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## A REPLY: THE REGULATORY BUDGET TAKES FORM

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## INTRODUCTION

In their Article, *The Regulatory Budget Revisited*, Jeffrey Rosen and Brian Callanan write, “There is good reason to expect political actors to rely increasingly on regulation to ‘fund’ major new government initiatives.”<sup>1</sup> Regulatory analysts are witnessing a reliance on regulation to accomplish what would be nearly impossible in the taxing and spending arena in Congress. Instead of Congress expanding the Earned Income Tax Credit to address inequality and poverty, the Obama Administration has opted to push for a minimum wage increase, expand wages for government contractors, and modify overtime protections for previously exempt employees. Rather than Congress ushering through formal legislation to ease the process for joining a union, the National Labor Relations Board (NLRB) has finalized a process for expedited unionization and expanded the definition of “joint employer” for the specific aim of increasing union rates.<sup>2</sup> Instead of Congress imposing a formal price on carbon or a cap-and-trade system for greenhouse gas emissions reductions, the Environmental Protection Agency (EPA) and other agencies have regulated emissions and efficiency standards, thus bypassing a legislative route but increasing the likelihood of a court challenge curtailing this regulatory approach.

During the past few years, Congress has taken notice of these regulatory interventions, and its push for regulatory reform, namely a regulatory budget, is as much about politics as it is about reasserting its constitutional authority. As it has delegated away power during the past decades, Congress now recognizes that even with majorities in both houses, it is often powerless to check executive action, aside from a perfunctory oversight hearing or a toothless Congressional Review Act vote that the President will not sign.<sup>3</sup>

This perceived or real power vacuum has resulted in a surge of regulatory reform legislation. Increasingly, leaders in the House and Senate have moved toward using a regulatory budget as one vehicle that

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1. Jeffrey A. Rosen & Brian Callanan, *The Regulatory Budget Revisited*, 66 ADMIN. L. REV. 835, 837 (2014).

2. See *Board Issues Decision in Browning-Ferris Industries*, NAT’L LABOR RELATIONS BD. (Aug. 27, 2015), <https://www.nlr.gov/news-outreach/news-story/board-issues-decision-browning-ferris-industries>.

3. E.g., Peter Baker, *Obama Rejects Republican Bid to Overturn New Union Rules*, N.Y. TIMES (Mar. 31, 2015), [http://www.nytimes.com/2015/04/01/us/obama-rejects-republican-effort-to-tighten-union-rules.html?\\_r=0](http://www.nytimes.com/2015/04/01/us/obama-rejects-republican-effort-to-tighten-union-rules.html?_r=0).

could curb controversial regulation and, more importantly, reassert Congress's role in regulatory action.<sup>4</sup> This Article presents a response to Rosen and Callanan's article on a regulatory budget with a specific focus on the logistical, legal, and political hurdles that likely stand in the way of a successful budget. Part I outlines the legislative path that may be necessary to make a regulatory budget effective in today's administrative state and highlights the current efforts in the House and Senate to establish such a budget. Part II describes the practical, legal, and political arguments against a functioning budget and offers rebuttals. Part III describes the possible economic benefits of a regulatory budget, with perspectives from other countries that have adopted forms of regulatory budgeting.

### I. LAYING THE GROUNDWORK FOR A REGULATORY BUDGET

Congressional political leaders have argued that Congress is in the midst of a political vacuum, generally unable to affect regulatory policy. Congress can still shape spending and tax policy and, as fiscal sequestration has demonstrated, Republicans in Congress still have some clout.<sup>5</sup> Yet, despite their historic majority in the House, a ten-seat edge in the Senate,<sup>6</sup> and a 913-seat net gain for Republicans in state legislatures across the country,<sup>7</sup> oversight of new regulation has been limited mostly to hearings. With their majorities, Republicans in Congress can introduce legislation to overturn executive action, which they have done with some frequency;<sup>8</sup> Congress also routinely introduces resolutions of disapproval under the Congressional Review Act. However, despite majorities in both the House and Senate, only one resolution of disapproval has made its way to President Obama; it was promptly vetoed.<sup>9</sup> Barring some political revelation or occasional appropriations rider, Congress will have little

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4. Rosen & Callanan, *supra* note 1, at 836–38.

5. Abby D. Phillip, *Sequester Seems to Have Emboldened, Not Hurt, Some Republicans*, ABC NEWS (May 31, 2013), <http://abcnews.go.com/Politics/sequester-emboldened-republicans/story?id=19298966>.

6. See, e.g., *Party Division in the Senate, 1789–Present*, SENATE HISTORICAL OFFICE, <http://www.senate.gov/history/partydiv.htm> (last visited Mar. 2, 2016) (“114th Congress (2015–2017) Majority Party: Republican (54 seats), Minority Party: Democrat (44 seats)”).

7. See, e.g., Chris Cillizza, *Republicans Have Gained More Than 900 State Legislative Seats Since 2010*, WASH. POST (Jan. 14, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/01/14/republicans-have-gained-more-than-900-state-legislative-seats-since-2010/>.

8. Sam Batkins, *The Past, Present, and Future of Congress on Regulatory Reform*, AM. ACTION FORUM (May 14, 2015), <http://americanactionforum.org/insights/the-past-present-and-future-of-congress-on-regulatory-reform> (describing seven regulatory reform bills introduced by Republicans in Congress).

9. 161 CONG. REC. S2107 (daily ed. Apr. 13, 2015) (Memorandum of Disapproval).

success chipping away at the accumulated power it has delegated to executive agencies. It appears that nearly eight years out of the White House has ignited a new effort to reshape the constitutional and political power struggle between the Legislature and the Executive. Rather than piecemeal attacks on individual regulation or routine oversight hearings, Congress has developed a detailed path to regulatory reform, including the first notable drafts of a regulatory budget in decades. This effort not only serves to check what Republicans view as regulatory excess, but also to reassert Congress's constitutional role.

#### *A. Current Framework Legislation*

Regulatory reform legislation in the House and Senate is almost too numerous to mention. Virtually every aspect of regulation has been identified at its source; from allowing Congress a second bite at the apple after regulations have been finalized to amending the Administrative Procedure Act (APA),<sup>10</sup> there is no shortage of ideas for how to examine and reform the regulatory process. Although some of these efforts might slow down rulemakings or improve ex ante analysis, they are not necessarily parallel or complementary to laying the foundation for a regulatory budget.

A budget depends on metrics: what is going in and what is leaving. With a fiscal budget, the calculation is relatively simple: outlays and tax collections. Both are easy to measure. For a regulatory budget, measuring costs and benefits is far more complicated. Many of the cited figures for regulatory costs and benefits are merely ex ante estimates derived from agency regulation.<sup>11</sup> Could Congress conceivably adopt a budget based only on estimates from agencies? Congress could, but a far better approach would be to design a system that examines actual, ex post costs and benefits from regulation. Both of these metrics are difficult to measure, at least compared to fiscal expenditures. However, some element of retrospective review or an independent assessment of the regulatory state must be conducted before a functioning regulatory budget takes form.

