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How to Roll Back the Administrative State

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Abstract: *Congress needs to take action to constrain the burgeoning regulations and closed-door, secretive rulemaking of the growing administrative state. To do that, Congress needs to restore formal rulemaking, with oral hearings presided over by an administrative law judge. It also needs to strengthen congressional control and oversight of rulemaking and establish a Congressional Office of Regulatory Review, which, among its other duties, would estimate the cost of major regulations.*

THE PROBLEM

Americans feel that they are increasingly being governed by administrators, not legislators. They are right; the rule of law is being supplanted by the rules and regulations that accompany government statutes.

On crucial issues that affect their daily lives, ranging from running their businesses to choosing their health care, Americans are becoming the subjects of an administrative state rather than citizens of a constitutional republic. Not only is administrative rulemaking expansive, but the process whereby rules are developed and the reasons behind many decisions are arbitrary, murky, secretive, and often highly political. It is time for Congress to confront and roll back this burgeoning administrative state.

In 1996, Congress tried to constrain excessive regulation through the Congressional Review Act, but the act has been invoked only rarely, and government agencies have ignored its reporting requirements. Meanwhile, Americans have been subjected to:

- **An explosion of red tape.** In 2009 alone, the Obama Administration published a record-breaking 163,333 pages of rules in the Code of Federal Regulations.[1] In 2010, the Administration continued to issue many thousands of pages of rules—carrying the force of law—on topics ranging from energy and greenhouse gases to financial reform and food safety to health care.
- **Massive economic costs.** The Small Business Administration (SBA) recently estimated that under the Obama Administration, the annual cost of federal regulation amounts to a staggering $1.75 trillion—almost twice the amount collected in individual federal income taxes in 2009.[2]
- **Politicized and inequitable rules.** The rigid design and subjective application of rules makes the process even worse. So far, more than 900 com-

[1] The Heritage Foundation, "The Rising Tide of Red Tape," *Solutions for America*, Vol. 9, August 17, 2010, at *http://www.heritage.org/research/reports/2010/08/the-rising-tide-of-red-tape*.

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panies and organizations, including unions, have received waivers from insurance rules mandating insurance coverage levels in the Patient Protection and Affordable Care Act (PPACA) that apply to millions of Americans. Meanwhile, Administration officials clumsily tried to sneak through a rule including a controversial provision for "end of life" counseling that Congress explicitly stripped from the PPACA last year.[3]

Congress should do its job under the first section of Article I of the Constitution, which declares that "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Certainly, Congress needs to write clear and coherent statutes, but it must also end the excessive delegation of vast lawmaking authority to unelected federal officials and make the rulemaking process transparent and more in line with congressional intent. This can be done by returning to formal rulemaking, with open hearings under a presiding administrative law judge, rather than continuing to rely on the informal process of "notice and comment" that governs federal rulemaking today.

THE SOLUTION

Congress must end the excessive delegation of vast lawmaking authority to unelected federal officials and make the rulemaking process transparent and more in line with congressional intent. To this end, there are several immediate steps that Congress can take to get the bureaucracy under control. For example:

- **Restore transparent, formal rulemaking and end secretive regulation.** By applying the Administrative Procedures Act of 1946, Congress can *restore* the formal rulemaking process that was the norm until the 1970s. That requires formal and public evidence gathering, with an oral hearing presided over by an administrative law judge. It prohibits *ex parte* communications with the judge or other federal officials designated to preside over the hearing, making it much harder for special interests or politics to influence final rules. Contending parties would have the right to present evidence and cross-examine witnesses, and the record of the proceedings would have to be the basis of the regulatory decision.

  To trigger formal rulemaking, Congress would have to include the requirement in a statute creating a program. But by including it in an amendment to, say, last year's health reform legislation, it could require formal rulemaking for all pending regulations for the entire act.

