PIONEER INSTITUTE
PUBLIC POLICY RESEARCH

Restoring the Republic

A Blueprint for Constitutional Administration

by Charles Keckler, Emmett McGroarty, & Adam Millsap
with a foreword from Adam White

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Table of Contents

Foreword: A Guide to Re-Constituting Good Government

Adam J. White, 21 July 2024

The Federalist's insights are timeless, but some of its most famous lines might strike new readers as out-of-date. In *Federalist 48*, James Madison warned that "[t]he legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex." And three papers later, writing of the Constitution's separation of powers and federalism: "Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."

What would Madison, Alexander Hamilton, and their fellow founders make of our current predicament? Today the administrative state, not Congress, seems our "impetuous vortex"; Congress is mostly reactive, commenting on administration in oversight hearings or soliciting agencies for constituent services.

Meanwhile, modern federalism seems less a framework for constraining federal overreach, and more an interstate "group project" for jointly administering federal programs. To the extent that Congress or states attempt to counteract federal agency ambitions, they mostly do it by invoking the judicial branch's power, with lawsuits and amicus briefs.

I'm not against oversight hearings, or constituent services, or lawsuits or amicus briefs. And as we saw in the Supreme Court's most recent year's work, in cases like *Loper Bright* and *Jarkesy*, the judicial branch often lives up to its own billing in *Federalist 78*: "peculiarly essential in a limited Constitution," especially for the "steady, upright, and impartial administration of the laws."

But truly reforming the modern administrative state, returning it to its proper constitutional shape, requires much more. It requires real legislative reforms from Congress and the states — and further reforms from the White House itself.

Recent years have seen some excellent proposals among all three. A decade or so ago, the House Judiciary Committee and other parts of Congress began to formulate new laws to reclaim legislative power that had been long ago delegated to agencies, and new proposals for stricter procedures for new agency actions. State legislatures and governors began working for reform, too. At the same time, federal courts were gravitating toward the new "Major Questions Doctrine" and harder looks at other aspects of agency policymaking, while state courts began to reconsider their own versions of *Chevron* deference.

These have been welcome developments, but there is much more to be done. And, crucially, the work requires both specific proposals and general principles. It is good to find discrete ways to improve the administrative process. It is better to root those proposals in a deeper understanding of American constitutional government and to build a framework for reform that brings out the best in each of our governing institutions.

To that end, this report by Pioneer Institute is a genuinely impressive achievement. In the pages that follow, you will find many specific reforms that are practical and plausible yet significant. Better still, they are not scattershot but systematic, built from the ground up to incorporate each constitutional institution's distinct virtues and responsibilities.

Take, for example, the first set of recommendations: "Strengthening Presidential Authority." The report begins, fittingly, with reforms that the White House can undertake on its own: expanding and improving the Office of Information and Regulatory Affairs (OIRA); reconnecting the agency rulemaking process to core values of the Constitution's Appointments Clause; and more. But then the report turns to Congress, urging legislation to repeal or reform statutes that delegate executive power to private parties to bring lawsuits against citizens. Congress was wrong to divest this part of the Constitution's executive power; Congress can and should correct its own mistake.

The report's focus on federalism deserves special attention. Today's federalism often resembles the original Anti-Federalists' worst fears: the states often seem to exist simply to administer federal programs and spend federal money. The states can assert themselves — and they often do, at least in litigation challenging the policies of a presidential administration led by the opposite political party — but there is enormous need for deeper reforms that respect the states' distinct responsibilities in our constitutional system.

And much of that reform can start in Washington, by creating new frameworks to better preserve the states' authority. The executive branch can build

more consideration of the states into its own regulatory management. Particularly striking is this report's creative incorporation of the Major Questions Doctrine into the federal grants-in-aid system, to prevent the federal government from leveraging Congress's power of the purse excessively in matters of state authority.

Even more importantly, Congress can take major steps to reduce the federal government's own actions that tend to distort the states' procedures and incentives. At their best, states can serve as "laboratories of democracy," as Louis Brandeis famously put it. (And as "laboratories of liberty," as *Harvard Journal of Law & Public Policy* symposium recently put it.) But modern administration flips the model on its head: federal agencies are the great experimenters, and state agencies are too often left to simply administer the latest federal experiment. This deprives us of the benefits of state experimentation, but it also concentrates far too many issues into the federal government — and, more specifically, into federal presidential politics. As long as the presidential election is our nation's "everything election," with all major domestic policy seemingly up for grabs, our politics and governance will remain sharply polarized. Returning more issues to the states could improve policies and politics.

Those are just two parts of this report; there are several more, and each contains extensive sub-parts. In a report this thorough, any reader will surely find points that they'd recalibrate — or disagree with entirely. But even readers who disagree with minor or major points will appreciate the report's thorough, nuanced approach.

Readers sympathetic to these proposals will be struck by familiar echoes of Madison and Alexis de Tocqueville in its efforts to deconcentrate the power that has accumulated in federal administration. But in trying to slow the pace of regulatory expansion — and thus the corresponding magnitude of regulatory flip-flops from one administration to the next — we also hear echoes of Alexander Hamilton's own emphasis on the need for "steady administration" for the sake of avoiding "disgraceful and ruinous mutability in the administration of the government."

At the same time, the longer I've advocated for such measures myself, the more I've come to regret such proposals' unavoidable costs to "energy" in administration. The more that the White House and Congress layer procedural burdens on agencies, the harder it becomes for administration to exemplify Hamilton's energy. Then again, Hamilton was writing of "energy in the *executive*," and the more that administration has assumed a *legislative* quality, the more that energy moves from virtue to vice.

In the long run, the challenge will be to make administration steadier *and* more energetic; but this will require a significant reduction in the amount of policymaking power Congress has delegated to agencies. That is the irony of modern delegation: its advocates think legislative delegations make administration better, when in fact they inevitably make administration *worse*—slower and less steady. This report proposes ways for Congress to un-delegate power—especially in its embrace of the now-familiar REINS Act—and the Supreme Court already is doing much to constrain agencies from expanding the scope of their already overbroad powers, but that remains a matter ripe for further study.

In recent years, some have claimed that we need to "deconstruct the administrative state." But that misses the point. The challenge of our time is not deconstruction but *reconstruction*. We need to rebuild institutions of republican self-government. This Pioneer Institute report lays an excellent foundation.

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Executive Summary

This paper offers systemic legislative and executive branch reforms to better align government practice with its constitutional structure. The paper identifies lapses in government's operational scheme that compromise the relationships among Congress, the executive branch, the States, and the people. Those lapses impair government's responsiveness and accountability to the citizenry and the structural safeguards to liberty. To address these lapses, the paper offers reforms that can be implemented in a new administration, either through executive action during the first 100 days in office or through a robust legislative agenda.

This paper is informed by a discussion group that met regularly for over a year. The group included analysts affiliated with national and state think tanks and academia as well as former personnel in the legislative and executive branches. It casts a wide net in identifying problems and offering solutions.

Some of the reform proposals suggested below reflect recent Supreme Court decisions, drawing on constitutional law to develop improvements to existing practices. Some proposals draw on the existing work of public-policy analysts or were crafted as part of this effort. Others reflect legislative proposals or rescinded executive actions. Each of the reforms addresses a facet of the federal administrative state's interaction with Congress, the States, or the citizenry.[1]

Content Overview

Reforms of the administrative state are logically divisible into four categories, according to which we have organized this paper: restoring the President's management authority; restoring the horizontal separation of power, particularly the role of the federal legislature; making vertical separation of power (*i.e.,* the division of power between federal and state governments) meaningful by instituting safeguards for the States in a renewed federalism; and finding ways to mitigate threats to individual liberty posed by the administrative state's expansion. The four problems that these reforms address could all rightly be labeled as impairing liberty. Nonetheless, the four-part classification reminds policymakers that the Constitution's structural

integrity has been weakened on multiple fronts, and restoring it requires attention to each. The sections are subdivided into those solutions that are ideally implemented by early executive action and those that should be incorporated into a new President's legislative agenda.

The following is a summary of the reform ideas that are spelled out in the body of this document.

Strengthening Presidential Authority

100-Day Executive Actions

- ***Require*** Independent Agencies to Report to the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs ("OIRA") and Congress. OMB and, within it, OIRA were created to assist the President to "take care that the laws be faithfully executed." This reform would ensure that the independent regulatory agencies and commissions participate in the regulatory review process and accommodate the President's constitutional duty to take care that the laws are faithfully executed.
- ***Issue*** a "Day One" Regulatory Process Executive Order. This order would refine the process through which the administrative state promulgates rules and projects power by adding process features that would make executive branch actions more accountable to the President, and through him or her, to the people.
- ***Require*** Adherence to the Appointments Clause in the Promulgation of Rules. The Constitution requires that executive branch officials who wield extensive powers be appointed by the President and confirmed by the Senate. Accordingly, all rules and amendments thereto should be undertaken under the imprimatur of a Senate-confirmed official, and all agency adjudications should be conducted by a constitutionally authorized officer. Currently, this requirement is not strictly followed.
- ***Reinstate*** Federal Workforce Management Principles. President Biden revoked executive orders that incorporated common management principles into the administration of the federal workforce. These reforms would restore fidelity to those principles.
- ***Re-Establish*** OIRA Review of IRS Regulatory Actions. By a memorandum of agreement between Treasury and OIRA, the Biden Administration eviscerated 2018 reforms that had made tax regulatory actions subject to OIRA analysis and policy review. Such review is critical for management purposes, especially given that, as the GAO reported, IRS regulatory actions are increasingly used to implement social and economic policies. An executive order is needed to re-establish these management and accountability functions.

Legislative Agenda

- ***Repeal*** Legal-Privateering Provisions. Legal-privateering statutes invest private parties with enforcement powers, empowering them to bring legal action against other private parties for alleged statutory or regulatory violations. These statutes implicate a host of due process, separation-of-powers, and rule-of-law problems. As detailed in the body of this document, many of the federal environmental statutes have legal-privateering provisions. For example, under the Clean Air Act, the Clean Water Act, and the Endangered Species Act, a private party can bring action against another private party, arguing that such person has violated the statute and demanding that the person make amends. Such statutes invest private parties with enforcement authority without the usual checks and balances that protect individual rights. They pose the danger of a private party's exploiting the law to abuse another private party for political power or monetary gain. They should be amended to delete the legal-privateering provisions.

Restoring the Separation of Powers

100-Day Executive Actions

- ***Regulatory Budget Executive Order.*** Informed by the regulatory budget processes in Virginia and Ohio, this executive order would reinstate, with some enhancements, the regulatory budget process that President Biden rescinded.
- ***Incorporate*** Major Question Doctrine Screening in the Interagency Regulatory Review Process. An executive order is needed to reflect *West Virginia v. EPA*, 597 U.S. __ (2022), which provided enhanced insight for evaluating the scope of a regulation's underlying authorization. The Major Questions Doctrine addresses the "particular and recurring problem [of] agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." This executive order would add Major Questions Doctrine screening to the review process of proposed rules.
- ***Guard*** Against Unauthorized Expansions of Government. This reform would outline the authorities for executive action, thus encouraging scrutiny in the executive's exercise of government power. In the face of whole-of-government initiatives, this executive order would help build executive branch precedent on the proper exercise of authority.

Legislative Agenda

- ***Regulations*** from the Executive in Need of Scrutiny (REINS) Act. One of the frustrating ways in which agencies arrogate power is through aggressive regulations that exceed their constitutional and statutory authorities. In this regard, congressional constraints embolden the administrative state, because in order to provide a "check" on such overreach, Congress must go through the laborious process of enacting legislation. In 1996, the Congressional Review Act established an expedited procedure for the review of certain rules. The REINS Act would strengthen those procedures by shifting the burden to the executive agencies to draft regulations that comport with statutory authorizations. Furthermore, simply having the expedited REINS process in place would give the administrative agencies pause before claiming unauthorized power.
- ***Establish*** a Congressional Regulation Office. The growth of regulatory power over the last century necessitates that Congress have an office dedicated to analyzing the effects of federal regulations. Such an office would enhance the analytical capabilities of Congress, making it less dependent on analyses provided by the very agencies it is scrutinizing.

Interference with State Government

100-Day Executive Actions

- ***Institute*** Major Question Doctrine Screening for Grants-in-Aid to States. In *West Virginia v. EPA*, 597 U.S. __ (2022), the Court enunciated the Major Question Doctrine for delineating regulatory rules that exceed their underlying authorizations. But as at least one legal scholar has noted, the same principles can be applied to whether a grant condition exceeds its underlying congressional authorization. This reform proposal would institute a Major Question Doctrine screening as a guardrail against unauthorized conditions in grants to States.
- ***Issue*** a Rule on How Grant-in-Aid Offers to States Characterize Federal Contributions. This reform would require that a grant-in-aid offer to a State specify the amount of the federal contribution in relation to the State's future obligations arising from the assistance, both as a percentage and in terms of actual funds to be obligated. This would help ensure that federal agencies accurately describe the net fiscal benefit of the federal offer. Thus, an offer to provide funding to hire 10 police officers would specify total funding to be received by the State relative to the 30-year cost of a new position. Such information is critical because how the federal government frames an offer largely shapes its presentation to a State's bureaucracy and elected leaders.

- ***Transparency*** in Federal Grant Recipients. This common-sense measure would require the identity of all institutional grant recipients, including institutional sub-grant recipients, be posted online by the grantmaking agency.
- ***Transparency*** in Federally Funded Development Projects. Just as grant funding should be transparent, so too should federal participation in development projects, which can tap into federal tax credits and other incentives and combine them with State incentives to launch private development projects. Such projects can have a substantial effect on local economies, the provision of local government services, and taxpayer obligations.

Legislative Agenda

- ***Prohibit*** Federal Agencies from Dictating Which State Official Accepts a Grant Offer and the Political Processes the State Uses to Make the Decision. These decisions are fundamental to State autonomy. They reflect the State's decisions of how the separation of powers within the State is to work, the assignment of responsibility among officials in its executive branch, and the subsequent accountability to the State's citizens. The improper use of grant conditions impairs a State's constitutional structure and the national constitutional structure, of which the States and their citizens are a part. Proper care of the Constitution thus obliges the federal government do no harm to a State's constitutional structure.
- ***Prohibit*** the Federal Government from Requiring State or Local Governments to Form a Commission or Other Body *(i.e.,* a body that distributes money or makes policy). This reform ensures respect for a State's constitutional structure. Requirements that a State form a political body interfere with fundamental State decisions on the form of its government and how it is going to respond and be accountable to its citizens.
- ***Restore*** State Control of Federal Assistance Through Block Grants. Federal financial assistance should be reformed to better respect federalism principles by consolidating most highly specific and regulated *categorical* grant programs into broad and flexible block grants to the States. In genuine block grant arrangements, funds will generally be more effectively used because the State can direct them to its specific and identified needs. Moreover, such grants sharply limit the federal government's ability to impose regulatory-like conditions.

Mitigating Direct Threats to Individual Liberty

100-Day Executive Actions

- ***Institute*** a Right to a Show Cause Hearing for Administrative Actions. All agencies with regulatory enforcement authority should have procedures for a show cause proceeding. This would enable an investigatory target to petition for an order that the agency must cease and desist its investigation or proceeding.
- ***Protect*** Routine, Reasonable Conduct. Agencies should be restricted in their authority to threaten huge fines and other penalties for conduct that was not deliberate and directed at a specified prohibited outcome.
- ***Provide*** Adequate Notice of Administrative Penalties, Reduce Arbitrariness, and Ensure Proportionality. Agencies should publish tables delineating the maximum fines for minor violations.
- ***Ensure*** Due Process, Transparency, and Fairness in the Issuance of Guidance Documents, Enforcement Proceedings, and Adjudications. This calls for the reinstatement of EO 13892 (revoked by President Biden), which had instituted uniformly accepted procedures of fair dealing.
- ***Protect*** Property Rights: Rule on Federal Funds, Tax Credits, and Eminent Domain. This measure calls for a prohibition on federal funds, guarantees, tax credits, or any other participation in projects wherein eminent domain is used to transfer ownership from one private party to another private party where the taking is not "for public use."

