Statement before the House Committee on Oversight and Accountability, on

Death by a Thousand Regulations: The Biden Administration's Campaign to Bury America in Red Tape

Testimony of Adam J. White

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"Death by a Thousand Regulations:
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"The true test of a good government," Alexander Hamilton wrote in *The Federalist*, "is its tendency and aptitude to produce a good administration."[1] There is deep cause for concern that the modern administrative state fails that test.

The failure is twofold. First, the administrative state imposes enormous regulatory burdens on the American public. Second, it imposes those burdens through increasingly unaccountable and unsteady methods. This causes great legal and regulatory uncertainty, which ultimately corrodes the public's faith in government itself, as Hamilton himself warned.

Recent actions by the Biden Administration exemplify these worrisome trends. The Securities and Exchange Commission is pushing itself past longstanding statutory and constitutional limits, turning itself from a securities regulator into a climate regulator; left unchecked, the SEC and other financial regulators may make themselves the new "everything regulators." The FTC,

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[1] Federalist No. 68; *see also* Federalist No. 76 (same).

meanwhile, is overturning longstanding policies and taking other actions to replace regulatory certainty with regulatory uncertainty, which it can then leverage to further expand its practical power. And the White House has undertaken wholesale rescissions of executive orders that promoted transparency and due process in administrative agencies. All of this makes the administrate state's actions less transparent, less accountable, more powerful, and more unlawful. I discuss these in greater detail in Part III of this written testimony.

Fortunately, key Supreme Court decisions over the last 20 years provide a counterweight to some of these developments, reflecting crucial aspects of what Hamilton knew to be good administration. Still, the Court's laudable decisions merely mitigate problems that Congress itself bears ultimate responsibility for, and which Congress itself, in the end, must correct.

I. Swift and "Steady" Administration: The Constitutional Ideal

Before focusing on the Supreme Court's recent decisions, and the agencies' recent actions, it is good to keep in mind what Hamilton and Madison saw as a well-functioning constitutional approach to administration.

The best administration is both swift and steady. For swiftness: when Congress enacts a law, the President executes it energetically, and he can do so because the Constitution vests the executive power in him alone instead of splitting it among various executives.[2] His administration's senior officials are trusted to give

[2] U.S. Const. art. II; Federalist No. 70.

him candid and often unwelcome advice,[3] but ultimately the president bears the constitutional duty to "take Care that the Laws are faithfully executed."[4]

The Federalist's argument for "energy" in the executive is well known. But it should not overshadow its parallel emphasis of *steadiness*. This is the original virtue of the Constitution' structure and procedures around the presidency: the lengthy four-year term and the possibility of re-election would not slow administration *per se*, but it would slow the pace of *change* in administration. Or as Hamilton put it, the Constitution was built to foster "the stability of the system of administration" across multiple presidencies.[5]

The alternative—a system of radical upheaval from one presidency to the next—would foster nothing less than "a disgraceful and ruinous mutability in the administration of the government," which more than anything else would corrode the public's confidence in government itself.[6]

Administration could be both stable and swift because Congress itself would already have undertaken the hard work of legislation: the people's representatives would bring the entire nation's interests to bear and produce legislation through

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[3] Federalist No. 76.

[4] U.S. Const. art. II, § 3.

[5] Federalist No. 71. And, Hamilton hoped, the arduous process of electing presidents, through the Electoral College, would filter for candidates best suited to administer the federal government wisely, prudently, stably, and successfully. *See* Federalist No. 68 ("It will not be too strong to say, that there will be a constant probability of seeing the station filled by characters pre-eminent for ability and virtue. And this will be thought no inconsiderable recommendation of the Constitution, by those who are able to estimate the share which the executive in every government must necessarily have in its good or ill administration.").

[6] Federalist No. 72.

deliberation and compromise—an arduous and often slow process, but one that would produce not transitory policies but dependable laws.[7]

And, crucially, the clearer those laws are, the easier it will be for a president to execute them energetically and steadily. When Congress makes the policy decision and gives a president clear direction, then execution is not slowed by an administration taking time to decide what the law should be in the first place, nor is it subject to sweeping changes from one president to the next.

