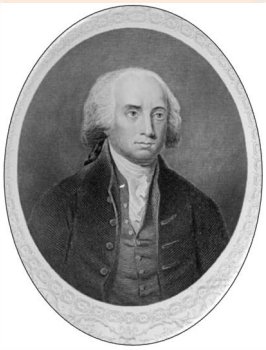
# ACCOUNTABILITY



*"But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition."*

**James Madison, Federalist No. 51.**

## Executive Summary

Regulation is necessary to ensure health, safety, and trust in the marketplace. But, as accelerating technological change transforms the American economy, there is an emerging bipartisan recognition that our federal regulatory processes must keep pace. The current outdated federal regulatory system must be brought into the 21st century in order to preserve America's innovation advantage and drive growth and prosperity, while maintaining fundamental protections.

This antiquated process is in part the fault of Congress, which, over many decades, and with the aid of the judiciary, has transferred legislative authority to the executive branch. The legislative branch was designed to make law and to answer directly to the electorate for the laws they make. In contrast, the Executive Branch executes the laws passed by Congress. Regulatory agencies in some cases exercise executive, legislative, and judicial functions. The result has been a massive shift of power away from those who answer to the electorate towards regulators who have few checks on their power and authority.

From the time of day we wake up, to the food we eat, the medicines we take, and the places we live, federal regulation touches nearly every aspect of our lives.[1] It is time for Congress to reform the process and make it more responsive by restoring an appropriate balance of power between the three branches. It must bring greater accountability to regulatory agencies, principally through a more efficient, transparent, and participatory rulemaking process.

[1] "Regulation: A Primer," Second Edition, by Susan Dudley and Jerry Brito, Mercatus Center and The George Washington University Regulatory Studies Center (http://mercatus.org/sites/default/files/RegulatoryPrimer_DudleyBrito_0.pdf).

# I. Introduction

The array of federal departments, agencies, and sub-agencies, staffed by over 2 million workers and contractors, which issues tens of thousands of new regulations every year, has become what George Washington University Law Professor Johnathan Turley has deemed a "fourth branch of government" not originally included in the Constitution.[2] Its power and reach has expanded significantly, operating with few checks on its authority.[3] Regulations, both individually and cumulatively, cost the economy two trillion dollars annually—a burden that is only growing.[4]

For individual families, the costs are staggering: in 2017 it cost the average household $14,809. Put another way, that is 21 percent of the average household income of $69,629 and 26 percent of the average household's expenditure budget of $55,978.[5] The regulatory burden also disproportionately harms small businesses over large corporations: for firms with 50 employees or less, regulatory compliance costs—per employee, per year—in 2017 were $11,724—more than 29 percent greater than the average for large firms.[6]

Congress should prudently reclaim its authority. Over decades, and continuing to this very day, Congress has delegated its legislative authority to regulatory agencies. What does it mean to have, or exercise, legislative authority? Generally speaking, some decisions are simply "legislative by nature; otherwise, the distinction among legislative, executive, and judicial powers that is fundamental to the Constitution's structure would be meaningless."[7] Legislating often involves making difficult tradeoffs between two competing goals in order to find meaningful compromise.

But decisions of that kind, which can have considerable socio-economic impacts, have been delegated to federal agencies for years.

As articulated in Appalachian Power Co. v. Environmental Protection Agency, the D.C. Circuit Court of Appeals explained, and lamented, how this kind of delegation has undermined the regulatory process, accountability, and democracy itself:

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[2] Jonathan Turley, Shapiro Professor of Public Interest Law, George Washington University, Testimony before the hearing of the House Judiciary Committee, "The President's Constitutional Duty to Faithfully Execute the Laws," December 3, 2013 (https://judiciary.house.gov/wp-content/uploads/2016/02/120313-Turley-Testimony.pdf)

[3] Susan Dudley, "Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future," draft for Case Western University Law Symposium, November 14, 2014 (http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley_Exec-Discretion-Reg-Accountability_20150121.pdf).

