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White House Review of Independent Agency Rulemaking: An Essential Element of Badly Needed Regulatory Reform

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Abstract

Heavy-handed federal regulation acts like an excessive tax on the American economy, stifling economic growth and innovation. In order to enhance its effectiveness in paring back overregulation, the Office of Information and Regulatory Affairs (OIRA) should extend its cost-benefit oversight to rules proposed by "independent" federal agencies, which are responsible for a large proportion of onerous regulations. President Trump, therefore, should promulgate an executive order directing independent agencies to submit their major rules for OIRA analysis, consistent with his constitutional authority to take care that the laws be faithfully executed. That Order should also require independent agencies to undertake additional regulatory reform initiatives that the President recently has placed on executive branch agencies.

Introduction

Heavy-handed federal regulation acts like an excessive tax on the American economy, stifling economic growth and innovation. With the cooperation of Congress, President Donald Trump commendably has taken significant steps (including regulatory reform executive orders and the enactment of bills that roll back specific rules) to reduce the enormous burden imposed by federal regulation on the private sector. A key player in current White House regulatory reform efforts is the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA), which for over 35 years has reviewed executive branch agency cost-benefit analyses of proposed "major rules."[1]

Key Points

- President Trump's recent initiatives to rein in the regulatory state already are showing promise, but more work needs to be done.
- Greater presidential oversight of intrusive over-regulation by independent agencies could substantially reduce excessive regulatory costs imposed by those entities on private businesses and individuals.
- In order to further extend the benefits of regulatory reform, the President should issue an executive order requiring independent federal regulatory agencies to submit their regulatory proposals to OIRA for cost-benefit review.
- Consistent with his duty to ensure the faithful execution of the laws, the President should also extend all of the recent deregulatory initiatives required of purely executive branch agencies to independent agencies.
- These actions would help ensure that agency "independence" does not get in the way of the reforms that are needed to enhance economic growth and benefit the American public at large.

This paper, in its entirety, can be found at **http://report.heritage.org/lm223**

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In order to enhance its effectiveness in paring back overregulation, OIRA should also extend its cost-benefit oversight to rules proposed by "independent" federal agencies, which are responsible for a large proportion of onerous regulations. The President therefore should promulgate an executive order directing independent agencies to submit their major rules for OIRA analysis, consistent with his constitutional authority to take care that the laws be faithfully executed. That Order should also require independent agencies to undertake additional regulatory reform initiatives that the President recently has placed on executive branch agencies.

I. Background: The Need for Substantial Deregulation

U.S. federal regulation imposes enormous costs on businesses and individuals—roughly $2 trillion per year.[2] In October 2017 testimony before Congress, Heritage Foundation Scholar Diane Katz explained that "[r]egulation acts as a stealth tax on the American people and the U.S. economy, and exacts an incalculable toll on individual liberty."[3] Moreover, federal regulatory burdens grew substantially during the Obama Administration, which during its entire eight years "imposed more than 23,000 regulations, including 693 major rules, of which 258 imposed a cumulative total of $122 billion in new annual costs on the private sector. That was nearly double the $68 billion in [new] private sector costs imposed under the Administration of President George W. Bush."[4] This understates, however, the full extent of regulatory excess under the Obama Administration:

> As large as that cumulative cost is, it does not account for the total costs of new rules. The $122 billion figure includes only major regulations, not the thousands of other rules issued each year. It also does not capture significant but intangible costs such as lost innovation or violations of individual liberty. Exacerbating matters, independent agencies are not required to conduct cost-benefit analyses for new major rules although some of these agencies generate a large number of regulations.[5]

Reversing the trend toward overregulation would bestow substantial benefits on the American economy. An October 2017 report by the President's Council of Economic Advisors found that excessive regulation has cost the U.S. an average of 0.8 percent of gross domestic product growth per year since 1980.[6] Fortunately, according to the Council, rolling back unnecessary regulatory burdens would benefit American businesses and consumers alike:

> Past instances of deregulation have shown substantial gains to consumers and businesses in the economy. Deregulation can unleash the greater potential of the U.S. economy, spurring the innovation and economic growth necessary to keep the United States prosperous, and to empower its citizens with greater opportunities.[7]