Legislative Agenda

- ***Prohibit*** the Use of Federal Consent Decrees and Orders to Transfer Non-Restitution Money to Third Parties (slush fund elimination). This would prohibit the practice of an agency's using settlement negotiations to wrangle the defendant into making payments to third parties who are not victims of the defendant's conduct. Such slush funds often have political overtones.

The collective benefits of these reforms would be profound. They would help restore the functional separation of powers, strengthening the system of checks and balances. By affirming the constitutional lines of authority, they would make government more responsive to the citizenry as a prospective matter and more accountable to them as a retrospective matter. The reforms would institute a higher level of due process in how federal agencies interact with citizens and would ensure proper care for the States' constitutional structures. They would thus foster faith in government.

Introduction

This document offers cross-agency structural reforms to more faithfully align legislative and executive branch practices to the Constitution. It discusses reforms that can be implemented through legislative and executive action. It does not address judicial strategies, constitutional amendments, or specific agency content reforms.

We cast a wide net in developing this document. Some proposals reflect recent Supreme Court decisions, drawing on fleshed-out constitutional law to suggest improvements to existing practices in the executive branch and the congressional support offices. Some were crafted or informed by public-policy analysts and scholars. Others, such as the call for federal REINS legislation, reflect long-standing proposals. Each reform addresses a facet of the federal administrative state's interaction with Congress, the States, the citizenry, or the President.

Although to some they might seem to be of a dry, technical nature, those interactions lie at the heart of the Constitution, implicating concerns of both liberty and order. As James Madison noted:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments.[2]

That institutional pluralism provides a "double security" for liberty, so long as each component has the means "to resist the encroachment of the others." Another way of looking at it is that the intended structure ensures that the practice of governing is the project of the American people. Each citizen has an invitation to help direct the ship of state, as to national matters through the federal government and as to state and local matters through the powers reserved to the States and the people. Moreover, that framework ensures that national politics do not swamp the pursuit of local concerns.

The Progressive Replacement

In the early 20th century, progressive theory of government rose to popularity in both political parties. That theory argued that advances in the

social sciences had rendered the Constitution antiquated. Promising a golden era for humanity, progressivism[3] rejected government undergirded by the sovereignty of the people and their unalienable rights. As John Dewey argued, such concepts were "themselves historically conditioned, and were relevant only to their own time."[4] Progressivism instead posited that the rise of the scientific method and the social sciences provides the path to human flourishing.

Government's expert managers would chart the way forward, inspired by Woodrow Wilson's dual charge to see "every day new things which the state ought to do, [and] to see clearly how it ought to do them." They would prescribe solutions to alleviate misery and avoid cataclysmic wars such as had plagued the previous century. They would manage the various groups within society, becoming, as John Dewey prophesized, "a regulator and adjuster among them; defining the limits of their actions, preventing and settling conflicts."[5] As is inherent in the scientific method, experimentation must take place and, with that, mistakes — "confusion and irregularity" — would be made. But the scientific method must predominate. The task "is not to avoid mistakes but to have them take place under conditions such that they can be utilized to increase intelligence in the future."[6]

To attain expert rule, progressivism needed several changes to the constitutional structure, either *de facto* or *de jure*. One, the unalienable rights and ultimate sovereignty of the people had to be de-emphasized, because the experts' efficacy will suffer if they have to take direction from the citizenry or yield to their rights and privileges. Two, authority would need to be transferred from Congress to the experts in the executive branch, and those experts would need to be insulated from congressional oversight and even presidential control. Three, State government had to be reined in, because it too undercut expert efficiency. In Wilson's words, progressives had "to make town, city, county, state, and federal governments ... interdependent and co-operative." And four, the people would have to be conditioned to "submit to instruction." After all, government's "motive power" is "to improve public opinion."[7] In the face of these adjustments, Congress and the executive branch have lagged in creating internal rules of engagement.[8] It is thus not surprising that the administrative state is barreling out of control, and along the way raising concern of its impartiality and overall fairness.

Looking Forward

The necessity of bureaucratic order touches on much more than the relationship among the States and the branches of government. The United

States is acknowledged as having been founded on a set of ideas. Those ideas rest on Western civilization, drawing on antiquity, medieval thought, and British tradition. They reflect the political practice of the colonists from the period of benign neglect through the Revolution, as well as the political struggles and achievements of the new nation. In this way, the care of the Republic is the practice of the American people. Like the common law is for attorneys, it is a continuing practice through which the citizenry reflects on its principles and dwells on its tradition in order to understand the present and evermore build a better future for its progeny. The constitutional structure preserved that practice, and its erosion is destroying the practice that binds us together as a people.

Structural progressivism is also diminishing the personalist nature of the Constitution. As Tocqueville discovered, citizens engage in the building of their society because, due to federalism, the constitutional structure preserved accessible political power. Those public freedoms, "which make many citizens put value on the affection of their neighbors and those close to them, therefore constantly bring men closer to one another, despite the instincts that separate them, and force them to aid each other."[9] It was thus "fitting to give political life to each portion of the territory in order to multiply infinitely the occasions for citizens to act together."[10]

But the good it affords the human person is another, even more profound, reason for restoring fidelity to the constitutional structure. Excluding people from building their community "'is fit only to enervate the peoples who submit to it, because it constantly tends to diminish the spirit of the city in them.'"[11] It denigrates the person, denying her the most accessible opportunity to be a person of substance in the public square. This has a sad, downstream effect. It takes from her the occasion for her children, other family, and friends to witness her being esteemed by the local citizenry. With that, society loses a great opportunity for those third-party witnesses to develop affection for the constitutional structure — the structure in which their loved one was esteemed.[12]

Technical Considerations

In this report, we examine current administrative state processes and recommend executive and legislative remedies. While we recognize that some problems could be solved through judicial action or constitutional amendment, we do not address those remedies. Our focus is on legislative and executive structural actions that will contribute to a return to constitutional order.

This document reflects the fruits of a working group on the administrative state that investigated the issues for over a year. It cast a wide net to identify problems and develop solutions. Some of the proposals reflect the work of scholars and analysts who are not members of the working group. Some proposals are the independent work of group members, and others reflect the collaborative work of the group.

Strengthening Presidential Authority

> *… the plurality of the Executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power, first, the restraints of public opinion, which lose their efficacy, as well on account of the division of the censure attendant on bad measures among a number, as on account of the uncertainty on whom it ought to fall; and, second, the opportunity of discovering with facility and clearness the misconduct of the persons they trust…*
>
> *–Alexander Hamilton, The Federalist Papers, No. 70*

Out of the millions of federal executive employees continually directing the American people, the people themselves have the ability to select and direct only one, on one day every four years. That democratic legitimacy for the administrative state may be numerically minimal, but it is crucial. Nonetheless, in many respects the President's authority to direct the agencies, which are constitutionally in his or her charge, has been diminished. This neutralizes a key check on the administrative state and deprives the people of an important constitutional safeguard on the proper functioning of an increasingly far-reaching federal government.

To understand both the problems of the growth of the administrative state, and possibilities for its reform, it is crucial to distinguish between the power of the federal executive branch and presidential power *over* that branch. As "the executive" expands at the expense of the other federal branches, the State governments, and the liberties of the people, it may appear that the President grows in power. However, in many respects the President's ability to manage personnel and thus to "take care that the laws be faithfully executed" has been compromised. The proposals in this section would help restore that accountability.

100-Day Executive Actions

1. Subject Independent Regulatory Agencies to the OIRA Review Process[13]

We define independent regulatory agencies as those executive branch

agencies with regulatory authority (*e.g.,* Commodity Futures Trading Commission, Consumer Protection Bureau, Federal Deposit Insurance Commission, Federal Reserve, Securities and Exchange Commission) that Congress has insulated from direct presidential control, most significantly by limiting the president's authority to appoint or remove the agency's leadership. Congress usually does this by structuring the agency's leadership in the form of a board or commission with staggered terms over multiple presidential terms and by limiting the number of members from any one party (e.g., "not more than 3 of the members of the Board of Directors may be members of the same political party," *12 U.S.C. 1812(a) (setting forth requirements for the FDIC Board)).*

Furthermore, solely by executive decision, independent agencies have been excepted from the normal review process conducted by the Office of Information and Regulatory Affairs (OIRA). In 1980, the Paperwork Reduction Act established OIRA within OMB to oversee and coordinate various administrative matters. Upon assuming office in 1981, President Reagan issued EO 12291, which established centralized regulatory review in OIRA. Under the order, most federal agencies were required to submit their proposed and final rules to OIRA for review to ensure consistency with the President's policy priorities and conduct cost-benefit analysis of "major" rules. These requirements applied to executive agencies but not to agencies designated as independent regulatory agencies, which are sometimes also referred to as independent regulatory commissions (IRCs), under 44 U.S.C. §3502(5).

As to rulemaking, for the most part the OIRA role has been shaped by executive orders. The Congressional Review Act (CRA) provides an exception. It charges OIRA with determining whether a rule is "major." If a rule is "major," its effective date must be delayed at least 60 days, and the Government Accountability Office (a government agency within the legislative branch that provides auditing, evaluative, and investigative services for Congress) must write a report to Congress on the rule. By custom, OIRA deferred to an independent agency's determination of whether a rule was "major." However, in April 2019, the acting director of OMB issued a memorandum to independent agencies requiring them to submit their rules to OMB (OIRA) for review as to whether they are "major rules."

Subsequently, several Senators expressed concern that "a growing number of regulations are being promulgated by independent agencies." While lauding the Congressional Review Act requirement that OIRA determine whether rules should be classified as "major," the Senators called for the President

to expand OIRA's duties by putting its review of independent agencies on par with its review of other agencies. They noted that, "through the requirements of Executive Order 12866, OIRA ensures agencies rigorously assess the costs and benefits of their significant regulatory actions." That analysis, they further noted, provides the public with a sense of a regulation's economic effect as well as its potential burden. Accordingly, the Senators requested that OIRA be directed to "review the significant regulatory actions of independent regulatory agencies to increase the transparency and accountability of the regulatory process."[14] In support of their request, the Senators noted that studies by the Administrative Conference of the United States and GAO:

> have found the analysis conducted by independent agencies without OIRA oversight is not as searching and thorough as agencies clearly within the Executive branch. These agencies often fail to produce quantitative cost-benefit analysis if not explicitly required by statute.[15]

More recently, other scholars have drawn attention to this reform.[16]

The reform is all the more necessary due to the rise of the whole-of-government strategy to command the federal executive, including independent agencies, to propagate policies. A whole-of-government approach refers to the implementation strategy of enlisting multiple agencies to pursue a particular objective, especially those agencies that would not have otherwise had that objective as a primary focus. It is commonly attributed as having originated in the administration of British prime minister Tony Blair, who held office from 1997 to 2007. The approach becomes problematic if it entails an agency exceeding its authorized scope, detracting from its statutory mission, compromising a legislative intent for siloing an agency, or creating a false perception of legislative policy.[17] Examples of current whole-of-government approach include collaborations on transportation pollution, the environment, and cryptocurrency.[18]

2. Day One Regulatory Process Executive Order[19]

In terms of ensuring management by elected officials (accountable to the citizens as opposed to unaccountable bureaucrats), the regulatory process is unwieldy. Process refinement by the executive branch is needed. For example, as noted below, legislative requirements such as the Regulatory Flexibility Act (RFA) can be ineffectual without a responsive executive process. On day one of a future administration, an executive order should be ready to be

signed that will require federal agencies to promulgate self-binding regulations that require the agency to write regulations following a specific process. These "process regulations" could be multiple regulations addressing specific topics. Each agency should issue its own, and in some cases (*e.g.,* EPA), a single agency may have to enact multiple regulations based under different areas of authority (*e.g.,* water, clean air). These regulations should include several components:

- ***A moratorium on new rulemaking.*** The agency should be prohibited from passing new regulations, except in cases where regulations are reducing regulatory burdens or there is a well-documented public health or safety threat. Any exception to the moratorium will require a waiver from the Office of Management and Budget.
- ***A sunset provision of agency regulations.*** Under the Regulatory Flexibility Act, agencies are required to review their regulations for effects on small businesses. Few agencies adhere to this requirement consistently. Under this authority, agencies can attach sunset provisions to their entire stock of existing rules, such rules will expire if not reviewed under the Regulatory Flexibility Act. *See, e.g.,* the HHS Sunset Regulation.[20]
- ***A requirement to promulgate rules through formal rulemaking procedures.*** Two basic types of rulemaking are authorized under the Administrative Procedure Act (APA). By far the most commonly used by federal agencies is known as informal rule-making, which is also referred to as "notice and comment" rulemaking. But the APA also established a second type of rulemaking, known as formal rulemaking. This entails a trial-like process by which agencies must meet a particular burden of proof and their evidence and witnesses can be questioned and opposing witnesses may be presented. That process can develop better rules and generate higher confidence in the fairness and efficacy of those rules. Such rulemaking must be used in instances in which Congress requires it. But where it does not, informal rulemaking is considered a minimum standard, with agencies having the discretion to use more robust procedures such as those found in formal rulemaking. Such a process results in a more thorough involvement of stakeholders, improved analyses, and greater communication among stakeholders and government. Agencies could use such an enhanced process for at least their most significant rulemaking actions, with exceptions made for deregulatory actions. *See, e.g.,* Department of Energy "Process Rule" for Energy Conservation Standards.[21]
- ***Procedures for guidance documents.*** Economically significant agency guidance should receive comments from the public, be subject to a cost-benefit analysis, and be reviewed by the Office of Management and Budget. *See, e.g.,* EPA Cost-Benefit Rule and various agency guidance regulations under EO 13891 (subsequently revoked).[22]

3. Require Adherence to the Appointments Clause in the Promulgation of Rules[23]

The Constitution requires that executive officials who wield extensive powers be appointed by the President and confirmed by the Senate. This ensures a measure of political accountability. With respect to less important officials (inferior officers), Congress can establish other procedures. However, under federal agency practice, some rulemaking and adjudication powers rest with unaccountable federal employees.[24] For example, the EPA Environmental Appeals Board, which was established by regulation, is composed of officers who are not nominated by the President and confirmed by the Senate.[25] Likewise, the FDA's Associate Commissioner for Policy is not Senate confirmed, yet is vested with rule-making power. To address this problem, the promulgation of all rules and amendments thereto should be undertaken under the imprimatur of a Senate-confirmed official, and all agency adjudications should be conducted by a constitutionally authorized officer. Agencies must not rely on unaccountable employees to make final adjudicatory or rule-making decisions.

An executive order should be issued ordering all agencies, including independent agencies, to identify which officials have final adjudicatory or rule-making authority, the nature of their appointment, and the precise legal authorities governing the rule-making or adjudicatory process at issue. Conforming rules and legislation should be promulgated as necessary to ensure the proper exercise of authority. Moreover, Senate-confirmed executive-branch personnel should be required to indicate that fact in their signature blocks.