#### *1. SCRUB Act*

Today, a popular refrain for Congress might be, "If at first you can't

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10. Administrative Procedure Act, 5 U.S.C. §§ 500–96 (2012).

11. See OFFICE OF INFORMATION & REGULATORY AFFAIRS (OIRA), OFFICE OF MGMT. & BUDGET (OMB), 2014 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES (2014), [https://www.whitehouse.gov/sites/default/files/omb/infereg/2014\\_cb/2014-cost-benefit-report.pdf](https://www.whitehouse.gov/sites/default/files/omb/infereg/2014_cb/2014-cost-benefit-report.pdf).

decide, delegate to an independent commission.” Delegation might not be that popular, but when large issues like solving military base closures, fundamental tax reform a decade ago, or discerning the causes of the Great Recession are at play, Congress often outsources policy recommendations to non-governmental experts.<sup>12</sup> In both the House and Senate, crafters of regulatory reform have borrowed this playbook, asking independent commissions to examine the cumulative stock of regulation and make recommendations for reform.

Among the bills that establish independent commissions to evaluate regulation include the Searching for and Cutting Regulations that are Unnecessarily Burdensome (SCRUB) Act, passed the House on January 7, 2016.<sup>13</sup> Like other related bills, a nine-member commission will be tasked with reviewing more than 175,000 pages in the Code of Federal Regulations.<sup>14</sup> That herculean job alone might disqualify the legislation as impractical in the view of some critics. However, even supporters of the SCRUB Act have never claimed that evaluating the cumulative stock of regulation could take place in a few weeks or even year. The bill recognizes this reality and allows the commission five years to review federal rules and identify regulation that is “unnecessary or obsolete . . . ineffective . . . conflicts with other Federal rules” or “whether the rule or set of rules has excessive compliance costs . . . or is otherwise excessively burdensome.”<sup>15</sup> Even if in its first five years, the commission only evaluates five of the fifty titles in the Code of Federal Regulations, that is still roughly ten percent of the regulatory state and a tremendous contribution of knowledge, considering how little the nation knows about

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12. See DEF. BASE CLOSURE & REALIGNMENT COMM’N (BRAC), <http://www.brac.gov/> (last visited Feb. 16, 2016) (“The Congress established the 2005 BRAC Commission to ensure the integrity of the base closure and realignment process. As directed by law, the Commission will provide an objective, non-partisan, and independent review and analysis of the list of military installation recommendations issued by the Department of Defense (DOD) on May 13, 2005.”); *History of the Commission*, FIN. CRISIS INQUIRY COMM’N, <http://fcic.law.stanford.edu/about/history> (last visited Feb. 16, 2016) (“The Commission was established as part of the Fraud Enforcement and Recovery Act (Public Law 111-21) passed by Congress and signed by the President in May 2009. This independent, 10-member panel was composed of private citizens with experience in areas such as housing, economics, finance, market regulation, banking and consumer protection.”). See generally PRESIDENT’S ADVISORY PANEL ON FED. TAX REFORM, <http://govinfo.library.unt.edu/taxreformpanel/> (last updated Nov. 1, 2005).

13. H.R. 1155, 114th Cong. (2015).

14. See OFFICE OF THE FED. REG., CODE OF FEDERAL REGULATIONS: TOTAL PAGES 1938–1949—TOTAL VOLUMES AND PAGES 1950–2014, <https://www.federalregister.gov/uploads/2015/05/OFR-STATISTICS-CHARTS-ALL1-1-1-2014.pdf> (last visited Feb. 16, 2016).

15. H.R. 1155 § 101(h)(2)(C)–(F).

regulation. That first step, however trivial compared to all federal regulation, will not alleviate the Republican fears of overregulation or diminish Democratic concerns about impediments to regulation, but it will provide a solid foundation of knowledge and, if successful, will likely be reauthorized after its first five-year charter.

There is little doubt that the idea and motivation behind the SCRUB Act emanated from past experience with agency-led retrospective review. What motivation do agencies have to repeal, as opposed to enact, regulations? The Obama Administration is unlikely to repeal its “Clean Power Plan”<sup>16</sup> or ban on “trans fats.”<sup>17</sup> There is doubtless precedent for such acts, but the political factors in play contribute to a world where regulators act to solve societal problems, whether real or perceived, and not to look back to repeal recent work. In government, as in markets, incentives matter and there are far more incentives favoring government action in the regulatory space than inaction or the politically embarrassing task of repealing recent rules. In fact, a review of the most recent retrospective review reports, required by Executive Order 13,610, reveals that many rules impose new costs, add new requirements, and rarely look back at existing laws to modify or streamline rules.<sup>18</sup> For example, the Patient Protection and Affordable Care Act (ACA) regulations are routinely included in reports designed to look back at old statutes, not implement recent laws.<sup>19</sup> In other words, the Obama Administration has claimed a new rule that imposes hundreds of millions of dollars in new burdens and implements the ACA is a retrospective review designed to streamline the regulatory process.

This history—or some would argue, failure of agency-led retrospective review—has led Congress to move review to outside sources. The SCRUB

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16. Carbon Pollution Emission Guidelines for Existing Stationary Sources, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

17. Final Determination Regarding Partially Hydrogenated Oils, 80 Fed. Reg. 34,650 (June 17, 2015).

18. Sam Batkins, *Administration’s July 2015 “Regulatory Review” Adds \$14.7 Billion in Costs*, AM. ACTION FORUM (Aug. 25, 2015), <http://americanactionforum.org/insights/administrations-july-2015-regulatory-review-adds-14.7-billion-in-costs> (“The recent ‘retrospective reports’ from the administration reveal that executive agencies have added more than \$14.7 billion in regulatory costs and 13.4 million paperwork hours.”).

19. Sam Batkins, *Administration’s January 2015 “Regulatory Review” Adds Nearly \$3 Billion in Costs*, AM. ACTION FORUM (Apr. 23, 2015), <http://americanactionforum.org/insights/administrations-january-2015-regulatory-review-adds-nearly-3-billion-in-cos> (“For example, the Department of Health and Human Services (HHS) included a rule in its retrospective plan that adds more than \$390 million in long-term burdens. The administration admits the rule implements part of the Affordable Care Act (ACA).”).

