally Incurred Cost of Regulator Changes and How Such Changes Are Made
July 17, 2019

I call this hearing of the Federal Spending Oversight Subcommittee to order.

A great deal of attention has been devoted to the cost of federal regulations as applied to the private sector. I'm glad that we recognize there are negative effects of regulation and I commend President Trump for his efforts in rolling back job killing regulations.

However, today I want to examine an aspect of regulations that has gotten little attention, regulations that impose cost on the federal government and ultimately the taxpayer. How does this happen?

Well, Congress has and continues to create programs and agencies to promulgate regulations to implement programs. We often give broad definitions of who gets what benefit; leaving it up to the agency to fine tune through regulation. Worse still, Congress gives agencies a blank check appropriation - "such sums as are necessary."

So the problem that arises here, is that without any congressional involvement, an agency can expand eligibility for a program and in effect increasing government spending without a proper appropriation. Similarly, regulations could be used to alter programs and processes to reduce spending but that doesn't appear to happen very often.

A flagrant example of a government agency expanding its mission and spending billions of dollars without Congressional approval occurred when the Social Security Administration expanded the disabled population to those who are obese. Also in the 1970s Disability insurance was extended to those who do not speak English, really it's a disability that requires government payments if you fail to speak English. Both of these expansions have since been partially rolled back, which I agree with, but whatever side you come down on, this causes government spending without Congress weighing in. Certainly such things were not envisioned when the Disability program was created in the 1930s.

Administrations publish some of the budgetary impact of regulation, but those are buried deep in the President's budgets. As we have looked at this we have found that during the past three administrations - Trump, Obama, and Bush – there have been billions of dollars in federal spending changes resulting from regulatory action. I'm told this might not even show the full scope of regulatory spending.

But this is also a question of checks and balances, in two regards. First, Congress makes laws and while we generally recognize that the executive will make certain regulations to execute those laws, what constraints exist to prevent regulation beyond the intent of Congress. Second, the Constitution reserves the right of appropriation to Congress.

I believe we are failing in our duties when we appropriate "such sums as are necessary;" but Congress does this, so what kind of checks exist or should exist to prevent unintended regulatory spending?

The Congressional Review Act, which in itself is an insufficient check, allows Congress to disapprove a significant regulation. However, many regulations fly under Congress's radar and do not get reviewed.

The only other check I know of is the Senate's advice and consent powers over nominees. At a minimum Senators can question and get commitments from would be regulators as to how they will execute their regulatory authority, and hold them accountable once in office. However, recent research indicates that an alarming number of regulations are finalized by career employees, not Senate-Confirmed principal officers.

In other words, it appears that unelected career bureaucrats, who enjoy civil service protections, have the capacity to make what amount to laws and appropriate funds, without any real accountability to Congress. That should trouble certainly members of congress, but more importantly the Americans they represent.

With that, I'll recognize Ranking Member Hassan for her opening statement.

Homeland Security and Governmental Affairs Committee
Federal Spending Oversight and Emergency Management Subcommittee

Ranking Member Margaret Wood Hassan
Opening Statement

Wednesday, July 17, 2019

Thank you Mr. Chairman, I appreciate your work and your staff's work on this hearing. And I also want to thank the witnesses for being here today to provide their expertise on these issues.

As members of the Federal Spending Oversight subcommittee, we have an obligation to examine all federal spending in order to ensure that taxpayer dollars are used efficiently and effectively. Today's hearing focuses on how regulations drive federal spending, and how accountability within the regulatory process may prevent unnecessary or even wasteful spending. I have long supported eliminating outdated and burdensome regulations that stymie economic growth and innovation – and I would be glad to work with you on that.

At the same time, I also believe that government's first job is to keep the people who we serve safe. Many regulations are intended to protect Americans from harmful products, infectious diseases, and financial exploitation. As we work to both foster innovation and also protect the American people, today's hearing reminds us that we need to account for the costs of establishing any common sense safeguards, as well as the costs of failing to provide adequate protections. Keeping track of regulatory-driven spending must involve strong Congressional oversight, robust input from non-federal stakeholders, and a thorough judicial review process.

I look forward to hearing from our witnesses today about the adequacy of the checks and safeguards that exist to cut unnecessary or unlawful regulatory spending. Most importantly, I hope our witnesses can help us to identify ways to continue to improve this process in order to safeguard taxpayers' dollars, while ensuring basic protections of public safety and the quality of life that Americans hold dear.

Thank you again Mr. Chairman for holding this hearing, and to the witnesses for your attendance.

TESTIMONY

GOVERNMENT REGULATION ON AUTOPILOT

James Broughel, PhD
Senior Research Fellow, Mercatus Center at George Mason University

US Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Federal Spending Oversight and Emergency Management

July 17, 2019

Chairman Paul, Ranking Member Hassan, and members of the committee:

Thank you for allowing me to offer testimony this afternoon on the cost of federal regulations as it pertains to the federal government and to taxpayers. My name is James Broughel, and I am a senior research fellow at the Mercatus Center at George Mason University, as well as an adjunct professor of law and economics at George Mason University. My research focuses on state and federal regulatory institutions, economic growth, and the economic analysis of regulations.

My message today is simple:

1. Much of what constitutes federal policy is on autopilot. By this I mean, many government programs, including the amount of money spent on them, operate largely outside the annual appropriations process and by extension the active management of legislators in Congress.
2. The true cost of leaving so many important policy decisions on autopilot remains unknown, but estimates of automatic mandatory spending and the total cost of regulations are in the trillions annually.
3. A simple reform could begin to shed light on those costs: require the Congressional Budget Office (CBO) to analyze the fiscal effects of regulations. CBO could start with so-called budget regulations, which primarily impact the federal government's budget and are systematically underanalyzed by executive branch regulatory agencies.

INTRODUCTION

As children, most of us receive a civics lesson that explains how the government is supposed to operate: citizens vote for their elected representatives; those representatives make tough tax and spending decisions that are supposed to reflect the interests of their constituents; and if citizens are unhappy with the mix of taxes and spending they receive, they can vote out their elected officials until they find representatives who give them the policy mix they prefer.

At least, that is the theory. In practice, things work very differently.

Over the past century, increasing amounts of authority have been transferred away from Americans' elected representatives in Congress and toward faceless bureaucracies that enact policy through regulation. At the same time, increasing amounts of the federal budget are taken up by nondiscretionary

For more information or to meet with the scholar, contact
Mercatus Outreach, 703-993-4930, mercatusoutreach@mercatus.gmu.edu
Mercatus Center at George Mason University, 3434 Washington Blvd., 4th Floor, Arlington, Virginia 22201

The ideas presented in this document do not represent official positions of the Mercatus Center or George Mason University.

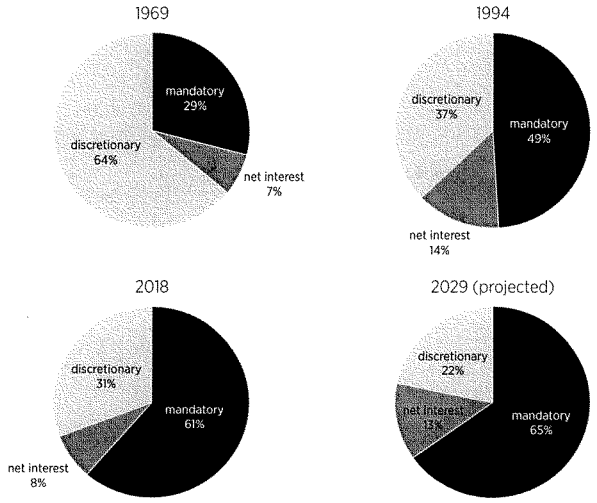
"mandatory" spending, which doesn't require the same active management from legislators because it doesn't typically require an annual appropriation from Congress. The end result is that an ever-increasing number of critical decisions about policy are made either by democratically unaccountable regulators or, worse, by no one at all.

SPENDING ON AUTOPILOT

Mandatory spending includes spending on massive government programs like Social Security, Medicare, and Medicaid. In 1969, 29 percent of federal outlays consisted of this mandatory spending, 64 percent consisted of discretionary spending, and 7 percent consisted of net interest payments on the debt (which also might be considered mandatory).[1] By 2018, 61 percent was mandatory, 31 percent was discretionary and 8 percent was interest on the debt.[2]

This trend is expected to continue: the CBO projects that, in 2029, 65 percent of federal outlays will be mandatory spending, 22 percent will be discretionary spending, and 13 percent will be net interest payments.[3] This projection is notable as 2029 is already within Congress's 10-year budget window. Under current law, the federal government will spend more on net interest on the debt in 2046 than all discretionary spending for that year.[4] In other words, a huge fraction of federal spending is on autopilot, and this trend is getting substantially worse over time.

FIGURE 1. TYPES OF SPENDING AS A SHARE OF FEDERAL GOVERNMENT OUTLAYS



Source: Congressional Budget Office, *The Budget and Economic Outlook: 2019 to 2029*, January 2019, 7, 11.

[1] Congressional Budget Office, *The Budget and Economic Outlook: 2019 to 2029*, January 2019, 11.
[2] Congressional Budget Office, *The Budget and Economic Outlook*, 7.
[3] Congressional Budget Office, *The Budget and Economic Outlook*, 11.
[4] Congressional Budget Office, *The 2019 Long-Term Budget Outlook*, June 2019, 27.