II. Presidential Oversight of Executive Agency Rulemaking

Presidential candidate Ronald Reagan vowed to roll back big government—and, in particular, excessive regulatory burdens—during his 1980 campaign.[8] Consistent with this commitment, in February 1981, President Reagan promulgated Executive Order 12291.[9] That Order, which was administered by OIRA: (1) required executive branch agencies to subject proposed new rules to cost-benefit analysis; (2) forbade the issuance of non-cost-beneficial rules; and (3) required executive branch agencies to prepare a "regulatory impact analysis" for every "major rule,"[10] which would be reviewed by the Director of OMB. Unlike prior executive orders dealing with regulatory review, this one had teeth, in that it authorized OMB to block the publication of proposed and final rules that flunked OMB review.[11]

Subsequent Presidents issued executive orders that maintained the basic framework of OIRA regulatory review established by President Reagan, including cost-benefit analysis and OMB review of executive branch agency rules. In 1993, President Clinton issued Executive Order 12866,[12] which made a number of minor tweaks to regulatory review.[13] Subsequently, in 2011, President Obama issued Executive Order 13563, which allowed agencies to consider qualitative benefits and costs "that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts."[14] The inherent subjectivity of these qualitative factors made it easier to justify regulations as passing cost-benefit muster, perhaps helping to explain the

Obama Administration's dismal record in promulgating rules that dramatically raised regulatory costs overall.[15]

III. The Trump Administration: Is Significant Regulatory Relief at Hand?

The outlook for regulatory relief, however, improved significantly when the Trump Administration took office in 2017. As explained in a November 2017 Heritage Foundation Report, "Red Tape Receding," in its first six months the "Trump Administration...launched a multifaceted reform agenda."[16]

In particular, President Trump:

1. Required that executive branch department heads freeze rulemaking until a designated senior official reviewed and approved the regulations, as well as withdraw regulations sent to the *Federal Register* but not yet published;

2. Signed congressional resolutions rescinding excessively burdensome regulations pursuant to the Congressional Review Act;[17]

3. Issued an executive order directing executive departments and agencies to identify for repeal at least two existing regulations for every new regulation adopted, as well as prohibiting any net increase in cost in regulations finalized in 2017;[18]

4. Issued an executive order directing the head of each executive branch agency to establish a Regulatory Reform Task Force to evaluate regulations and recommend those appropriate for repeal, replacement, or modification;[19]

5. Issued various other significant executive orders and memoranda directed at regulatory reform in specific sectors and requiring the OMB Director to propose a government reorganization to eliminate unnecessary agencies;[20]

6. Released a Unified Agenda of Regulatory and Deregulatory actions for executive branch agencies that set forth plans to curb rulemaking;[21]

7. Announced on June 1, 2017, plans to withdraw from the Paris Climate Accord, which threatened to impose prohibitively costly regulatory restraints on U.S. industry;[22] and

8. Initiated a variety of other rule delays and reconsiderations affecting environmental, communications, nutrition labeling, and various other areas subject to federal regulation.[23]

All told, these and related regulatory relief initiatives by the Trump Administration are bearing some initial fruit and hold promise for future relief—but much more needs to be done. Accordingly, Heritage Foundation Scholar Diane Katz recommends seven specific recommendations to boost regulatory reform: (1) require congressional approval of new major regulations issued by agencies; (2) create a congressional regulatory analysis capability; (3) automatically sunset regulations; (4) codify regulatory impact analysis requirements; (5) reform "sue and settle" practices that result in greater regulation; (6) increase professional staff levels within OIRA; and (7) subject independent agencies to executive branch regulatory review.[24]

As Katz explains, the need to rein in independent agencies is particularly acute:

> Rulemaking is increasingly being conducted by independent agencies outside the direct control of the White House. Regulations issued by agencies such as the FCC [Federal Communications Commission], the SEC [Securities and Exchange Commission], and the CFPB [Consumer Financial Protection Bureau] are not subject to review by OIRA or even required to undergo a cost-benefit analysis. This is a gaping loophole in the rulemaking process. These agencies should be fully subject to the same regulatory review requirements as executive branch agencies.[25]

IV. Presidential Legal Authority to Review Independent Agencies' Regulations

Before directly addressing the President's authority to oversee independent agency rulemaking, a brief consideration of the problem agency "independence" poses for our constitutional system is warranted.