- **Beef up congressional control of existing regulations.** To reform the process, Representative Geoff Davis (R–KY) and Senator Jim DeMint (R–SC) are sponsoring the Regulations from the Executive in Need of Scrutiny (REINS) Act. The REINS Act (H.R. 3765/S. 3826) would reverse the existing burden of action. Today Congress has to stop a rule; otherwise, it goes into effect. Under their bill, the House and Senate would have to affirmatively enact a bill embodying a *major* rule *before* it could be enforced.[4]

Congress needs to write clear and coherent statutes, but it must also end the excessive delegation of vast lawmaking authority to unelected federal officials and make the rulemaking process transparent and more in line with congressional intent.

[2] James L. Gattuso, Diane Katz, and Stephen A. Keen, "Red Tape Rising: Obama's Torrent of New Regulation," Heritage Foundation *Backgrounder* No. 2482, October 26, 2010, at *http://www.heritage.org/research/reports/2010/10/red-tape-rising-obamas-torrent-of-new-regulation.*

[3] "Sneaking End of Life Consultations into Obamacare," *The Washington Examiner*, January 3, 2011.

[4] Current law would be retained with regard to congressional review and oversight of minor federal rules, defined as those with an impact of less than $100 million on the economy.

- **Strengthen congressional oversight of informal rulemaking.** For the bulk of federal rules, currently made through the informal process of notice and comment before final publication, tough congressional oversight into each agency's rulemaking process would be a major constraint on bureaucratic power.
- **Establish a Congressional Office of Regulatory Review.** Congress could create a Congressional Office of Regulatory Review (CORR) modeled after the Congressional Budget Office (CBO). Like the CBO, the CORR would report on the estimated costs and impact of the federal regulatory authority embodied in bills that come before Congress. House and Senate rules could require a Regulatory Review score similar to the CBO score.

THE ADMINISTRATIVE STATE AND A FREE REPUBLIC: MUTUALLY EXCLUSIVE

The Founders designed the American republic carefully and elegantly. What makes the United States a republic is that political authority is inherently limited and exercised as a *public trust* over public affairs (*res publica*), not private affairs (*res privata*). America is at once a *democratic* and a *federal* republic. It is democratic because political decision-making (in most instances) is based on the principles of popular sovereignty, political equality, and majority rule. Its federal character is embodied in the wise division of authority between a national government carefully confined to general concerns, and state governments that retain plenary authority over particular concerns.

Within the framework of the national government, the U.S. Constitution provides for three distinct and separate and independent branches of a republican government to execute legislative, executive, and judicial functions. The Founders' functional division of authority is designed specifically to prevent a consolidation of political power that would threaten Americans' personal, political, and economic liberty. Writing in *The Federalist* No. 48, James Madison is explicit:

The Founders' functional division of authority is designed specifically to prevent a consolidation of political power that would threaten Americans' personal, political, and economic liberty.

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self- appointed, or elective, may justly be pronounced the very definition of tyranny."

Escaping Responsibility. Over the course of the 20th century, Congress has habitually delegated legislative, or rulemaking, authority to executive branch departments and agencies, as well as to independent agencies.[5] Continuing into the 21st century, these delegations often reflect Congress's inability or unwillingness to deal directly with demanding, often technically difficult problems of public policy or are a convenient means to avoid taking direct responsibility for difficult and potentially painful and unpopular decisions.

The agenda of the early Progressives, Woodrow Wilson's New Freedom, Franklin D. Roosevelt's New Deal, Lyndon B. Johnson's Great Society, and Richard Nixon's vast expansions of federal power, including the imposition of wage and price controls, all contributed to the growth of federal bureaucratic power that controls progressively larger chunks of Americans' economic lives. Since the 1960s, this growth has been accompanied by an avalanche of federal regulation.