REGULATION ON AUTOPILOT

The situation with federal spending, concerning enough in its own right, is just part of the story, because spending is only part of what government does. Much of the cost of government is not captured in the official budget because it comes from regulation. By virtually every measure, the amount of federal regulation has been growing over time. According to the Office of the Federal Register, there were fewer than 10,000 pages in the US *Code of Federal Regulations* in 1950, compared with more than 185,000 in 2018.[5] Regulatory agencies had 57,109 employees in 1960, compared with 277,163 in 2017.[6] Regulator budgets have increased in real terms from $3 billion in annual spending in 1960 to $58 billion in 2017 (in 2009 dollars).[7] In 1970, there were roughly 406,000 regulatory restrictions in the US *Code of Federal Regulations*.[8] By 2018 that number had risen to nearly 1.09 million.[9]

Contrast this regulatory activity with activity from Congress. Wayne Crews of the Competitive Enterprise Institute has noted that during calendar year 2018, federal agencies issued 3,368 final rules, while Congress enacted 313 laws.[10] Thus, agencies issued roughly 11 rules for every law passed by Congress and signed by the president.

One might consider the entire federal regulatory apparatus as being, to some extent, on autopilot, as this entire branch of government enjoys a high degree of insulation and independence from Congress. Furthermore, the burden of federal regulation occurs primarily off budget. In fact, estimates of the total cost of federal regulation in the United States can be enormous, at times dwarfing the entire federal government budget. To give just a few examples, a 2013 study in the *Journal of Economic Growth* estimates that federal regulation has slowed the growth rate of the US economy by 2 percentage points per year on average since 1949.[11] Two percentage points in lost growth may not sound like much, but this estimate suggests that had regulation remained at its 1949 level,[12] 2011 GDP would have been about $39 trillion (or more than 3.5 times) higher than it actually was. An estimate produced by the Mercatus Center is that the cumulative cost of federal regulation was $4 trillion in 2012 alone, resulting from reduced growth of 0.8 percentage points per year on average since 1980. By comparison, total federal outlays in 2018 were around $4.1 trillion.[13]

While there is significant uncertainty surrounding any estimate of the total cost of federal regulations,[14] the numbers cited suggest that US federal regulation is indeed slowing the growth rate of the US economy and that the preponderance of costs from regulation are not captured in the federal budget. Even if the slowdown from regulation only amounts to a few tenths of a percentage point shaved off

---

[5] Office of the Federal Register, *Code of Federal Regulations Total Pages 1938 - 1949, and Total Volumes and Pages 1950 - 2018*, April 2019, https://www.federalregister.gov/uploads/2019/04/cfrTotalPages2018.pdf.

[6] Susan Dudley and Melinda Warren, "Regulators' Budget: More for Homeland Security, Less for Environmental Regulation: An Analysis of the U.S. Budget for Fiscal Years 1960 through 2019" (Regulators' Budget Report 40, George Washington University Regulatory Studies Center, Washington, DC, May 2018).

[7] Dudley and Warren, "Regulators' Budget."

[8] Regulatory restrictions are instances of the terms *shall*, *must*, *may not*, *prohibited*, and *required*.

[9] Patrick A. McLaughlin and Oliver Sherouse, RegData 3.1 Annual (dataset), QuantGov, Mercatus Center at George Mason University, Arlington, VA, accessed July 8, 2019, https://quantgov.org/regdata-us/.

[10] Clyde Wayne Crews Jr., *Ten Thousand Commandments 2019: An Annual Snapshot of the Federal Regulatory State*, 2019 ed. (Washington, DC: Competitive Enterprise Institute, 2019), 5.

[11] John W. Dawson and John J. Seater, "Federal Regulation and Aggregate Economic Growth," *Journal of Economic Growth* 18, no. 2 (2013): 137–77.

[12] Keeping regulation at its 1949 level does not mean no new regulations would be issued post 1949. Rather, it would mean that old regulations would have had to be removed to offset any new regulations added. Texas imposed a similar cap in 2017, and the federal government in Canada did as well in 2015. See H.B. 1290, 2017 Leg., 85th Sess. (Tx. 2017); Red Tape Reduction Act, S.C. 2015, c. 12 (Can).

[13] Office of Management and Budget, "Historical Tables," accessed July 8, 2019, https://www.whitehouse.gov/omb/historical-tables/.

[14] For a review of some of the methodical issues that arise when estimating the total cost of federal regulations, see Maeve P. Carey, *Methods of Estimating the Total Cost of Federal Regulations* (Washington, DC: Congressional Research Service, 2016).

growth annually, this will add up to trillions in lost output over the course of time, an invisible cost that won't show up in any formal accounting statement.

BUDGET REGULATIONS

Although much of federal spending is not discretionary from the perspective of Congress, some of this mandatory spending is discretionary from the perspective of executive branch regulatory agencies. That's because some appropriations decisions are made by unelected regulators in the executive branch, rather than by the American people's elected representatives in Congress.

An annual report from the Office of Management and Budget (OMB) sheds light on some of these regulatory spending decisions.[15] According to OMB, in fiscal year (FY) 2016, regulatory agencies promulgated 85 "major" rules, which are essentially rules expected to have an annual impact of $100 million or more on the economy.[16] Of these 85 rules, 27 were "budget" rules,[17] which are rules whose primary impact is on the federal government's budget. Budget rules fall under a more general class of rules known as "transfer" rules because they are "rules that primarily cause income transfers usually from taxpayers to program beneficiaries."[18]

Budget regulations come in a variety of forms, including rules that set or establish Medicaid program premiums, physician fee schedules under the Medicare program, or revisions to prescription drug benefits under Medicare Advantage. These rules can set fees for consular services, expand grants for various education and federally funded childcare initiatives, or outline eligibility for business loan guarantees or the September 11th Victim Compensation Fund, to name just a few examples. They might expand or contract the list of ailments that qualify for federal health coverage for veterans or broaden or narrow eligibility for federal agricultural disaster aid. In short, budget regulations address a myriad of issues, but all have in common that they primarily impact federal spending.

In its annual report to Congress on regulations, OMB compiles information from the regulatory impact analyses that agencies produce alongside their most economically significant rules. Drawing from these analyses, OMB reports that, for those rules for which agencies estimated dollar values for both benefits and costs in their regulatory impact analyses, total regulatory costs were between $78 billion and $115 billion (in 2015 dollars) over the previous decade. Similar rules finalized in FY 2016 produced $4.3 to 6.4 billion in annual costs (in 2015 dollars), according to OMB.[19] For comparison, budget regulations for FY 2016 had a net budgetary cost of approximately $5 billion (in 2015 dollars).[20] Although budgetary transfer rules constituted 32 percent of major rules in FY 2016, there isn't much information beyond this in the OMB report. From what limited information exists, budget rules appear to be significant compared to other major rules.

The cost estimates in OMB's report may not sound like much money compared to the massive federal budget, but it's important to note that these cost estimates can vary fairly significantly depending on the year, and they also capture only a tiny sliver of the overall regulatory system. For example, OMB's aggregate social cost estimate for FY 2016 comes from just 16 rules—those that met the threshold of

---

[15] Office of Management and Budget, *2017 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act*, 2017.

[16] Technically, the OMB report defines major rules as rules designated as "major" under 5 U.S.C. § 804(2), rules designated as meeting the analysis threshold under the Unfunded Mandates Reform Act of 1995 (UMRA), or rules designated as "economically significant" under § 3(f)(1) of Executive Order 12866. See Exec. Order No. 12,866, 58 Fed. Reg. 51735 (October 4, 1993).

[17] Office of Management and Budget, *2017 Draft Report to Congress*, 28–30.

[18] Office of Management and Budget, 8.

[19] Office of Management and Budget, 20.

[20] Office of Management and Budget, 28–30. Note that gross costs were higher, but some budget regulations reduce spending. Note also that these budget costs are excluded from the OMB's aggregate cost estimate cited earlier, as they are considered a "transfer" by OMB rather than a net cost to society.

having a cost-benefit analysis comprehensive enough to include dollar estimates of both benefits and costs.[21] Based on a search of the *Federal Register*, 3,752 final rules were published between October 1, 2015, and September 30, 2016,[22] meaning that the OMB FY 2016 cumulative cost estimate reflects the cost of less than one-half of one percent of all rules finalized in FY 2016. Similarly, of the 36,255 final rules published between 2007 and 2016, only 137 rules had estimates of monetized benefits and costs in OMB's draft report.[23] This represents about four-tenths of one percent of all final regulations during that period, suggesting that the true costs to society of federal regulation far exceed the very limited set of costs detailed in OMB's report.

BUDGET REGULATIONS HAVE LOW-QUALITY ANALYSIS

The Mercatus Center conducted an analysis of the quality of regulatory impact analyses in 2008 using a regulatory scorecard system.[24] One-third of the economically significant regulations scrutinized as part of the study were transfer regulations, which the authors define as rules that "outline how the federal government will spend money, set fees, or administer spending programs."[25] A key finding from this analysis was that transfer regulations have significantly lower-quality analysis than other economically significant regulations.