4. Reinstate Federal Workforce Management Principles[26]

President Biden revoked three executive orders that had increased civil service efficiency and accountability.[27] The three revoked EOs are:

- ***EO 13836***, "Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining," 83 FR 25329 (May 25, 2018):
  - ***Citing*** the authority of Section 7101(b) of title 5, United States Code, this executive order required agencies to implement the Federal Service Labor-Management Relations Statute (the Statute). Specifically, it required agencies endeavor to not take more than a year to renegotiate a collective bargaining agreement (CBA) and to secure CBAs that: promote an effective and efficient means of accomplishing agency missions; encourage the highest levels of employee performance and ethical conduct; ensure employees are accountable for their conduct and performance on the job; expand agency flexibility to address operational

needs; reduce the cost of agency operations, including with respect to the use of taxpayer-funded union time; are consistent with applicable laws, rules, and regulations; do not cover matters that are not, by law, subject to bargaining; and preserve management rights under section 7106(a) of title 5, United States Code.

- ***Established*** an Interagency Labor Relations Working Group (Labor Relations Group), consisting of the Office of Personnel Management (OPM) and representatives of certain other agencies, which it tasked with assisting OPM with labor-management relations in the executive branch; developing model ground rules for negotiations; analyzing CBAs on subjects relevant to more than one agency, particularly those that may infringe on, or otherwise affect, reserved management rights; assessing the consequences of CBA provisions on federal effectiveness, efficiency, cost of operations, employee accountability and performance, and the orderly implementation of laws, rules, or regulations; establishing ongoing communications among agencies in order to facilitate common solutions to common bargaining initiatives; and assisting the OPM Director in developing, where appropriate, government-wide approaches to bargaining issues.
- ***Established*** internal timelines and processes for the renegotiations of CBAs in order to advance the policies of the EO.
- ***Required*** OPM to make each CBA term and expiration date publicly accessible on the Internet.

- ***EO 13837***, Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use, 83 FR 25335 (May 25, 2018):
  - ***Required*** agencies to ensure that federal employees "spend the clear majority of their duty hours working for the public"; that the government does not pay for federal labor organizations' expenses, except where required by law; that unrestricted grants of taxpayer-funded union time are eliminated and instead require employees to obtain specific authorization before using such time; that taxpayer-funded union time is monitored to ensure it is used only for authorized purposes, and that information regarding its use is made readily available to the public. Furthermore, it required the agencies to work with OMB and OPM to implement controls on the authorization of taxpayer union time.
  - ***Prohibited*** employees from engaging in lobbying activities during paid time, except in their official capacities as an employee; from devoting, with exceptions, less than 75 percent of annual time on agency business and training; from having the free or discounted use of government property or any other agency resource if such free or discounted use is not generally available for non-agency business by employees when

acting on behalf of non-federal organizations; from being reimbursed for expenses incurred performing non-agency business, unless required by law or regulation; and from using taxpayer-funded union time to prepare or pursue grievances brought against an agency, except where such use is otherwise authorized by law or regulation. Exceptions were made for, among other things, the preparation of grievances or adverse personnel action taken against the employee in retaliation for engaging in federally protected whistleblower activity, including for engaging in activity protected under section 2302(b)(8) of title 5, United States Code, under section 78u–6(h)(1) of title 15, United States Code, under section 3730(h) of title 31, United States Code, or under any other similar whistleblower law.

  - Ordered agencies to develop implementation and reporting procedures.

- ***EO 13839***, "Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles," 83 FR 25343 (May 25, 2018):
  - ***Issued*** to promote civil servant accountability consistent with merit system principles while recognizing employees' procedural rights and protections.
  - ***Stated*** principles of personnel management for agencies to follow that are aligned with accepted authorities on terminating non-performing workers, thereby enabling the agencies to use their discretion and tailor penalties to the facts and circumstances of misconduct, rather than instituting progressive discipline.
  - ***Directed*** agencies to institute certain procedures for handling certain personnel decisions, *e.g.,* reductions in force, instances of unacceptable performance, grievance procedures, employee complaints, and employee settlements.
  - ***Required*** the collection and publication of aggregate data on personnel litigation and disciplinary actions.
  - ***Directed*** the renegotiation of CBAs and the amendment of policies and regulations inconsistent with EO 13839.
  - ***Ordered*** a government-wide initiative to educate federal supervisors about holding employees accountable for unacceptable performance or misconduct under EO 13839 and the ensuing policies and regulations.

These executive orders would lead to a more efficacious executive branch, ensuring that legislative intent is carried out, and helping ensure that the President can "take Care that all the Laws be faithfully executed." They would thus help restore faith in government and should be reinstated.

5. Re-Establish OIRA Review of IRS Regulatory Actions[28]

For over 40 years, the Office of Information and Regulatory Affairs (OIRA) has served a coordinating and analytical function to ensure that, among other things, regulations are consistent with applicable laws, the President's priorities, and the principles set forth in executive orders as well as to ensure that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency.[29] However, in 1983 when OIRA was in its infancy, OIRA and the Treasury signed a Memorandum of Understanding (the 1983 MOA) that exempted most Treasury and IRS tax regulatory actions from OIRA review. That exemption was ratified by the two signatory parties in 1993. As a result of these agreements, few Treasury regulations were ever submitted for OIRA review.[30] Moreover, since the MOA was signed in 1983, the nature of tax regulations has changed. As the Government Accountability Office (GOA) recently noted:

> Over the past three decades, the tax code has increasingly been used by policymakers as a tool for accomplishing social and economic objectives by creating special tax credits, deductions, and exemptions to achieve certain policy goals. These credits, deductions, and exemptions are known as "tax expenditures" because they represent revenue losses. In our body of work on tax expenditures, we have reported that they have major budgetary effects and deserve greater scrutiny.[31]

Such tools are used to pursue policy aims and the ensuing tax guidance documents "are related to social and economic objectives rather than traditional tax collection or administration issues." Furthermore, as the GAO stated, those tax regulatory actions can also have "major budgetary effects." Nonetheless, the 1983 MOA gave IRS leeway to routinely exempt those actions from EO 12866 and Congressional Review Act (CRA) analysis and oversight.[32]

In 1993, with the issuance of EO 12866, which replaced EO 12291, the OIRA Administrator and the Treasury General Counsel reaffirmed the 1983 MOA and issued a "Guidance for Implementing EO 12866 (M-94-3), Appendix C: Regulatory Actions Exempted from Centralized Regulatory Review, Department of the Treasury (Oct. 12, 1993)."[33]

On April 21, 2017, President Trump issued EO 13789, "Identifying and Reducing Tax Regulatory Burdens," which directed the Secretary of Treasury and the OMB director to review the IRS's exemptions from OIRA review and, "if appropriate," reconsider the "existing exemption for certain tax

regulations from the review process set forth in Executive Order 12866 and any successor order." The EO further ordered the Secretary to revise specified sections of the Internal Revenue Manual, if necessary to fulfill these directives.[34]

On April 11, 2018, Treasury and OIRA signed an MOA expressly superseding the 1983 MOA and associated documents and establishing that:

1. ***A tax regulation*** will be subject to OIRA review, pursuant to EO 12866, if it is likely to result in a rule that (a) creates a serious inconsistency with or otherwise interferes with another agency; (b) raises a novel legal or policy issue; or (c) has an annual non-revenue effect on the economy of $100 million or more.
2. ***Tax regulatory actions*** that fall within the ambit of paragraph 1 will be subject to the analytical requirements, as specified in EO 12866, for "significant regulations" as well as subjecting those regulations that have an annual non-revenue effect on the economy of $100 million or more to EO 12866's analytical requirements for economically significant regulations.
3. ***Treasury will submit*** to OIRA a quarterly notice of planned tax regulatory actions that describes each action; identifies any significant policy changes proposed or resulting from the proposed regulatory action; and articulates the basis for determining whether the regulation is covered by paragraph 1. Furthermore, at the election of the OIRA Administrator, Treasury will engage in substantive consultation with OIRA regarding any such regulatory action.
4. ***Treasury will not publish*** in the *Federal Register* or otherwise release any tax regulatory action within the scope of paragraph 1 (above) unless OIRA notifies Treasury that it has waived or concluded its review. In the event of a disagreement, OIRA will facilitate a principals meeting.
5. ***Any Treasury regulatory action*** not explicitly modified by the 2018 MOA will be subject to the standardized centralized review process under EO 12866, including the analytical requirements of OMB Circular A-4, with a few explicit narrow exceptions.

In 2020, Treasury and OMB signed an Addendum to the Memorandum of Agreement requiring that "regulatory impact analyses of tax regulatory actions …shall account for transfers (including revenue effects) of tax regulatory actions to the same extent as required under this Agreement for non-revenue effects, consistent with section 6(a)(3) of Executive Order 12866."[35]

On June 9, 2023, the Biden administration reversed the 2018 and 2020

reforms. Treasury and OIRA signed an MOA that superseded the 1983 MOA; the 1993 letter exchange between the OIRA Administrator and Treasury General Counsel reaffirming that agreement and the "Guidance for Implementing EO 12866 (M-94-3), Appendix C: Regulatory Actions Exempted from Centralized Regulatory Review, Department of the Treasury (Oct. 12, 1993)"; and the 2018 MOA, including the 2020 Addendum. The 2023 MOA acknowledged that "Treasury regulatory actions shall be subject to the standard centralized review process under section 6 of Executive Order 12866 (including the analytical requirements of OMB Circular No. A-4)," but, at paragraph 1(a), it added the following to the list of matters that are not subject to OIRA review:

> Tax regulatory actions, defined as a regulatory action (as defined by Executive Order 12866) issued by the Internal Revenue Service whether pursuant to Title 26 of the United States Code or with respect to any other United States Federal income, excise, estate, gift, or employment tax.

In brief, the 2023 MOA once again largely exempted Treasury and IRS from OIRA analysis, management, and oversight. An executive order is thus needed to reinstate the 2018 MOA and the 2020 addendum.

Legislative Agenda

1. Repeal Legal-Privateering Provisions in Statutes[36]

Legal-privateering statutes authorize private parties to enforce specified statutory provisions. They empower private persons to bring legal action against a private party that the privateer alleges has violated a statute or against a government agency that the privateer alleges has failed to enforce a statute. They implicate constitutional considerations as well as prudential concerns.

As to constitutional matters, on July 5, 2024, a Fifth Circuit panel in *National Horsemen's Benevolent and Protective Association v. Black* held that the Horseracing Integrity and Safety Act of 2020 ("HISA") unconstitutionally delegated enforcement powers to a private entity — the Horseracing Integrity and Safety Authority ("Authority"). The court so held because the statute did not vest final authority in the Federal Trade Commission (FTC) — the pertinent federal agency in the case.[37] Specifically, HISA gives the Authority enforcement power to investigate, subpoena, impose civil sanctions, and file civil actions seeking injunctions or sanctions. The Authority is invested to so act "all without the FTC's say-so." The court reasoned that the

private nondelegation doctrine "teaches that a private entity may wield government power only if it 'functions subordinately' to an agency with 'authority and surveillance' over it."[38] But the court noted, "The bottom line… is that a private entity, not the agency, is in charge of enforcing HISA." The court held that the fact that the FTC could later reverse some actions (it can reverse fines but not injunctions) did not cure HISA because, prior to such a reversal, the Authority could have launched an investigation, issued subpoenas, conducted a search, charged the defendant with a violation, adjudicated it, and fined him or her. Each of those actions is "enforcement" that could occur without FTC supervision. Nonetheless, as the *Horsemen's II* court noted, the Sixth Circuit recently rejected a nondelegation challenge to HISA's enforcement provisions.[39] Some of those concerns are also implicated in legal privateering schemes.

Regardless of the judicial disposition of these issues, Congress should eliminate legal privateering because it generates discord among the citizenry and fosters alienation from government. In the conventional statutory scheme, Congress authorizes a federal agency to bring legal action, or it provides a statutory remedy for a party to recover for an injury to his or her person or property. In contrast, legal privateering statutes invite private parties with generalized complaints to act as the statute's enforcers. That mechanism circumvents agency discretion.[40] Furthermore, whereas the formidable power of a government attorney is tethered to the citizenry through the presidential electoral process, legal privateers are insulated from both public accountability and executive control, especially qualitative and ethical responsibilities. Nor are they responsive to legislative checks and balances in the form of budgetary appropriations, investigations, and reporting. Such statutes also have increased risks of excessive and uneven enforcement.[41]

Below are examples of federal statutes that authorize private persons to bring legal actions to enforce federal statutes and rules.

- ***Under the Clean Air Act (CAA)***, "any person may file a civil action against any person, including the United States (EPA) for violations of emission standards or limitations, or violation of an order issued by EPA or a state with respect to such a standard or limitation. Citizens may also file a civil action against the EPA Administrator for failing to perform its duties under the CAA, as well as intervene in an action led by the EPA or a state or local regulatory authority."[42]
- ***Under the Clean Water Act (CWA),*** any "citizen" (essentially defined by the statute as any person)[43] who has been adversely affected by a violation of an "effluent standard or limitation," as defined in the CWA,[44] may file a

civil action against any person, including the United States or "any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution" for that violation or for violation of "an order issued by the [EPA] Administrator or a State with respect to such a standard or limitation."[45] Furthermore, any person may file suit against the EPA Administrator for failure "to perform any act or duty … which is not discretionary with the Administrator."[46]

- ***Under the Endangered Species Act***, "Any person may commence a civil suit on his own behalf" to enjoin any person, including federal or State government, who is alleged to be in violation of the Endangered Species Act, specifically chapter 35 (§§ 1531 to 1544) of title 16 of the U.S. Code or against the Secretary of the Interior for failure to take certain actions.[47]

The Framers intended the constitutional system of checks and balances as a safeguard of the rights and privileges of the citizenry, particularly protecting them from the effects of financial corruption and tyranny of the majority — the age-old problem wherein the passions of the majority turn on a minority or even a single person. Legal privateering statutes untether enforcement action from many of these checks and balances, raising the specter of a private party using the law to intimidate others.

Restoring the Separation of Powers

> *America's greatness is due in no small measure to our system of government, in which power and authority are deliberately divided. The separation of powers is not a mere "technicality." It is the centerpiece of our Constitution. Our freedoms depend upon it in the future, just as they have in the past.*
>
> *Prof. Richard Epstein*[48]

Over a century ago, progressivism took root and posited that the rise of the scientific method and expert managers trained in the nascent social sciences had rendered the separation of powers antiquated. The division of powers, with policymaking primarily in Congress, presented an institutional obstacle. As the branch closest to the people with the role to "refine and enlarge"[49] their views, it stood in the way of expert rule. Instead, the key to good government was to give the bureaucrat, as Woodrow Wilson phrased it, "large powers and unhampered discretion." This would identify clearly who was responsible for administrative action. "If to keep his office a man must achieve open and honest success, and if at the same time he feels himself entrusted with large freedom of discretion, the greater his power the less likely is he to abuse it, the more is he nerved and sobered and elevated by it." The good of the people, then, would be ensured not by checks and balances, but by its converse–power. A sort of inner morality would ensure the public good.[50]

Throughout the 20th century, Congress cleared the way for expert rule. It granted experts — bureaucrats — broad powers, while insulating them as much as possible from the checks and balances established in the Constitution. Likewise, it avoided granting "a corresponding increase in the scope of presidential power."[51] Full restoration of the separation of powers will require a series of judicial, legislative, and executive actions. Below are suggestions for legislative and executive action reform.