Since congressional delegations of legislative authority have rarely been nullified by the federal courts as unconstitutional, the consequence has been the creation of a "fourth branch" of the federal government:

[5] The exception to this general rule involves those cases in which there is a violation of the principle of the separation of powers.

the administrative state. Gary Lawson, professor of law at Boston University, has noted:

> Many administrative agencies have authority over matters that are far removed from any of the enumerations of the Constitution…. Many of these agencies—the so-called independent agencies—are statutorily insulated from presidential control. And to cap things off, the agencies perform all of the functions of government at the same time: They promulgate rules, enforce the rules, and adjudicate their own enforcement actions.[6]

So the administrative state's functionaries are powerful, their operations subtle, yet their decisions are consequential for millions of Americans. They are unelected, unknown, and, for all practical purposes, often unaccountable, and their positions are protected by an impressive body of civil service laws, rules, and regulations. As Madison warned in 1788, "There are more instances of the abridgement of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations."[7]

Since congressional delegations of legislative authority have rarely been nullified by the federal courts as unconstitutional, the consequence has been the creation of a "fourth branch" of the federal government: the administrative state.

Concentrations of Power. With the administrative state, the laws that govern the day-to-day activities of millions of Americans are in fact not laws, the common products of legislative deliberation by elected representatives, but federal rules and regulations produced by unelected administrators. These, in turn, are routinely accompanied by federal guidelines and administrative decisions of officials in increasingly powerful federal departments and agencies.

Today, these rules have the force of law, just like acts of Congress signed into law by the President. Indeed, Congress has not only delegated rulemaking authority, but also authorized new forms of judicial authority, exercised by administrative law judges, to decide cases and controversies concerning the application of federal rules. Moreover, Congress has authorized civil monetary fines and penalties against violators of federal rules and regulations. In effect, Congress has created administrative institutions that do indeed combine executive, legislative, and judicial powers—precisely the dreadful combination against which Madison warned Americans in 1788.

These delegations have also undermined democratic accountability and undercut the transparency of American government. As Judge James L. Buckley has argued:

> [The administrative state] is manned by insulated and sometimes imperious officials who wield an enormous influence over virtually every facet of American life. As they are not elected, they are not directly responsible to the people; and as they are protected by the civil service laws, they are virtually immune to the discipline by a president or by Congress. We have, in short, managed to vest these individuals with a degree of authority over others that the Founders of the Republic went to great pains to prevent anyone from acquiring.[8]

[6] Gary S. Lawson, "Limited Government, Unlimited Administration: Is It Possible to Restore Constitutionalism?" Heritage Foundation *First Principles Series Report* No. 23, January 27, 2009, p. 11, at *http://www.heritage.org/Research/Reports/2009/01/Limited-Government-Unlimited-Administration-Is-it-Possible-to-Restore-Constitutionalism* (February 7, 2011).

[7] James Madison, Speech to the Virginia Ratifying Convention, June 16, 1788, cited in Matthew Spalding, ed., *The Founders' Almanac: A Practical Guide to The Notable Events, Greatest Leaders and Most Eloquent Words of the American Founding* (Washington, D.C.: The Heritage Foundation, 2002), p. 133.

[8] James L. Buckley, *Freedom at Risk: Reflections on Politics, Liberty and the State* (New York: Encounter Books, 2010), p. 52.

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Ronald Pestritto, a professor of political science at Hillsdale College, has observed similarly that:

> For those who hold the Constitution of the United States in high regard and who are concerned about the fate of its principles in our contemporary practice of government, the modern state ought to receive significant attention. The reason for this is that the ideas that gave rise to what is today called the "administrative state" are fundamentally at odds with those that gave rise to our Constitution.[9]

WHY AMERICANS ARE READY TO ROLL BACK BUREAUCRATIC POWER

Particularly over the past century, these delegations of congressional authority have become a norm of American public policy; they are taken for granted. Among Washington's policymakers and their allies on K Street, the well-paid agents of a lucrative industry of special-interest lobbying, well-connected and schooled in the arts of influence peddling, the existence and continued prosperity of the administrative state has long been a settled question.