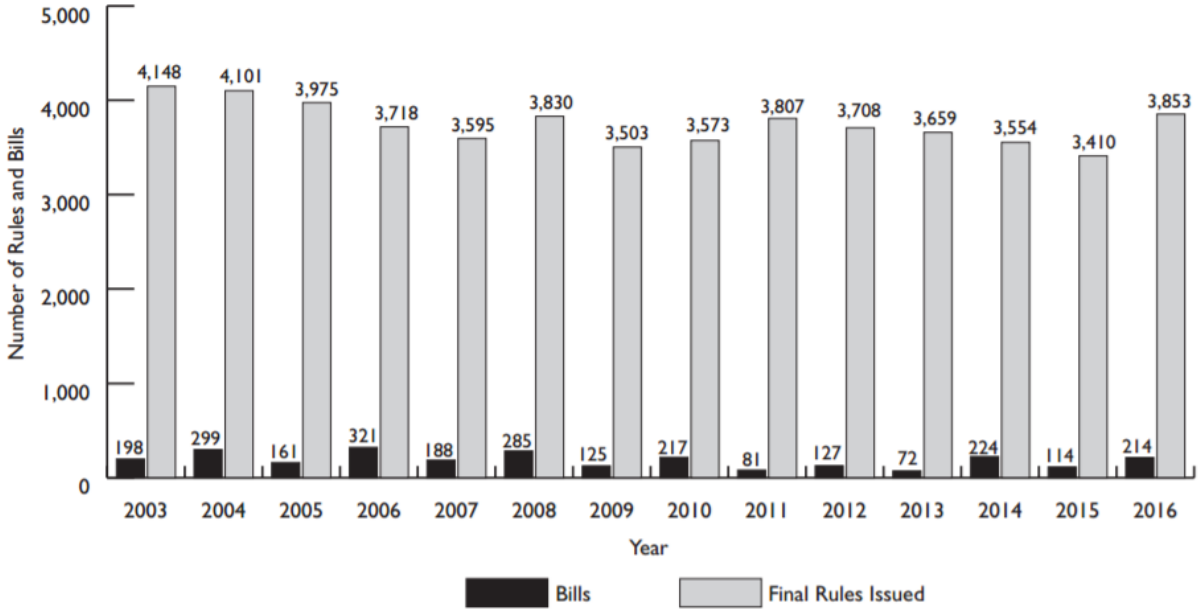
[4] The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business," a report for the National Association of Manufacturers, by W. Mark Crain and Nicole V. Crain, September 10, 2014 (http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf).

[5] "Ten Thousand Commandments: An Annual Snapshot of the Regulatory State," by Clyde Wayne Crews, Jr., 2017 (https://cei.org/10kc2017).

[6] Ibid.

[7] The Honorable Douglas Ginsburg, Judge, U.S. District Court for the District of Columbia Circuit, "Legislative Powers: Not Yours to Give Away," January 6, 2011 (http://www.heritage.org/research/reports/2011/01/legislative-powers-not-yours-to-give-away).

By consistently avoiding the "hard choices" inherent in legislating,[8] Congress—both wittingly and unwittingly—has ushered in the "Age of Regulation," in which the number of rules promulgated every year far outweighs the number of statutes passed. For example, in 2016, Congress enacted 214 laws, while agencies issued 3,853 rules.[9]




**Source: CEI**

## II. Delegation to Unelected Officials

The Administrative Procedure Act (APA) provides avenues for public participation in rulemakings, and in theory, can help democratize the regulatory process. Yet the reality of the process is far different: federal agencies, or more precisely, unelected government officials, exercise considerable authority and autonomy, often with little or no accountability to the broader public.[10] Supreme Court Chief Justice Roberts wrote in dissent in *City of Arlington v. FCC*, that "the citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, in the 'public interest'—can perhaps be excused for thinking that it is the agency really doing the legislating."[11]

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[8] David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation*, Yale University Press, 2008.

[9] "10,000 Commandments: An Annual Snapshot of the Federal Regulatory State" (2017), by Clyde Wayne Crews, Jr. (https://cei.org/sites/default/files/Ten%20Thousand%20Commandments%202017.pdf).

[10] According to a paper by Joseph Postell, Ph.D., for the Heritage Foundation, as of 2009, "of the 2.7 million civilian (non-military) civil servants employed by the federal government, only 2,500 were political appointees." (http://www.heritage.org/research/reports/2012/12/from-administrative-state-to-constitutional-government#_ftnref18). Also, see testimony by Professor Jonathan Turley, George Washington University School of Law, before the U.S. House Judiciary Committee, December 3, 2013 (https://judiciary.house.gov/wp-content/uploads/2016/02/120313-Turley-Testimony.pdf).