100-Day Executive Actions

1. Promulgate Regulatory Budget Executive Order[52]

The Biden administration dismantled the requirement for a regulatory budget, which imposed limitations on agency rulemaking and guidance on limiting regulatory volume. An executive order requiring a new regulatory budget should include the following elements, some of which mirror the previous administration's seminal regulatory budget and some of which constitute improvements:

- ***Comprehensiveness:*** All regulations should be included in the regulatory budget. This means agencies should seek approval from OMB for any regulation promulgated to ensure it satisfies the regulatory budgeting process. This budget process should be explicitly made separate from the process under Executive Order 12866, which governs the OIRA-review process for cost-benefit analysis. In general, EO 12866 should not be allowed to interfere with the implementation of the regulatory budget.
- ***Inventories:*** Agencies should first have to conduct a review of their regulations to create an initial inventory of their requirements. These reviews should identify those requirements that are discretionary and those that are mandated by statute. Virginia and Ohio have already created inventories that can serve as a model for this requirement.
- ***Reduction target:*** Agencies should be required to reduce their regulatory requirements by one third within three years, or some similar target. If this is too stringent, the goal could be attached to discretionary regulations, *i.e.,* those that don't require statutory changes to amend or eliminate.
- ***Regulatory cap:*** Once the reduction goal is met, agencies should be required to maintain the reduction going forward.
- ***Economic analysis and annual reporting:*** For significant regulations, agencies should be required to calculate the costs and cost savings associated with proposed revisions of regulations. Only regulations that are cost saving should be allowed to be enacted. Each year OMB should aggregate the cost and cost-savings estimates from these analyses into an annual report. This report could replace what is currently called the OMB Report to Congress on the Benefit and Costs of Federal Regulations. Guidance on the construction of the regulatory budget, including how to conduct economic analysis for it, should be included in any update of Circular A-4.

2. Incorporate Major Question Doctrine Screening into the Interagency Regulatory Review Process[53]

An executive order or OMB memorandum is needed to reflect the Supreme Court's recent, explicit recognition of the Major Question Doctrine.

For many decades, courts had given the administrative state wide leeway to expand its regulatory and programmatic control over the States, the economy, and society overall. In the absence of explicit congressional grants of authority, courts developed theories to divine implicit grants of power. Recently, the Supreme Court began tightening the recognition of such implicit grants. With its decision in *West Virginia v. EPA*, 597 U.S. ___ (June 30, 2022), the Court summarized this body of case law with its seminal explicit invocation of the Major Questions Doctrine.

As the Court described it, the Major Questions Doctrine addresses a "particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." In other words, is the agency attempting to "'work [a]round' the legislative process to resolve for itself a question of great political significance?" *West Virginia*, 597 U.S. ___ (Gorsuch, J. concurring, *quoting NFIB* v. *OSHA*, 595 U. S., at ___ (Gorsuch, J., concurring)). In recognizing this doctrine, the Court cited as precedent its recent decisions in *National Federation of Independent Business v. OSHA,* 142 S.Ct. 661, 595 U.S. ____ (2022) (*per curiam*) (rejecting agency mandate of COVID–19 vaccines nationwide for most workers at a time when Congress and State legislatures were engaged in robust debates over vaccine mandates); *Alabama Association of Realtors v. Department of Health and Human Services*, 594 U.S. ____, 141 S.Ct. 2485 (2021) (*per curiam*) (rejecting attempt by a public-health agency to regulate housing); *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014) (rejected argument that Clean Air Act granted authority to apply certain permitting requirements to stationary sources of greenhouse gases "because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization"); *Gonzales v. Oregon*, 546 U.S. 243 (2006) (finding that Attorney General had no authority to issue regulation effectively banning most forms of physician-assisted suicide even as certain States were considering whether to permit the practice); *EPA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (FDA's statutory authority to regulate "drugs" and "devices" did not authorize the agency to regulate tobacco products).

An executive order or OMB Memorandum is needed to revise the interagency rule review process to include a major questions screening, as set forth in the OMB forms entitled *Submission of Federal Rules Under the Congressional Review Act* and *Executive Order 12866 Submission*. The basis of the screening should be the indications of a major question as set forth in the *West Virginia* concurrence written by Justice Gorsuch and joined by Justice

Alito. The screening should be conducted by the agency in the first instance, with OIRA having the discretion to review it and copies of both reports being forwarded to Congress. The following is a sample screening:

Major Questions Doctrine Screening

1. ***State the statutory language*** authorizing the proposed agency action.
2. ***Does the agency's claim*** of power attempt to resolve a matter of "great 'political significance'" or "end an 'earnest and profound debate across the country,'" for example in Congress or in State government?
3. ***Does the agency seek to regulate*** "'a significant portion of the American economy'" or "require 'billions of dollars in spending' by private persons or entities"?
4. ***Does the agency seek*** to "intrud[e] into an area that is the particular domain of State law"?
5. ***Would the proposed action*** result in the agency's regulating additional industries?
6. ***Would the proposed agency action*** expand the class of problems over which the agency has authority (*e.g.,* from problems originating in the workplace to problems originating at large; from safety from accidental injury to the prevention of communicable disease)?
7. ***Would the proposed agency*** action expand the class of protected human or corporate persons (*e.g.*, CDC's protection of renters)?
8. ***Does the agency's proposed action*** match its congressionally assigned mission and expertise? *See, e.g., Alabama Assn. of Realtors*, *supra,* 595 U. S. ___, wherein the Court rejected an effort by a workplace safety agency to ordain "broad public health measures" that "f[ell] outside [its] sphere of expertise."

3. Guard Against Unauthorized Expansions of Government[54]

The Court in *West Virginia v. EPA* noted a "particular and recurring problem" of agencies' asserting highly consequential power beyond what Congress authorized. An executive order or memorandum is needed requiring agencies to justify significant exercises of authority. In particular, federal regulatory, programmatic and management activity should be (i) required by statute or necessitated by court decision; (ii) authorized but not required by statute and undertaken to achieve those statutory purposes; (iii) in furtherance of constitutional duties; or (iv) for purposes inherent in executive

branch responsibilities: (a) to safeguard the constitutional structure; (b) to protect constitutionally recognized rights; (c) to enhance government efficacy, including the effective and fair delivery of services and the fair distribution of burdens; (d) to promote government transparency; and (e) to protect the integrity of government by, for example, guarding against its misuse for personal or partisan purposes. Such an executive order (or legislation) is even more critical given the contemporary approach to "whole-of-government"—including independent agencies—implementation of executive policies.

Legislative Agenda

1. The Regulations from the Executive in Need of Scrutiny Act (the REINS Act)[55]

The administrative state is the product of a steady, century-long erosion of the constitutional structure, particularly the exercise of legislative power. Although that erosion might understandably evoke despair, we submit that the long view is one of promise. Recent decades have seen significant steps forward in restoring the constitutional allocations of responsibility. The REINS Act would be a logical next step.

The REINS Act would build on the Congressional Review Act (CRA) of 1996, which fulfilled one of the promises in the Contract with America. CRA gives Congress special procedures to pass a joint resolution of disapproval to overturn executive agency rules. For example, a resolution of disapproval is introduced in the same way as any other bill, except that it must be introduced within a 60-days-of-continuous-session period beginning when Congress receives the rule from the agency. The resolution is not subject to the Senate filibuster. A Senate committee can report the rule out of committee, but it may not amend it. Moreover, after 20 calendar days, the resolution can be sent to the floor by a discharge petition signed by at least 30 Senators. Once it is on the floor, any Senator may make a nondebatable motion to proceed to consider the resolution. The resolution and all motions and appeals are subject to a total debate limit of 10 hours before being voted on. Amendments are prohibited. All CRA votes are by simple majority. As of February 2023, the CRA has been used to overturn a total of 20 rules: one in the 107th Congress, 16 in the 115th, and three in the 117th. The problem of "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted" remains.[56] The REINS Act would strengthen the hand of Congress by requiring that it pass a rule of approval—as

opposed to a rule of disapproval — of certain major regulations before those regulations can take effect, thus changing the burden of action.

The House of Representatives passed the REINS Act in the 112th Congress through the 115th Congresses. The first Senate action on REINS legislation occurred in the 115th Congress, when the Homeland Security and Governmental Affairs Committee reported it out of committee. Now, with the runaway administrative state seemingly touching every aspect of life, the REINS Act is gaining in relevance. The need for the legislation is clear. Congress needs an efficient means to check agency overreach; otherwise, agencies have an incentive to arrogate more power than Congress intended, because corrective legislation faces a laborious process.

Rep. Kat Cammack (R-Fla.) introduced the REINS Act as H.R.277 in the 118th Congress, and it passed the House on June 14, 2023, on a vote of 221 to 210. The bill had 182 cosponsors. In January 2023, Sen. Rand Paul introduced a companion bill, S.184, which has 29 cosponsors, all of whom are Republicans. H.R.277 revises provisions relating to congressional review of agency rulemaking. Specifically, the bill establishes a congressional approval process for a major rule, defined as a rule that results (i) in an annual effect on the economy of $100 million or more; (ii) a major increase in costs or prices for consumers, individual industries, government agencies, or geographic regions; or (iii) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

2. Establish a Congressional Regulation Office (CRO)[57]

To provide sufficient administrative state oversight, Congress must enhance its own analytical capabilities, especially regarding estimates of economic impact and major statutory questions. Moreover, as William Yeatman points out in his Cato analysis (see below) Congress's analytical staff has been severely reduced in recent decades, while the size of government has increased significantly. The creation of a new congressional office, as opposed to embedding the functions in an existing office, would help ensure that the CRO mission would not be subordinated to the missions of legacy offices.

CRO would be directed by a credentialed economist and would have a legal office to provide analyses of statutory authorities. Its functions would include:

- ***Assumption*** of Congressional Review Act functions currently assigned to the Comptroller.[58]

- ***Evaluation*** of the adequacy and methodology of cost-benefit analyses of major rules (which number about 100 per year) and, if it deems necessary or if requested by a standing committee, performance of original cost-benefit analyses of such rules. Major rules would be defined to include those that implicate a major question.[59]
- ***Performance*** of periodic retrospective cost-benefit analyses informed by actual data rather than forward-looking estimates.[60]
- ***Analysis*** of policy areas in which multiple agencies regulate the same realms of activity.[61]
- ***Analysis*** of OMB's regulatory budget (assuming that practice has been continued).[62]

Any standing committee could request an analysis of a major rule, the definition of which would include major questions. In addition, similar to GAO's authorities, CRO would have discretion to initiate an analysis. An analysis could be initiated on the belief that a rule might be a major rule.

The core CRO mission would be to scrutinize executive branch actions for fidelity to statutory and constitutional obligations, including reviewing whether executive agencies give due respect to State constitutional structures. CRO would enhance Congress's capacity to ensure that legislative directives are carried out. Establishing it as a distinct congressional office will fill an oversight gap as well as help ensure that Congress sets aside adequate resources for its oversight duties. GAO would continue to act as the investigative arm of Congress, providing scrutiny of agency performance efficacy and ensuring financial accountability.

OIRA would add CRO to the distribution list of cost-benefit analyses generated by it and executive agencies. CRO would also receive cost-benefit analyses generated by independent agencies. It would have protocols similar to those of GAO to determine priorities. In terms of work priority, CRO's order would be referrals from: (1) standing committees; (2) a member requesting a matter that concerns his or her State where such member has the majority support of the State's congressional delegation; and (3) requests from individual members or groups of members.

CRO's assessments would be posted online, delivered to the committees of jurisdiction, and made available to all members.[63] In the event of conflict, its evaluations would supersede that of the executive branch as to whether a rule is a "major rule" for purposes of the Congressional Review Act.

Protecting State Sovereignty: The Responsiveness of State Government to the Citizenry

> *Federal-state collaboration is increasingly Congress's regulatory model of choice, and the terms of these collaborations will be the federalism fight of this new century.*
>
> *Prof. Bridget Fahey*[64]

This section calls for guardrails on the administrative state's engagements with State government. As Professor Fahey points out, the form of these encounters has proceeded largely without scrutiny. They raise "fundamental questions about the degree of autonomy, self-determination, and respect the states deserve" when they are considering, and making agreements with, the federal government. Should the federal government take care to not damage the States' constitutional structures, or should it be encumbered only by the *de minimis* judicially created standards of coercion and commandeering?

State government is part of the overall constitutional structure. The federal government should take into account the complexity of State governments and take care not to short-circuit the States' decision-making processes, a precept that is all the more proper given that a State's citizens are also federal citizens. It should therefore develop "rules of engagement" for its encounters with the States.[65] We begin with a few general observations and then discuss some of the particulars raised by the working group and legal scholars.

Federal and State government, as well as the people, are all part of an overarching constitutional structure. In the words of Chief Justice Chase, "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government."[66] Moreover, the Constitution protects State sovereignty not just for the benefit of State government but also for the protection of individuals. In this regard, "just as

the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse."[67] As a further practical matter, the intended division of powers between federal and state government would ensure that citizens can exert influence over both national and state matters, rather than risk having to subordinate their state and local demands to their national demands.

In *New York v. United States*, Justice O'Connor discussed overreach by federal branches with federal encroachment on the States: "The constitutional authority of Congress cannot be expanded by the *consent* of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States."[68] No such unit has the authority to alter the constitutional structure, for either its own or future generations.

In "Consent Procedures and American Federalism," Fahey details some of the ways in which the federal government weakens the structural integrity of State government. She notes:

> In every program and for every grant that relies on the states' voluntary participation, the federal government decides how the states volunteer: which official or institution gets to speak for the state, how the decision is presented to that speaker, what process the speaker must use to communicate the state's decision, and the timeline on which the decision must be made.[69]

Fahey calls these dictates *consent procedures*. Consent procedures can range from designating a particular official as the State's spokesperson or agent for the acceptance of federal programs (and strings attached), to instructing him or her to take certain actions such as meeting with the public, consulting with other officials or bodies in State government, and issuing an opinion. In so doing, the federal agency can interfere with the functioning of a State's constitutional structure. In some instances, consent procedures are the product of statute, and in other instances they are crafted by executive action.

Federal structural interference is sometimes done intentionally in order to craft a favorable path to State acceptance of the federal program. That path sometimes has alternatives that are triggered when the designated State actor fails to accept the federal program. On that score, the American Recovery and Reinvestment Act of 2009 designated the governor as the State's acceptance agent, but if the governor did not accept funds, "then acceptance

by the State legislature, by means of a concurrent resolution, shall be sufficient to provide funding for the State."[70] Such alternative pathways can also be found, for example, in the Clean Water Act and the Affordable Care Act. As a rule of thumb, the severity of consent procedures intensifies as the federal government's desired policy prescription becomes more intrusive.

The common theme of the following subsections is that, for the federal government, fidelity to the Constitution includes a duty to respect the state constitutional structure, including its decision-making apparatus.

100-Day Executive Actions

1. Institute Major Question Doctrine Screening for Conditions (or Waivers of Conditions) in Grants-in-Aid to the States in Order to Curtail Unauthorized Regulatory Effects[71]

Federal grants expenditures have increased dramatically in recent decades, and with that, the conditions tied to those grants have become "a key part of how policy gets achieved across a wide range of areas."[72] As Eloise Pasachoff detailed, federal grants to State and local government increased steadily from $285 billion in 2000 to a pre-pandemic level of $750 billion in 2019 and then $1.2 trillion in 2021. At the same time, Congress is legislating less and less particularly, folding massive funding into broadly sketched omnibus bills. Sometimes those conditions run afoul of judicially recognized constitutional boundaries. But in other instances, conditions operate in a judicially unexplored place — in an area the courts have so far left to the other branches of government. Through these conditions, federal agencies manipulate State agencies to take part in innovative strategies that reshape the constitutional pathways of power, altering the relationships between government and the citizen and otherwise enabling government to "increasingly regulate" through grants.[73]

Over the last 75 years, the federal government has built an impressive structure for the promulgation, revision, and administration of regulations. Not so with regard to federal grants. As Philip Hamburger observes, the use of grant conditions "has evolved in an *ad hoc* manner, without much public fanfare, and has[74] developed into a mode of governance only during the past half century." The administrative foundation supporting grant-making lags the foundation that supports the regulatory environment. The suggestion here is not a panacea, but it would build out administrative practice in distinguishing between authorized and unauthorized grant proposals. Likewise, it would encourage Congress to provide more precision in its authorizations.