Act accomplishes this and goes a step further toward advancing a regulatory budget by establishing a modified “one-in, one-out” system for regulation. Much like the system in Canada and the United Kingdom today, agencies would need to repeal an old regulation for every new rule they adopt.<sup>20</sup> This could be thought of as a form of a regulatory cap, akin to a budget cap on new expenditures. However, rather than forcing agencies to formulate a list before they can start new rulemakings, the independent commission would provide a set of old rules for agencies to repeal or modify. This would form the basis of a “cut-go” pool for regulations. Agencies are free to issue new regulations, provided they continue to modify rules in their cut-go pool, “such that the annual costs of the new rule to the United States economy is offset by such repeals. . . .”<sup>21</sup>

The SCRUB Act would be a transformative piece of legislation on its own merit, but it offers two important components to any successful regulatory budget: comprehensive retrospective review and a modified regulatory budget. The knowledge gained from at least five years of retrospective review will provide the necessary ex post metrics for defensible budget figures, and the cut-go pool, if effective, can prove that a regulatory budget can function in the United States.<sup>22</sup>

## 2. *ALERT Act*

A regulatory budget cannot work in practice without the ability to keep track of federal regulations. Currently, the Obama Administration is supposed to put Congress and the public on notice about pending regulations through the publication of the biannual Unified Agenda. Yet, in today’s world, with today’s politics, the Unified Agenda provides little to no notice of new regulation. For example, in 2012, the Administration declined to publish the spring agenda and instead published one agenda for the year.<sup>23</sup> In addition, the Administration has published at least twelve economically significant rules without first issuing notice in the Unified Agenda;<sup>24</sup> many of those were interim final rules implementing the

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20. E.g., *Business Red Tape To Get One-In, One-Out System*, BBC News (Aug. 5, 2010), <http://www.bbc.com/news/business-10878262>.

21. H.R. 1155, 114th Cong. § 201(a) (2015).

22. See Regulatory Flexibility Act § 3(a), 5 U.S.C. § 610(c) (2012) (requiring periodic review of existing significant regulations).

23. See Sam Batkins, *Publication Dates of the Unified Agenda of Federal Regulation*, AM. ACTION FORUM (Nov. 27, 2013), <http://americanactionforum.org/insights/publication-dates-of-the-unified-agenda-of-federal-regulation>.

24. See Sam Batkins & Ike Brannon, *What Regulatory ‘Ossification?’*, REGULATION, Winter 2015, at 11, 12, [http://object.cato.org/sites/cato.org/files/serials/files/regulation/2015/12/regulation-v38n4-8\\_2.pdf#page=6](http://object.cato.org/sites/cato.org/files/serials/files/regulation/2015/12/regulation-v38n4-8_2.pdf#page=6).

Affordable Care Act. There is a great deal of “regulatory dark matter” that needs added transparency in order to track regulatory activity.<sup>25</sup> Without a full picture of regulatory activity, a regulatory budget cannot operate.

The All Economic Regulations Are Transparent (ALERT) Act aims to address defects in the Unified Agenda by making regulatory reporting an ongoing interactive feature that gives the public and affected entities advanced notice.<sup>26</sup> The bill modified the biannual reporting requirement to monthly reports. It also required the Administrator of the Office of Information and Regulatory Affairs (OIRA) to list: (1) the number of rules proposed or finalized by agency; (2) the number of rules repealed or significantly modified; (3) the costs of proposed or final rules; and (4) an account of rules for which there was no cost information.<sup>27</sup>

The bill goes one step further than transparency and also provides an enforcement mechanism. Too often, regulatory reform provides no penalty for agency noncompliance. The ALERT Act rectifies these defects by prohibiting a rule from taking effect unless it is “posted on the Internet . . . for not less than six months.”<sup>28</sup> There are certain exceptions, but given the length of time it takes for some major rulemakings, a six-month public notice is hardly an obstacle to new rules.

If a regulatory budget were already in place, the ALERT Act would function as the accountant, keeping track of regulator debits and credits. The current Unified Agenda is static, often outdated, and does little to account for total costs and benefits of regulation. The ALERT Act, if passed, would allow Congress and the public to see the monthly fluctuations in federal regulation, from every new rule, to every modified or repealed rulemaking.

### 3. *Regulatory Accountability Act*

The final piece of groundwork for a regulatory budget is arguably the most controversial: The Regulatory Accountability Act. Despite previous passage in the House, the bill has no Democratic cosponsors in the Senate (although independent Angus King (I-Me.) supports the bill) and just one Democratic co-sponsor in the House.<sup>29</sup> When it passed the lower chamber

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25. Clyde Wayne Crews, *Mapping Washington's Lawlessness*, COMPETITIVE ENTER. INST. (Dec. 9, 2015), <https://cei.org/content/mapping-washington%E2%80%99s-lawlessness>.

26. H.R. 1759, 114th Cong. § 651 (2015).

27. *Id.* § 651–53.

28. *Id.*

29. Compare H.R. 185—*Regulatory Accountability Act of 2015*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/185/cosponsors> (last visited Feb. 10, 2016) (reflecting one Democratic House co-sponsorship for H.R. 185), with *All Bill Information (Except Text) for S. 2006—Regulatory Accountability Act of 2015*, CONGRESS.GOV,



on January 13, 2015, it received eight Democratic votes.<sup>30</sup>

This partisan discord is understandable when one considers the breadth of the Regulatory Accountability Act. It is arguably the most significant revision to the APA in history. In its nine sections, the bill makes several major changes to the APA. It creates a new category of rule—“high impact”—defined as a measure that could impose \$1 billion or more in annual costs.<sup>31</sup> This new class of rules would require agencies to publish an advanced notice of rulemaking to solicit initial comments and hold a hearing before adoption of the rule. Among other provisions, it would require agencies to adopt rules only upon a determination of best evidence and the least cost.

Here, regulatory scholars of various ideological stripes might quibble with the language. Traditionally, regulatory policy is designed to enhance total societal net benefits, as opposed to minimizing costs. Why adopt a rule with \$10 million in costs and \$15 million in benefits when an agency could promulgate a measure with \$20 million in costs and \$100 million in benefits? Should society not value a rule with \$90 million in net benefits at the cost of \$10 million more?

However, many conservatives view the recent history of cost-benefit analysis as a benefit bonanza, where fine particulate matter generates a perpetual supply of benefits for agencies.<sup>32</sup> Forced to comply with statutes and executive orders on cost-benefit analysis, many conservatives view agencies as expert manipulators of the system, designed to extract as many benefits as possible to justify new regulation.<sup>33</sup> As C. Boyden Gray, former White House Council argues, “Particulate matter and ozone seem to offer [the Environmental Protection Agency (EPA)] an inexhaustible well of regulatory co-benefits.”<sup>34</sup> Forced with this reality, conservatives can now turn to “least cost” as opposed to “net benefits.” In their view, if agencies are going to regulate, they may as well impose as little economic damage as possible.

Finally, the Regulatory Accountability Act steps outside of congressional control over administrative agencies by changing the standard of review

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<https://www.congress.gov/bill/114th-congress/senate-bill/2006/all-info#cosponsors> (last visited Feb. 10, 2016) (reflecting no Democratic Senate co-sponsorship for S. 2006).

30. *Final Vote Results For Roll Call 28*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES (Jan. 13, 2015, 5:29 PM), <http://clerk.house.gov/evs/2015/roll028.xml> (reflecting eight House Democrats voted in favor of passage for H.R. 185).

31. H.R. 185, 114th Cong. § 2(16) (2015).

32. See Susan E. Dudley, *Perpetuating Puffery: An Analysis of the Composition of OMB's Reported Benefits of Regulation*, 47 BUS. ECON. 165, 167–68 (2012).