[11] See *City of Arlington v. FCC*, May 20, 2013 (http://www.supremecourt.gov/opinions/12pdf/11-1545_1b7d.pdf). In dissent, Chief Justice John Roberts asserted, "It would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed."

Civil servants' personal views can influence analyses of costs and benefits, interpretations of scientific studies, and how certain legal criteria are applied, while the public's views are frequently treated as an afterthought – a final box to check as a rule is pushed out the door. As a result, regulations and their various offshoots "are escaping…standard mechanisms for democratic input in the policymaking process."[12]

Consider the prevalence of "guidance documents." Rather than promulgating rules according to the APA, requiring opportunity for public notice and comment, agencies interpret their own regulations through guidance rather than rulemaking. This practice was reinforced in 2015 by the Supreme Court, which ruled in *Perez v. Mortgage Bankers Association* that federal agencies are not required to provide public notice or solicit comments when they revise interpretive rules, which often take the form of guidance documents.[13] "By authorizing agencies to significantly revise interpretive rules with no prior notice or opportunity to comment," according to a legal analysis of the decision, "the ruling effectively allows federal agencies to amend this type of guidance without any procedural safeguards."[14]

Delegation, and its attendant lack of accountability, threatens the separation of powers at the heart of the Constitution. Consider that many executive branch entities, by design, are empowered to exercise enforcement, lawmaking, and adjudicative responsibilities.[15] Boston University Law School's Gary Lawson encapsulated this phenomenon by describing a typical case at the Federal Trade Commission:

> The Commission promulgates substantive rules of conduct. The Commission then considers whether to authorize investigations into whether the Commission's rules have been violated. If the Commission authorizes an investigation, the investigation is conducted by the Commission, which reports its findings to the Commission. If the Commission thinks that the Commission's findings warrant an enforcement action, the Commission issues a complaint. The Commission's complaint that a Commission rule has been violated is then prosecuted by the Commission and adjudicated by the Commission. This Commission adjudication can either take place before the full Commission or before a semi-autonomous Commission administrative law judge. If the Commission chooses to adjudicate before an administrative law judge rather than before the Commission and the decision is adverse to the Commission, the Commission can appeal to the Commission…[16]

This process can foster insular decision-making, disconnected from the wishes of the public and democratic accountability. This problem also manifests itself through the rulings of federal judges, who have a dominant role in the regulatory process. Regulations are frequently challenged in court, and thus their ultimate legal fate

[12] John D. Graham and James W. Broughel, Stealth Regulation: Addressing Agency Evasion of OIRA and The Administrative Procedure Act," *Harvard Journal of Law and Public Policy* (http://www.harvard-jlpp.com/wp-content/uploads/2010/01/Graham_Broughel_final.pdf)

[13] *Perez, Secretary of Labor, Et Al. v. Mortgage Bankers Association Et Al.* (https://www.supremecourt.gov/opinions/14pdf/13-1041_0861.pdf).

[14] "Supreme Court Widens Agency Latitude on Guidance Documents," by Jane C. Luxton and Kenneth von Schaumburg, March 12, 2015, Clark Hill PLC (http://www.clarkhill.com/alerts/supreme-court-widens-federal-agency-latitude-on-guidance-documents.pdf).

[15] James Landis, *The Administrative Process*, (New Haven: Yale University Press, 1938), p. 2.

[16] Gary Lawson, "The Rise of the Administrative State," Harvard Law Review, Vol. 107, number 1231 (1994) (http://assets.drupal.ku.edu/sites/law.drupal.ku.edu/files/docs/law_journal/v17/dobkin.pdf).

and substance is determined by the federal judiciary. But, as Supreme Court Justice Felix Frankfurter wrote over 50 years ago:

> …it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic.[17]

Even still, the judiciary has largely facilitated Congress's legislative delegation. Courts routinely defer to agencies' "expertise" and rarely question agencies' self-imposed limits on their jurisdiction and authority.[18] Though some recent cases have chipped away at it, the Supreme Court's landmark *Chevron* decision remains a significant foundation of administrative law.[19] As DC Circuit Judge Douglas Ginsburg explained:

> The Supreme Court, by failing to prevent delegations of legislative authority, forgoes a significant opportunity to maintain the structure of government prescribed by the Constitution. As a result, legislators may and do delegate difficult and divisive legislative issues to agencies in the executive and judicial branches far removed from political accountability.[20]