As discussed above, in the 2022 case of *West Virginia v. EPA*, the Court explicitly recognized the Major Questions Doctrine, which provides an analytical approach for distinguishing between activities that Congress has authorized and those it has not. Although the Court discussed the doctrine in the context of analyzing whether Congress had authorized expansive regulatory activity, it can serve as a tool for analyzing congressional authorizations more generally. In that regard, at least one scholar has noted that the doctrine "could, in the future, allow courts to find many interpretations leading to new grant conditions as beyond the scope of delegated authority."[75] And, in the context of grants-in-aid to States, the Court has noted that, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."[76]

Myriad concerns come with the exercise of federal executive power, including whether that power is constitutionally permissible and whether it is authorized by Congress. The gravity of this issue is made clear by consideration of the effect of some actual and proposed grant conditions. For example, as Derek Black noted:

> In the fall of 2011, the U.S. Secretary of Education told States he would use his statutory power to waive violations of the No Child Left Behind Act ("NCLB") [a federal grant-in-aid to States program], but only on the condition that they adopt his new education policies — policies that had already failed to move forward in Congress.[77]

States were under tremendous pressure to accept the conditions because 80 percent of their schools faced serious statutory sanctions under the grant program. As a result of the waiver program, "[f]or the first time, the content of school curriculum and the means by which schools would evaluate teachers came under the direct influence of a federal official." Moreover, "these [waiver] terms were identical to those the President had proposed to Congress in 2010, and which Congress chose not to adopt — terms that the Administration had previously indicated would move education in an entirely different direction from [existing federal law]."[78]

Even more jarring, the executive branch's efforts to self-authorize these policies through grants did not begin with the waivers. The Obama administration had pushed the same policies through competitive grants appropriated through the American Recovery and Reinvestment Act of 2009. However, as Grover Whitehurst points out:

> There is nothing in the text of the ARRA, or in the portions of the two other statutes to which it points (the Elementary and Secondary

> Education Act and the America Competes Act), that authorizes, requires, or even suggests that states competing for funds would need to adopt common state standards, create more charter schools, evaluate teachers and principals based on gains in student achievement, emphasize the preparation of students for careers in science, technology, engineering, and mathematics, or restructure the lowest 5 percent of their schools.[79]

In other words, without congressional authorization, the federal executive branch made a grant offer to the States that, through the grants conditions, instituted systematic State and local policy changes. A State might indeed be able to simply reject the federal offer, but the prior question is whether the money is being used as Congress intended. In contrast, if Congress wishes to grant wide discretion to a grantee, it can do so, and has done so.[80]

The suggestion here calls for an executive order instituting major question doctrine screening for unauthorized conditions in grants-in-aid to the States as well as in waivers to those conditions in order to curtail unauthorized exertions of power by the administrative state. Below is a suggested screening.

Major Questions Doctrine Screening for Grants-In-Aid to States, Local Government or Consortia of States

1. ***For conditions in the grant or grant-waiver agreement*** that address matters other than routine administration (for example, financial reporting, grants budgets), state the statutory language authorizing the proposed grant or waiver condition.
2. ***With respect to those conditions,*** if the answer to any of the following questions (which are informed by the Court's decision in *West Virginia v. EPA*, 597 U.S. ___ (June 30, 2022)) is yes, then the proposed grant must be approved by the agency's general counsel and OMB and reported to Congress:
   - ***Through the grant***, would the agency be attempting to address a matter of "great 'political significance'" or "end an 'earnest and profound debate'"?
   - ***Would the grant program*** put States in competition with each other for funding and, in so doing, tie funding to the State's adoption of policies or standards, for example by awarding grant competition points for States that have committed to the agency's preferred policies or standards?

- ***Would the grant or waiver condition encourage*** State agencies to lobby their legislatures for significant policy changes?
- ***Would the grant or waiver condition require*** States to centralize policymaking within the State in a matter that is traditionally in the purview of local government?
- ***Through the grant program,*** does the agency seek to shape "'a significant portion of the American [or State] economy'" or in the aggregate require significant spending by State or local government?
- ***Would the grant or waiver condition shape policy*** in an area that is the domain of State or local policymaking?
- ***Does the grant condition or waiver condition exceed*** the agency's congressionally assigned mission and expertise?
- ***If the grant or waiver program contemplates*** a joint effort with other agencies, is there express congressional authorization for such a joint effort?
- ***If the grant or waiver program contemplates*** a joint effort with other agencies, does the combined program create new objectives or goals –either explicitly or through grant scoring rubrics–for one or more of the participating agencies?
- ***If the agency proposes*** waiver of existing grant conditions in exchange for new conditions, (i) are such new conditions outside the scope of the underlying grant; (ii) would their acceptance necessitate a significant change in State or local policy; or (iii) would their acceptance effectively require a re-ordering of State or local governance structure?
- ***If the condition is tied*** to a waiver of a grant obligation or benchmark, (i) did the grantee have notice in the underlying grant agreement that waivers would be tied to conditions, and (ii) are the conditions within the scope of the authorizing statute and the underlying grant program?

The screening should be conducted by the relevant agency in the first instance, with OIRA having the discretion to review it and copies of both reports being forwarded to Congress. If implemented, this reform would also indirectly encourage Congress to more carefully draft authorizing language, and it would help refine executive grant practices to better align with the constitutional framework.

2. Promulgate a Rule on How Grants-in-Aid to the States Characterize Federal Contributions

Federal spending on grants-in-aid to States should express federal contributions as a percentage of implied or express State contributions, both in the

grant offer itself as well as in public descriptions of the grant. Thus, three years of federal funding for a new police officer position should be expressed as funding of $x, amounting to 10 percent of the new State obligation of $y (reflecting a 30-year career). Presently, the offer can be presented in terms of the federal payout but not the attendant state obligation. For example, see "Justice Dept. Grant Awards $139M to Hire 1,000 New Officers" (grant money is to increase the number of police officer positions, which provides an early boost to law enforcement but can be, and has been, a long-term liability that impairs the ability of departments to retain officers).[81] Current federal practice shifts the burden to State officials to explain the federally designed State obligation, which is often a longer-term obligation.

3. Promulgate a Rule on Transparency in Federal Grant Recipients[82]

Federal grants can have downstream effects on State government and local communities. Simple transparency is required so that citizens have notice of how their tax dollars are being used in their communities. Specifically, federal grantees should be required to post on a federal website the names of any sub-grant recipient organizations. The U.S. Department of Health and Human Services (HHS) Community Services Block Grant program (CSBG) demonstrates how such transparency would be beneficial.

The CSBG program is a legacy of the 1964 Economic Opportunity Act, a keystone of the War on Poverty. The Act funded Community Action Agencies. The Economic Opportunity Act was replaced by the Omnibus Reconciliation Act of 1981, P.L. 97-35, which was itself amended in 1998 by the Coates Human Services Reauthorization Act of 1998, P.L. 105-285. The result is a block grant mechanism that funds over 1,200 community action agencies. The express CSBG objective is to work through "community action agencies and other neighborhood-based organizations" to, among other purposes, empower low-income persons and to provide services and activities having a "major impact on causes of poverty"; to provide activities designed to assist low-income participants to remove obstacles and solve problems that block the achievement of self-sufficiency; to achieve greater participation in the affairs of the community; and to make more effective use of other related programs. The proposed rule here would require that all federal grant recipients post on a federal web-page the names of any institutional sub-recipients, and sub-sub recipients, as well as the amounts received.

4. Require Transparency in Federally Funded Development Projects[83]

A niche group of investors uses federal tax credits and other incentives, combined with State incentives, to launch private development projects. The federal programs act as a funding base that helps investors secure additional State and local government funding. Frequently, the product is a private development project that has been built on heavy government funding, for example 70 percent government and only 30 percent private funding. On occasion, the project is fully funded by government.

These projects tend to have alarming consequences. The developer gets a building mostly or even completely paid for with public money. It commonly receives a tax break as well, a period of years during which it pays no real estate taxes on the finished project. Among the consequences of this are an increased tax burden on other taxpayers to make up the tax deficit so that the police, fire, school, sewer, water, parks, and other public services remain funded. On that note, a policy analyst in Marion, Indiana complains that "a dollar out of every five that a homeowner pays in my city" goes to these schemes rather than to pay for necessary services. These exemptions lower the total net assessed value of the real property in a locality and, consequently, lower the amount of total taxes collected–unless of course a locality increases taxes on the remaining taxpayers to make up the difference.

Tax consequences are but one ramification. By using the tax system to fund a private development project, government picks winners and losers. It decides what part of a locality will receive a flourish of businesses, often national entities that the developer courts to anchor its project. Likewise, by favoring one area of its jurisdiction, the locality might be, depending on the circumstances, picking winners and losers by drawing foot and automobile traffic from other areas to the development project. This, of course, disadvantages a competing local business.

A process solution is issuing an executive order (or enacting legislation) requiring that all economic development or redevelopment projects on privately owned real property, or to be owned by a private entity as a result of the development or redevelopment project, with the exception of single-family, owner-occupied homes, must, before receiving federal credit, complete on a public federal website a finance sheet that specifies the sources and amounts of such private party's financing, including private financing. This would include, but not be limited to, loans, tax credits, and grants. The online filing should specify what entities will have title to the project upon its completion.

Legislative Agenda

1. Prohibit Federal Agencies from Dictating Which State Official Accepts a Grant or Waiver Offer and the Political Processes Used to Make the Decision[84]

Federal grants-in-aid to States frequently prescribe the approval process through which States accept a federal grant or waiver offer. Federal agencies (and sometimes Congress) prescribe these pathways to ensure State approval of contentious grants and the attendant substantive conditions (*e.g.,* the 2009 Stimulus Bill, the Affordable Care Act, No Child Left Behind). Generally, the more ambitious the policies that the federal government wants to promote through the grant, the more laden the grant offer is with dictates as to how the State, and who within the State, must accept the grant offer ("consent procedures"). In brief, consent procedures distort the State constitutional decision-making processes, neutralizing States' checks and balances. For example, a grant offer might require which State officials have to accept the grant on behalf of the State, or it might require that legal authority must be allocated to a specific State office.

Through these grant offers, federal agencies also shape a State's external political processes, thus interfering with the State's relationship with its citizens. For example, they will define stakeholders and mandate meetings and other interactions with citizens. Although discussions with the electorate are laudable, federal agencies should not be dictating the contours of those interactions and, inadvertently or otherwise, tipping the scales of the discussion.

2. Prohibit the Federal Government from Requiring that State or Local Governments Form a Commission or Other Body[85]

Structural progressives seek to break down the division of power between federal and State government. The original allocation of power ensured that citizens would have the power to shape their own communities, most significantly by working with their neighbors to do so. As Tocqueville noted, the great spirit of the American republic arises from that dynamic. It produces tranquility, invests citizens in the overall constitutional structure, and provides them with opportunities to be persons of substance in the eyes of fellow citizens. One of the great mistakes of progressivism is to overlook this personal, social aspect of de-centralized government. Instead of embracing that dynamic, progressivism perceives it as a threat to its efficiency and thus seeks to neutralize it. In Woodrow Wilson's view, the task is to make federal,

State, and local government "all interdependent and co-operative."[86] A significant way in which it does this is through the use of what we call *parallel governments*, which the federal government deploys across several areas of local concern. These federally dictated entities appear to be functionaries of local government but, in fact, are creatures of federal government.

The formula grants under the Community Services Block Grant Program (CSBG) dictate the formation of parallel government bodies. Among the stated goals of this federal program is to "ameliorate poverty"[87] by, among other things, empowering targeted persons "to respond to the unique problems and needs within their communities."[88] In brief, through its Department of Health and Human Services (HHS), the federal government distributes money to the States, which then awards it to community level entities.[89] Those entities include community action agencies (CAAs), migrant and seasonal farmworker organizations, or other organizations designated by the States.

The federal government has a heavy hand in the administration of the grant and, with that, in State and local policymaking, and at this point the program deviates from semblance to a true block program. Under the program, the lead state agency (designated by the governor) develops a State plan to manage the federal grant funds to be received.[90] Although styled as a "State" plan, it is anything but that. Federal statute requires participating States to develop it. Prior to finalizing the plan, the lead agency must hold a public hearing. It must then submit it to the federal HHS Secretary for approval. The federal government prescribes the plan's content, including descriptions of how the grant funds will be used and how the State's social services programs — both "governmental and other social service programs" — will be linked and coordinated. It requires that sub-grantees (the State's grantees) have a community action plan that is incorporated into the State plan. The State must also coordinate, and require each of its grantees to coordinate, with other public and private social service programs.[91] Moreover, federal statute provides that the State's awardees can be either private or public entities, but in either case, it imposes intrusive governance conditions on the awardees.[92] Nonprofit awardees must have a tripartite board of which one-third of the members are elected public officials, one-third are "representative of low-income individuals and families selected to represent a specific neighborhood," and one-third are "officials or members of business, industry, labor, religious, law enforcement, education, or other major groups" in the community served. Public awardees must also have a board, and it must adhere to federal prescriptions as to its makeup and consist of

"persons chosen in accordance with democratic selection procedures."[93]

The State may not terminate or reduce the level of funding any of its awardees (*i.e.,* sub-recipients of the federal grant) received in a previous year unless it does so for cause and after notice and an opportunity for a hearing on the record. Moreover, such terminations or reductions are subject to the Secretary's approval.[94] If the State terminates or reduces the funding prior to the Secretary's approval, the Secretary is authorized to continue the funding directly until the State's "violation is corrected" and reduce the funding to the State accordingly.[95] The State must ensure that each of its subgrantees establish procedures under which various third-parties can petition for greater representation on the particular subgrantee's board.[96] The governor may revise the plan — which as noted above includes the coordination with other social service programs — but must submit it to the Secretary.[97] Federal statute dictates that a State annually evaluate its performance under the grant, dictates the substance to be evaluated, and requires the submission of the report to the federal government. The Secretary must approve the State's performance measurement system.[98] In sum, this is more of a federal program with the state acting as a local contractor.