That norm can change. With a new, innovative, and imaginative congressional leadership committed to the spirit and example of America's Founders, the administrative state, particularly its regulatory excesses, can be rolled back. There is nothing inevitable about the growth of the administrative state, no permanent arrangement in the correlation of political forces that govern official Washington. As *The Wall Street Journal* observes:

> [T]he Constitution vested Congress with the duty to make laws, not vague suggestions about what it might be good for the law to be. And now there is a growing movement to force Members to take responsibility for the laws they pass, and to force Administrations to be accountable for the laws they create through regulation.[10]

While President Barack Obama himself has recently called for a review of federal regulation, his Administration issued 62 major rules in 2010 alone, and 191 such rules are under development.[11] In the area of financial regulation alone, Americans can expect as many as 243 new regulations over the next 12 years thanks to the Wall Street Reform and Consumer Protection Act sponsored by Senator Chris Dodd (D–CT) and Representative Barney Frank (D–MA).[12]

High Cost. The level of public anxiety over official Washington's policy initiatives, ranging from complex financial regulations to the unpopular health care law, gives new Members of Congress an opportunity to channel the growing public dissatisfaction with current governance into a positive agenda for far-reaching reform. As noted, the Small Business Administration estimates the annual cost of federal regulations at a staggering $1.75 trillion—almost twice as much as the total amount collected in individual federal income taxes in 2009.[13] Additionally, new rules often reflect an excessive faith in central planning.

[9] "In fact, the original Progressive-Era architects of the administrative state understood this quite clearly, as they made advocacy of this new approach to government an important part of their direct, open, comprehensive attack on the American Constitution." Ronald J. Pestritto, "The Birth of the Administrative State: Where It Came From and What It Means for Limited Government," Heritage Foundation *First Principles Series Report* No. 16, November 20, 2007, at *http://www.heritage.org/research/reports/2007/11/the-birth-of-the-administrative-state-where-it-came-from-and-what-it-means-for-limited-government*.

[10] "The Congressional Accountability Act," *The Wall Street Journal*, January 14, 2011, at *http://online.wsj.com/article/SB10001424052970203525404576049703586223080.html* (February 7, 2011).

[11] *Ibid.*

[12] *Ibid.*

[13] Gattuso, Katz, and Keen, "Red Tape Rising."

Even more damaging than its economic cost is the high toll that the administrative state exacts on America's civic life. As Judge Buckley has written:

> Millions of Americans are being overwhelmed by events they can no longer influence, and [realize] that voting to replace one government official with another is an act of futility. There is no single cause for this disintegration of confidence, but as a veteran of six years on Capitol Hill who has had to wrestle with hundreds of constituents' concerns, I am persuaded that a major source of current discontent stems from the accelerating expansion of federal authority and the way that authority is being exercised.[14]

Federal regulations have routinely targeted discrete sectors of the economy such as banks and financial institutions, specific areas of general concern such as the protection of air and water quality under the Environmental Protection Agency (EPA), or safety in the workplace, the object of the regulatory authority of the Occupational Safety and Health Administration (OSHA). Complaints affecting any one of these areas have thus been contained to those areas of public policy, as has the political fallout from the exercise of arbitrary or abusive power.

Health Law Excesses. As *The New York Times* reports, "Federal rule makers, long neglected stepchildren of Washington bureaucrats, suddenly find themselves at the center of power as they scramble to work out details of hundreds of sweeping financial and health care regulations that will ultimately affect most Americans."[15] In 2010, the Obama Administration issued 43 new major regulations with a net cost of $26.5 billion to the economy; 15 of them involve financial regulation, and five of them are attributable to the Patient Protection and Affordable Care Act of 2010, an unprecedented and radical federalization of health care decision-making.[16]

With the enactment of financial reform and the massive 2,700-page PPACA, Americans are witnessing a record-breaking surge in federal intrusion into a huge and highly complex sector of the American economy. From March to September 2010 alone, federal officials published more than 4,000 pages of rules implementing the new health care law. The U.S. Departments of Health and Human Services (HHS), Labor, and Treasury, including the IRS, have the primary responsibility for making and enforcing rules that would compel individuals and businesses, states, doctors, hospitals, nursing homes, home health agencies, and insurers to follow detailed *diktats* that affect virtually every aspect of their business operations or professional lives.[17]

The level of public anxiety over official Washington's policy initiatives gives new Members of Congress an opportunity to channel the growing public dissatisfaction with current governance into a positive agenda for far-reaching reform.