It is concerning that the analysis accompanying these rules is so scant, as economically significant regulations have to meet the federal requirement of being subjected to cost-benefit analysis, regardless of whether or not they are budget or transfer regulations. For example, under Executive Order 12866, all regulations that are "significant" must include "an assessment of the potential costs and benefits of the regulatory action."[26] A significant regulation includes regulations that "materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof."[27]

For those rules that are "economically significant", meaning that they "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,"[28] a more thorough regulatory impact analysis must be completed, which must include an assessment "of costs anticipated from the regulatory action (such as, but not limited to, the direct cost . . . *to the government in administering the regulation.*" (emphasis added).[29]

Budget rules have effects on the economy other than just on the budget. Yet, the OMB report states in a footnote that "agencies typically do not estimate possible resulting distortionary effects on the economy" that result from budgetary transfer regulations,[30] a finding confirmed in empirical studies of budget rules.[31] These distortions include "deadweight losses," which are economic losses that "may impose real costs on society to the extent that they cause people to change behavior, either by directly prohibiting or mandating certain activities, or, more often, by altering prices."[32] At the same time, regulations other than budget regulations also impact the federal government's fiscal position, as any

[21] For the 30 or so rules that have monetization of all or some costs but no dollar estimate of benefits, there is an additional $7 billion or so in annual cost. See Office of Management and Budget, *2017 Draft Report to Congress*, 25–27.
[22] Office of the Federal Register, document search page, accessed July 12, 2019, https://www.federalregister.gov/documents/search#advanced.
[23] James Broughel and Richard Williams, "More Information Needed on the Benefits and Costs of Regulations," *The Bridge*, August 22, 2018.
[24] Jerry Ellig and Patrick A. McLaughlin, "The Quality and Use of Regulatory Analysis in 2008," *Risk Analysis* 32, no. 5 (2012): 855–80.
[25] Ellig and McLaughlin, "The Quality and Use of Regulatory Analysis in 2008," 863.
[26] Exec. Order 12,866, 58 Fed. Reg. 51741 (October 4, 1993) (§ 6(a)(3)(B)(ii)).
[27] Exec. Order 12,866, 58 Fed. Reg. 51738 (October 4, 1993) (§ 3(f)(3)).
[28] Exec. Order 12,866, 58 Fed. Reg. 51738 (October 4, 1993) (§ 3(f)(1)).
[29] Exec. Order 12,866, 58 Fed. Reg. 51741 (October 4, 1993) (§ 6(a)(3)(C)(ii)).
[30] Office of Management and Budget, *2017 Draft Report to Congress*, 8.
[31] Ellig and McLaughlin, "The Quality and Use of Regulatory Analysis in 2008."
[32] Office of Management and Budget, *2017 Draft Report to Congress*, 22.

regulation that allows or restricts economic activity will have an impact on tax collections. But these indirect budget effects also tend to go overlooked by federal agencies.

To summarize, regulatory analysis occurs only for a small sliver of regulations. It tends to be seriously incomplete when it is conducted but is especially deficient for budget regulations. Furthermore, budget regulations have impacts beyond the federal budget, just as nonbudget regulations also impact the federal government's finances. Yet little is understood about these effects because analysis tends to be of such low quality, if it is conducted at all.

CONGRESS CAN REASSERT ITSELF

A first step towards addressing regulatory costs on autopilot is to better understand the extent of the problem. This means beginning to shine a light on these costs and reporting on them in a transparent manner. The track record of federal agencies is that the quality of the regulatory analysis that accompanies their rules tends to be quite poor.[33] Agencies routinely skip fundamental steps in analysis such as identifying the problem they are trying to solve or considering multiple alternative ways of solving the relevant problem.[34] They also tend to overlook basic economic concepts in their analysis, such as the opportunity cost of funds exhausted to comply with or implement a government regulation or program.[35]

The Office of Information and Regulatory Affairs (OIRA) plays an oversight role that, in part, is about ensuring the quality of regulatory analysis in the executive branch. But given the track record of federal agencies,[36] it is not clear that OIRA is up to the task. It seems likely that OIRA is either too weak or it is not sufficiently insulated from the political influence of the president to reject deficient analysis.[37] As just one example, a key report for tracking the annual costs of federal regulations, including budget regulations, is the OMB annual report to Congress on the costs and benefits of regulations, which OIRA issues. Although the OMB report is nominally an annual report and is required by law,[38] it has not been issued since 2017, meaning transparency is lacking.

The executive branch cannot be expected to police itself. However, Congress is well positioned to reassert some of its constitutional authority over rulemaking. A reasonable first step is to task an agency like CBO with reviewing the fiscal impacts of federal regulations. While CBO may have less experience estimating the off-budget social costs and benefits of regulations (as compared to executive branch regulatory agencies), it is perfectly positioned to assess the budgetary impacts of regulations.

CBO has three specific advantages that make it well poised to take on this task:

1. *Independence.* Agencies in the executive branch often craft their cost and benefit estimates to reach predetermined conclusions,[39] which is why their analyses are sometimes referred to as "advocacy

[33] Jerry Ellig, "Evaluating the Quality and Use of Regulatory Impact Analysis: The Mercatus Center's Regulatory Report Card, 2008–2013" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, 2016).
[34] Jerry Ellig and James Broughel, "Regulation: What's the Problem?" (Mercatus on Policy, Mercatus Center at George Mason University, Arlington, VA, November 2011); Jerry Ellig and James Broughel, "Regulatory Alternatives: Best and Worst Practices" (Mercatus on Policy, Mercatus Center at George Mason University, Arlington, VA, February, 2012); Jerry Ellig, James Broughel, and Spencer Bell, "Regulating Real Problems: The Principle of Regulatory Impact Analysis" (Mercatus on Policy, Mercatus Center at George Mason University, Arlington, VA, March 2016).
[35] James Broughel, "Equity or Efficiency: The Battle for the Soul of Benefit-Cost Analysis" (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, March 2019).
[36] For example, many of the shortcomings in agency analysis have persisted for decades. See Thomas Hopkins and Laura Stanley, "The Council on Wage and Price Stability: A Retrospective," *Journal of Benefit-Cost Analysis* 6, no. 2 (2015): 400–431.
[37] James Broughel, "New Rule Exposes the Regulatory Watchdog That Wasn't," *The Hill*, May 20, 2019.
[38] Regulatory Right to Know Act, 31 U.S.C. § 1105 (2018).
[39] Stuart Shapiro, *Analysis and Public Policy: Successes, Failures and Directions for Reform* (Cheltenham, UK: Edward Elgar Publishing, 2016); Richard Williams, "The Influence of Regulatory Economists in Federal Health and Safety Agencies" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, 2008).

documents."[40] Unlike regulatory agencies, which are run by political personal with specific policy agendas they enter office looking to implement, CBO has no obvious stake in the outcome of rules.

2. *Experience.* Since the mid 1970s, CBO has analyzed the fiscal impacts of legislation.[41] The fiscal impacts of regulation are likely to be similar to legislation, especially for budget regulations. Analyzing regulations may be even easier, as regulations tend to be more narrowly tailored than legislation.
3. *Democratic Accountability.* CBO is part of the legislative branch, which has direct accountability to voters. By contrast, federal regulations are issued by career civil servants or political officials only indirectly accountable to voters. Many regulations, including some budget regulations, are apparently signed off on by agency officers who have not been confirmed by the Senate.[42]

CONCLUSION

More is unknown about the budgetary impacts of federal regulations than is known because very few regulations receive the scrutiny of an economic analysis. Where there is analysis, it tends to be of poor quality. Budget regulations have analysis more deficient than most, even compared to the very low standards set by executive branch agencies.

What scholars do know is troubling, however. Mandatory spending currently constitutes a large and growing portion of federal spending. Regulatory costs, which are estimated to be in the trillions annually, occur primarily off the federal budget altogether. In short, much of the federal government is on autopilot.

A simple and straightforward reform would be to task CBO with analyzing the budgetary impacts of federal regulations. CBO has the relevant expertise, is part of the legislative branch that is most accountable to voters, and has the independence to ensure analysis gets done professionally. Such a reform could prevent a regulation from going into effect unless CBO review and analysis is completed and the agency is afforded an opportunity to amend regulations in response to the analysis. At a minimum, significant and economically significant budget regulations could be so scrutinized. However, any regulation affecting economic activity can be expected to impact the federal government's finances.

With more transparency about the budgetary impacts of regulations, the true costs of having a government on autopilot should begin to reveal themselves, at which point perhaps Congress will begin to reestablish its constitutional role in the American republic.

Thank you for granting me the opportunity to speak today. I'm happy to answer any questions you may have.

ATTACHMENT

"Are the Costs of Government on 'Autopilot'?" (Mercatus Chart)

---

[40] E. Donald Elliott, "Rationing Analysis of Job Losses and Gains: An Exercise in Domestic Comparative Law," in *Does Regulation Kill Jobs?*, ed. Cary Coglianese, Adam M. Finkel, and Christopher Carrigan (Philadelphia: University of Pennsylvania Press, 2014); Christopher Carrigan and Stuart Shapiro, "What's Wrong with the Back of the Envelope? A Call for Simple (and Timely) Benefit-Cost Analysis," *Regulation and Governance* 11, no. 2 (2017): 203–12.

[41] Congressional Budget Office, "History," accessed July 9, 2019, https://www.cbo.gov/about/history.

[42] This was the finding of a recent report issued by the Pacific Legal Foundation (PLF), which questioned the legality of hundreds of federal regulations issued by the Department of Health and Human Services over the past two decades. A significant portion of the regulations reviewed in the PLF report are budget regulations, especially those coming from the Centers for Medicare & Medicaid Services (CMS). Most of the identified budget regulations lacking a signature from a Senate-confirmed officer appear to be amendments or corrections to other regulations. Nonetheless, this issue deserves further study. See Angela C. Erickson and Thomas Berry, *Who Rules the Rulemakers? A Study of Illegally Issued Regulations at HHS* (Sacramento, CA: Pacific Legal Foundation, 2019).