Of course, a new law's precise meaning may not be perfectly clear from the start. As Madison recognized: "All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."[8]

In other words: sometimes a law's meaning, at the margin, would need to be clarified over time through actual administration. This is not to say that a law has no original meaning, but rather, that a law's finer details might come to be seen clearly only through the initial experience of administering that law.

Thus, crucially, administration itself must be a process of not just asserting the executive's will, but faithfully trying to vindicate Congress's original intentions as enacted in the law's original meaning.

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[7] *See*, *e.g.*, Federalist Nos. 10, 51, 55, 57.

[8] Federalist No. 37.

And finally, the courts play a crucial role in administration, too. In deciding cases, the courts—ultimately the Supreme Court—must "say what the law is."[9] The courts show a proper measure of deference to Congress by nullifying statutes as unconstitutional only when absolutely necessary—when there is no "fair" way to construe the statute in a way that avoids constitutional problems.[10] But even with that measure of deference, the courts must eventually settle disputed questions of legal interpretation, so that people can live their lives—investing their time, talent, and capital with an eye to the long term, knowing that a law can change but also knowing generally what the law is, and what it takes to change it.

Thus, the courts' power and duty are themselves key parts of good constitutional administration. As Hamilton emphasized, in his seminal defense of judicial review, the courts' power to finally determine a law's meaning is "the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws."[11]

II. The Supreme Court's Recent Administrative Law Decisions

That constitutional foundation helps to better evaluate the Supreme Court's recent decisions. In fact, the Roberts Court's recent decisions in key regulatory cases are helping to make administration "steadier" in an increasingly unsteady era.

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[9] *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

[10] Federalist No. 78 ("So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other."); *see also id.* ("If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.").

[11] Federalist No. 78.

A. The "Major Questions" Doctrine

In several recent cases, the Supreme Court has reaffirmed the basic principle that *Chevron* deference is not an invitation for agencies to undertake radical changes to our laws outside of Congress's legislative process.

Specifically, the Court has repeatedly rebuffed agencies' supposed discoveries of vast new powers in familiar statutes. Most prominently, in *West Virginia v. EPA*, the Court recognized once again the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[12] Striking down the transformative Clean Power Plan's climate regulations as exceeding the powers that Congress granted the EPA in the Clean Air Act, the Court reiterated that courts should look with skepticism on "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[13]

In such "extraordinary cases," the Court explained, the "'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."[14] Instead, the courts should uphold the agency's regulatory policy only when the agency "point[s] to 'clear congressional authorization' for the power it claims."[15]

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[12] *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022) (quoting *Davis v. Mich. Dep't of the Treas.*, 489 U.S. 803, 809 (1989)).

[13] *Id.* at 2609.

[14] *Id.* at 2608.

[15] *Id.* at 2609.

The Court's opinion in *West Virginia v. EPA* reiterated its holding just months earlier in the OSHA Vaccine Mandate case,[16] and its 2021 order in the CDC Eviction Moratorium case.[17] But more importantly, it reiterated the Court's long series of holdings over the course of more than a quarter century, which applied this non-deferential approach against many agencies, in many contexts, and in all aspects of the *Chevron* framework.[18]

While the Roberts Court's attackers often try to paint this body of precedent as partisan or ideological, it simply is not. When the Court applied the "Major Questions" doctrine in *King v. Burwell*—holding that the legal issue at hand was "a question of deep 'economic and political significance,'" and thus could not be handled with *Chevron* deference because Congress had not clearly indicated so—the Chief Justice's opinion for the Court was joined by Justices Ginsburg, Breyer, Sotomayor, Kagan, and Kennedy.[19]

Similarly, while there is no bright textual line between "major" and "non-major" questions, that is not necessarily fatal to the doctrine—at least, no more fatal than *Chevron*'s own lack of a bright textual line separating "ambiguous"

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[16] *NFIB v. Dep't of Labor*, 142 S. Ct. 661 (2022).

[17] *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485 (2021).

[18] *See*, *e.g.*, *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 (1994) (*Chevron* Step One); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006); *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014) (*Chevron* Step Two); *King v. Burwell*, 576 U.S. 473, 486 (2015) (*Chevron* Step Zero).