Special-Interest Politics. A troubling feature of the health care rulemaking thus far is its arbitrariness. In sharp contrast to the general public, many of the leaders of large corporations and unions strongly supported the enactment of the national health law. James Forbes, an executive with Bank of America Merrill Lynch, recently declared that "[r]eform is not going to be repealed. It's not going to happen, folks. Quite hon-

[14] Buckley, *Freedom at Risk*, p. 52.

[15] Eric Lichtblau and Robert Pear, "Washington Rule Makers Out of the Shadows," *The New York Times*, December 8, 2010, at *http://www.nytimes.com/2010/12/09/us/politics/09rules.html?pagewanted=print* (February 4, 2011).

[16] Gattuso, Katz, and Keen, "Red Tape Rising."

[17] For an excellent account of the vast scope of this regulatory regime, see John S. Hoff, "Implementing Obamacare: A New Exercise in Old-Fashioned Central Planning," Heritage Foundation *Backgrounder* No. 2459, September 10, 2010, at *http://www.heritage.org/research/reports/2010/09/implementing-obamacare-a-new-exercise-in-old-fashioned-central-planning*.

estly, most of your private equity firms view this as a tremendous opportunity."[18]

But the special benefits are clearly uneven. The law progressively reduces coverage limits for health insurance and eliminates them entirely in 2014, for instance. Understandably, this change in the legal status of limited-benefit health plans undermines low-cost coverage for millions of Americans. So, in enforcing the law last year, the Secretary of HHS approved 222 applications for waivers from the law, covering an estimated 1.5 million workers, including members of 45 labor organizations, such as the powerful Service Employees International Union (SEIU).[19] As of February 2011, the total number of such waivers has exceeded 900, affecting as many as 2.4 million persons.

The new law also establishes a "medical loss ratio" (MLR) for health insurance that specifies how much insurance plans must pay out in medical benefits and how much they may retain for administrative expenses,

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efforts to combat fraud and abuse, and profits. Under the terms of the law, insurance companies will be required to spend 80 percent to 85 percent of their premium dollars on health care benefits rather than administrative and related costs. If a plan does not meet the MLR target, it must rebate the difference to enrollees in lower premiums or lump-sum payments. Federal officials expect as many as 9 million persons to be eligible for $1.4 billion in rebates in 2012.[20]

The Patient Protection and Affordable Care Act of 2010 is becoming an engine for arbitrary exercises of bureaucratic power.

Because the MLR regulations deal with complex technical issues, the law requires the National Association of Insurance Commissioners to provide detailed recommendations for the federal rule writers. During the fall of 2010, this process engaged what are called "stakeholders," which is another word for special interests such as brokers, employers, and insurers. Such a bureaucratic process always produces winners and losers. Rowen Bell, vice president of the Health Care Service Corporation, says that "I think what we have here in the rebate MLR rule is a new burden on the small business community."[21]

The law authorizes the Secretary of HHS to give states temporary relief from the MLR rule and make an "adjustment" to the federal standards if a state can prove to the Secretary's satisfaction that its imposition would "destabilize" the individual market and reduce the choice of coverage for that state's citizens. Because health insurance markets are radically different and Washington's rules will have a diverse impact, it can be expected that several states will file for special "waivers."

The new law also has a "grandfather clause" so that employees can keep their existing employer health plans, yet even the authors of the PPACA regulations concede that employers and employees will see changes in their coverage. At the same time, there are special rules for health plans under collective bargaining

[18] John Dorschner, "Experts: Reform Good for the Economy," *The Miami Herald*, January 14, 2011, at *http://www.miamiherald.com/2011/01/14/2015404/experts-reform-good-for-economy.html* (February 4, 2011).

[19] Fred Lucas, "Three SEIU Locals—Including Chicago Chapter—Waived from Obamacare Requirement," *CNSNews.com*, January 24, 2011, at *http://www.cnsnews.com/news/article/seiu-locals-including-chicago-chapter-wa* (February 4, 2011).