As explained in the *Heritage Guide to the Constitution*, the President's duty to oversee faithful execution of the laws is undermined by agency independence:

> From the New Deal era on, the Supreme Court has sanctioned the creation of independent agencies,

> which operate as a fourth branch of government. Among other things, these independent agencies execute various laws (communications, banking, securities) by investigating and prosecuting alleged lawbreakers. "For cause" restrictions on removal (statutory restrictions requiring a reason for removal [of agency leaders by the president]) and a tradition of independence make it difficult, if not impossible, for the president to ensure that these agencies faithfully execute the law.[26]

Furthermore, limitations on the political accountability of independent agencies raise serious questions under the constitutionally mandated separation of powers:

> [I]ndependent agencies, sometimes referred to as the "headless fourth branch of government"...are and remain a constitutional anomaly. In theory, independent agencies are subject to supervision by the constitutional branches in the sense that the president appoints agency leadership (subject to Senate confirmation), Congress authorizes agency budgets and conducts legislative oversight, and judicial review ensures agency compliance with statutory and constitutional requirements. But these controls, precisely because they are remote, indirect, and incomplete, strain the legal and political accountability that the separation of powers was designed to secure.[27]

These constitutional concerns strongly suggest that the President should have the ability to generally oversee the actions of independent agencies—by, for example, mandating that such agencies provide the President with information about proposed regulations. Fortunately, the President has clear legal authority to review independent agencies' regulatory activities. That authority derives directly from the U.S. Constitution and is widely recognized by legal scholars.

The Constitution explicitly provides that the "executive Power shall be vested in" the President,[28] and separately requires that the President "take care that the Laws be faithfully executed."[29] Read in tandem, these provisions were "widely understood at the Founding as encompassing [presidential] authority to execute the laws and control the execution of others."[30] Furthermore, the Constitution grants the President the specific power to "require the Opinion, in writing of the Principal officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices."[31] This provision confirms that a President's authority to require that federal agencies provide him with written analyses is a key component of his general power to ensure the faithful execution of the laws.

The President's authority to direct executive subordinates that flows from these constitutional provisions extends to administrative actions by "independent" agencies whose heads can only be removed by the President "for cause" as specified by federal statute. In 2010, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[32] the U.S. Supreme Court confirmed that "even in his oversight of independent agencies, the President has 'the ability to ensure that the laws are faithfully executed.'" In particular, "[t]o exercise real supervisory authority, the President must be able to exert some 'structural protections against abuse of power,'"[33] since oversight without enforcement would "reduce the Chief Magistrate to a cajoler-in-chief."[34] Since the President's "take care" authority extends to independent agencies, it follows that the President may require that independent agencies provide written evaluations pertaining to the execution of their duties. This includes, of course, the nature of regulations independent agencies may consider issuing pursuant to the exercise of their statutory powers—and, in particular, assessments of the benefits and costs of such rules.

As Boyden Gray, a noted legal scholar and former counsel to President George H. W. Bush, has put it:

> Requiring independent agencies to analyze the benefits and costs of their major rules and to submit them to OIRA would be a prudent and rather minimalist exercise of th[e] [president's] constitutional ["take care"] duty. If the president is to exercise any control at all over independent agencies, as the Supreme Court says he must, at the very least he must be able to require independent agencies to follow general principles of good governance. Requiring that regulations do more good than harm is common sense, and it allows some executive branch input without sacrificing the agencies' independent judgment as to the merits of any given rule.[35]

Furthermore, denying the President the authority to review independent agency regulatory activity

would undermine the fundamental governmental design established by the Constitution:

> A constitutional interpretation must be rejected if it would result in an unworkable system of government or one ungovernable by the three branches that the framers designed. Thus, any rational interpretation of the president's constitutional authority must be consistent with preserving a functional government that adheres to the tripartite structure of the Constitution. If the president were powerless to influence the cost and coherence of independent agency rulemakings, the result would be an unaccountable, self-contradicting, many-headed fourth branch of government found nowhere in the Constitution and unanswerable to the people who established it.[36]