Federal transportation planning provides another example of parallel governments. Through it, the federal government exerts a dominant, controlling hand in transportation decisions across the country, and in many respects, in decisions that touch on transportation. As a condition for receiving federal highway funds, a state must have authorized its "State highway department … by the laws of the State, to make final decisions for the State in all matters relating to, and to enter into, on behalf of the State, all contracts and agreements for projects and to take such other actions on behalf of the State as may be necessary to comply with [federal highway laws and regulations]."[99] The federal government also requires a State to develop long-term (20-year) transportation and short term (four-year) transportation improvement plans.[100] Long- and short-term plans must also be developed for all metropolitan and nonmetropolitan areas within the state.[101] The federal Department of Transportation has significant approval authority over the plans.[102]

With respect to metropolitan areas (populations of 50,000 or more), the planning process is conducted by the Metropolitan Planning Organization (MPO) process, which is a type of entity invented by federal statute.[103] As described by the federal Department of Transportation, an MPO has the authority of federal law, is a representative group of local stakeholders, leads a region's transportation planning process, is that "region's policymaking

organization responsible for prioritizing transportation initiatives," "prioritizes transportation initiatives for funding," and "carries out the metro transportation planning process in cooperation with the State's [Department of Transportation] and transit operators."[104] Federal law requires each metropolitan area to be administered by an MPO, which must be designated by State law to carry out transportation planning. Federal law also dictates how the MPO is to be formed, requiring that it shall be the product of an "agreement between the Governor and units of general purpose local government that together represent at least 75 percent of the affected population"[105] but that, in any event, its geographic area of administration "shall encompass at least the existing urbanized area and the contiguous area expected to become urbanized within a 20-year forecast period."[106]

With respect to MPOs of areas with a population in excess of 200,000, the federal dictates become more demanding, requiring that the MPO board "shall consist of (i) Local elected officials, (ii) Officials of public agencies that administer or operate major modes of transportation in the metropolitan area, including representation by providers of public transportation; and (iii) Appropriate State officials."[107] The scheme ensures that MPO board members who represent "providers of public transportation" have the same "responsibilities, actions, duties, [and] voting rights" as board members who are appointed by virtue of being an elected state or local official.[108]

The MPOs must develop long-range plans — a Metropolitan Transportation Plan (MTP) — for its region and short-term transportation improvement program (TIP) plans based on the MTP.[109] The MPO and the Governor must approve the TIP and, when they do, it is folded into the statewide short-term plan, which is submitted to the federal Department of Transportation for approval "without change, directly or by reference."[110] MPO responsibility extends even to a project that does not receive federal funding if that project is "regionally significant."[111] With respect to both the MPO-developed plans and the state-developed plans, federal law sets forth how the plans are to be developed and the policy objectives of the plans.[112]

The federal MPO structure interferes with a State's authority to construct its decision-making process and disperse power within the State. Under federal statute, the Governor and the MPO are tasked with drawing, by mutual agreement, an MPO's geographical boundaries, provided that the area "shall encompass at least the existing urbanized area and the contiguous area expected to become urbanized" in the ensuing 20 years.[113] By such agreement, the Governor and an MPO can draw those boundaries to "encompass the entire metropolitan statistical area or consolidated metropolitan statistical

area, as defined by the Bureau of the Census."[114] The Governor and the MPO board can draw the boundaries to include multiple cities, towns, and other political sub-divisions, thus giving the MPO multi-jurisdictional authority.[115] For instance, the same MPO that oversees Indianapolis also has jurisdiction over other cities and towns.

Federal statute also expressly grants States the authority to enter into compacts with other states on transportation matters, including to form multistate agencies. However, it also reserves the "right to alter, amend, or repeal [such] interstate compacts." Overall, the MPO structure significantly diminishes the role of the state legislature, allocating power to the governor and the MPO boards, both of which in many ways function as appendages of the federal executive branch. That structure also reconfigures the relationships among state government, its political subdivisions, and citizens.[116]

Parallel governments have the exclusionary effect of diminishing citizens' connections to their state and local elected officials and legislative bodies, neutralizing the great advantages of having a sovereign state government and, under it, local government. Parallel governments are policy-making, legislative-like bodies that change the dynamics of governance, if not the structure itself. The federal government should refrain from requiring the formation of commissions and boards to address matters of state or local concern. Current funding mechanisms that require such entities should be reformed.

3. Restore State Control of Federal Assistance Through Block Grants[117]

The massive growth of the federal grants-in-aid system has eroded the core federalist principle that States and their subsidiaries are to be the primary government that interfaces with citizens on matters of local concern. Regardless of whether federal financial assistance to States should be curtailed, its mode of delivery should be reformed to better respect federalism principles by consolidating specific, highly regulated grant programs into broad, flexible block grants to the States. States generally have a better understanding of their needs, and it is thus more efficacious to allow them the flexibility to direct funds to those needs. Furthermore, block grants will reduce the administrative costs of both the federal and State governments.

From a constitutional perspective, block grants also represent an important step to bringing balance to federal-state relations. Especially during the Great Society era, categorical grant programs mushroomed and money began to be sent in large amounts directly to localities and federally dependent

nonprofit organizations, purposely bypassing States and undermining the authority over domestic policy choices.[118] The people of each State should be able to set their own priorities, re-establishing the States as both the responsible and accountable governments for most domestic affairs and allowing them to set a coherent policy agenda. While States should be free to set their own performance measures for federal grants, they should be required to make results publicly accessible. Such a mechanism would help overcome some of the past resistance to block grants and further the ideal of States as "laboratories of democracy."

Mitigating Direct Threats to Individual Liberty

> *The true danger is when liberty is nibbled away, for expedience, and by parts.*
>
> *Edmund Burke*[119]

Baked into the design of the administrative state is expedience. Structural features designed to protect liberty are given short shrift in favor of the administrative state's efficacy. The reforms below would ensure basic fairness in how the administrative state conducts enforcement activities.

100-Day Executive Actions

1. Institute a Right to a Show-Cause Hearing for Administrative Actions[120]

Guardrails are needed to protect against agencies' conducting pre-adjudication and investigatory procedures on targeted individuals. Such overreach can have a draconian effect on liberty, including financial liberty. Agencies can drag out their investigative and adjudicative process for years before the agency is rebuked by the courts, backs down, or worst of all, the innocent citizen succumbs to the weight of an investigation. The process itself is punishment. The targeted individual loses, even if he ultimately wins the legal fight, because of the time lost, money spent, and anguish suffered. This process has a chilling effect on similarly situated citizens who will be deterred from taking perfectly legal actions for fear of enduring the same fate. Government becomes strange to, and feared by, citizens.

All agencies with investigatory authority should be required to make show-cause procedures available to targets of enforcement proceedings. In brief, a party under investigation or subject to administrative proceedings would be able to file a petition for a ruling that the agency must cease and desist its investigation or proceeding. Such a petition would be based on any one of a number of grounds, including a showing that: sets forth *prima facie*

evidence that petitioner did not engage in prohibited conduct; petitioner's conduct does not constitute prohibited conduct or satisfies mandated conduct; or petitioner has an affirmative defense, including reasonable reliance on an agency's guidance documents, statements or other conduct; a public emergency; or the granting of a license or a finding of no violation by a federal agency with concurrent jurisdiction. At such show-cause proceedings, the agency would have the burden of making the case that the investigation should continue.

2. Protect Routine, Reasonable Conduct[121]

Tenets of a just legal system include notice of the possible penalties and proportionality between an infraction and the penalty. Without those, the enforcement process becomes one of intimidation, and vast swathes of legal representation become guesswork. Enforcement proceedings can have a draconian effect, such as when the threat of criminal prohibitions and harsh civil penalties is used to reach unknowing, ordinary, reasonable, or inadvertent conduct. To this end, in 2018, Pacific Legal Foundation (PLF) recommended, in response to an OMB request for information, that:

> Agencies should declare by regulation that, for a criminal prosecution to occur or for a civil penalty greater than $5,000 to be threatened or imposed, the offending conduct must have been deliberate and directed at a specified prohibited outcome. Otherwise, enforcement should be limited to minor administrative penalties of less than $5,000 and/or reasonable remedial remedies.[122]

In making this recommendation to OMB, PLF cited clients whom government agencies had targeted with heavy-handed criminal and administrative civil actions for purported violations of the Clean Water Act and the Endangered Species Act. The crux of those cases was that the purportedly actionable activities were among the normal, reasonable activities of daily life. Drawing on a real-life example, an elderly man should not be imprisoned because he protected his home from wildfires by creating a buffer zone of ponds.

The President should establish an interagency working group to draft agency guidance assuring that normal, reasonable conduct which may have triggered an administrative violation is not bootstrapped into an oppressive encounter between government and citizen.

3. Provide Adequate Notice of Administrative Penalties, Reduce Arbitrariness, and Ensure Proportionality[123]

Agencies with the authority to issue fines should publish tables identifying classes of common *de minimis* violations with the maximum penalty that will be sought and a reasonable limitation on the accumulation of daily accruing penalties.[124] A somewhat analogous effort was undertaken by the United States Sentencing Guidelines Commission.[125]

4. Due Process, Transparency, and Fairness in the Issuance of Guidance Documents, Enforcement Proceedings, and Adjudications[126]

Trust in government is at an alarmingly low level, having steadily declined since public research began measuring it in the 1950s. We suspect that the uncertainty seeping from the administrative state's situational power undergirds much of that distrust. Situational power is the ability to dictate policies or procedures that are not the result of statute or the rule-making process. The administrative state's enforcement authorities give it situational power. It can set procedures that contravene centuries-old understandings of fairness or issue guidance documents that overstep authorities granted by Congress. It would behoove the next administration to robustly address these matters and to thereby help alleviate the public's mistrust in its government.

The dynamics of guidance documents illustrate the use of situational power. If you have a business to start or run, why not avoid stepping on the toes of an enforcement agency? If an agency publishes a document setting forth its view of the law, why not abide by that? There are nonetheless two sides to this issue. In and of themselves, guidance documents can be helpful. An agency might issue a pamphlet in clear, everyday language that explains a regulation or program. But if care is not taken, an agency could use guidance documents to arrogate unauthorized power. It could expand the meaning of regulations or statutes and fiddle with procedures and thereby undermine the just application of the law. At that point, government becomes oppressive and can no longer be viewed as being of and for the people.

An executive order and legislation are needed — with application across multiple regulatory agencies — to institute important principles for the protection of rights and the assertion of the truth. The substantive bases of the proposed solutions are a revoked executive order, EO 13892, and three documents — an internal order and two internal memoranda — written in 2018 and 2019 by Steven G. Bradbury, General Counsel and Regulatory Policy

Officer at the U.S. Department of Transportation. The content of the new executive order, and the basis of complementary legislation, is set forth below:

i. ***Enforcement Policy Generally.*** A party should not be subject to an administrative enforcement action or adjudication absent prior public notice of both the enforcing agency's jurisdiction over particular conduct and the legal standards applicable to that conduct.[127]

ii. ***Investigative Functions.***

- ***An agency's investigative powers*** must be used in a manner consistent with due process, basic fairness, and respect for individual liberty, including private property. Where Congress has authorized an agency to conduct enforcement actions, it has in many instances given that agency broad discretion in determining whether and how to conduct investigations, periodic inspections, and other compliance reviews. Nonetheless, an agency must not use these authorities as a game of "gotcha," and it should follow existing statutes and regulations. To the maximum extent consistent with protecting the integrity of the investigation, an agency should promptly disclose to affected parties the reasons for the investigative review and any compliance issues identified or findings made in the course of the review. It should provide effective legal guidance to investigators and inspectors to ensure adherence to the agency's policies and procedures.[128]
- ***Within 120 days*** of the date of such an order, each agency that conducts civil administrative inspections or investigations must publish a rule of agency procedure governing such actions, if such a rule does not already exist.[129]

iii. ***Separation of Functions.*** Unless provided otherwise by statute, agencies engaged in both enforcement and adjudication proceedings must promulgate regulations that provide for a separation of decisional personnel from adversarial personnel in administrative enforcement proceedings. Any agency personnel who have taken an active part in investigating, prosecuting, or advocating in an enforcement action should not serve as a decision maker and should not advise or assist the decision maker in that same or a related case. In such proceedings, the agency's adversarial personnel must not furnish *ex parte* advice or factual materials to decisional personnel. When and as necessary, agency employees involved in enforcement actions should consult legal counsel and applicable regulations and ethical standards for further guidance on these requirements.[130]

iv. ***Avoiding Bias.*** Consistent with all applicable laws and ethical standards

relating to recusals and disqualifications, no federal employee or contractor may participate in an enforcement action in any capacity, including as Administrative Law Judge, adjudication counsel, adversarial personnel, or decisional personnel, if that person has: (a) a financial or other personal interest that would be affected by the outcome of the enforcement action; (b) personal animus against a party to the action or against a group to which a party belongs; (c) prejudgment of the adjudicative facts at issue in the proceeding; or (d) any other prohibited conflict of interest.[131]

v. ***Contacts with the Public (Including the Press).*** After the initiation of an enforcement action, communications between persons outside the agency and agency decisional personnel, including the press, should occur on the record. Consistent with applicable regulations and procedures, if oral, written, or electronic *ex parte* communications occur, they should be placed on the record as soon as practicable. Notice should be given to the parties that such communications are being placed into the record. When performing official duties, all agency employees should properly identify themselves as agency personnel; they should properly show official identification if the contact is made in person; and they should clearly state the nature of their business and the reasons for the contact. All contacts by such personnel with the public must be professional, fair, honest, direct, and consistent with all applicable ethical standards.[132]

vi. ***Fairness and Notice in Jurisdictional Determinations (Guidance Documents, Judicial Deference Doctrines).***

- ***A guidance document*** is any statement of agency policy or interpretation concerning a statute, regulation, or technical matter within the jurisdiction of the agency that is intended to have general applicability and future effect, but which is not intended to have the force or effect of law in its own right and is not otherwise required by statute to satisfy the rulemaking procedures specified in 5 U.S.C. §553 and §556.[133] Guidance documents may not be used to impose new standards of conduct on persons outside the executive branch except as expressly authorized by law.[134] Furthermore, agencies must establish rules for the issuance of guidance documents.[135]
- ***Use of Guidance Documents.*** If an agency seeks to rely on an agency adjudication, administrative order, or agency document to assert a new or expanded claim of jurisdiction (*e.g.,* a claim to regulate a new subject matter or an explanation of a new basis for liability), it must have published that document in full or, if publicly available, by citation in

the *Federal Register* and, if applicable, on the portion of the agency's website that contains a single, publicly searchable, indexed database of all guidance documents in effect. This must be done prior to the occurrence of the conduct over which the jurisdiction is sought.[136]

- ***If an agency intends*** to rely on a document arising from litigation (other than a published opinion of an adjudicator) such as a brief, a consent decree, or a settlement agreement, to establish jurisdiction in future administrative enforcement actions or adjudications involving parties who were not party to the litigation, it must publish that document in the manner noted in the paragraph above and provide an explanation as to its jurisdictional implications.[137]
- ***Guidance documents can do no more***, with respect to prohibition of conduct, than articulate the agency or department's understanding of how a statute or regulation applies to particular circumstances. The agency may cite a guidance document to convey this understanding in an administrative enforcement action or adjudication only if it has notified the public of such document in advance through publication in the *Federal Register* or on the Department's website.[138]
- ***An agency may not seek judicial deference*** to its interpretation of a document arising from litigation (other than a published opinion of an adjudicator) in order to establish a new or expanded claim or jurisdiction unless it has published that document in the manner set forth above.[139]

vii. ***Clear Legal Foundation.*** All enforcement actions seeking redress for asserted violations of a statute or regulation must be founded on a grant of statutory authority in the relevant enabling act. The authority to prosecute the asserted violation and the authority to impose monetary or equitable penalties through an administrative enforcement proceeding must be clear in the text of the statute.[140]

viii. ***Proper Exercise of Prosecutorial and Enforcement Discretion.*** Agencies generally have broad discretion in deciding whether to pursue an enforcement action. Nevertheless, in deciding whether to initiate an enforcement action and in the pursuit of that action, an agency must not adopt or rely upon overly broad or unduly expansive interpretations of its governing statutes or regulations and should ensure that the law is interpreted and applied according to its text. Acknowledging *Loper Bright Enterprises v. Raimondo***,** any remaining judge-made rules of deference must not be exploited by an agency to strain or expand the limits of a statutory grant of enforcement authority.[141] All decisions to prosecute or not to prosecute an enforcement action should be based

upon a reasonable interpretation of the law about which the public has received fair notice and should be made with due regard for fairness, the facts and evidence adduced through an appropriate investigation or compliance review, the executive branch's obligation to enforce the law, the availability of resources, Administration policy, and the fulfillment of the Department's statutory responsibilities.[142]

ix. ***Duty to Review for Legal Sufficiency.*** Each agency must have written procedures for the evaluation of a case prior to the commencement of an enforcement action to ensure its legal sufficiency under applicable statutes and regulations, judicial decisions, and other appropriate authorities. An agency must have prior evidence (*i.e.,* probable cause) in order to initiate an enforcement action. If, in the opinion of the responsible agency component or its counsel, the evidence is sufficient to support the assertion of a violation, then the agency may proceed with the enforcement action. If the evidence is insufficient to support the proposed enforcement action, the agency may modify or amend the charges and bring an enforcement action in line with the evidence or return the case to the enforcement staff for additional investigation. The reviewing attorney or agency component may also recommend the closure of the case for lack of sufficient evidence. An agency may not initiate an enforcement action (i) as a "fishing expedition" to find potential violations of law in the absence of sufficient evidence in hand to support the assertion of a violation; or (ii) to pursue ends outside its statutory authority.[143]

x. ***Fairness and Notice in Administrative Enforcement Actions.*** In engaging in administrative enforcement, in adjudicating or in otherwise making a determination that has legal consequences for a person, an agency may apply only standards of conduct that have been publicly stated in a manner that would not cause unfair surprise. An agency must avoid unfair surprise in imposing penalties and in adjudging past as well as present conduct to have violated the law. Notice to the regulated party is a due process requirement. All documents initiating an enforcement action shall ensure notice reasonably calculated to inform the regulated party of the nature and basis for the action being taken to allow an opportunity to challenge the action and to avoid unfair surprise. The notice should include legal authorities, statutes or regulations allegedly violated, basic issues, key facts alleged, a clear statement of the grounds for the agency's action, and a reference to, or recitation of, the procedural rights available to challenge the agency action,

including appropriate procedures for seeking administrative and judicial review.[144]

xi. Opportunity to Contest Agency Determination.