[20] "Medical Loss Ratio: Getting Your Money's Worth on Health Insurance," HealthCare.gov, at *http://www.healthcare.gov/news/factsheets/medical_loss_ratio.html*.

[21] "Looming: Paperwork Burden in MLR?" *Politico Pulse*, January 21, 2011, at *http://www.politico.com/politicopulse/0111/politicopulse418.html* (February 9, 2011).

agreements (union plans), which are given flexibility in making changes denied to other plans without losing their "grandfathered" status.[22] Meanwhile, in a survey of American firms by Mercer, a prominent business consulting firm, only half expected that they would be able to keep their existing coverage in 2011.[23]

The national health law is becoming an engine for arbitrary exercises of bureaucratic power. As reporters for *The New York Times* relate:

> Congress provided a road map for measures aimed broadly at getting more Americans covered by health insurance and providing more federal safeguards against risky financial practices. But the laws were so broad and complex that executive-branch regulators have wide leeway in determining what the rules should say and how they should be carried out. In all, the bills call for drafting more than 300 separate rules on a rolling schedule by about 2014, plus dozens of other studies and periodic reports. That may be only the beginning. A recent report from the Congressional Research Service said the publication of rules under the health care law could stretch for decades to come.[24]

HOW CONGRESS CAN RESTRAIN THE ADMINISTRATIVE STATE

The new Congress has the power to curtail and reverse the growth of the administrative state. To this end, there are six specific steps that Members can pursue.

Step #1: Stop expanding the administrative state.

The first thing that Congress can do is to craft legislative language clearly and concisely and stop delegating broad legislative authority to federal agencies and departments and independent agencies. Americans expect Congress to accept—and demand that it accept—direct responsibility for the laws it enacts and for the impact of those laws on the personal and economic lives of ordinary citizens.

Step #2: Restore transparent, formal rulemaking as the norm.

In 1946, Congress enacted the Administrative Procedures Act (APA) as a comprehensive effort to increase the regularity and transparency of the federal administrative process. Several provisions of that act deal with federal rulemaking, categorized by the statute as either formal or informal. That categorization results in very different procedures, which in turn have important consequences for the openness and rigor of the process of agency lawmaking.

In formal rulemaking, when Sections 556 and 557 of the APA apply, the act provides for a process that requires the gathering and orderly presentation of evidence, an oral hearing presided over by an administrative law judge with some measure of independence from the rulemaking agency, prohibition of *ex parte* communications with the presiding official, the right of contending parties to present opposing cases, a presumptive right of cross examination of the witnesses in the proceedings, and a requirement that the public record of the proceedings be the exclusive basis for the regulatory decision.[25]

Formal rulemaking, then, is conducted very much as the civil procedures of a courtroom are conducted. Not only would the administrative law judge be empowered to issue subpoenas, but counsel or representatives for parties on either side of a regulatory issue would be able to make the case in this open hearing to

[22] For a discussion of the "grandfather" rules for health insurance, see John S. Hoff, "Broken Promises: How Obamacare Undercuts Existing Health Insurance," Heritage Foundation *Backgrounder* No. 2516, February 7, 2011, at *http://www.heritage.org/research/reports/2011/02/broken-promises-how-obamacare-undercuts-existing-health-insurance.*

[23] Mercer, "Even as Reform Pushes Up Benefit Cost, Employers Will Take Steps to Hold 2011 Increase to 5.9%," September 8, 2010, at *http://www.mercer.com/press-releases/1391585* (February 4, 2011).

[24] Lichtblau and Pear, "Washington Rule Makers Out of the Shadows."

[25] Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, 4th ed. (Chicago: American Bar Association, 2006), pp. 58–59.

secure, in the language of the statute, "a full and true disclosure of the facts."

This formal style of rulemaking has fallen into disuse, though it was quite commonplace until the early

The informal process of mere "notice and comment" is a recipe for backroom deals and special-interest lobbying. Congress should require the restoration of formal rulemaking as the norm.