[19] *King*, 576 U.S. at 485–86 (interpreting Obamacare's framework for insurance subsidies). Indeed, Justice Stephen Breyer warned nearly four decades ago that agency actions on "major questions" should be treated differently, with less judicial deference. Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986) (citing multiple appellate cases).

statutes from "unambiguous" ones,[20] let alone the Constitution's lack of a bright textual line separating "unreasonable" searches from reasonable ones.[21] The cases decided so far fall easily on the "major" side of the line; now the Supreme Court and lower courts will reason their way toward the proper prudential line.

The "Major Questions Doctrine," as it has come to be known, serves at least two constitutional purposes. First, it serves as a doctrine of constitutional avoidance. Absent such reasonable limits in statutory interpretation, statutes would become effectively open-ended grants of regulatory power, raising real questions of whether the statutes themselves are unconstitutional "delegations" of legislative power outside of Congress. The Major Questions Doctrine vindicates basic principles of our Constitution's structural separation of powers without taking the much more disruptive and significant step of striking down statutes as unconstitutional.[22]

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[20] *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2142–43 (2016) ("After nearly a decade on the bench, I have a firm sense that the clarity versus ambiguity determination … is too often a barrier to the ideal that statutory interpretation should be neutral, impartial, and predictable among judges of different partisan backgrounds and ideological predilections.").

[21] U.S. Const. amdt. IV.

[22] *Cf. NFIB v. Dep't of Labor*, 142 S. Ct. at 668–69 (Gorsuch, J., concurring) ("In this respect, the major questions doctrine is closely related to what is sometimes called the nondelegation doctrine."); *Gundy v. U.S.*, 139 S. Ct. 2116, 2142 (Gorsuch, J., dissenting) ("When one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines. And that's exactly what's happened here. We still regularly rein in Congress's efforts to delegate legislative power; we just call what we're doing by different names."); *but see West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring) (suggesting that the Court's opinion applies the Major Questions Doctrine not as an "ambiguity canon" but rather as a "clear statement rule"). *See also Solid Waste Agency of N. Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 172–73 (2001) ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result … This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.").

Second, and relatedly, the Major Questions Doctrine protects the public's reliance interests. The public can trust that transformative policy decisions come from Congress, not agencies—slowly and deliberately, not swiftly and unilaterally—and that an agency's own history helps to signal the basic limits of the agency's power. Thus, we can plan our lives accordingly—and to the extent that we want to change those laws, we know to channel our political energy back to Congress, not into the agencies.[23]

In this respect, the Major Questions Doctrine promotes steadier administration and the constitutional values that steady administration serves.[24]

B. Other Judicial Doctrines for Steadier Administration

I will briefly note three other recent decisions in which the Court looked skeptically on major changes of administrative policy.

In *Michigan v. EPA* (2015), the Court struck down a new set of EPA regulations of power plants under the Clean Air Act, because the agency refused to consider the new rules' immense costs. Because the Act itself did not direct the agency to ignore costs, the agency's refusal to consider such a significant issue fell short of administrative law's requirements for "reasoned decisionmaking"—and, the

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[23] *See* Adam J. White, "Democracy, Delegation, and Distrust," *Hoover Institution—Defining Ideas* (2019), *at* https://www.hoover.org/research/democracy-delegation-and-distrust.

[24] The Court recently announced that it will consider whether to renounce *Chevron* altogether, in *Loper Bright Enterprises v. Raimondo*, No. 22-451. When the Court heard a similar case in 2019, challenging the related doctrine of *Auer* deference, the Court did not renounce such deference but rather "cabined" it, emphasizing limitations to prevent agency flip-flops from undermining public "reliance" and "expectations." *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2408, 2418 (2019).

Court added, "[n]o regulation is 'appropriate' [per the Clean Air Act's requirement] if it does significantly more harm than good."[25]

In *Department of Commerce v. New York* (2019), the Court nullified the Commerce Department's decision to add the citizenship question to the census. The Court did not forbid the question outright; rather, it held that the Commerce Department's explanation of its decision was arbitrary and capricious under the Administrative Procedure Act because it was pretextual.[26] This decision was controversial, particularly in that it seemed to constitute a more aggressive version of "hard look" review, which normally eschews looking beyond the agency's own stated reasons for a policy.[27] It certainly reflected a much more skeptical judicial approach to major agency action.