33. See C. Boyden Gray, *EPA's Use of Co-Benefits*, 12 ENGAGE, July 2012, at 31, 31–33.

34. *Id.* at 32.

under which parties may challenge rulemakings. Section 7 of the bill prohibits a court from deferring to agency action if the agency failed to comply with the APA and if the agency issued an interim final rule or guidance. The bill also employs an “abuse of discretion” standard, as opposed to “arbitrary and capricious,” for certain challenges under the APA.<sup>35</sup> Reforming how agencies conduct cost-benefit analysis and issue rules does little to curb regulation if courts always (or mostly) defer to agency actions.

For some, the Regulatory Accountability Act is an important precursor to a regulatory budget. Congress and courts must ensure the inputs—the benefits and costs—of a regulatory budget are accurate. Any successful budget must distinguish between “high-impact” rulemakings and all other rules. Congress must take a seat next to regulators during the process to ensure that rules impose the least cost on society. Ideally, the Regulatory Accountability Act provides the necessary oversight of agency actions to ensure the inputs to a regulatory budget are accurate and do not impose unnecessary burdens. Combined with the SCRUB Act and ALERT Act, this package of reform bills provides some foundation for a functioning regulatory budget. If all Congress does is establish a regulatory budget, with no parallel legislation, the oversight becomes quantifiable, but still unreliable.

### *B. Movement in Congress*

Arguably, Congress is more focused on a regulatory budget currently than at any time in history. Previous forays were generally focused in the Executive Branch, but now both the House and Senate have taken formal steps to explore a budget concept.

Although the Senate has never taken a vote on a regulatory budget, in the last half of 2015 it held two hearings exploring a budget and gained perspective from Canada, which has enacted a form of a regulatory budget. On June 23, 2015, the Senate Budget and Homeland Security and Government Affairs Committees (HSGAC) held a rare joint hearing to explore “the possibility of a regulatory budget.”<sup>36</sup> In addition to former

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35. H.R. 185 § 7.

36. *Accounting for the True Cost of Regulation: Exploring the Possibility of a Regulatory Budget: Joint Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs and S. Comm. on the Budget* 2 (June 23, 2015), [http://www.budget.senate.gov/repUBLICan/public/index.cfm?a=Files.Serve&File\\_id=5700108e-7dd2-4a3b-ae71-3eefd545c9ec](http://www.budget.senate.gov/repUBLICan/public/index.cfm?a=Files.Serve&File_id=5700108e-7dd2-4a3b-ae71-3eefd545c9ec) (statement of Tony Clement, President, Treasury Board of Canada) [hereinafter Clement Statement]; see also 161 Cong. Rec. D748 (daily ed. June 23, 2015) (providing that the Senate Committee on Homeland Security and Governmental Affairs and Senate Committee on the Budget “on exploring the possibility of a regulatory budget, after receiving testimony from Tony

OIRA Administrator Susan Dudley, the Committees heard testimony from Tony Clement, the President of the Canadian Treasury Board.<sup>37</sup> Mr. Clement introduced the “Red Tape Reduction Act” in Canada, which repeals a regulation for every new rule.<sup>38</sup> Thus far, it has already saved Canadians about \$32 million.<sup>39</sup> This hearing was not simply an isolated instance, but the beginning of a process to the study the implementation of a regulatory budget.

As evidence of this, the Senate Budget Committee held a second hearing on a regulatory budget on December 9, 2015,<sup>40</sup> the same day a regulatory budget was also offered as a reform option during a hearing in the House.<sup>41</sup> The most recent regulatory budget hearing also offered supportive testimony from a former OIRA Administrator, John Graham. Although Professor Graham did not advocate for an immediate regulatory budget, he did rebut certain myths about budgeting and recommended “a congressionally-designed pilot project where three regulatory agencies (e.g., EPA, DOT, and SEC) work under a regulatory budget for a 3-year to 5-year period. If the pilot is successful, the pilot could be extended to the entire federal government.”<sup>42</sup>

Two hearings might not be considered a sign that Congress is seriously considering a regulatory budget, but there are also two regulatory budget bills in the Senate, a version of a budget in the SCRUB Act and the promise by legislators to continue examining the idea in 2016.<sup>43</sup> It is entirely possible Congress could vote on a regulatory budget bill in 2016. Although it will not be signed into law this year, this Congress has established an elaborate foundation for the next Administration to consider regulatory budgeting.

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Clement, President, Treasury Board of Canada, Ottawa”).

37. *Id.*

38. Red Tape Reduction Act, S.C. 2015, c. 12 (Can).

39. *Red Tape Reduction Regulations*, CANADA GAZETTE (June 27, 2015), <http://www.gazette.gc.ca/rp-pr/p1/2015/2015-06-27/html/reg11-eng.php>.

40. *Moving to a Stronger Economy Through Regulatory Budgeting: Hearing Before the S. Comm. on the Budget*, 114th Cong. (Dec. 9, 2015).

41. *How the Administration’s Regulatory Onslaught is Affecting Workers and Job Creators: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. and the Workforce*, 114th Cong. (2015).

42. *Examining Federal Rulemaking Challenges and Areas of Improvement within the Existing Regulatory Process: Hearing Before the S. Comm. on the Budget* (Dec. 9, 2015), <http://www.hsgac.senate.gov/download/?id=11df5a77-c9ae-40f0-9d89-3fd79c60be28> (statement of John Graham, former OIRA Administrator).

43. S. 1944, 114th Cong. (2015); S. 2153, 113th Cong. (2014).

## II. IMPEDIMENTS TO A REGULATORY BUDGET

As Rosen and Callanan write, at one time there was bipartisan support for a regulatory budget.<sup>44</sup> A budget does not preclude more regulation; it simply outlines the parameters for growth. The federal budget did not prohibit stimulus spending, tax cuts, the ACA or Dodd-Frank financial reform. Yet, if a regulatory budget enjoys some degree of bipartisan support, why is it not the law?

The reasons are perhaps too numerous to mention, but a combination of legal, practical, and (foremost) political obstacles have stopped any concrete efforts to adopt a budget for regulation. How will Congress be able to enforce a regulatory budget if it cannot wholly enforce a fiscal budget? Will previous Supreme Court precedent upending a legislative veto and sequestration imperil a regulatory budget? What Democrats or moderate Republicans will support a cap, however flexible, on federal regulation?

### A. Legal Obstacles

Congress has taken bites at stringent regulatory oversight in the past only to have courts rebuff each snip, citing separation of powers concerns. At one time, Congress possessed what was known as the “legislative veto,” which allowed Congress to overturn certain executive action. In *INS v. Chadha*,<sup>45</sup> the Supreme Court found the legislative veto unconstitutional, writing, “Congress must abide by its delegation of authority to the [Executive Branch] until that delegation is legislatively altered or revoked.”<sup>46</sup> The Regulations from the Executive in Need of Scrutiny (REINS) Act is a twenty-first century version of the legislative veto, but faces its own legal questions.<sup>47</sup>

When Congress sought to limit federal spending and allowed the Comptroller General to sequester federal funds, the Supreme Court also found that action to violate constitutional separation of powers. In *Bowsher v. Synar*,<sup>48</sup> the Court wrote, “The powers vested in the Comptroller General under § 251 violate the [Constitution’s command] that the Congress play no direct role in the execution of the laws.”<sup>49</sup> Congress may establish a regulatory budget, but any functioning budget will require full support from

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44. See Rosen & Callanan, *supra* note 1, at 839 (“Building on that insight, proponents have advanced a number of arguments for regulatory budgeting since the idea first attracted bipartisan interest.”).