1970s. In 1973, the United States Supreme Court effectively held that Sections 556 and 557 of the APA apply only when Congress has prescribed in specific statutes that rules be made "on the record after opportunity for agency hearing."[26] Statutes authorizing agency rulemaking seldom use that precise language. Statutes typically require agencies to make rules after hearings or public hearings, and under the Supreme Court's earlier interpretation of the law, those statutes do not require formal rulemaking procedures.

Instead, almost all rulemaking today uses informal procedures, which simply require the agency to give notice of its intention to propose a rule, receive comments in writing from interested parties, and issue a statement of the rule's basis and purpose if one is issued. There is no requirement of oral proceedings or cross-examination of witnesses, no formal presentation of evidence, no impartial administrative law judge overseeing the proceedings, and no requirement that the agency rule be based exclusively on publicly vetted and adversarially tested evidence. This informal process of mere "notice and comment" is a recipe for backroom deals and special-interest lobbying.

In the interest of transparency and public accountability, and as a way to restore public trust in a process that is increasingly seen as arbitrary and abusive, Congress should require the restoration of formal rulemaking as the norm. This could be done either as an omnibus measure, applying the requirement to all federal departments or agencies, or as an amendment to any bill governing the activities of any agency that has federal regulatory authority. Because the Supreme Court in 1973 purported simply to be determining the will of Congress, Congress can clarify its intent and secure the objective of proving openness in the agency lawmaking process by amending both existing and future statutes to require a formal rulemaking process, referencing the language of APA section 553(c), which refers to "rules [that] are required by statute to be made on the record after [an] opportunity for an agency hearing."[27]

Step #3: Reinforce congressional control of regulation.

Under the Congressional Review Act of 1996, each federal agency is required by law to send its final rules to the Comptroller General of the United States and to the House and Senate before the federal rules take effect.[28] The law provides a delay of 60 days after the final rules are published in the *Federal Register* or submitted to Congress, whichever is later, before the rules take effect. During that period, Congress may enact a joint resolution of disapproval of the rule and thus render it null and void.

Under current law, the rules to be submitted for congressional consideration are those that are designated as "major." A rule fits this category if it has an annual effect on the economy of $100 million or more; results in a major increase in costs to consum-

[26] The Supreme Court found, for example, that Congress did not require formal hearings for rulemaking, as otherwise provided under the Administrative Procedures Act, in a case involving implementation of the provisions of the National Bank Act. *Camp v. Pitts*, 411 U.S. 138 (1973); see also *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973).

[27] Lubbers, *A Guide to Federal Agency Rulemaking*, pp. 58–59.

[28] A key sponsor of the 1996 law was Senator Don Nickles (R–OK), who saw the Congressional Review Act as a way to reclaim the eroding congressional authority over the substance of public policy.

ers, individual industries or federal, state or local agencies; or adversely affects competition, employment, investment, productivity and innovation, undermining the ability of firms to compete in domestic or foreign markets.[29]

In practice, the Congressional Review Act has been disappointing. Federal agencies have simply failed to submit the appropriate rules to Congress and the Government Accountability Office in more than 1,000 instances.

In practice, the Congressional Review Act has been disappointing. It has been rarely invoked, and a Congressional Research Service analysis of its enforcement indicates that federal agencies have simply failed to submit the appropriate rules to Congress and the Government Accountability Office in more than 1,000 instances.[30]

The Regulations from the Executive in Need of Scrutiny (REINS) Act (H.R. 3765/S. 3826), introduced by Representative Geoff Davis (R–KY) and Senator Jim DeMint (R–SC), would reverse the burden of action and require that the House and Senate each affirmatively enact a bill that would embody a *major* rule *before* it can be enforced.[31] Like all legislation, the bill would, of course, be signed or vetoed by the President. Thus, any issue of controversy over the rules would become a highly visible public policy question to be settled in open debate and in broad daylight.

The REINS Act holds great promise of reversing the accelerating trend toward congressional delegation of legislative authority and limiting the powers of an opaque administrative state. In 1983, Supreme Court Justice Stephen Breyer, then a federal appeals court judge, indicated that such a "confirmatory" statute for major federal rules would be a constitutionally appropriate response to the problem.[32]

Step #4: Strengthen congressional oversight of rulemaking.