- ***Before an agency*** takes any action with respect to a particular person that has legal consequence for that person, including by issuing a notice of noncompliance or other similar notice, the agency must afford that person an opportunity to be heard, in person or in writing, regarding the agency's proposed legal and factual determinations. The agency must respond in writing to the person's submission and articulate the basis for its decision prior to taking the action.[145]
- ***This section shall not apply*** to settlement negotiations between agencies and regulated parties, to notices of a prospective legal action, or to litigation before courts.[146]
- ***An agency may proceed*** without a prior opportunity to be heard if a statute expressly authorizes it. If an agency so proceeds, it nevertheless must afford the affected person an opportunity to be heard, in person or in writing, regarding the agency's legal determinations and respond in writing as soon as practicable.[147]

xii. Appropriate Procedures for Information Collections.

- ***Any agency seeking to collect information*** from a person about the compliance of that person, or of any other person, with legal requirements must ensure that such collections of information comply with the provisions of the Paperwork Reduction Act, §3512 of title 44, United States Code, and §1320.6(a) of title 5, Code of Federal Regulations, applicable to collections of information (other than those excepted under §3518 of title 44, United States Code).
- ***Any collection of information during the conduct of an investigation*** (other than those investigations excepted under §3518 of title 44, United States Code, and §1320.4 of title 5, Code of Federal Regulations, or civil investigative demands under 18 U.S.C. §1968) must either: (i) display a valid control number assigned by the Director of the Office of Management and Budget; or (ii) inform the recipient through prominently displayed plain language that no response is legally required.[148]

vii. Cooperative Information Sharing and Enforcement.

- ***Within 270 days of the date of the executive order***, each agency, as appropriate, shall, to the extent practicable and permitted by law, propose procedures: (i) to encourage voluntary self-reporting of regulatory violations by regulated parties in exchange for reductions or waivers of civil penalties; (ii) to encourage voluntary information

sharing by regulated parties; and (iii) to provide pre-enforcement rulings to regulated parties.

- ***(b) Any agency that believes additional procedures*** are not practicable — because, for example, the agency believes it already has adequate procedures in place or because it believes it lacks the resources to institute additional procedures — shall, within 270 days of the date of the executive order, submit a report to the President and OMB describing, as appropriate, its existing procedures, its need for more resources, or any other basis for its conclusion.[149]

xiii. ***Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) Compliance.***[150] Within 180 days of the date of the executive order, each agency shall submit a report to the President demonstrating that its civil administrative enforcement activities, investigations, and other actions comply with SBREFA, including §223 of that Act. A copy of this report, subject to redactions for any applicable privileges, shall be posted on the agency's website.[151] Each agency shall establish formal procedures to ensure cooperation with the Small Business Administration regarding SBREFA compliance requests and complaints related to the agency's inspection authority.[152]

xiv. ***Disclosure of Exculpatory Evidence.*** In an administrative enforcement proceeding, federal agencies must provide early and full disclosure of facts that tend to establish a case against the defendant as well as those that tend to vindicate him or her. Such a rule would bring federal administrative practice into conformance with the basic notions of justice and fair procedure as embodied in the *Brady* rule, the line of case law named after *Brady v. Maryland,* 373 U.S. 83 (1963). Pursuant to the *Brady* rule, prosecutors have a duty to disclose materially exculpatory evidence, including that which would tend to negate or diminish a finding of wrongdoing, to support an affirmative defense, to reduce a defendant's potential sentence, or that would attenuate the credibility of a witness. The prosecutor is required to disclose such evidence regardless of whether the defendant requests it. This puts the burden on the government to root out favorable facts in its possession or known to it and apprise the defense of their existence. As the Court in *Kyles v. Whitley* observed, "This is as it should be. Such disclosure will serve to justify trust in the prosecutor as 'the representative…of a sovereignty…whose interest…in a criminal prosecution is not that it shall win a case, but that justice shall be done.'"[153] These same concerns apply to government agency enforcement proceedings.[154]

xv. ***Training Programs and Materials.*** With respect to these principles, agencies shall (i) establish training programs and publicly available practice manuals, with hypotheticals, for all adversarial personnel who exercise discretion; and (ii) establish a written protocol for its enforcement attorneys to provide effective legal guidance to investigators and inspectors to ensure adherence to the policies and procedures set forth herein.[155]

xvi. ***Duty to Adjudicate Proceedings Promptly.*** Agencies should promptly initiate proceedings or prosecute matters referred to them. In addition, cases should not be allowed to linger unduly after the adjudicatory process has begun. Attorneys should seek to settle matters where possible or refer the case to a decision maker for proper disposition when settlement negotiations have reached an impasse.[156]

xvii. ***Informal Adjudications.*** If an agency conducts an informal adjudication, it should ordinarily afford the applicant or the regulated entity that is the subject of the adjudication, as well as any other directly affected party, adequate notice and an opportunity to be heard on the matter under review, either through an oral presentation or through a written submission. Unless explicitly authorized otherwise, the agency must give such persons appropriate advance notice of the proposed enforcement action and must advise them of the opportunity for an informal hearing in a manner and sufficiently in advance so that the person's representatives have a fair opportunity to prepare for and to participate in the hearing, whether in person or by writing. The notice should be in plain language and, when appropriate, contain basic information about the applicable adjudicatory process.[157]

xviii. ***Agency Decisions.*** With regard to both formal and informal adjudications, an agency must inform parties of its decision, and the decision must reasonably inform the parties in a timely manner of the additional procedural rights available to them.[158]

5. Protecting Property Rights: Rule on Federal Funds, Tax Credits, and Eminent Domain[159]

Almost 20 years ago, the Supreme Court in *Kelo v. City of New London*, 545 U.S. 469 (2005), refused to confine the eminent-domain power to its constitutional limits. It instead continued down a terrible path that has eroded property rights. It is time for the other two branches of government to protect property rights beyond the Court's reading of the Constitution. This calls for legislation and executive action to prohibit the use of federal funds,

tax credits, or tax deductions in any property development that uses eminent domain, or the threat of it, to transfer real property from one private party to another where the intended use of the property is not a "use by the public."

The story of the homeowner plaintiffs in *Kelo* demonstrates the significance of this issue. The *Kelo* Court held that government may use its eminent domain powers to take private property, in this case 15 homes, and give it to another private party for purposes of economic development. To add insult to injury, after the State took the homes, Pfizer — the intended beneficiary (but not the recipient of the property) of the eminent domain action — pulled out of the project.

Earlier case law had established that government may take property from a private owner only for public ownership, such as for a park or highway, or for transfer to a private party if the purpose is a "use by the public" — a use that can be exploited by people generally — such as for a common carrier railroad or a public utility. However, the Court observed that it had "long ago rejected any literal requirement that condemned property be put into use for the general public," and it held that the Fifth Amendment phrase "for public use" means mere "public purpose," not use by the public. In dissent, Justice O'Connor wrote that the Court had abandoned the "long-held, basic limitation on government power" that a "law that takes property from A and gives it to B … is against all reason and justice." She continued:

> Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded — *i.e.,* given to an owner who will use it in a way that the legislature deems more beneficial to the public — in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings "for public use" is to wash out any distinction between private and public use of property — and thereby effectively to delete the words "for public use" from the Takings Clause of the Fifth Amendment.[160]

Commentators have criticized President George W. Bush's executive order in response to that ruling, EO 13406, as ineffectual and as essentially ratifying the *Kelo* decision. In that regard, Section 3 of that executive order provides a list of traditional uses of eminent domain. Problematically, the executive order does not limit the uses of eminent domain to those purposes, thus leaving the door open for expansions of eminent domain, such as that

at issue in *Kelo*.[161] Section 3 is further defective because it incorporates undefined terms like "safety" and "public health."[162] In some instances, government will find "blight" — an equally vague term — by classifying it as a health or safety concern. In his *Kelo* dissent, Justice Thomas fleshed out the problems:

> Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful… The deferential standard this Court has adopted for the Public Use Clause is therefore deeply perverse. It encourages "those citizens with disproportionate influence and power in the political process, including large corporations and development firms," to victimize the weak.[163]

Corrective action, by executive order or legislation, would provide a measure of protection for the individual's property rights, and it would symbolize government's return to its proper role of being by and for the people.

Legislative Agenda

1. Prohibit the Use of Federal Consent Decrees and Orders to Transfer Non-Restitution Money to Third Parties.

Federal agencies sometimes use enforcement action, or the threat thereof, to wrest money or concessions from a defendant to advance a politically favored cause — purposes beyond the pale of restitution or punishment. In these cases, the executive branch brings or threatens legal action against well-capitalized entities, and then enters into settlement negotiations. It uses those negotiations to wrangle the defendant into making non-restitution payments to third parties (*i.e.,* payments to non-victims). In a *Wall Street Journal* piece, Kimberly Strassel discussed the development of this practice. In 2013, J.P. Morgan agreed to a $13 billion settlement and, as part of that agreement, was offered credits for donations to nonprofits. Subsequently, in settlements with Citigroup and Bank of America, $150 million in credits were required to be made to entities on a list of government-approved nonprofits.[164] This practice creates a host of problems.[165] As a general matter, such practices lack congressional authorization and are thus an arrogation of power by the executive branch. Their use and the demands made, have

few guidelines and are arbitrary, thus bullying targets toward submission rather than fighting a government of undefined powers.

The practice incentivizes private parties to lobby agencies to bring action against other private parties. And it incentivizes bureaucrats and, even more so their political bosses, not to use the law for the ends of justice, but rather for political power or future employment. Legislation and an executive order are needed to prohibit this practice and to confine settlement and penalty payments to fines that accrue to the United States Treasury, restorative efforts to precise harms arising from the transgressive act, and restitution payments to actual victims.[166]

Conclusion

> *The Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS.*
>
> *Alexander Hamilton*[167]

The care of the Constitution is our national project — a political and cultural activity that binds us together as a people. Ideally, through that project we contemplate our national principles, reflect on our tradition, protect individual rights, and exercise power for the common good. In that regard, in arguing for the necessity of the Constitution, James Madison noted, "A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."[168] Those precautions instilled humility in the national project, providing checks and balances on the exercise of power. Nonetheless, as government has taken on new activities and new ways of accomplishing its objectives, it has developed practices to evade those precautions. We must now renew our commitment to them, most especially the separation of powers, Presidential authority to "take care that the laws be faithfully executed," adherence to our federalist structure, and respect for the integrity of state government.

There is another, perhaps more profound, reason for restoring the constitutional structure. The centralization of government too often makes it seem that the system of power is designed for a rarefied body of experts and influencers. This has distanced citizens from building their society, both nationally and in their own communities. In the late Richard Cornuelle's estimation, this "is the real root cause of the evident loss of the feeling of cohesion and solidarity." We devote a lot of time, money, and discussion trying to ameliorate civil discord. We lament the rising ignorance of civics. We fret about the steady, disturbing decline, since the 1950s, of faith in government. We search for ways to de-marginalize the marginalized. On all these fronts, a step forward would be to restore the Constitutional structure.

We hope that this work encourages a practice of government more faithful to the Constitutional structure.

Endnotes and Resources

1 We are grateful to James Broughel, PhD, Senior Fellow at Competitive Enterprise Institute, for his counsel on numerous reforms and for having contributed three reforms to this work—the Day One Regulatory Process Executive Order, Reinstate Federal Workforce Management Principles, and Promulgate a Regulatory Budget Executive Order.

2 The Federalist No. 51 (James Madison, 1788). *See also* The Federalist No. 47 (James Madison, 1788) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.").

3 W. Wilson, *The Study of Administration* (July 1887), http://thf_media.s3.amazonaws.com/CPP/FP_PS18.pdf.

4 John Dewey, Liberalism and Social Action 32 (New York: G.P. Putnam's Sons, 1935).

5 John Dewey, Reconstruction in Philosophy 203 (Rahway, NJ: Henry Holt and Company, 1920), https://www.gutenberg.org/files/40089/40089-h/40089-h.htm.

6 *Id*. at 208.

7 W. Wilson, *supra* note 3; Emmett McGroarty, Jane Robbins & Erin Tuttle, Deconstructing the Administrative State (Sophia Press/Liberty Press 2017).

8 *See generally* Bridget A. Fahey, *Consent Procedures and American Federalism*, 128 Harv. L. Rev. 1561 (Apr. 2015); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 Iowa L. Rev. 243, 285 (2005) ("Because cooperative federalism accepts the general notion of a federal-state partnership, but does not provide for rules of engagement, the theory provides no resources for monitoring federal-state relations.").

9 Alexis de Tocqueville, Democracy in America 487 (v. 2, pt. 2, ch. 4) (Harvey C. Mansfield & Delba Winthrop, eds. & trans., Chicago: University of Chicago Press, 2000). *See also id.* at 486 (The citizen feels "the value of public benevolence and [seeks] to capture it by attracting the esteem and affection of those in the midst of whom he must live.").

10 *Id.* at 486.

11 Emmett McGroarty & Brendan McGroarty, *Privacy, Property, and Third-Party Esteem in Arendt's Constitutionalism*, 12 Laws 75 (2023), https://doi.org/10.3390/laws12050075 (*quoting* Tocqueville, *supra* note 9, at 83 (v. 1, pt. 1, ch. 5)).