45. 462 U.S. 919 (1983).

46. *Id.* at 955.

47. H.R. 427, 114th Cong. (2015).

48. 478 U.S. 714 (1986).

49. *Id.* at 736.

the Executive Branch as well.

Take a page from the fiscal world. Congress also sets a fiscal budget, but it is largely an unenforceable document, non-binding. If Congress amends the Budget Act of 1974 to adopt a regulatory budget for each federal agency, what would stop a reluctant administration from violating the caps? Congress might be able to control the flow of new legislation and new regulation under regulatory budget caps, but what about previous regulation implementing old laws?

There may be two solutions to these problems. One, as embodied in Senator Marco Rubio's (R-Fla.) regulatory budget proposal, vests much of the enforcement power in the Executive Branch, alleviating some of the separation of powers issues.<sup>50</sup> Second, a flexible regulatory budget could address past rules by allowing agencies credit to modify and repeal past rules. For example, if an agency is granted a prospective regulatory budget of \$5 billion in annual costs for the next fiscal year, but its agenda calls for \$5.5 billion in costs, it can meet its goal through rescission of a past rule that costs \$500 million. Congress merely sets a ceiling for regulatory activity, allowing the agency broad discretion in how to achieve the goal.

### *B. Practical Considerations*

There are numerous versions of a regulatory budget. Which one is the most politically palatable? How would it be enforced? Is it based on cumulative regulatory burdens, prospective burdens, or a hybrid thereof? How would agencies simultaneously repeal an old rule and implement a new rule? Who manages the budget?

There are countless questions involved in the logistics of a regulatory budget and even supporters have different forms of what constitutes a working budget. Perhaps most important, as discussed above, is how Congress would enforce the budget. Far too often, regulatory reform contains no enforcement mechanisms. When an agency violates the Paperwork Reduction Act, the Unfunded Mandates Reform Act, or executive orders on reform, private parties have no basis to challenge agency action.<sup>51</sup> Any regulatory budget must have an effective enforcement mechanism, either through judicial review or the rescission of agency funds for noncompliance. For example, Senator Rubio's legislation

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50. S. 2153, 113th Cong. (2014).

51. See 2 U.S.C. § 1571 (2012); 44 U.S.C. § 3507(d)(6) (2012); Exec. Order No. 13,563, §6(d), 3 C.F.R. 215, 217 (2012), ("This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.").

contains strong judicial review language “Any party may bring an action in a district court of the United States to declare that a covered Federal rule has no force or effect because the covered Federal rule was promulgated in violation of this section.”<sup>52</sup> Similar language could be included to give teeth to a budget.

Another question is the operation of a regulatory budget. Although the Organisation for Economic Co-operation and Development recommends agencies improve the quality and stock of existing regulation, the Nation needs to examine tens of thousands of pages of past rules, analyze their effectiveness, and make recommendations for reform.<sup>53</sup> Some cost-benefit analyses can take a team of economists and data analysts more than a year to complete. The SCRUB Act would take a gradual approach to this research task, allowing five years to sort through redundant or obsolete regulations. Thoroughly examining the entire regulatory slate may be impractical, leaving the best option as a prospective budget that provides credits to agencies.

There are at least two options under the prospective approach as well. One would employ the United Kingdom’s “one-in, one-out” approach, permitting agencies to adopt a new regulation, so long as they repeal a past rule of equal impact, whether equal costs or equal net benefits.<sup>54</sup> A second option is to treat a regulatory budget almost exactly like a fiscal budget. For example, a federal agency would have \$5 billion in regulatory costs allocated for the next fiscal year. This does nothing to eliminate regulation, but in theory it could give Congress control over regulatory output, a power it now desperately wants. This might seem arbitrary, but so, to some extent, is fiscal budgeting. Congress and the President must make policy and political priorities based on a finite supply of resources, and many argue that for too long regulatory costs have had no limits.

### *C. Political Opponents*

In an environment where virtually every significant piece of legislation requires sixty votes in the Senate, enacting a hard cap on federal regulation might appear impossible. Few Democrats would rush to support such legislation. Senator Mark Warner (D-Va.) once advocated for a “one-in, one-out” program, but that was more than five years ago and there is no

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52. S. 2153, 114th Cong. § 619(c)(2) (2014).

53. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD GUIDING PRINCIPLES FOR REGULATORY QUALITY AND PERFORMANCE 1 (2005).

54. Mark R. Warner, *To Revive the Economy, Pull Back the Red Tape*, WASH. POST (Dec. 13, 2010), <http://wapo.st/227XCax>.

formal legislation memorializing this concept.<sup>55</sup> Senator Rubio's bill has twelve co-sponsors (but no Democrats),<sup>56</sup> and Dan Sullivan's (R-Alaska) bill also lacks bipartisan support.<sup>57</sup>

There must be a triggering event or central argument that motivates moderate Republicans or Democrats to support even a flexible cap on regulation. Democrats have supported regulatory reform legislation in the past, but nothing of this scope. Even so, if the reforms of the past were effective checks on executive action, why is Congress proposing a myriad of new bills to reform regulation today? Any successful regulatory budget push must explain how and why Democrats and moderates would support a budget. Either proponents coax at least some bipartisan support or find ways to abolish the filibuster and pass the budget with just fifty-one votes. Today, both paths to regulatory budget appear difficult to cross, though not out of the question.

#### *D. Arguments Against Budgeting*

During the December 9, 2015 Senate Budget Committee hearing on regulatory budgeting, Professor Robert Verchick testified in opposition to a regulatory budget.<sup>58</sup> The organization he leads, the Center for Progressive Reform, has made the case against a regulatory budget in the past, arguing it is "designed to make regulation harder to promulgate."<sup>59</sup> Professor Verchick's testimony serves as a useful roadmap to explore the policy and political arguments against a budget.

##### *1. Arbitrary*

As Professor Verchick wrote in his testimony, "An arbitrary cap on future rulemaking would deprive us of many necessary protections and of

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55. *Id.*

56. *S. 2153—National Regulatory Budget Act of 2014*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/senate-bill/2153/cosponsors> (last visited Feb. 16, 2016); *All Bill Information (Except Text) for S. 1944—RED Tape Act of 2015*, Congress.gov, <https://www.congress.gov/bill/114th-congress/senate-bill/1944/all-info#cosponsors> (last visited Feb. 16, 2016).

57. S. 1944, 114th Cong. § 619(c)(2) (2015).

58. *Moving to a Stronger Economy Through Regulatory Budgeting: Hearing Before the S. Comm. on the Budget* 1–2 (Dec. 9, 2015), [http://www.budget.senate.gov/republican/public/index.cfm?a=Files.Serve&File\\_id=AC7BA5AB-42A2-4C8B-BD60-F86AF59D67D4](http://www.budget.senate.gov/republican/public/index.cfm?a=Files.Serve&File_id=AC7BA5AB-42A2-4C8B-BD60-F86AF59D67D4) (statement of Robert R.M. Verchick, Gauthier-St. Martin Chair in Environmental Law at Loyola University New Orleans).