According to the staff of Representative Davis, the federal government issued 3,482 new rules and regulations in 2009; 84 of them were major rules, as defined under current law.

The Patient Protection and Affordable Care Act has opened the floodgates of federal regulation, giving the Secretary of Health and Human Services sweeping rulemaking authority as well as broad discretion in granting exemptions or waivers to the rules. In the case of the rules governing "mini-med" plans (inexpensive health plans with limited coverage), as of December 2010, there had been 222 waivers, including the prominent year-long exemption given to the McDonald's fast food chain. Since then, as noted, the Administration has granted hundreds more.

The standards that govern these waivers seem to be almost infinitely flexible, and the exact process by which some companies are exempted from the requirements of the health law and others are not is not entirely clear. Nor is it clear either how much political or partisan influence governs the decisions of the Secretary of HHS or other federal officials in this process or what kinds of communications are exchanged among officials within or outside the Administration.

Congressional oversight into the process of rulemaking can be a major restraint on the arbitrary exercise of power by the administrative state.

[29] Curtis W. Copeland, "Congressional Review Act: Rules Not Submitted to GAO and Congress," *CRS Report for Congress*, August 2, 2010, p. 3.

[30] *Ibid.*, p. 2.

[31] Current law would be retained with regard to congressional review and oversight over minor federal rules.

[32] "The Congressional Accountability Act," *The Wall Street Journal*, January 14, 2011.

Given the enormous impact of the national health care law, these matters deserve scrutiny, and the public expects Congress to shine the light on these practices. The purpose of congressional hearings and investigations is not to embarrass federal officials, but to gather useful information to make substantive policy changes through legislation. Since the bulk of federal rules are made through the informal process of notice and comment before final publication, congressional oversight into the process of rulemaking can be a major restraint on the arbitrary exercise of power by the administrative state.

Step #5: Establish an internal mechanism for regulatory review.

There are two options to accomplish this objective. First, Congress could create a Congressional Office of Regulatory Review (CORR) modeled after the Congressional Budget Office (CBO). Like the CBO, the CORR would report on the estimated costs and impact of the federal regulatory authority embodied in bills that come before Congress. House and Senate rules could require the provision of a Regulatory Review score just like the CBO score.

Alternatively, Congress could establish a Joint Committee on Regulatory Review modeled on the Joint Committee on Taxation, whose central function would be to monitor the regulatory activities of federal agencies and departments and independent agencies: a body that would hold hearings, hear testimony, and assess the impact of federal rules on business and the economy.

Step #6: Provide citizens with a right to legal self-defense and recovery for regulatory damages.

Congress should undertake, as part of its oversight functions, a review of actions by federal agencies that have improperly damaged persons or firms subjected to faulty, abusive, or arbitrary applications of federal rules. Judge Buckley suggests two remedies.

First, any accused citizen should be presumed innocent until proven guilty before the imposition of administrative fines or penalties, and, if successful, the citizen should also be able to recover costs of presenting his case in an administrative or civil hearing.

Second, Congress should waive sovereign immunity for federal agencies in certain circumscribed areas of regulatory enforcement. This means that a business owner, for example, would be able to recover damages from abusive or incompetent agency actions.[33]

CONCLUSION

There is nothing inevitable about the growth of the administrative state unless the people's elected representatives allow it to continue. A congressional leadership committed to promoting transparency and curbing bureaucratic power can roll back the administrative state.

To do this, Congress must stop the practice of broad delegations of legislative power to executive and independent agencies. It must re-establish formal rulemaking, with its open hearings and rules of evidence, as the norm in federal regulation, especially with major or particularly sensitive rules. Congress should also exercise better control over the substance of federal rules, review the costs and impact of federal rules more effectively, and provide legal recourse for citizens damaged by regulatory abuses.

It is time for Congress to restore accountability, transparency, and the traditional rule of law under the Constitution.

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[33] Buckley, *Freedom at Risk*, pp. 56–60.