MERCATUS CENTER
George Mason University

Chart / Data Visualization

Are the Costs of Government on "Autopilot"?

September 2, 2015

Authors: Richard Williams, Tyler Richards

Taxes and the costs of complying with regulation are two of the larger and more noticeable ways that private individuals pay for government services. Yet it may surprise most people to learn that a significant portion of the federal government's expenditures and indirect costs to the US economy occur each year on "autopilot" without any action by the current Congress. These autopilot costs are the result of past legislation, interest payments, and rules created by government agencies, all of which bypass the annual appropriations process that exists to ensure the accountability of our elected officials.

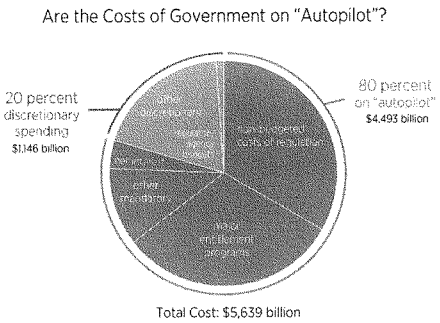
Some federal government costs *are* included in the yearly budget [1]. For example, discretionary expenditures—those appropriated by annual congressional vote—are budgeted at $1.15 trillion for fiscal year (FY) 2015. According to a yearly report [2] by Susan Dudley of George Washington University and Melinda Warren of Washington University in St. Louis, MO, $62 billion of that $1.15 trillion will flow to regulatory agencies. While $62 billion is a substantial figure, it is relatively small in terms of overall government spending. The sum of regulatory costs to the economy, however, extends far beyond the salaries and spending at the agencies themselves.

The remaining costs of regulations are much more difficult to calculate than those plainly stated in the federal budget. These are the costs of complying with regulations that are borne by consumers and producers, and those costs are, in turn, paid for through higher prices, lower wages, and reduced innovation. An oft-cited report [3] by Clyde Wayne Crews Jr. of the Competitive Enterprise Institute estimates that these costs will be approximately $1.88 trillion in 2015.

Other organizations such as the National Association of Manufacturers (NAM) and the Office of Management and Budget (OMB) offer estimates that help highlight the wide range and uncertainty in this calculation. NAM estimates these costs were $2.03 trillion in 2012 [4], while OMB calculates that the range of annual costs from 2001 to 2013 was from $74.3 to $110.5 billion [5] (all amounts adjusted to 2015 dollars by the authors). However, the OMB estimation only includes the costs of 116 of the 569 economically significant regulations (those with an impact of $100 million in at least one year) and none of the 36,453 regulations that do not qualify as economically significant during this period. The authors acknowledge that, because of this exclusion, "the total benefits and costs of all Federal rules now in effect are likely to be significantly larger than the sum of the benefits and costs reported." Yet even the lower-range value from the OMB, when compared to Dudley and Warren's figure, shows that the annual appropriations by Congress only reflect 45 percent, or $62 billion, of the total costs of regulations, $136.3 billion. The higher-range estimates from Crews and NAM indicate that this figure may be as low as 3 percent.

To get a full picture of the costs of government, we must also take into account the expenditures that *are* a part of the budget but *are not* appropriated each year by congressional votes. The three major entitlement programs—Social Security, Medicare, and Medicaid—are estimated at $1.75 trillion for the year. These programs, along with another $628 billion in other mandatory spending and $229 billion in net interest, account for the remainder of the autopilot costs. Combining the estimates of regulatory costs and the numbers from the federal budget, we can produce estimations of the total cost of the federal government in 2015.

Then we can separate the costs that are appropriated by Congress as part of the annual budget process from those that are not to see how much is on autopilot. The appropriated costs are the discretionary expenditures, including budgets for regulatory agencies. Those remaining—non-budgeted costs of regulation, Social Security, Medicare, and Medicaid, other mandatory programs, and net interest—give us the total "autopilot" costs. Using the Crews estimate, the data reveal that the current Congress is voting on just 20 percent of the amount that we pay for their services, leaving 80 percent—an astounding $4.5 trillion—as autopilot costs in 2015. But even using the lower-bound estimate of $74.3 billion for the non-budgeted costs of regulation would only decrease the autopilot costs to 70 percent of the total.



MERCATUS CENTER
George Mason University

Citation: Richard A. Williams and Tyler Richards, "Is Congress Driving Spending, or Is the Budget on 'Autopilot'?" (Arlington: Mercatus Center at George Mason University, July 17, 2015.)

[6]

This recurring process is not inescapable. Our Mercatus Center colleagues Jason Fichtner and Patrick McLaughlin have proposed a method of more accurately estimating costs and including them in the annual budget process called legislative impact accounting [7]. This method would:

incorporate economic analyses of legislation and regulation into the budget process in two ways: First, when new legislation is proposed, an independent office—perhaps the Congressional Budget Office—would produce an estimate of the economic costs the legislation would create. Importantly, a legislative impact assessment would attempt to consider economic costs of proposed legislation, not just budgetary outlays. . . . Second, legislative impact accounting would require retrospective analyses of the economic effects of legislation, starting five years after the legislation passed. The idea is to learn what the real effects have been, and to then update the original estimates produced in the first stage. This would effectively create a much-needed feedback loop that communicates information about the economic effects of legislation back to Congress.

Such a process would help inform Congress and the public about the hidden costs that accompany legislation and regulation, and it would help incorporate this information into the annual appropriations process.

Indeed, any effort to account for these autopilot costs would help promote transparency and accountability within the federal government.

Source URL: https://www.mercatus.org/publication/are-government-costs-autopilot

Links
[1] https://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/budget.pdf
[2] http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/2016_Regulators_Budget.pdf
[3] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2502883
[4] http://www.nam.org/Data-and-Reports/Reports/Cost-of-Federal-Regulations/The-Cost-of-Federal-Regulation/
[5] https://www.whitehouse.gov/sites/default/files/omb/inforeg/2014_cb/2014-cost-benefit-report.pdf
[6] https://www.mercatus.org/sites/default/files/federal-govt-costs-chart-1_0.png
[7] http://www.economics21.org/commentary/mercatus-legislative-impact-analysis-budget-06-09-2015

https://www.mercatus.org

Prepared Statement of
Thomas Berry
Pacific Legal Foundation

Hearing on Federally Incurred Cost of Regulatory Changes and How Such Changes are Made

July 17, 2019

Thank you for inviting me to testify today on unconstitutional rulemaking by unaccountable agency bureaucrats. My aim is to impress upon the committee three key points:

1. Within just one agency, the Department of Health and Human Services, more than 2,000 out of a total of 3,000 rules over the last 18 years have been signed and issued by department employees who were never nominated by the president or confirmed by the Senate. Most or all of these rules were issued pursuant to internal agency subdelegations of rulemaking power.
2. This practice of subdelegating rulemaking power is harmful for several reasons. It weakens the separation of powers by divesting the Senate of its proper role in vetting executive-branch decision-makers. It is anti-democratic, because it gives decisions to career bureaucrats rather than presidential appointees. And it harms political accountability by making it harder for the public to blame responsible officials for the rulemaking decisions they don't like.
3. This practice is also unconstitutional. Rulemaking by mere agency employees violates both the original meaning of the Appointments Clause and current Supreme Court precedent. Thousands of rules, both good and bad, have thus been placed in unnecessary legal jeopardy. These subdelegations of authority have failed to attract the attention that would attend to a statute explicitly violating the Appointments Clause, but the violations are no less harmful or serious for having been achieved by subdelegation rather than by statute.

My testimony today will be organized into four sections: the first three fleshing out these points in order, and the fourth responding to potential objections to my argument.

I hope that this testimony will encourage Congress to explore this issue further, including consideration of statutory solutions to prohibit the subdelegation of rulemaking power to career bureaucrats. Whether by across-the-board prohibitions or more targeted reforms, this is a problem that Congress can and should solve.

Part 1: A Case Study in Subdelegating Rulemaking Authority[1]

Subdelegation of power is rampant within federal agencies. I am not the first to note this.[2] But a recent study that I coauthored with Angela C. Erickson is the first to quantify just *how* rampant. These numbers give a sense of just how much agency rulemaking occurs via illegal subdelegation of rulemaking power to career bureaucrats.

Because compiling statistics across the entire federal government would have been a years-long undertaking, our report focused on just one federal department as a case study: The Department of Health and Human Services. We collected all HHS final rules going back two full administrations and including the first year of the Trump administration.[3] This totaled 2,952 final rules. For each rule, we noted the name and title of the issuing official, based on the signature appearing at the end of the rule. We then determined whether each issuing official was Senate-confirmed at the time of issuing the rule, by consulting several independent sources.[4]

The result: 2,094 of the 2,952 rules (71%) were issued by non-Senate-confirmed persons.[5] Of these, 1,860 were issued by FDA employees, while 234 came from other agencies within HHS.

We then examined whether rules signed by lower-level employees were limited to the most minor rules, such as typo fixes or other small changes. But our study found that this is not the case. We homed in on a subcategory of "substantive" rules, a category that omitted rules with small changes including corrections, technical amendments, and date changes.[6] We found that nearly 1,300 out of 2,060 substantive rules (63%) were signed by non-Senate-confirmed employees.[7] Of these, 1,273 were issued by FDA employees.