And in 2020, the Court nullified the Department of Homeland Security's repeal of the Obama-era "DACA" immigration enforcement policy, holding that DHS's repeal failed to grapple sufficiently with concerns that DACA itself had created "legitimate reliance" interests.[28] This decision, too, was controversial, because it subjected the DACA repeal to a level of judicial scrutiny that DACA itself had avoided (because the original DACA case left the Court deadlocked 4-4).[29]

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[25] *Michigan v. EPA*, 576 U.S. 743, 750–52 (2015).

[26] *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573–76 (2019).

[27] *See id.* at 2578–84 (Thomas, J., dissenting).

[28] *Dep't of Homeland Security v. Regents of the Univ. of Calif.*, 140 S. Ct. 1891, 1913–15 (2020).

[29] *See, e.g., id.* at 1926–29 (Thomas, J., dissenting). The original DACA decision was "affirmed by an equally divided Court" without further explanation. *Texas v. U.S.*, 136 S. Ct. 2271 (2016) (*per curiam*). But the logic of the Court's 2020 decision casts clear doubt on the validity of the underlying DACA policy. *See* Adam J. White, *Want to understand what the Supreme Court did this term? These*

Regardless, this decision also reflected a highly skeptical judicial approach to major agency action.

III. Our Increasingly Unsteady Administrative State

The Supreme Court's decisions occur in an era of increasingly unsteady administration. Agencies are announcing vast new regulatory programs that are unprecedented and unmoored from the agencies' actual statutory powers. Agencies also seem increasingly keen to leverage regulatory uncertainty, particularly in matters requiring agency permits or approvals. The White House compounded these problems by repealing executive orders that promoted transparency and procedural rights. Now it is undertaking major changes to the Office of Information and Regulatory Affairs's regulatory framework.

A. Old Statutes, Unprecedented Assertions of Agency Power

Despite the Supreme Court's decisions in *West Virginia v. EPA* and other significant cases, federal agencies continue to press the limits of the powers that Congress granted them. The clearest example now pending before the Supreme Court is the Biden Administration's proposal to categorically waive billions of dollars in student loans, ostensibly pursuant to the HEROES Act.[30]

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two words are the key, Wash. Post. (July 16, 2020); Adam J. White, *Courting Lawlessness*, The Bulwark (July 20, 2020).

[30] *Biden v. Nebraska*, No. 22-506; *Dep't of Educ. v. Brown*, No. 22-535. As my AEI colleagues Beth Akers and Nat Malkus have highlighted, the Biden Administration's broader policies for "income-driven repayment" would dwarf the student loan forgiveness policy. *See, e.g.*, Beth Akers, "Biden's Changes to Student Loans Means the Vast Majority of Borrowers Will Never Repay Their Debt," *AEIdeas* (Feb. 7, 2023).

Yet two of the most significant examples come from nominally "independent" commissions: the Securities & Exchange Commission and the Federal Trade Commission.

In April 2022, the SEC announced its sweeping new regulatory proposal for "enhancement and standardization of climate-related disclosures for investors."[31] This rulemaking, and similar initiatives at other agencies to leverage financial regulatory power as a tool of climate policy, arose not as an ordinary application of generally applicable financial regulatory rules, but as special new initiatives focused on climate policy *per se*—making financial regulation another means to climate policymakers' own ends.

The SEC's rulemaking has not yet been finalized, perhaps due to a recognition by the Commission's leadership that its regulatory initiative cannot pass muster under Supreme Court precedent.[32] And rightly so: as Commissioner Hester Peirce emphasized in her dissent, "Congress, however, did not give us plenary authority over the economy and did not authorize us to adopt rules that are not consistent with applicable constitutional limitations." As she further explained, "[t]his proposal steps outside our statutory limits by using the disclosure framework to achieve objectives that are not ours to pursue and by pursuing those objectives by means of disclosure mandates that may not comport with First Amendment

[31] 87 Fed. Reg. 21334 (Apr. 11, 2022).