The President's constitutional authority to require that independent agencies submit to OIRA regulatory review has been asserted by the Office of Legal Counsel (OLC), the entity within the U.S. Department of Justice that "provid[es] legal advice to the Executive Branch on all constitutional questions."[37] In a February 12, 1981, opinion,[38] the OLC addressed the legality of a proposed executive order (never issued) that would have extended cost-benefit analysis and centralized review obligations to independent agencies. The OLC concluded that "under the best view of the law, these and some other requirements of the order can be imposed on the independent agencies."[39] The OLC grounded this supervisory authority in the President's "take care" duty, stating that the President may supervise independent agencies "as necessary to ensure that they are faithfully executing the laws."[40]

Since the issuance of the 1981 OLC opinion, nonpartisan legal experts have endorsed the view that the President has ample authority to apply cost-benefit analysis to independent agencies, and should assert that authority as a matter of policy. For example, in 1990, the American Bar Association's House of Delegates recommended that "presidential review should apply generally to all federal rulemaking, including that by independent regulatory agencies."[41] In 2013, the Administrative Conference of the United States (an independent federal agency charged with convening expert representatives from the public and private sectors to recommend improvements to administrative process and procedure) provided recommendations for the implementation of cost-benefit analysis at independent agencies.[42] Most recently, in its 2016 report to the President-Elect on improving the administrative process, the American Bar Association's Section of Administrative Law and Regulatory Practice affirmed the President's authority to impose cost-benefit analysis on independent federal agencies, and urged the President-Elect to do so:

> The Supreme Court has clearly and properly held that independent regulatory commissions are elements of the executive branch, necessarily subject to presidential oversight—which, of course, must include the constitutional authority to require their written reports on how they intend to carry out the duties Congress has created for them. Imposing compliance with the regulatory oversight Executive orders as an obligation could answer judicial concerns about the need for such analyses, while providing a clear and well-established framework for their execution that the judicial expressions necessarily lack. We strongly urge you to bring the independent regulatory commissions within the requirements for cost-benefit analysis, OMB review, and retrospective review of rules currently reflected in [presidential executive orders].[43]

In sum, pursuant to his constitutional authority to oversee the faithful execution of the laws, the President legally can—and should—subject federal independent agency regulatory proposals to OIRA cost-benefit analysis. Moreover, in furtherance of his constitutional "take care" authority, the President can and should extend all of his recent executive orders dealing with regulation to the independent agencies. That would require those agencies, like their purely executive branch counterparts, to institutionalize deregulatory initiatives—through regulatory review task forces, the elimination of old regulations when new ones are promulgated, and commitments to reduce overall regulatory burdens.

Conclusion

President Trump's recent initiatives to rein in the regulatory state already are showing promise, but more work needs to be done. In particular, greater presidential oversight of intrusive over-regulation by independent agencies could substantially reduce

excessive regulatory costs imposed by those entities on private businesses and individuals. Accordingly, in order to further extend the benefits of regulatory reform, the President should issue an executive order requiring independent federal regulatory agencies to submit their regulatory proposals to OIRA for cost-benefit review. Additionally, consistent with his duty to ensure the faithful execution of the laws, the President should extend all of the recent deregulatory initiatives required of purely executive branch agencies to their independent brethren. Such actions would help ensure that agency "independence" does not get in the way of the reforms that are needed to enhance economic growth and benefit the American public at large.