---

[1] This section is adapted from Angela C. Erickson and Thomas Berry, *But Who Rules the Rulemakers?* 18, 33 (2019) [hereinafter "Rulemakers"].
[2] Jennifer Nou has written the most thorough treatment to date of agency subdelegation. *See generally* Jennifer Nou, *Subdelegating Powers*, 117 Colum. L. Rev. 473, 475 (2017) ("In reality, however, much of that power is subdelegated within the agency. Agency heads, that is, take authority granted from Congress or the President and further redelegate it to their subordinates. As a result, tenure-protected career staff and lower-level political officials often make decisions initially granted to their superiors.") (citations omitted).
[3] Specifically, those rules published from January 20, 2001, through January 19, 2018.
[4] The three sources we used were the Plum Book, a CRS list of positions requiring Senate confirmations, and the Senate's own website, which includes a database of every presidential nomination going back to 1981. *See* Rulemakers at 18, 33.
[5] Rulemakers at 35.
[6] Rulemakers at 19, 34.
[7] Rulemakers at 36.

But "substantive" was not even the highest level of importance we looked at. We also narrowed our search to just rules deemed "significant" by the Office of Management and Budget.[8] Even for these rules, the most important ones that an agency issues, career bureaucrats continued to issue final rules with regularity. Non-Senate-confirmed employees issued 254 of the 755 significant rules in our study (34%).[9] Of these, 121 were issued by FDA, 109 were issued by Center for Medicare and Medicaid Services, and 24 were issued by other agencies. Notably, the FDA's own estimates found that the 23 most economically significant rules issued by non-Senate-confirmed employees have had a combined cost of $17.7 billion and combined benefits of only $14.5 billion since those regulations were issued.[10]

How did these rules come to be issued by non-Senate-confirmed agency employees? Since the FDA is the biggest offender, we researched its history of illegal subdelegations of power in the most depth. The FDA Commissioner has subdelegated rulemaking power to a position called the "associate commissioner for policy."[11] That title belongs to a career FDA employee in the Senior Executive Service, who cannot be fired for policy reasons.[12]

Importantly, this rulemaking power has been delegated *concurrently*. That is to say, both the Secretary of HHS and FDA Commissioner retain their authority to issue rules, and both continue to do so.[13] It is this concurrent form of rulemaking authority that has made such subdelegations

---

[8] A rule is deemed significant for the purposes of Executive Order 12866 if it has "an annual effect on the economy of $100 million or more," adversely affects one of several economic subcategories, interferes with another agency action, alters the budgetary impact of certain core programs, or raises novel legal or policy issues. See E.O. 12866, 58 Fed. Reg. 51735, § 3(f).

[9] Rulemakers at 36.

[10] These totals are calculated from the cost-benefit analyses within the agency's final rules. Total estimates were calculated by taking the primary annualized 7% discount rate estimate (where not available the 3% was used or an average of low and high estimates) and multiplying it by the number of years (max 10) and months between the effective date and mid-2019. These estimates were then inflation adjusted to 2019 dollars. Note two of the rules have no quantified costs and 12 have no quantified benefits. Several other rules note benefits or costs that may exist but were not quantified as part of their final estimates. In addition, there are numerous problems with how agencies conduct cost benefit analysis.

[11] *See* FDA Staff Manual Guide 1410.21.1.G.1 (authorizing the associate commissioner for policy "[t]o perform any of the functions of the Commissioner with respect to the issuance of FR notices and proposed and final regulations of the Food and Drug Administration"), available at https://www.fda.gov/downloads/AboutFDA/ReportsManualsForms/StaffManual%20Guides/UCM273783.pdf.

[12] *See* Senate Committee on Homeland Security and Governmental Affairs, United States Government Policy and Supporting Positions 70 (2016) (listing the associate commissioner for policy as a career position within the SES); 5 U.S.C. §§ 7541–43 (SES employees subject to removal only for cause).

[13] The various HHS Secretaries who served during the period of our study issued a combined 822 rules. *See* Rulemakers at 25.

largely unnoticed. Had the FDA Commissioner completely surrendered his rulemaking authority to a little-known career FDA employee, this subdelegation might not have flown so far under the radar. But in practice, the reality we have is not too different from that hypothetical, as the associate commissioners for policy have issued vastly more regulations than FDA commissioners during the period of our study.

Further contributing to the lack of attention is the fact that these subdelegations can be made without the President or Senate ever being aware. While the subdelegations occurred pursuant to a statute that permits the HHS secretary to delegate her authorities, it is unlikely that Congress ever contemplated that a power as important as rulemaking would be subdelegated *twice*, and that the second of these subdelegations would be to someone never nominated by the president or confirmed by the Senate (let alone to a career employee who had been working for the FDA for many years prior).[14] In fact, we are not aware of any statutes that directly grant rulemaking power to officials who are not appointed by the president and confirmed by the Senate.

As the numbers we have found show, rulemaking by agency bureaucrats who have never been vetted by the Senate is the norm rather than the exception, at least within the Department of Health and Human Services (and, more specifically, within the FDA). In the next section, I will explain why this is a serious problem.

Part 2: Why Rulemaking by Non-Senate-Confirmed Agency Employees Is a Problem

When senators question nominated agency heads during confirmation hearings, those senators are well aware of the rulemaking power that the position holds. When Robert Califf was nominated as FDA Commissioner in 2015, senators of both parties asked questions regarding his plans for rulemaking if confirmed.[15] It is unlikely that any of those senators would have

[14] The HHS Secretary's statutory authority to subdelegate her powers is found in Reorganization Plan No. 1 of 1953 § 6, reprinted in 5 U.S.C. Appendix. Pursuant to this authority, the Secretary has subdelegated all rulemaking power derived from the Food, Drug, and Cosmetic Act to the FDA Commissioner, with authority to further redelegate that power. *See* FDA Staff Manual Guide 1410.10(A)(1). Of course, a statute can't override a constitutional command, and thus, a statute cannot wittingly or unwittingly authorize the subdelegation of a power that must constitutionally be exercised by a Senate-confirmed officer to a career employee.

[15] *See* Hearing on the Nomination of Robert Califf to Serve as FDA Commissioner (Nov. 17, 2015), available at https://www.govinfo.gov/content/pkg/CHRG-114shrg97694/pdf/CHRG-114shrg97694.pdf, at 29 (oral question of Senator Franken) ("I want to talk about generic drug labeling and the generic drug labeling rule. . . . What is the current plan for finalizing the FDA's generic drug labeling rule?"); *id.* at 57 (written question of Senators Isakson and Murphy) ("If

anticipated that most of the FDA rules that would be issued during Califf's tenure would not be issued by Califf himself, but instead by a career FDA employee who assumed her role five years prior to that hearing and would continue in her position long after Califf had left.

When the final decision to issue a binding rule is made by someone the Senate has never vetted, the purpose of our nomination-and-confirmation system is undermined. One of the Framers of the Constitution, Gouverneur Morris, touted the strength of the Constitution's dual-role system: "as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security."[16] But when a final decision can be made regardless of the Senate's choice to confirm or not confirm an agency head, such security is lost. It is the judgment of unvetted bureaucrats that determines what rules will bind the American people, not the judgment of the agency heads that this body reviews.

This is a principle that Senators on both sides of the aisle understand. In a recent lawsuit filed by three Democratic senators, their complaint argued that bypassing advice and consent "unlawfully denied the Plaintiffs their right, as sitting U.S. Senators, to vote on whether to consent to" an appointment.[17] The complaint further noted that the disputed officer, who had not been confirmed by the Senate, had "vast ability to shape whether and how the laws enacted by Congress are enforced and the money appropriated by Congress is spent."[18] Without expressing an opinion on the legal merits of that particular lawsuit, their complaint is evidence that there is a bipartisan understanding in this chamber: advice and consent is one of the Senate's core duties, and any potential abrogation of that right is a serious matter.

But it is not just the Senate's loss when unaccountable bureaucrats issue final rules, it is also the American public's loss. Just as unconfirmed agency employees lack the "security" of Senate review, they also lack the "responsibility" of presidential nomination. Our system was designed with a unitary executive: the President and Vice President are the only elected members of the executive branch, and so decisions made in that branch have democratic legitimacy only because they can ultimately be traced back to the top. When decisions are made by low-level employees, the public is deprived of the ability to trace such blame to the top. The president has never nominated—let alone likely even heard of—the FDA's associate commissioner for policy. The associate commissioner for policy is a career position within the civil service system, meaning that an FDA employee might stay in that role for years across multiple administrations. The

---

confirmed, will you commit to updating FDA's regulations to address the longstanding enforcement issues as to medical gas?").

[16] 2 The Records of the Federal Convention of 1787, at 539 (Max Farrand ed., 1911).

[17] Complaint at 13, *Blumenthal, et al. v. Whitaker*, No. 18-02664 (S.D.N.Y Nov. 19, 2018), available at https://assets.documentcloud.org/documents/5188870/11-19-18-Blumenthal-v-Whitaker-Complaint.pdf.

[18] *Id.*

public would have a hard time plausibly blaming the president for the decisions of an employee hired within the FDA who is not democratically responsible, was not hired on the basis of her policy or political judgement, and is expected to stay in that agency across multiple administrations regardless of party.