59. SIDNEY A. SHAPIRO ET AL., CTR. FOR PROGRESSIVE REFORM, REGULATORY "PAY GO": RATIONING THE PUBLIC 2 (2012).

even more net benefits.”<sup>60</sup> Today, agencies work within time and budget constraints to craft regulations that implement federal law. The only real limits are what Congress delegated and what courts will permit. Congress would be setting an arbitrary cap on agency activity, preventing agencies from carrying out the will of Congress.

### 2. *Limits Health and Safety Protections*

For public interest groups determined to enact new protections on health and safety, limit greenhouse gas emissions, and regulate risky behavior on Wall Street, enacting a regulatory budget would be an anathema. Regulators are already limited by funding constraints, and placing a firm cap on new rules could endanger these new protections. A hard cap could imperil the Federal Aviation Administration’s regulation of drones or other aspects of aviation safety in a timely manner if it has to repeal an old rule first. A budget could force EPA to choose between regulating greenhouse gases or ozone and fine particulate matter.

### 3. *Quantity Over Quality*

As Professor Verchick wrote, “It is a mistake to focus on the quantity of regulations rather than the quality. By itself, quantity (as expressed in terms of compliance costs) says nothing useful about a rule at all.”<sup>61</sup> It makes little sense to repeal a past rule if that regulation imposed tremendous net benefits for society while imposing minimal costs. If anything, successful past regulation should be studied and emulated as model for future regulation. The federal government, Verchick argues, should value a regulation for its contribution to health and safety, not diminish it for its burden on a regulatory budget. A new rule with low net benefits should not replace an old rule with high net benefits.<sup>62</sup>

### 4. *Government Gridlock*

The federal government is hardly the paragon of a well-functioning democracy. Passing a budget, funding the government, and averting the debt ceiling are viewed as accomplishments in governance. Adding another layer of complexity to governing, through a regulatory budget, will only serve to add a flashpoint to the delicate compromises that must be cemented in Congress during the end of every fiscal year. As Professor

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60. Verchick, *supra* note 58, at 1.

61. *Id.* at 2.

62. *Id.* at 1 & n.1.



Verchick writes, “A regulatory budget program could create a series of novel governance problems, including threats of government shut-down over a failure to raise the ‘reg ceiling.’”<sup>63</sup> In other words, Congress will not be able to handle the management of a regulatory budget when it can hardly negotiate a fiscal budget.

### 5. *Redundant*

Finally, regulatory budgets are premised on the fact that agencies rarely lookback and examine past rules and that there are plenty of excessively burdensome regulations that agencies never notice. Verchick argues the Regulatory Flexibility Act (RFA) and Executive Order 13,563 already mandate that agencies review past rules.<sup>64</sup> A regulatory budget would merely add another layer of duplication to these efforts, slowing down the regulatory process and impeding the adoption of health and safety standards. A regulatory budget would not lead to better regulation; it would stop better regulation.

### E. *Rebuttals*

Many of the arguments against a regulatory budget are based on the unknown. The nation has never taken this step for federal rulemaking, and if a regulatory budget proves impractical, there will likely be health and safety consequences. Professor John Graham proposed a solution to this by recommending a pilot program for a regulatory budget in certain agencies to determine feasibility. Another option would be to adopt a regulatory budget for paperwork requirements alone.<sup>65</sup> This would not affect the underlying statutes, only how the federal government collects information and imposes recordkeeping requirements. Yet another idea would be to acknowledge that there are certain political areas that a regulatory budget should omit at the outset. Scholars at the Progressive Policy Institute have suggested policymakers omit certain regulations from regulatory reform initiatives.<sup>66</sup> Finally, the “unknown” is not quite as pronounced as regulatory budget opponents would have the public believe. As will be discussed in the following section, there is evidence from Canada and the United Kingdom that the adoption of a regulatory budget has not eroded

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63. *Id.* at 2.

64. *Id.* at 5–7.

65. Sam Batkins, *Can a Regulatory Budget Trim Red Tape?*, PENN PROGRAM ON REG. REG BLOG (Aug. 28, 2013), <http://www.regblog.org/2013/08/28/28-batkins-regulatory-budget/>.

66. MICHAEL MANDEL & DIANA G. CAREW, PROGRESSIVE POL’Y INST., REGULATORY IMPROVEMENT COMMISSION 1, 12–13 (2013).

health or environmental standards.

In response to claims that a regulatory budget would impose an arbitrary cap on public health, that claim could be leveled against a fiscal budget as well. Congress could, if politics will allow, provide free college, universal health care, and a basic income for all Americans. The “arbitrary” budget they approved did not provide sufficient funds to drive up health insurance rates to 100 percent or greatly reduce the poverty level.<sup>67</sup> With regulatory policy, as with fiscal policy, these decisions are political, based on public opinion and public resources. It should surprise no one to learn regulatory decisions are political now, even without a regulatory budget.

When the White House publicly rejected new ozone standards one year before the presidential election, the decision was a de facto regulatory budget for EPA.<sup>68</sup> When the White House delayed regulations during 2012, there was no firm regulatory budget in place, but there were political motivations controlling regulatory output.<sup>69</sup> It makes sense to bring these politically motivated decisions on the size of the regulatory state into the public, allowing both Congress and the President to have some oversight function. Better to move to a de jure regulatory budget than operate a de facto budget behind closed doors.

As for claims that a budget promotes the quantity of regulation over quality, a functioning budget with a strong retrospective review component should value quality and use the success or failure of past regulation to inform future decisions. No one is suggesting that the nation repeal a successful past rule that continues to provide health and safety protections with a new rule that offers fewer protections. Ozone and particulate matter regulations will not be repealed to implement new methane or carbon dioxide regulations. A flexible budget that allows an agency to “spend” \$5 billion during the next fiscal year permits the agency to decide the appropriate mix of new rules and does nothing to alter past successful measures. Comprehensive retrospective review should give agencies the tools to highlight and learn from past high quality rules that will inform new policy.

The notion that a regulatory budget will cause government gridlock suggests, at its extreme, we should abandon all experiments at self-

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67. See generally Bipartisan Budget Act of 2015, Pub L. No. 114-74, 129 Stat. 584 (2015).

68. Letter from Cass R. Sunstein, former OIRA Administrator, to Lisa P. Jackson, former EPA Administrator (Sept. 2, 2011), [https://www.whitehouse.gov/sites/default/files/ozone\\_national\\_ambient\\_air\\_quality\\_standards\\_letter.pdf](https://www.whitehouse.gov/sites/default/files/ozone_national_ambient_air_quality_standards_letter.pdf).