12 McGroarty and McGroarty, *supra* note 11.

13 Authorities and Resources for *Subject Independent Agencies to the OIRA Review Process:*

- Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520, Pub. L. No. 104-13, 109 Stat. 163 (1995), https://www.reginfo.gov/public/reginfo/pra.pdf.
- Exec. Order No.1229, Federal Regulation, 46 Fed. Reg. 13193 (Feb. 19, 1981) (predecessor to and revoked by Exec. Order No.12866), https://www.archives.gov/federal-register/codification/executive-order/12291.html.
- Exec. Order No. 14067, Ensuring Responsible Development of Digital Assets, 87 Fed. Reg. 14143 (Mar. 9, 2022), https://www.govinfo.gov/content/pkg/FR-2022-03-14/pdf/2022-05471.pdf.
- Exec. Order No. 12866, Regulatory Planning and Review, 58 Fed. Reg. 51735 (Oct. 4, 1993), https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf. Note: for a list amendments and supplements to Exec. Order 12866, see https://www.federalregister.gov/presidential-documents/executive-orders/william-j-clinton/1993.
- The White House, Information and Regulatory Affairs, *OIRA Governing Authorities*, https://www.whitehouse.gov/omb/information-regulatory-affairs/ (last visited Sept. 24, 2024).
- OIRA Adm'r Mem. on "Pres. Rev.of Agency Rulemaking by OIRA," Sept. 20, 2001, https://georgewbush-whitehouse.archives.gov/omb/inforeg/oira_review-process.html (archived).
- Memorandum, U.S. Dep't of Just., Mem. of Act. Ass't Atty. Gen. (Larry L. Simms) to Off. of Mgt. & Budget, Exec. Off. of the President, (David Stockman, Dir.), Proposed Executive Order on Federal Regulation (Feb. 12, 1981), *as reprinted in* Role of OMB in Regulation, H.R. Rep. No. 97-70, at 152 (1981), http://njlaw.rutgers.edu/collections/gdoc/hearings/8/82601518/82601518_1.pdf.
- Legal opinion, Extending Regul. Rev. Under Exec. Order 12866 to Indep. Regul. Agencies, Off. of Leg. Counsel, DOJ, 43 Op. O.L.C. __ (Oct. 8, 2019) (concluding that "the President may require independent regulatory agencies to comply with the centralized regulatory review process prescribed by EO 12866"), https://www.justice.gov/olc/file/1349716/download.
- U.S. Dep'ts of Energy, Transp., Env't Prot. Agency, & Hous. & Urb. Dev., Mem. of Understanding, (Sep. 15, 2022), https://www.energy.gov/sites/default/files/2022-09/mou-doe-dot-epa-hud-final_09-15-2022.pdf.
- Off. of Mgmt. & Budget, Exec. Off. of the President, Guidance on Compl. with the Cong. Rev. Act, Mem. to the Heads of Exec. Depts. & Agencies, M-19-14 (Apr. 11, 2019) (Russell T. Vought, Acting Dir.) (requiring that independent agencies submit their rules to OMB (OIRA) for review as to whether they were "major rules"), https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf, (*superseded by* M-24-09 (Feb. 16, 2024)).

- Letter from 21 U.S. Senators to President of the U.S. (Mar. 5, 2020), https://www.yalejreg.com/wp-content/uploads/Letter-to-President-Trump-re-OIRA-Review-of-Independent-Agencies-signed.pdf.
- Maeve P. Carey, Cong. Rsch. Serv., IN11122, OMB Issues New CRA Guidance, Potentially Changing Relationship with Independent Agencies (2019), https://crsreports.congress.gov/product/pdf/IN/IN11122.
- Clark Nardinelli & Susan Dudley, *On Ballance: Extending Executive Order 12866 to Independent Regulatory Agencies*, GW Regulatory Studies Center: Commentaries & Insights (Feb. 3, 2021), https://regulatorystudies.columbian.gwu.edu/extending-executive-order-12866-independent-regulatory-agencies.
- Neomi Rao, *Regulatory Review for Independent Agencies*, Yale J. on Regul.: Notice and Comment (Dec. 14, 2016), https://www.yalejreg.com/nc/regulatory-review-for-independent-agencies-by-neomi-rao/.
- Reviewing Independent Agency Rulemaking, S. Comm. on Homeland Sec. & Gov't Aff., Subcomm. on Regul. Aff. & Fed. Mgmt., 114th Cong. 2nd Sess. (Sept. 8, 2016) (Test. of Adam J. White, The Hoover Inst.) (noting, among other things, that in 1981 the Reagan administration intentionally excluded independent agencies from the scope of OIRA review while explicitly noting that it had the authority to include them. Its express rationale for the exclusion was a policy calculation that the administration, at that time, had enough on its plate in reining in other executive agencies), https://www.hsgac.senate.gov/imo/media/doc/White%20Statement.pdf.
- The White House, *President Biden's Historic Climate Agenda*, https://www.whitehouse.gov/climate/ (last visited Sept. 24, 2024).

14 Letter from 21 Senators to President, supra note 13.

15 *Id.*

16 Nardinelli & Dudley, *supra note 13.*

17 See David Yost, Ohio Attorney General, Opinion, *Biden Tempts Judicial Fate With "Whole of Government" Plans*, Wall Street Journal, Jan. 3, 2024, https://www.wsj.com/articles/biden-tempts-judicial-fate-with-whole-of-government-plans-2a1ad927.

18 U.S. Dep'ts of Energy, Transp., Env't Prot. Agency, & Hous. & Urb. Dev., Mem. of Understanding, *supra* note 13; Exec. Order No. 14067, Ensuring Responsible Development of Digital Assets, *supra* note 13.

19 Authorities and Resources for *Day One Regulatory Process Executive Order:*

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whether a particular TSL was economically justified); *revised*, 86 Fed. Reg. 70892 (Dec. 13, 2021); *revised*, 89 Fed. Reg. 24340 (Apr. 8, 2024).

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22 Exec. Order No. 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents (revoked), *supra* note 19.

23 Authorities and Resources for *Require Adherence to the Appointments Clause in the Promulgation of Rules*:

- U.S. Const. art. II, § 2, cl. 2 (the Appointments Clause).
- Lucia v. SEC, 585 U.S. 237 (2018). Note that, at p. 244 n.3, the Court states that the "Government and Lucia view the SEC's ALJs as inferior officers and acknowledge that the Commission, as a head of department, can constitutionally appoint them.
- 40 C.F.R. § 1.25(e), 57 Fed. Reg. 5323 (Feb. 13, 1992), https://archives.federalregister.gov/issue_slice/1992/2/13/5293-5347.pdf#page=31, under authority of 5 U.S.C. § 552 ("Public information; agency rules, opinions, orders, records, and proceedings").

- U.S. Env't Prot. Agency, *About the Environmental Appeals Board (EAB*, https://www.epa.gov/aboutepa/about-environmental-appeals-board-eab) (last accessed Sept. 24, 2024).
- Ensuring Accountability in Agency Rulemaking Act, H.R. 4434, 117th Cong. (2021) (introd. by Rep. Ben Cline (VA), three democrat and one republican cosponsors, no Senate companion bill). H.R. 4434 would have required, subject to limited exceptions, that any agency rule promulgated under notice and comment procedures must be issued and signed by the head of the agency and would require OIRA to issue guidance for the agencies on the implementation of the Act.
- Pacific Legal Found., PLF Recommendations in Response to OMB RFI (Mar. 16, 2020), https://www.regulations.gov/document/OMB-2019-0006-1358.

24 *See* Pacific Legal Found., *supra* note 23.

25 *See* 40 C.F.R. § 1.25(e), 57 Fed. Reg. 5323 (Feb. 13, 1992), https://archives.federalregister.gov/issue_slice/1992/2/13/5293-5347.pdf#page=31, under authority of 5 U.S.C. §552 ("Public information; agency rules, opinions, orders, records, and proceedings")); see U.S. Env't. Prot. Agency, *About the Environmental Appeals Board (EAB), supra* note 23.

26 Authorities and Resources for *Reinstatement of Federal Workforce Management Principles*:

- Exec. Order No. 13836, Developing Efficient, Effective, and Cost-Reducing Approaches To Federal Sector Collective Bargaining, 83 Fed. Reg. 25329 (June 1, 2018), https://www.govinfo.gov/content/pkg/FR-2018-06-01/pdf/2018-11913.pdf (revoked by Exec. Order No. 14003, Protecting the Federal Workforce, 86 Fed. Reg. 7231 (Jan. 27, 2021), https://www.govinfo.gov/content/pkg/FR-2021-01-27/pdf/2021-01924.pdf).
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- Exec. Order No. 13839, Promoting Accountability and Streamlining Removal Procedures Consistent With Merit System Principles, 83 Fed. Reg. 25343 (June 1, 2018), https://www.govinfo.gov/content/pkg/FR-2018-06-01/pdf/2018-11939.pdf (revoked by Exec. Order No. 14003 (Jan. 22, 2021)).

27 *See* Exec. Order No. 14003, Protecting the Federal Workforce, 86 Fed. Reg. 7231 (Jan. 27, 2021), https://www.govinfo.gov/content/pkg/FR-2021-01-27/pdf/2021-01924.pdf.

28 Authorities and Resources for *Re-Establish OIRA Review of IRS Regulatory Actions*:

- Statutory Obligations with regard to drafting and issuing regulations: (i) the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559; (2) the

Paperwork Reduction Act, *supra* note 13; (iii) the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 601-608; (iv) the Congressional Review Act (CRA), 5 U.S.C. §§ 801-808; and (v) the Internal Revenue Code (IRC), 26 U.S.C. § 7805.

- Exec. Order No. 12291 (predecessor to and revoked by Exec. Order No.12866), *supra* note 13.
- Exec. Order No. 12866, Regul. Planning and Rev., *supra* note 13.
- Exec. Order No. 13789, Identifying and Reducing Tax Regulatory Burdens, 82 Fed. Reg. 19317 (Apr. 26, 2017), https://www.govinfo.gov/content/pkg/FR-2017-04-26/pdf/2017-08586.pdf.
- U.S. Dep't of Treas. & Off. of Mgmt. & Budget, Exec. Off. of the President, Mem., Treasury & OMB Implementation of Exec. Order 12291 (Apr. 29, 1983) (includes related documents: additional letters exchanged on Nov. 4, 1993 and Dec. 22, 1993) (MOA and Letters superseded by subsequent MOA between Treasury and OMB, dated June 9, 2023, https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/memos/2016/omb_moa_83_93.pdf (Exec. Order 12291 superseded and revoked by Exec. Order 12866 (Sept. 30, 1993), *see supra* note 13)).
- Off. of Mgmt. & Budget, Exec. Off. of the President, Guidance for Regulatory Review, M-09-13 (Mar. 4, 2009) (clarifying the current status of OMB review of agency actions), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/memoranda/2009/m09-13.pdf.
- U.S. Dep't of Treas. & Off. of Mgmt. & Budget, Exec. Off. of the President, Mem. of Understanding, Review of Tax Regs. Under Exec. Order 12866 (Apr. 11, 2018) (superseded by MOA between Treasury and OMB, dated June 9, 2023, https://home.treasury.gov/sites/default/files/2018-04/04-11%20Signed%20Treasury%20OIRA%20MOA.pdf.
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29 *See* Exec. Order No. 12866, Regulatory Planning and Review, *supra* note 13; *see also* Exec. Order No. 12291 (predecessor to, and revoked by, Exec. Order No.12866, *see supra note* 13).

30 U.S. Gov't Accountability Off., GAO16-720, Regulatory Guidance Processes, *supra* note 28; Dooling & Hickman, *supra* note 28.

31 *Id.*

32 *Id. See also* U.S. Gov't Accountability Off., GAO-16-622, Tax Expenditures, *supra* note 28.

33 Off. of Mgmt. & Budget, Exec. Off. of the President, Guidance for Implementing E.O. 12866, M-94-3, *supra* note 28.

34 Exec. Order No. 13789, Identifying and Reducing Tax Regulatory Burdens, 82 Fed. Reg. 19317, *supra* note 28.

35 U.S. Dep't of Treas. & Off. of Mgmt. & Budget, Exec. Off. of the President, Mem. of Agreement, Addendum to the Mem. of Agreement, Review of Tax Regulations under Exec. Order No. 12866 (Dec. 11, 2020), https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/12/Addendum-to-MOA-12.11.2020.pdf (superseded by MOA between Treasury and OMB, dated June 9, 2023, *see supra* note 28).

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- 42 U.S.C. § 7401 et seq.
- 33 U.S.C. § 1365.
- 16 U.S.C. § 1540.
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37 Horsemen's II, __ F.4th __, No. 23-10520 (5th Cir. July 5, 2024). In the same case, the Fifth Circuit had previously ruled that the statute impermissibly delegated rulemaking authority. *See* Horsemen's I, 53 F.4th 869 (5th Cir. 2022).

38 *Id*.

39 *See* Oklahoma v. United States, 62 F.4th 221 (6th Cir. 2023).

40 U.S. Const. art. II, § 1, cl.1.

41 *See* Stephenson, *supra* note 36.

42 U.S. Env't Prot. Agency, *Clean Air Act and Federal Facilities, supra* note 36. Federal CAA regulations are set forth at 40 C.F.R. pts. 50-99. The CAA statute is found at 42 U.S.C. § 7401 *et seq*.

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49 The Federalist No. 10 (James Madison 1787.

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51 Richard A. Epstein, *Why the Modern Administrative State Is Inconsistent with the Rule of Law*, 3 NYU Journal of Law and Liberty 491 (2008), http://www.law.nyu.edu/sites/default/files/ECM_PRO_060974.pdf.

52 Authorities and Resources for *Regulatory Budget Executive Order*:

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by the Office of Management and Budget. These requirements do not apply to major rules related to agency procedures, the Armed Forces, national security, or foreign affairs.

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53 Authorities and Resources for *Incorporate Major Question Doctrine Screening to the Interagency Regulatory*: *Review Process*:

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59 *See* Wallach & Kosar, *supra note* 57, at 64.

60 *See id*.

61 Wallach & Kosar, *supra note* 57, at 64.

62 *See id. at* 66; section, *supra*, on *A Regulatory Budget Executive Order*, which calls for OMB to ascertain the regulatory burden).

63 Wallach & Kosar, *supra note* 57, at 64.

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65 Schapiro, *supra* note 8, at 285.

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85 Authorities and Resources for *Prohibit the Federal Government from Requiring that State or Local Governments Form a Commission or Other Body*:

- 23 U.S.C. § 135.
- Community Services Block Grant Programs, 42 U.S.C. § 9901, *et seq*.
- 49 U.S.C. § 5303.
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- Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. Pa. L. Rev. 841 (2014), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=7690&context=penn_law_review.
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112 *See, e.g.*, 23 C.F.R. §§ 450.200, 450.206, 450.208, 450.210, 450.216, 450.218, 450.300, 450.306 & 450.324.

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- Pacific Legal Found., *supra* note 23.

121 Authorities and Resources for *Protect Routine, Reasonable Conduct*:

- Pacific Legal Found., *supra* note 23.

122 Pacific Legal Found., *supra* note 23.

123 Authorities and Resources for *Provide Adequate Notice of Administrative Penalties, Reduce Arbitrariness, and Ensure Proportionality*:

- United States Sentencing Commission, https://www.ussc.gov.
- Pacific Legal Found., *supra* note 23.

124 *See* Pacific Legal Found., *supra* note 23, at pp. 5-6 (discussing Sackett v. EPA wherein defendants had purchased a lot in a partially built subdivision, obtained all local permits, and proceeded to build, but then the EPA and Army Corps of Engineers charged that they were liable for accumulating penalties of tens of thousands of dollars per day) & Johnson v. EPA (farmer worked with State engineers to design a pond with numerous, intentional environmental benefits, but EPA charged a violation under the Clean Water Act, demanded removal of the pond, and threatened daily, accumulating fines that eventually reach in excess of $20 million)).

125 United States Sentencing Commission, https://www.ussc.gov.

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- Loper Bright Enter. v. Raimondo, 603 U.S. __ (2024).
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128 49 C.F.R. § 5.61 (as implemented in 2019).

129 *See* Exec. Order No. 13892, § 7 (revoked by Exec. Order No. 13992, *supra* note 19).

130 *See, e.g.*, 49 C.F.R. § 5.71 (as implemented in 2019).

131 *See, e.g.*, 49 C.F.R. § 5.73 (as implemented in 2019).

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133 *See* 49 C.F.R. § 5.25 (as implemented in 2019).

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137 *See id*.

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140 *See,* e.g., 49 C.F.R. § 5.63 (2019).

141 Loper Bright Enter. v. Raimondo, No. 22–451, 603 U.S. __ (2024).

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