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Endnotes

1. OMB, a part of the Executive Office of the President, oversees the implementation of the President's policy, budget, management, and regulatory objectives within the federal government's executive branch. *See* Office of Management and Budget (2017), https://www.whitehouse.gov/omb. OIRA, a statutory part of OMB, "is the United States Government's central authority for the review of Executive Branch regulations, approval of Government information collections, establishment of Government statistical practices, and coordination of federal privacy policy." *See* Office of Information and Regulatory Affairs (2017), https://obamawhitehouse.archives.gov/omb/oira.
2. *See, e.g.*, Clyde Wayne Crews Jr., Ten Thousand Commandments: An Annual Snapshot of the Regulatory State (2017), https://cei.org/sites/default/files/Ten%20Thousand%20Commandments%202017.pdf (estimating federal regulatory costs of $1.963 trillion in fiscal year 2016); W. Mark Crain & Nicole V. Crain, The Cost of Regulation to the U.S. Economy, Manufacturing, and Small Business (2014), http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf (estimating that federal regulations cost an estimated $2.028 trillion in 2012 (in 2014 dollars), an amount equal to 12 percent of U.S. gross domestic product).
3. *Regulatory Reform Task Forces Check-In: Joint Hearing Before the H. Comm. on Oversight and Government Reform, Subcomm. on Government Operations, & Subcomm. on Health Care, Benefits, and Administrative Rules*, 115th Cong. 1 (Oct. 24, 2017) (testimony of Diane Katz, Senior Research Fellow in Regulatory Policy, Heritage Foundation), http://docs.house.gov/meetings/GO/GO24/20171024/106529/HHRG-115-GO24-Wstate-KatzD-20171024.pdf.
4. *Id*. at 2.
5. Diane Katz, *Red Tape Receding: Trump and the High-Water Mark of Regulation*, Heritage Found. Backgrounder No. 3260, at 2 (Nov. 8, 2017), http://www.heritage.org/sites/default/files/2017-11/BG3260.pdf.
6. *See* Council of Economic Advisors, The Growth Potential of Deregulation (Oct. 2, 2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/The%20Growth%20Potential%20of%20Deregulation_0.pdf.
7. *Id*. at 14.
8. *See Republican Party Platform of 1980*, Am. Presidency Project (July 15, 1980), http://www.presidency.ucsb.edu/ws/?pid=25844 ("Republicans realize the immediate necessity of reducing the regulatory burden to give small business a fighting chance against the federal agencies."); Ronald Reagan, *Acceptance of the Republican Nomination for President* (July 17, 1980), http://www.cnn.com/SPECIALS/2004/reagan/stories/speech.archive/nomination.html.
9. Exec. Order No. 12291, 46 Fed. Reg. 13, 193 (Feb. 17, 1981), https://www.archives.gov/federal-register/codification/executive-order/12291.html.
10. *See id*. at § 1(b) (defining a "major rule" as one likely to result in: (1) an annual economic effect of $100 million or more; or (2) a major increase in costs or prices; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the international competitiveness of U.S.-based firms).
11. *See id*. at § 3(f).
12. Exec. Order No. 12866, 58 Fed. Reg. 51, 735 (Oct. 4, 1993), https://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf.
13. *See* Ellen Siegler, *Executive Order 12866: An Analysis of the New Executive Order on Regulatory Planning and Review*, 24 Envtl. L. Rep. 10070 (1994), https://elr.info/sites/default/files/articles/24.10070.htm (noting, among other things, the broadening of factors to be included in regulatory cost-benefit analysis).
14. Exec. Order No. 13563 § 1(b), 76 Fed. Reg. 3,821 (Jan. 21, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review.
15. *See* Testimony of Diane Katz, *supra* note 3, at 2; James L. Gattuso & Diane Katz, *Red Tape Rising 2016: Obama Regs Top $100 Billion Annually*, Heritage Found. Backgrounder No. 3127 (May 23, 2016), http://www.heritage.org/government-regulation/report/red-tape-rising-2016-obama-regs-top-100-billion-annually.
16. Gattuso & Katz, *supra* note 15, at 2.
17. President Trump had signed 15 such resolutions as of November 14, 2017. *See Congressional Review Act FAQs*, U.S. Gov't Accountability Off. (last visited Dec. 19, 2017), https://www.gao.gov/legal/congressional-review-act/faq. The Congressional Review Act is "a 1996 congressional statute that provides for fast-track review of regulations. If passed by Congress and signed by the President, a resolution of disapproval rescinds a regulation and prohibits a future rule that is 'substantially the same.'" Gattuso & Katz, *supra* note 15, at 5 (footnote omitted). For a scholarly evaluation of the Congressional Review Act and its applicability to certain older regulations as well as recent regulations, see Paul J. Larkin, Jr., *The Reach of the Congressional Review Act*, Heritage Found. Legal Memorandum No. 201 (Feb. 8, 2017), http://www.heritage.org/sites/default/files/2017-02/LM-201_1.pdf. As the author explains, the Congressional Review Act allows Congress to reach back and review agency regulations that were never properly submitted to Congress under the CRA. *See id*.
18. Exec. Order 13771, 82 Fed. Reg. 9339 (Jan. 30, 2017), https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling. This order also called for a "regulatory budgeting" process to manage regulatory costs. In addition, for future years, the order required the OMB Director to set the amount of incremental costs an executive branch agency will be allowed to impose, if any.