Finally, this practice is harmful because it is unconstitutional. Rulemaking is an authority that both the Constitution's text and current Supreme Court doctrine confirm to be reserved to those validly appointed as officers of the United States. The majority of the rules in our study were issued by career employees who were never validly appointed as officers. And even if some subset of these rules were issued by persons appointed as *inferior* officers, there are several compelling reasons to believe that even this is constitutionally insufficient, and that such officers must instead go through the Senate confirmation that is required of principal officers.

As a lawyer, my first instinct was to put this fact upfront as the very *first* harm. But I wish to emphasize today that even if you are uncertain about (or disagree with) our legal theory, there are compelling policy reasons to end this practice. Nonetheless, its unconstitutionality is relevant to you as well, because thousands of agency rules have been put in legal jeopardy by this practice. Some of these rules you may disagree with, but there are surely many that you support on policy grounds. Eliminating the practice of subdelegating rulemaking authority will ensure that future rules are not issued on shaky legal footing.

Part 3: Why It Is Unconstitutional[19]

The Appointments Clause of the U.S. Constitution reads as follows:

> [The President] shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.[20]

The Constitution never explicitly defines the terms "officer" or "inferior officer," meaning judges and scholars have had to work out the meaning of these terms over the years since the Constitution's enactment. For ease of terminology and to clearly distinguish those officers who are not inferior (and who therefore must be confirmed by the Senate without exception), the term

[19] This section is closely adapted from Rulemakers, Appendix A, pages 31–32.
[20] U.S. Const. art. II, § 2, cl. 2.

principal officer came into use.[21] And to further distinguish those millions of people who work for the federal government but are not officers (neither inferior nor principal) at all, the term employee became standard usage.[22] The result is a three-tiered hierarchy:

1. Principal officers (who must be confirmed by the Senate without exception);
2. Inferior officers (who must be confirmed by the Senate unless Congress grants an exception);
3. Employees (who may be hired by methods other than those laid out in the Constitution).

The hard work of constitutional interpretation is to draw the two dividing lines between these three tiers. Which powers are so important that the public at the time of enactment would have expected them to only be exercised by principal officers? And which powers are important enough that they must be exercised by at least inferior officers, not employees?

These lines have slowly been fleshed out by the Supreme Court over the years. The key dividing line between officers and employees is that only officers may exercise "significant authority" pursuant to the laws of the United States.[23] And the key dividing line between principal and inferior officers is that inferior officers "are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate."[24]

The Supreme Court has explicitly held that the power to issue final rules is a significant authority that, at the least, must be exercised by an officer.[25] This is uncontroversial. After all, rulemaking is virtually indistinguishable from William Blackstone's classic definition of the lawmaking power, since rulemakers have the power to impose a "rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong."[26] It is inconceivable that the founding generation would have anticipated such a power being exercised by someone not even appointed an officer pursuant to the Constitution.

---

[21] *See, e.g.*, *Morrison v. Olson*, 487 U.S. 654, 670–71 (1988) ("The initial question is, accordingly, whether appellant is an 'inferior' or a 'principal' officer.").
[22] *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976) ("'Officers of the United States' does not include all employees of the United States . . . . Employees are lesser functionaries subordinate to officers of the United States . . . .") (citations omitted).
[23] *Id.* at 126.
[24] *Edmond v. United States*, 520 U.S. 651, 663 (1997).
[25] *Buckley*, 424 U.S. at 140–41 ("[R]ulemaking . . . . represents the performance of a significant governmental duty exercised pursuant to a public law. . . . [This function] may therefore be exercised only by persons who are 'Officers of the United States.'").
[26] 1 William Blackstone, Commentaries *44.

The more difficult question—and one the Supreme Court has not yet had an opportunity to answer—is whether rulemaking must further be limited only to principal officers. But research on the historical meaning of the term "officer," especially that by Jennifer Mascott, strongly supports the view that inferior officers were not anticipated to wield such a final and unreviewable power. As Mascott explains, "[i]n the Founding era, the term 'officer' was commonly understood to encompass any individual who had ongoing responsibility for a governmental duty."[27]

The power held by executive-branch rulemakers today is virtually indistinguishable from what the Framers would have considered to be legislative power. Wielding such power in the executive branch was at that time the exception, not the norm. The rulemaking power was so unusual and significant in the Framing era, it is implausible the Framers would have approved its dispersal among the many inferior officers. Mascott's convincing research as to how many positions were considered inferior officers supports this conclusion.

Further, this view is consistent with the Supreme Court's approach, which defines inferior officers by their relationship to a superior. The power to issue a final and unreviewable rule without the assent of a superior is incompatible with any realistic definition of being a true "subordinate." Consistent with that reasoning, the Court of Appeals for the D.C. Circuit recently held that arbitrators with the power to issue final and unreviewable rules were necessarily principal officers. As that court put it, an arbitrator was "inescapabl[y]" a principal officer because she held the power to take a "final agency action, the promulgation of metrics and standards," without "any procedure by which the arbitrator's decision is reviewable."[28] Most tellingly, the D.C. Circuit cited with approval Justice Alito's recent observation in a concurrence that "nothing final should appear in the Federal Register unless a Presidential appointee has at least signed off on it."[29]

Although the level of supervision of any particular officer is necessarily a fact-specific inquiry, most career employees, including career members of the Senior Executive Service (such as the FDA's associate commissioner for policy), can be removed from their jobs only for cause—not for policy disagreements.[30] This removal protection eliminates a "powerful tool for control" by a superior, which further supports the view that such rulemakers must be appointed as principal officers.[31]

---

[27] Jennifer Mascott, *Who Are 'Officers of the United States'?*, 70 Stan. L. Rev. 450 (2018).
[28] *Ass'n of Am. R.R. v. U.S. DOT*, 821 F.3d 19, 39 (D.C. Cir. 2016).
[29] *Id.* at 37–38 (quoting *U.S. DOT v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1239 (2015) (Alito, J., concurring)).
[30] 5 U.S.C. §§ 7541–43.
[31] *See Edmond v. United States*, 520 U.S. 651, 664 (1997).

In sum, there is no doubt that a rule issued by an employee is unconstitutional as a violation of the Appointments Clause. A proper reading of the Constitution's structure makes clear that a rule issued by an inferior officer is unconstitutional as well.

Further, even if inferior officers may in some cases issue rules consistent with the Appointments Clause, the majority of the rules in our study would still be unconstitutional. To be properly appointed as an inferior officer without Senate confirmation, Congress must vest "by law" such an appointment in the president or the head of a department. We conducted an exhaustive search for every statute authorizing such an appointment within the Food, Drug, and Cosmetics Act, and none come remotely close to authorizing the appointment of the positions that actually issued the FDA's 1,860 rules signed by non-Senate-confirmed officials.[32] In litigation, the FDA has implausibly cited several general organizational statutes as vesting a power in the HHS Secretary to create and appoint any officers she wishes, even though none of the statutes cited actually say that they are granting the power to "appoint" to the HHS Secretary. The FDA's tenuous argument has made us even more confident that Congress has not vested this appointment power. Thus, these 1,860 rules were issued by persons not even validly appointed as inferior officers.

These 1,860 rules constitute 63% of the rules in our overall study, which means that even if inferior officers may in some cases issue rules, *and* even if every other non-Senate-confirmed signer in other HHS agencies was both validly appointed and sufficiently supervised (each unlikely on its own and both unlikely together), a clear majority of the rules we studied are nonetheless still unconstitutional. In other words, even if every non-FDA rule in our study were constitutional, the overall percentage of unconstitutional rules in our study would go down only slightly, from 71% to 63%.

Finally, there is little doubt that the officer whose signature appears on a rule is the officer who has issued it. Courts generally do not look into the mental steps or workflow of the signer of a regulation because such an inquiry would delve too deeply into the internal processes of a coordinate branch.[33] Absent exceptional circumstances, a constitutionally authorized signer will not have his signature called into question by delving into whether the rule was primarily drafted and reviewed by a nonsigning underling.[34] But by the same token, an unauthorized signer cannot justify the validity of a rule by claiming that it was reviewed and approved by a nonsigning superior. It is the authority of the signer and the signer alone that gives a rule its binding power.

---

[32] The portions of the U.S. code authorizing such appointments are 21 U.S.C. § 355; § 355-1; § 360c; § 360d; § 360e; § 360kk; § 360j; § 379d-3; § 379d-3a; § 379e; § 387q; § 393; § 399a; § 454; § 603; § 604; § 606; § 616; § 621; § 661.
[33] *See United States v. Morgan*, 313 U.S. 419, 421–22 (1941).
[34] *See Nat'l Nutritional Foods Ass'n v. FDA*, 491 F.2d 1141, 1144–46 (2d Cir. 1974).

In sum, a staggering number of rules issued within just one department since 2001 are unconstitutional. Both because this creates legal uncertainty and because it shows how much modern practice has diverged from the Framers' design, this similarly demonstrates the urgency of fixing this problem.

Part 4: Potential Concerns and Objections

I will conclude by addressing some arguments we have heard and anticipated against our thesis that subdelegating rulemaking power to non-Senate-confirmed agency employees is both undesirable and unconstitutional.