[32] *See*, *e.g.*, Andrew Ramonas & Amanda Iacone, *SEC Climate Rules Pushed Back Amid Bureaucratic, Legal Woes*, Bloomberg Law (Oct. 19, 2022).

limitations on compelled speech."[33] Her warning was echoed and elaborated in a letter from nearly two dozen leading academic experts,[34] among many others who question the commission's claims of legal authority under the nearly century-old Securities Act and Exchange Act.[35]

Meanwhile the FTC has persistently pushed the bounds of its own legal power.[36] For example, the agency announced a proposed rule to prohibit non-compete agreements between employers and employees, claiming that such agreements are an unfair method of competition under the Federal Trade Commission Act.[37] This rulemaking, like the SEC's climate rule, runs headlong into the Supreme Court's precedents, as Commissioner Christine Wilson highlighted in her own dissent.[38]

Moreover, the FTC's encroachment on a regulatory issue that long has been the subject of state authority raises questions under other applicable case law, such as the D.C. Circuit's 2005 decision striking down the FTC's attempt to regulate

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[33] Comm'r Hester M. Peirce, SEC, *We Are Not the Securities and Environment Commission—At Least Not Yet* (Mar. 21, 2022).

[34] Letter of Lawrence A. Cunningham *et al.*, SEC File No. S7-10-22 (Apr. 25, 2022).

[35] *See, e.g.*, Andrew N. Vollmer, *Does the SEC Have Legal Authority to Adopt Climate-Change Disclosure Rules?*, Mercatus Center Policy Brief (Aug. 2021).

[36] *See*, *e.g.*, Comm'r Noah Phillips, FTC, *Against Antitrust Regulation*, American Enterprise Inst. (Oct. 2022); Eugene Scalia, *The Major Questions Doctrine, National Petroleum, and the Federal Trade Commission's Competition Rulemaking Authority*, American Enterprise Inst. (Dec. 2022); Thomas W. Merrill, *Antitrust Rulemaking: The FTC's Delegation Deficit*, C. Boyden Gray Center Working Paper No. 22-18 (2022); Richard J. Pierce, *Can the Federal Trade Commission Use Rulemaking to Change Antitrust Law?*, C. Boyden Gray Center Working Paper No. 21-49 (2001).

[37] 88 Fed. Reg. 3482 (Jan. 19, 2023).

[38] Comm'r Christine S. Wilson, FTC, *Dissenting Statement of Commissioner Christine S. Wilson Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule*, Comm'n File No. P201200-1 (Jan. 5, 2023).

lawyers, which the FTC had attempted to justify under the Gramm-Leach-Bliley Financial Modernization Act of 1999. When the D.C. Circuit struck down that FTC policy, it did so in terms starkly similar to the most recent "Major Questions Doctrine" cases: "Congress does not hide elephants in mouseholes," the D.C. Circuit explained, and "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute."[39] The FTC's new rulemaking on non-compete clauses is similarly unlawful.

B. Weaponizing Regulatory Uncertainty

In its effort to limit mergers and acquisitions, meanwhile, the FTC is asserting power not through the creation of new regulatory policies, but the repeal of familiar ones. In September 2021, the FTC announced its withdrawal of its Vertical Merger Guidelines, a thorough and thoroughly well-established body of agency policies clarifying the laws and policies that govern mergers and acquisitions.[40] The FTC's dissenting commissioners, Noah Phillips and Christine Wilson, decried the Commission's "disturbing trend of pulling the rug out under from honest businesses and the lawyers who advise them, with no explanation and no sound basis of which we are aware."[41]

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[39] *ABA v. FTC*, 430 F.3d 457, 467, 471–72 (D.C Cir. 2005) (brackets, ellipses, quote marks omitted).

[40] FTC, *Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary* (Sept. 15, 2021).

[41] Comm'rs Noah Joshua Phillips & Christine S. Wilson, FTC, *Dissenting Statement* (Sept. 15, 2021).

Just months earlier, the FTC also withdrew its 2015 policy statement on the agency's power to regulate "unfair methods of competition" under Section 5 of the FTC Act.[42] Then-Commissioner Phillips, in dissent, warned that the FTC's repeal of the policy statement "reduces clarity in the application of the law and augurs an attempt to arrogate terrific regulatory power never intended by Congress to a handful of unelected individuals on the FTC." He added: "Here we are at a public hearing, with a chance to add transparency, but instead we are doing the opposite: removing guidance and adding uncertainty."[43]

These are parts of a broader trend of regulatory uncertainty that the FTC is pursuing broadly, one that then-Commissioner Phillips detailed in a 2022 address. He identified three examples of the FTC leveraging its regulatory processes: (1) lengthening the FTC's initial Hart-Scott-Rodino review period; (2) leveraging the FTC's "prior approval" process to give the agency a veto of future mergers and acquisitions; and (3) threatening to retroactively undo mergers that the FTC did not prevent in the first place. In all of this, Commissioner Phillips saw his agency "openly taxing M&A in a way that does nothing for competition and also disparately impacts smaller players."[44]

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[42] *See FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act* (July 1, 2021), *at* https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under-ftc-act.