69. Juliet Eilperin, *White House Delayed Enacting Rules Ahead of 2012 Election to Avoid Controversy*, WASH. POST (Dec. 14, 2013), [https://www.washingtonpost.com/politics/white-house-delayed-enacting-rules-ahead-of-2012-election-to-avoid-controversy/2013/12/14/7885a494-561a-11e3-ba82-16ed03681809\\_story.html](https://www.washingtonpost.com/politics/white-house-delayed-enacting-rules-ahead-of-2012-election-to-avoid-controversy/2013/12/14/7885a494-561a-11e3-ba82-16ed03681809_story.html).

governance. There is a general agreement Congress cannot function smoothly and discord is at record highs, while approval ratings are at record lows, but assuming Congress and any administration cannot handle regulatory oversight is defeatist. Other advanced democracies have instituted regulatory budgets without devolving into anarchy. Congress has its warts, but so does the history of executive-legislative branch compromise. Despite the flaws with Congress and compromise today, the argument the government is incapable of handling regulatory oversight is belied by the nation's history.<sup>70</sup>

Finally, there is little to no evidence that agency-guided retrospective review has produced meaningful results. Omitting the strong argument of agency incentives to repeal their own rules when they could be issuing new ones, Professor Verchick cites the RFA as evidence of agency-led review. He declined to list the number of retrospective reviews currently in place because of the RFA: two. Based on a search of the most recent Unified Agenda, there are two rulemakings conducting reviews under the RFA.<sup>71</sup> For comparison, eighty-one major rules were issued in 2014.<sup>72</sup>

There is also Executive Order 13,563 requesting agencies to “modify, streamline, expand, or repeal” burdensome regulations.<sup>73</sup> However, as discussed above, recent reports have contained scores of regulations that add new burdens, impose new paperwork requirements, and implement new rules.<sup>74</sup> There are some agency-led retrospective efforts, but they are dwarfed by the efforts to impose new rules. This reality has driven many in Congress to push for either an independent agency or a legislative approach to handle regulatory accumulation. A regulatory budget alone will not address all past regulation, but it will allow agencies to focus on future rules and not ones implemented decades ago.

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70. Sam Batkins, *Why Critics of a Regulatory Budget Have it Wrong*, AM. ACTION FORUM (Jun. 25, 2015), <http://americanactionforum.org/insights/why-critics-of-a-regulatory-budget-have-it-wrong> (“There are so many different forms of a regulatory budget and it’s foolish to assume all are unworkable when we have clear evidence that budgeting works in North America and Europe. Every argument against a regulatory budget could be leveled at fiscal budgeting.”).

71. Semiannual Regulatory Agenda, 80 Fed. Reg. 78,062, 78,062 (Dec. 15, 2015) (to be codified at 16 C.F.R. ch. 2); Fall 2015 Regulatory Agenda, 80 Fed. Reg. 78,024, 78,027 (Dec. 15, 2015) (to be codified at 40 C.F.R. ch. 1).

72. *Congressional Review Act*, GOV’T ACCOUNTABILITY OFFICE, <http://www.gao.gov/legal/congressional-review-act/about> (last visited Mar. 2, 2016) (select “Major” for “Rule Type.”; select “All” for “Priority.”; enter “01/01/2014” and “12/31/2014” for “Date Published in Federal Register.”; then click the “Search” button).

73. Exec. Order No. 13,563. § 6, 3 C.F.R. § 215, 217 (2012).

74. See generally Batkins, *supra* note 8.

### III. BENEFITS OF A REGULATORY BUDGET

The main benefit of a regulatory budget is probably the least obvious: knowledge. There is a great deal the nation does not know about federal regulation and its impact on employment, wages, and the nation's competitiveness. There are metrics that attempt to estimate the costs and benefits of federal regulation, but many are based on ex ante estimates, surveys, or the number of pages in the Code of Federal Regulation. Implementing a regulatory budget would at least give Congress and the Executive the knowledge of the debits and credits of the regulatory world. A robust retrospective review component could also give policymakers the knowledge of how past regulatory programs performed and what can be amended to produce good policy in the future. For perspective on how little the nation knows about regulation, Resources for the Future just spent three years conducting retrospective reviews of nine regulatory programs.<sup>75</sup> It is one of the largest retrospective analyses in recent memory. A functioning regulatory budget should build off of this work and give policymakers the tools to decide which policies are efficient and which need to be amended.

#### *A. Economic and Political Advantages*

There is general agreement that regulation has an impact on economic performance. Depending on one's perspective, that impact is positive, negative, or statistically insignificant. As with any public policy debate, there are studies on both sides that support or oppose a position. Indeed, there are studies showing that regulation can increase employment in certain industries, decrease employment, or lead to statistically insignificant results.<sup>76</sup> The macroeconomic effect of regulation is more difficult to discern. For example, even a \$10 billion regulation will likely have insignificant effects on nationwide employment and output.

Recent work, however, by Professors John Dawson and John Seater suggests the aggregate impact of regulation over time is profound. In their analysis of regulation from 1949 to 2005, they find regulation has reduced annual output by roughly 28%.<sup>77</sup> To put that in context, they write, "In 2011, nominal GDP was \$15.1 trillion. Had regulation remained at its 1949 level, current GDP would have been about \$53.9 trillion, an increase

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75. See RICHARD D. MORGENSTERN, RES. FOR THE FUTURE, THE RFF REGULATORY PERFORMANCE INITIATIVE 14 (2015).

76. See generally DOES REGULATION KILL JOBS? (Cary Coglianese et. al. eds., 2013).

77. John W. Dawson & John J. Seater, *Federal Regulation and Aggregate Economic Growth*, 18 J. ECON. GROWTH 137, 138 (2013).

of \$38.8 trillion.”<sup>78</sup> Few would argue that the 1949 level of regulation is appropriate today, and indeed, the authors share that sentiment. They note, “Consequently, we emphasize that our results offer no conclusion on whether regulation is a net social benefit.”<sup>79</sup>

Someone must bear the costs of regulation. Generally, everyone enjoys the benefits of federal rules, but someone must pay: either owners of a firm, employees of the firm, or consumers in the form of higher prices. Sometimes, all parties bear the costs of increased regulation. In a seminal study, Professor Michael Greenstone examined how employment in “pollution intensive industries” in non-attainment ozone counties, those with stringent EPA controls, differed from attainment counties.<sup>80</sup> The results were dramatic: non-attainment counties lost 590,000 jobs, \$37 billion in capital, and \$75 billion in output.<sup>81</sup>

However, as Richard Morgenstern’s review of this study reveals, the jobs total may be shocking, but the study’s results did not preclude the possibility that these jobs could have simply been transferred from non-attainment counties to attainment counties.<sup>82</sup> Based on Morgenstern’s review, he finds that “there is only limited evidence that environmental regulation leads to significant job loss.”<sup>83</sup> That might be the general consensus on the economic impact of regulation. There is some evidence regulation leads to industry specific job loss, but in the aggregate, its impacts are mixed.

Despite these mixed results, there is evidence that controlling regulatory costs can lead to economic advantages. A 2005 World Bank study found that as a country’s index of regulation increases by one standard deviation (roughly thirty-four percent), its annual GDP per capita declines by 0.3 percent.<sup>84</sup> This percent doubtless translates into employment loss and diminished competitiveness abroad. A regulatory budget designed to track regulatory costs could at least give policymakers and broader picture for how regulation is affecting economic growth.