19. Exec. Order 13777, 82 Fed. Reg. 12285 (Feb. 24, 2017), https://www.whitehouse.gov/the-press-office/2017/02/24/presidential-executive-order-enforcing-regulatory-reform-agenda.
20. *See* Gattuso & Katz, *supra* note 15, at 6–8.
21. *See id*. at 8.
22. *See id*. This was "part of a broader Trump Administration effort to scale back the Obama Administration's vast web of global warming programs." *Id*.
23. *See id*. at 8–10.
24. *See id*. at 10–11.
25. *Id*. at 11.
26. Saikrishna B. Prakash, *Take Care Clause*, *in* The Heritage Guide to the Constitution 288, 290 (David F. Forte & Matthew Spalding, eds., 2nd ed. 2014).
27. Michael M. Uhlmann, *A Note on Administrative Agencies*, *in* The Heritage Guide to the Constitution, *supra* note 26, at 277, 279.
28. U.S. Const. art. II, § 1, cl. 1.
29. U.S. Const. art. II, § 3.
30. Prakash, *supra* note 26 at 289.
31. U.S. Const. art. II, § 2, cl. 1.
32. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010).
33. C. Boyden Gray, The President's Constitutional Power to Order Cost-Benefit Analysis and Centralized Review of Independent Agency Rulemaking 12 (May 31, 2017) (Mercatus Working Paper) (citing *Free Enter. Fund*, 561 U.S. at 501), https://www.mercatus.org/system/files/mercatus-gray-executive-power-independent-agencies-v1.pdf.
34. *Free Enter. Fund*, 561 U.S. at 502.
35. Gray, *supra* note 33, at 12.
36. *Id*. at 14. See *id*. at 8–9 for a documentation of the growing burden on the American economy imposed by independent agency regulations.
37. *Office of Legal Counsel: About the Office*, U.S. Dep't of Just. (last visited Dec. 19, 2017), https://www.justice.gov/olc.
38. Memorandum from Larry L. Simms, Acting Ass't. Att'y. Gen., Off. of Legal Counsel, to the Hon. David Stockman, Director of OMB (Feb. 12, 1981), *reprinted in Role of OMB in Regulation: Hearing Before the Subcomm. on Oversight and Investigations of the H.R. Comm. on Energy and Environment*, 97th Cong. 71, 152 (1982).
39. *Id*. at 9, *reprinted in Hearing on Role of OMB in Regulation*, at 160.
40. *Id*. at 11, *reprinted in Hearing on Role of OMB in Regulation*, at 162.
41. Amer. Bar Ass'n House of Delegates, Recommendation: Presidential Review of Rulemaking (Aug. 7–8, 1990), https://www.americanbar.org/content/dam/aba/directories/policy/1990_am_302.authcheckdam.pdf.
42. Admin. Conf. of the U.S., Recommendation 2013-2, *Benefit-Cost Analysis at Independent Regulatory Agencies*, 78 Fed. Reg. 41, 352, 355–57 (June 10, 2013), https://www.gpo.gov/fdsys/pkg/FR-2013-07-10/pdf/2013-16541.pdf.
43. Am. Bar Ass'n, Section of Admin. Law & Reg. Practice, Improving the Administrative Process: A Report to the President-Elect of the United States 10 (2016) (footnote omitted), https://www.americanbar.org/content/dam/aba/administrative/administrative_law/Final%20POTUS%20Report%2010-26-16.authcheckdam.pdf.