[43] *Remarks of Commissioner Noah Joshua Phillips Regarding the Commission's Withdrawal of the Section 5 Policy Statement* (July 1, 2021), *at* https://www.ftc.gov/system/files/documents/public_statements/1591578/phillips_remarks_regarding_withdrawal_of_section_5_policy_statement.pdf.

[44] Comm's Noah Joshua Phillips, FTC, *Disparate Impact: Winners and Losers From the New M&A Policy* (Apr. 27, 2022) (prepared remarks).

And the FTC's tax is significant. Professors D. Daniel Sokol *et al.* recently published a study of the effect of the new FTC approach to M&A activity, reporting multiple aspects of increased regulatory uncertainty and compliance cost.[45] Professor Richard J. Pierce, Jr., one of the nation's leading administrative law scholars, put the point more bluntly: under the current FTC, "Merger Law Is Dante's Inferno Revisited."[46]

The regulatory uncertainty surrounding M&A increasingly seems to be an intentional effort to replicate the regulatory uncertainty and compliance costs that plague another crucial subject: the development of infrastructure, especially energy infrastructure, and the utilization of U.S. energy resources. For infrastructure, the permitting process is now well recognized even among progressives as a regulatory quagmire.[47]

Regulators do not need new regulations to block mergers that they dislike, or infrastructure that they disfavor. Rather, they can deter such activity simply by a combination of regulatory uncertainty and threats; and even when not intentional, existing regulatory frameworks often exacerbate such problems.[48]

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[45] D. Daniel Sokol *et al.*, *Antitrust Mergers and Regulatory Uncertainty*, Social Science Research Network (Dec. 6, 2022), *at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4295283.

[46] Richard J. Pierce, Jr., *Merger Law Is Dante's Inferno Revisited*, The Regulatory Review (U. Penn. Law) (Mar. 13, 2023).

[47] *See, e.g.,* Ezra Klein, *Government Is Flailing, in Part Because Liberals Hobbled It*, N.Y. Times (Mar. 13, 2022) (on NEPA and related issues).

[48] Unfortunately, accounts of this problem are far too numerous to collect. For journalistic accounts, *see*, *e.g.*, David McCabe, *Why Losing to Meta in Court May Still Be a Win for Regulators*, N.Y. Times. (Dec. 7, 2022); Editorial, *How to Kill American Infrastructure on the Sly*, Wall St. J. (Apr. 20, 2022). For market analysis, *see, e.g.*, Goehring & Rozencwajg, Natural Resource Market Commentary, *Why Won't Energy Companies Drill?* (Nov. 22, 2022); S&P Global, *The Future of Copper: Will the looming supply gap short-circuit the energy transition?* (2022). For academic commentary, *see, e.g.,* Suzanne

Unfortunately, administrative law is not well geared to solve this problem. Judicial review of final agency action is straightforward; judicial review of agency inaction, or of threatened agency action, is not the ordinary subject of meaningful judicial review.

C. Reducing White House Restraints on Agency Overreach

Normally the White House—especially the Office of Information and Regulatory Affairs—is a significant check on agency overreach. For four decades, OIRA was a bipartisan institutional success story.[49] And in recent years, the White House supplemented the OIRA framework with further executive orders requiring agencies to be more transparent in their use of "guidance" documents,[50] and more protective of the public's procedural rights.[51]

But those executive orders were repealed summarily, without explanation.[52] This is unfortunate, for their repeal deprived the public of both transparency and procedural rights, without any indication of why greater transparency or other protections were too great a burden on the government.

Chang *et al.*, *Follow the Pipeline: Anticipatory Effects of Proposed Regulations* (Feb. 28, 2023), *at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4360231.