The result is a civil service that "appears to be awash in discretion," which is "arguably controlled only at the margins by a federal judiciary that sanctions the passing of policymaking authority to administrative agencies..."[21]

## III. Defining Accountability in the "Age of Regulation"

Fostering a smarter, more efficient approach to the regulatory process is essential to rejuvenate dynamism, growth, and innovation in the American economy. This requires a greater degree of regulatory accountability from the federal government. This should be guided by the following principles: 1) A reassertion by Congress of its legislative responsibilities under Article I of the Constitution, including more effective checks on agency discretion, with clearer guidance on the limits of authority; 2) A more robust regulatory process that instills greater transparency and the burden of proof to regulate; and 3) A process that substantially increases public participation and input, with appropriate clarity and responsiveness to the concerns of the people.

### Article I Responsibility

These goals can be achieved in a variety of ways. Congress may, in individual cases, simply restrict the discretion of federal agencies by legislating more prescriptively. But such direct Congressional action may not

[17] *Trop vs. Dulles*, 356 U.S. 86, 120 (1958) (J. Frankfurter, dissenting).
[18] Ibid at 7. In dissent, Chief Justice John Roberts asserted, "It would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed."
[19] "Do Judges Make Regulatory Policy – An Empirical Investigation of Chevron," by Thomas J. Miles and Cass R. Sunstein, University of Chicago Law Review, Summer 2006 (http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2663&context=journal_articles).
[20] Id. at 10.
[21] "*Chevron* Deference, the Rule of Law, and Presidential Influence in the Administrative State," by Peter M. Shane, Fordham Law Review, Vol. 83, November 2014 (http://fordhamlawreview.org/assets/pdfs/Vol_83/Shane_November.pdf).

always be the best answer to misguided regulatory actions. A better way is to encourage Congress to reassert and strengthen its oversight power in the regulatory space.

In 1984, Justice Stephen Breyer, then a federal appeals court judge, outlined a proposal that would enable Congress to assume greater oversight of regulations. Breyer suggested a "confirmatory law procedure," allowing for Congressional *approval*, with the President's signature, of regulations.[22] In 1996 Congress enacted the Congressional Review Act (CRA), which flipped Breyer's proposal and established an expedited procedure to consider a "resolution of *disapproval*" for major regulations, which also required the President's signature. An alternative approach, which hearkens back to Breyer's original idea, would require Congress to pass, and the President to sign, a joint resolution *approving* a new major regulation issued by a regulatory agency before a regulation could take effect, thus returning power to those who can be held accountable by the electorate.

## Regulatory Checks on Agency Discretion

Congress should also strengthen how agencies conduct rulemakings, and impose stronger oversight on agency authority. Several bills have been introduced that would accomplish these goals. An excellent example is S. 951, the Regulatory Accountability Act, which was co-introduced by Sens. Rob Portman (R-OH), Heidi Heitkamp (D-ND), Orrin Hatch (R-UT) and Joe Manchin (D-WV). **S. 951 would require agencies to conduct a cost-benefit analysis for new regulations and ensure that major regulations, or those that impose an economic cost of $100 million or more, are reviewed at least every 10 years. The bill would increase transparency of the economic and scientific data used to justify new rules and would allow stakeholders to request public hearings on the rules.**

As noted above, agencies frequently resort to issuing guidance documents, which can evade traditional regulatory checks. Before issuing so-called "major guidance" (costs to the economy of $100 million or more) or "guidance that involves a novel legal or policy issue arising out of statutory mandates," an agency could ensure that the guidance:

- Adheres to the relevant statutory authorities and regulatory provisions;
- Identifies costs and benefits that arise from following the guidance;
- Demonstrates that the benefits outweigh the costs; and
- Describes any alternatives to guidance, their costs and benefits, and an explanation as to why the agency rejected those alternatives.

## IV. Conclusion

The previous examples are by no means a definitive list; there are many ways Congress can strengthen the regulatory process to make it more accountable to voters and the regulated community. Yet one thing is clear: only *Congress* can take the ultimate steps necessary to reduce the power of the fourth branch of government, for only Congress has the authority to return decision-making with vast societal consequences back to legislators, who are directly accountable to voters.

[22] Stephen Breyer, "The Legislative Veto after Chadha," Georgetown Law Journal 72 (1984): 793.