For Congress, there are obvious political advantages to adopting a regulatory budget, regardless of party affiliation. The first is additional

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78. *Id.* at 160.

79. *Id.* at 161.

80. *See generally* Michael Greenstone, *The Impacts of Environmental Regulations on Industrial Activity: Evidence from the 1970 and 1977 Clean Air Act Amendments and the Census of Manufactures*, 110 J. POL. ECON. 1175, 1178 (2002).

81. *Id.* at 1178.

82. MORGENSTERN, *supra* note 75, at 6.

83. Richard D. Morgenstern, *Analyzing the Employment Impacts of Regulation*, in DOES REGULATION KILL JOBS? 33, 41 (Cary Coglianese et. al. ed., 2013).

84. Norman V. Loayza et. al., *The Impact of Regulation on Growth and Informality: Cross-Country Evidence* 8 (World Bank, Working Paper No. WPS3623, 2005).

control over and oversight of the Executive Branch. Today, oversight is limited to hearings and the occasional appropriations rider. For progressives shy of a regulatory budget, it would also give Democrats in Congress enhanced power to analyze and check executive action.

Now, when Congress passes legislation, legislators can take credit for addressing a particular problem. If later implementation through regulation fails, Congress can excoriate the administration and regulators for failing to carry out the intent of Congress. Legislators can win twice: once at the outset of passing popular legislation and again for claiming to root out bad policy. A regulatory budget gives Congress yet another bite at the apple, albeit with more responsibility. A budget would allow Congress and the administration to control output and take the credit, or the blame, for regulatory budget decisions.

### *B. International Experiences*

Perhaps the strongest argument for a form of a regulatory budget is that it is working in other countries: Canada and the United Kingdom. Those nations have not descended into chaos; health and safety has not plummeted since adoption of a regulatory budget, and these nations have reported large economic savings as a result of a regulatory budget.

Take the economic records of both nations. Canada's unemployment rate hovered around 6.8 percent in 2015<sup>85</sup> and the United Kingdom's was approximately 5.6 percent.<sup>86</sup> In terms of the environment and workplace safety, both nations' records are comparable to or better than the United States. Particulate matter pollution in the United Kingdom has actually decreased since its adoption of a regulatory budget in 2010.<sup>87</sup> Even greenhouse gases in the United Kingdom have steadily declined since then. Although a regulatory budget is not the reason for these declines, it has not led to a "parade of horrors" since its adoption.<sup>88</sup> Those who decry the unknowns of a regulatory budget must first attempt to explain away its success abroad. A regulatory budget is hardly an unknown risky policy solution; it works in industrialized countries.

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85. *Labour Force Survey, May 2015*, STATISTICS CANADA (June 5, 2015, 8:30 AM), <http://www.statcan.gc.ca/daily-quotidien/150605/dq150605a-eng.htm>.

86. LABOUR MKT. STATISTICS, AUGUST 2015, OFFICE FOR NAT'L STATISTICS 1 (2015), [http://www.ons.gov.uk/ons/dcp171778\\_412021.pdf](http://www.ons.gov.uk/ons/dcp171778_412021.pdf).

87. DEP'T FOR ENV'T, FOOD, & RURAL AFFAIRS, STATISTICAL RELEASE: 23 APRIL 2015 1-2 (2015), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/423353/National\\_Statistic\\_on\\_Air\\_Quality\\_2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/423353/National_Statistic_on_Air_Quality_2014.pdf).

88. *See generally* DEP'T OF ENERGY & CLIMATE CHANGE, 2013 U.K. GREENHOUSE GAS EMISSIONS, FINAL FIGURES (2015), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/407432/20150203\\_2013\\_Final\\_Emissions\\_statistics.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/407432/20150203_2013_Final_Emissions_statistics.pdf).

These nations have also saved consumers and businesses billions of dollars and countless fewer hours of paperwork. Canadian Parliamentary member Tony Clement reports a regulatory budget has already saved his nation \$32 million (CAD) and almost 750,000 paperwork burden hours.<sup>89</sup> The United Kingdom, which had moved from an already ambitious “one-in, one-out” to “one-in, two-out” approach to new regulation, reports a net cut in regulatory costs of nearly £430 million.<sup>90</sup> For comparison, based on regulatory cuts to gross domestic product, if the United Kingdom results were replicated in the United States, it could save the nation \$4.3 billion.<sup>91</sup> That might seem like a trivial figure in the context of the U.S. economy, but consider that OIRA reported in fiscal year 2014 that executive agencies only imposed \$3 billion to \$4.4 billion in total costs.<sup>92</sup>

These results are hardly provocative, but they do provide some precedent. Policymakers in the United States know a regulatory budget can work. They know it has not caused significant health and safety concerns and they know a regulatory budget can deliver economic benefits in the form of reduced regulatory costs. Enacting a regulatory budget would not put the nation into uncharted waters. On the contrary, it would show that the United States is ready to follow the lead of other industrialized countries that have quantified and updated their regulatory management.

#### CONCLUSION

If 2015 was the year Congress laid the foundation for a regulatory budget, 2016 might be the year Congress builds on that foundation and begins to move legislation through the committee process and to a formal

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89. Clement Statement, *supra* note 36, at 2.

90. DEP'T FOR BUS. INNOVATION & SKILLS, BIS NINTH STATEMENT OF NEW REGULATION: REGULATIONS COVERING JANUARY–JUNE 2015 (2015) (UK), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/393056/bis-15-19-bis-ninth-statement-of-new-regulation.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/393056/bis-15-19-bis-ninth-statement-of-new-regulation.pdf).

91. See *Country Comparison: GDP (Purchasing Power Parity)*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html> (last visited Mar. 2, 2016) (noting that the U.S. Gross Domestic Product (GDP) is approximately 6.75 times that of the United Kingdom); see also *Bloomberg Business GBPUSD Spot Exchange Rate*, BLOOMBERG BUS., <http://www.bloomberg.com/quote/GBPUSD:CUR> (last visited on Jan. 30, 2016) (1 British Pound equals roughly \$1.42 USD; combine that rate with the GDP ratio mentioned above—1:6.75—and the comparative ratio between the United Kingdom and United States is roughly 10 to 1).

92. OMB, 2015 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 22 (2015), [https://www.whitehouse.gov/sites/default/files/omb/inforeg/2015\\_cb/draft\\_2015\\_cost\\_benefit\\_report.pdf](https://www.whitehouse.gov/sites/default/files/omb/inforeg/2015_cb/draft_2015_cost_benefit_report.pdf).

vote. After multiple hearings, several reform bills, and lessons from abroad, there is plenty of information for Congress to consider. This calculation will be political, but it also offers legislators the opportunity to wrest additional power from the President and enhance oversight of executive and independent agencies. Yet, to transform a budget into a law will require a willing Executive Branch. Otherwise, this effort will have succeeded in advancing regulatory reform, but failed to institute effective checks on federal regulation. It is clear the current Congress wants both.