A. Would our constitutional theory call into question the authority of acting officers to issue rules?

Not for acting officers who have been confirmed by the Senate to some other position, of which there is always at least one in every department. When a vacancy arises in a position requiring Senate confirmation, the president does have the authority to appoint some non-Senate-confirmed officials to serve as the acting officer.[35] But most of the time, for positions of importance, an acting officer is chosen who has already been confirmed by the Senate to another position.[36] It is in the interest of the executive branch to do this, since acting officers who have not been confirmed by the Senate to any position risk having their most significant actions challenged in court.[37] The government does not want to have the rules it issues in legal limbo, and there are always a sufficient number of Senate-confirmed officers in other positions available to serve as acting officers for the most important vacant positions. This is true even during president transitions, when Senate-confirmed deputies will temporarily stay in government as holdovers from the prior administration. A Senate-confirmed Deputy Secretary of Labor, for example, may continue to serve in a subsequent administration as the Acting Secretary of Labor until a new Labor Secretary is confirmed. At the very least, such Senate-confirmed acting secretaries can sign urgent rules that must be issued, since cabinet secretaries normally retain rulemaking authority for all the agencies within a department. Thus, even if a particular agency temporarily has no Senate-confirmed officers, the rulemaking for that agency can be exercised by a Senate-confirmed acting secretary.

---

[35] *See* 5 U.S.C. § 3354(a)(3).
[36] *See id.* at § 3345(a)(2) (authorizing the appointment of anyone currently serving in a Senate-confirmed position as an acting officer).
[37] *See, e.g.*, *Guedes v. B.A.T.F.*, 920 F.3d 1 (D.C. Cir. 2019).

B. If Congress has made the choice to allow such subdelegations in its statutes, what right does Congress have to object to such subdelegations?

First, it must be emphasized that our objection is not to *every* type of subdelegation. There are many duties that do not affect the rights of citizens, and these powers need not be exercised by constitutional officers. Subdelegating such powers to career employees is thus not problematic. Further, rulemaking power can be subdelegated one level down if the recipient of that power is a Senate-confirmed official. Statutes that allow *some* subdelegation are thus not problematic *per se* (although Congress should certainly revise them to clarify that significant authority can only be subdelegated to Senate-confirmed officials).

Instead, as noted above, the subdelegations of power to which we object are those that push rulemaking authority all the way down to the level of career bureaucrats. In the case of the FDA (and likely other agencies as well), this happens because a statute allows multiple tiers of subdelegation, leaving discretion in each recipient of rulemaking power whether to further subdelegate. But when a statute allows subdelegation of rulemaking power to career employees via this process, that final subdelegation is unconstitutional and subject to judicial invalidation. As the Supreme Court has stated, "the separation of powers does not depend on . . . whether 'the encroached-upon branch approves the encroachment.'"[38] When Congress allowed such subdelegations, it likely never contemplated that it would be used in this rampant and unconstitutional way. But it is ultimately the harm to individual liberty from unaccountable rulemaking that is the primary reason this practice must be eliminated, regardless of the views of the Congresses that originally authorized these subdelegations.

C. Would rulemaking reform prevent those agency employees with the most technical expertise from drafting rules?

No. We are not proposing a ban on allowing career employees to aid in researching or drafting rules. Indeed, that is a proper function when guided by democratically accountable officials who have the responsibility to exercise the ultimate policy judgement. Rather, we are insisting that the *final* decision to issue those rules, and the rules' final content, must be made by politically accountable officers. Just as a judicial opinion may be drafted by a hired law clerk but must be signed by a Senate-confirmed judge, so must the American people know who has taken final accountability for binding rules. It is perfectly acceptable for political appointees to put great

[38] *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010) (quoting *New York v. United States*, 505 U.S. 144, 182 (1992)).

trust in the work of their subordinates (although trust with some degree of verification is the proper management practice), but those appointees still must ultimately take responsibility for that trust by issuing the work of their subordinates themselves.

D. What if the volume of rules makes it infeasible for a Senate-confirmed officer to issue every rule?

Our study found that there is no reason to think a Senate-confirmed officer is incapable of issuing every final rule promulgated by an agency. Some agencies in our study issued rules the right way. The Center for Medicare and Medicaid Services (CMS), for example, had Senate-confirmed officers issue all of its nearly 470 substantive rules issued during the period of our study.[39] And CMS substantive rules were generally longer and more complex than FDA rules.[40] Finally, if the volume of rules issued by an agency is indeed too much for a single agency head to handle, the proper response is to create additional Senate-confirmed positions within an agency, not to subdelegate powers to positions that are not Senate confirmed.

E. If a Senate-confirmed officer made the decision to delegate his rulemaking power to a subordinate, doesn't that decision lend political legitimacy to the decisions of the subordinate?

No. The Supreme Court has made clear that Senate confirmation of a delegator does not allow subordinates to exercise significant authority "once removed."[41] Even if final decision-making power is delegated on a case by case basis, that final decision-making power gives the recipient significant authority that can only be held by validly appointed officers.

Further, from a policy perspective, it is not enough that the Senate has vetted the delegator of power. Even if this logic were sound when a delegatee makes decisions while her delegator remains in office, subdelegations continue to be effective even after a delegator has left office.

---

[39] *See* Rulemakers at 36.

[40] All of CMS's substantive rules combined totaled more than 32.6 million words. All of these were in rules that were constitutionally issued. This is in stark contrast to the FDA, whose substantive rules combined totaled 7.4 million words, of which 6.1 million were in unconstitutionally issued rules. *See* Rulemakers at 23.

[41] In *Lucia v. SEC*, the Supreme Court found SEC ALJs to be officers under the meaning of the Appointments Clause. *Lucia* concerned a statute that gave SEC commissioners the option to delegate some of their adjudicative power to ALJs. Thus, SEC ALJs only had this adjudicative power when it was subdelegated by the SEC commissioners. 138 S. Ct. 2044, 2049 (2018). The Court ultimately struck down this delegation as a violation of the Appointments Clause, because the subordinate ALJs had not been properly appointed. *Id.* at 2055.

For example, when Scott Gottlieb replaced Robert Califf as FDA commissioner, the associate commissioner for policy continued to issue rules pursuant to a delegation made by Califf. In such situations, even the once-removed theory of political accountability breaks down.

More fundamentally, decisions to delegate are not the same as actual decisions. If it were enough for the Senate to vet a delegator of decision-making authority, why wouldn't it also be enough to only vet the delegator to a delegator? How many chains of subdelegation would be too much? There is no principled line other than the correct one: final rulemaking decisions must be made by officers confirmed by the Senate.

Finally, the Senate should reflect on why it generally insists on Senate confirmation for deputy secretaries, associate secretaries, and assistant secretaries. Why isn't it enough for the Senate to confirm only the Cabinet Secretary for every department and leave it to that person to subdelegate all power within the department? The reason is that these other high-ranking officers also exercise significant power, and there is added security in vetting such officers. In these situations, the Senate does not simply assume that these deputies will have their judgement adequately supervised by Senate-confirmed secretaries—the Senate quite rightly has a duty to vet their judgement independently.

F. What can Congress do to ensure constitutional rulemaking?

There are several statutory options available for Congress to rein in this harmful and unconstitutional practice. The simplest and most direct may be a short bill requiring that, as a final step in the rule promulgating process, every rule published in the Federal Register must be signed by a Senate-confirmed officer who also possesses statutory authority to issue that particular rule. Such an amendment would immediately supersede any delegations of rulemaking authority to non-Senate-confirmed employees.

Short of this sweeping solution, individual organizational statutes for the various departments can and should be amended, so that subdelegations of rulemaking authority are no longer permissible except to officers confirmed by the Senate.

Further, Congress can bring attention to this matter through its oversight powers. Hearings such as this one can help encourage the executive branch to alter its practices and ensure that it issues rules in a constitutional manner. Since the executive branch never wants to have its rules invalidated in the courts, it is in the interest of that branch as well to eliminate this practice.

Finally, since subdelegation is always made at the discretion of particular officers, the Senate can question nominees on this practice and ensure that they commit that they will not subdelegate rulemaking power below the level of Senate-confirmed officers.

Conclusion

Thank you for allowing me to testify today on this important matter. As the body charged by the Framers with vetting the character and judgment of executive officers, it is natural that this body should take a leading role in reining back an abusive end-run around that system. Whether through oversight, reform to delegation statutes, or a law that requires final sign-off by Senate-confirmed officers, Congress has several options at its disposal to restore the balance our Framers designed and ensure that every rule binding on the public is made by a politically accountable officer.

United States Senate Committee on Homeland Security and Governmental Affairs
Subcommittee on Federal Spending Oversight and Emergency Management

Hearing on Federally Incurred Cost of Regulatory Changes and How Such Changes are Made

July 17, 2019

Prepared Statement of
Richard W. Parker, Professor of Law
University of Connecticut School of Law

Mr. Chairman, Ranking Member Hassan, and members of the Subcommittee, thank you for giving me the opportunity to testify before you today. I have been asked to testify on the adequacy of current safeguards and checks on agency power in the current regulatory process; and to provide my assessment of the likely impact of further limiting federal agencies' ability to make regulatory changes in response to stakeholder input or emerging challenges.

I am a tenured professor at University of Connecticut School of Law. I have worked in federal agencies for five years, taught administrative law for 24 years, and published journal articles on the rulemaking process. I also have convened and facilitated negotiated rulemaking exercises for the Department of Energy and the Department of Transportation, and I serve on the Council of the ABA Administrative Law Section. However, the views expressed today are entirely my own. I am not employed by – or beholden to -- any organization that holds a vested interest in the subject matter of today's hearing.

I understand this Subcommittee is particularly interested in exploring issues raised by a recent report by the Pacific Legal Foundation (PLF), which has a representative testifying here today, and which I read as raising three main concerns:[1]

First, PLF quotes a recent study by the Mercatus Center to the effect that federal regulations are costing the U.S. economy four trillion dollars a year. This exorbitant cost is cited as evidence of a regulatory state that is out of control and needs to be reined in.

Second, PLF claims that many of these costly regulations are issued unconstitutionally -- in violation of the Appointments Clause -- by career civil servants who are merely agency employees and not Officers of the United States as required by the Constitution. PLF cites the example of the Food and Drug Administration (FDA), which has issued literally hundreds of rules over the signature of Leslie Kux and certain other senior career civil servants.

Third, PLF and other regulatory critics are worried by the fact that many agency regulations and regulatory changes invoke broadly worded statutory delegations of authority from laws that may be decades old. Here, the concern is that the drafters of the original authorizing legislation may not have anticipated the specific situations for which

[1] Angela C. Erickson and Thomas Berry, *But Who Rules the Rulemakers: A Study of Illegally Issued Regulations at HHS* (Report by the Pacific Legal Foundation, April 29, 2019).

agencies issue or amend regulations under the authority of old statutes many years later, raising issues about the accountability of those later regulations and spending programs.

Frankly, I do not share these concerns. In fact, for reasons I will explain in my remarks, I find these concerns entirely without merit.

To begin with, there is no sound reason to believe that regulations in aggregate are costing Americans anywhere near $4 trillion a year. I and other scholars have thoroughly debunked cost estimates of *half* that amount, and even President Trump's Office of Management and Budget acknowledges that the benefits of regulation far outweigh their costs.[2]

The $4 trillion regulatory cost figure comes from a single unpublished study by the Mercatus Center, a libertarian-leaning advocacy center. That study reaches its $4 trillion estimate not by actually measuring the cumulative cost of regulation, but by constructing a hypothetical model of the economy that assumes what it ought to prove: that regulation always *hampers* economic growth and never *promotes* such growth (for example, by keeping workers healthy and by preventing massive fraud that causes market meltdowns and recessions). In other words, the Mercatus study employs a tautological theoretical model that builds its desired conclusions into its core assumptions. And the costs it finds are not out-of-pocket costs of real people, but utterly speculative opportunity costs in form of foregone economic growth.

The implausibility of its core premise can be seen by reading the newspaper. The study assumes an economy in which regulatory compliance costs starve industry of the cash needed for innovation and investment that leads to growth. Newspapers, however, report a quite different, and happier, reality – an economy of full employment in which many US firms are so flush with surplus cash that they are buying back their own stock for want of better options.[3]

After conjuring $4 trillion in phantom regulatory costs, PLF next leaps to the conclusion that the FDA is issuing "unconstitutional" rules because they appear in the Federal Register over the signature of senior career civil servants. This claim reads way too much into a signature. It also reveals a misunderstanding of how the administrative process actually works. What matters to accountability in the rulemaking process is not who signs a rule, but who is required to review and sign *off* on the rule before it can be signed. To take a simple example: the "Deeming Rule" on "vaping" of which PLF complains in its report (and lawsuit) may have been signed by Leslie Kux, a senior civil servant; but if that rule followed normal procedures, it was reviewed and cleared by multiple offices within the FDA before going up the chain of command to be reviewed and then approved by the FDA Commissioner. After that, it would be reviewed and approved by the Office of the Secretary of HHS. Indeed, for a rule of this consequence, it would have been approved only after several face to face meetings with both the FDA

---

[2] See Richard W. Parker, *The Faux Scholarship Foundation of the Regulatory Rollback Movement*, 45 ECOL. L. QUARTERLY 845 (2018).

[3] Matt Phillips, *Trump's Tax Cuts in Hand, Companies Spend More on Themselves Than on Wages*, N.Y. Times (Feb. 26, 2018), available online at https://www.nytimes.com/2018/02/26/business/tax-cuts-share-buybacks-corporate.html. Michael Kranish, *Feast for investors sells workers short*, Boston Globe (May 31, 2015), https://www.bostonglobe.com/news/nation/2015/05/30/companies-pour-billions-into-buying-back-stock-but-workers-and-economy-may-paying-high-price/8vi1toy4kZBr59ykKYzdNL/story.html. ("Buybacks are booming because US companies have earned record profits and are hoarding a vast amount of cash").

Commissioner and the Secretary. After that, since it was deemed a "significant" rule, it would have been reviewed and cleared by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget, which is headed by an advice-and-consent political appointee who answers directly to the President. During OMB's review the rule would be cleared by other federal agencies. Only after clearing these multiple levels of review by political appointees (with the possibility of rejection or amendment at each stage) would the rule be issued -- over the signature of Leslie Kux, a career civil servant.

These higher-level reviews and approvals may be cursory, deep or in-between -- depending on the salience of the rule, the people involved in the rulemaking process, the level of trust they have in each other, and the management style of the leadership. The fact remains: at the end of the day the rule goes out *if and only if* all these political overseers approve it. And these political overseers are accountable to Congress, to the President, and ultimately to taxpayers, for each and every rule they clear for issuance. The buck stops with them. The same analysis applies to the other rules of the FDA and the other Executive Branch departments and agencies.

Does this mean the vaping rule is good policy? Not necessarily. Agencies may make errors even after multiple levels of review. But the remedy for those who believe a rule to be misguided is to challenge the rule's policy choice as arbitrary and capricious in a court of law. The signature appearing at the end of the rule is beside the point.

The final concern I have been asked to address today is a deeper and more substantive one: the concern that many agencies issue sometimes costly rules under statutory delegations of authority that are old – and broad. Is this a bad thing? I do not believe it is. Indeed, I would suggest that broad delegations of authority are a salutary and necessary thing, and, in any event, are within Congress's discretion. Two simple examples will illustrate the point.

The Public Health Service Act, first passed in 1944, provides that: "(1) Regulations prescribed under this section may provide for the apprehension and examination of any individual reasonably believed to be infected with a communicable disease in a qualifying stage . . ."[4] No one had heard of Ebola when this Act was passed in 1944. Should the CDC be required to go back to Congress to get a specific authorization to address Ebola before responding to the risks it poses to our health? I believe the answer is clearly no.

The National Highway Traffic Safety Administration (NHTSA) sets auto safety standards under a delegation which provides that: "The Secretary of Transportation shall prescribe motor vehicle safety standards. Each standard shall be practicable, meet the need for motor vehicle safety, and be stated in objective terms."[5] That's broad language. But how much narrower could the delegation be without getting Congress in way over its head, technically? Over 40,000 Americans lost their lives in car crashes last year: equivalent to thirteen 9/11 tragedies *per year*. New advances in collision avoidance technology now under development could save thousands and perhaps tens of thousands of lives a year. Should *Congress* take over the job of deciding exactly which of these life-saving technologies to build into regulatory standards for the auto industry of the future?

---

[4] The Public Health Service Act, 42. U.S.C. § 264(d).
[5] 49 U.S.C. § 30111.

These examples involve regulations of private sector conduct, but comparable complexities attend the administration of Medicare, Medicaid and many other benefits programs. They illustrate why I believe congressional micromanagement of agency rulemaking simply does not work. I have studied and worked with regulations for most of my career. One thing I can say with assurance about regulations is that most of them grapple with issues that are highly technical and complex. But extreme technical complexity does not play to Congress's strengths. Congress is comprised of a relatively small number of generalists, whereas agencies are able to bring to bear large numbers of specialized in-house experts on the problems they address. Congress also lacks either time, staff, or adequate procedures to undertake the kind of detailed fact-gathering, analysis, and stakeholder involvement in the regulatory process that agencies routinely allow -- through public hearings, expert workshops, notice and comment rulemaking, negotiated rulemaking, advisory committees, and regulatory analysis.

Moreover, Congress does not require itself to prepare a detailed analysis demonstrating that the benefits of the statutes it enacts justify their costs, as executive branch agencies are required to do with their major rules. Nor does Congress bind itself to respond in detail to the comments and objections it receives from stakeholders and the public about the draft laws on which it deliberates. By contrast, agencies *must* consider and respond to the views of the public on pre-promulgation drafts of the rules they issue, or else run the risk of reversal when challenged by stakeholders in court. More fundamentally, there is the fact that agencies *can* be challenged in court for issuing standards that are arbitrary and capricious. Congress faces no comparable check.

Ultimately, of course, Congress has the final say on all agency regulations and that is as it should be. Congress writes the laws that the agencies must implement. Congress can review and reject any agency rule that Congress disagrees with, following expedited procedures with no possibility of filibuster.[6] Congress controls the appropriations of agencies. And Congress can require agencies to account for their rules and actions in oversight hearings such as this one.

Thus, even though agencies obviously lack traditional electoral accountability, federal agencies are accountable to the public in far more direct, material and practical ways – directly in the rulemaking process and indirectly through White House, Congressional and judicial review.

In sum: the agencies I have studied and worked with are not the rogue elephants that some regulatory critics like to pretend they are. They are subject to multiple checks and balances as they try to protect the American people from a wide variety of harms that free-market actors would otherwise impose on them in the course of seeking profits. The risks these agencies are trying to manage are often major risks of harm to public health, safety, the environment or the economy. They are risks, moreover, from which markets cannot and will not protect us without the intervention of government.

Sometimes agencies stray off course and need to be checked. More often they simply need resources, support and a reasonable level of discretion to make sound policy on what often are highly complex issues of fact and law.

---

[6] Small Business Regulatory Enforcement Fairness Act, 5 USCA § 801, et. seq,

○