[49] *See, e.g.*, Andrew Rudalevige, *Beyond Structure and Process: The Early Institutionalization of Regulatory Review*, 30 J. Policy Hist. 577 (2018); Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 Harv. L. Rev. 1838 (2013).

[50] Exec. Order 13891 (Oct. 9, 2019) ("Promoting the Rule of Law Through Improved Agency Guidance Documents").

[51] Exec. Order 13892 (Oct. 9, 2019) ("Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication").

[52] *See* Exec. Order 13992 (Jan. 20, 2021) ("Revocation of Certain Executive Orders Concerning Federal Regulation").

Now the White House is proposing significant changes to OIRA's own oversight function.[53] To be sure, the latest executive order and other White House documents are in some ways less dramatic in substance than President Biden's initial 2021 memorandum signaled.[54] Still, the White House's significant new changes to OIRA's framework for analyzing regulatory costs and benefits—in the scope of benefits to be claimed, the lower discount rates for future benefits, and the incorporation of "distributive impacts and equity" in OIRA and the agencies' economic analyses—may permanently unsettle the longstanding bipartisan consensus around OIRA's cost-benefit analysis.

Indeed, the White House's latest developments may prove to be not the end of a two-year conversation, but the beginning of many more years' discussion of OIRA's proper role and tools. And to the extent that OIRA is seen as relaxing its institutional and methodological constraints on over-energetic agencies, the public will need to rely even more on the courts and Congress to constrain agency discretion and preserve the rule of law.

IV. Congress's Own Responsibility

OIRA was originally conceived as a means for ensuring democratic accountability for agency power and discretion. Similarly, judicial review of agency action, under the Administrative Procedure Act and other laws, was intended to be

[53] Exec. Order 14094 (Apr. 6, 2023) ("Modernizing Regulatory Review").

[54] *See* "Modernizing Regulatory Review," Memorandum for the Heads of Executive Departments and Agencies (Jan. 20, 2021), *at* 86 Fed. Reg. 7223 (Jan. 26, 2021) (seeking the OMB Director's recommendations on how OIRA might "affirmatively promote" new regulations).

a means for ensuring legal accountability for agency power and discretion. But in that respect, they were both efforts to mitigate a more fundamental problem: the vast grants of power and discretion that agencies enjoy under more than a century of statutes, by which Congress delegated seemingly open-ended power to the administrative state.[55]

The direct solution, then, would be for Congress to modernize its laws, reducing or recalibrating its grants of power and discretion to the agencies, and rephrasing those laws in terms of current circumstances.[56] At the very least, Congress could legislate generally applicable limits on agency regulatory powers, setting threshold limits beyond which an agency rule would require newly explicit authorization by legislation, perhaps with a fast track that mitigates the filibuster.

Absent modernization of the agencies' substantive powers, Congress should consider modernizing the procedural and judicial constraints on agencies. Where the White House has reduced transparency requirements for agency guidance documents, Congress could mandate better transparency and reduce agencies' abuse of nominally nonbinding guidance documents through legislation like the Guidance Out Of Darkness Act and the Guidance Clarity Act. Congress could also mandate greater disclosure from OIRA itself, through legislation like the ALERT

[55] So too was *Chevron* itself, at least in the eyes of Justice Scalia. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 518 (1989) ("If Congress is to delegate broadly, as modern times are thought to demand, it seems to me desirable that the delegee be able to suit its actions to the times, and that continuing political accountability be assured, through direct political pressures upon the Executive and through the indirect political pressure of congressional oversight.").

[56] Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 Iowa L. Rev. 1931 (2020).

Act. And Congress could mandate greater and earlier public participation in rulemaking processes.

Furthermore, in an era when the White House is making significant changes to OIRA's methodology for agency analysis, Congress could legislate binding procedures and standards for the agencies' regulatory impact analyses, ensuring quality and consistency across presidencies, through amendments to the Unfunded Mandates Reform Act. Congress should also consider requiring agencies to regularly undertake "retrospective review" of existing rules, which could spur agencies to reform outdated or unjustifiable regulations, and at the very least would improve agencies' evaluation of new rules going forward.[57]

President Biden summarily revoked the 2021 executive order that supplemented OIRA's cost-benefit analysis with a regulatory budget requirement.[58] But he did not explain this decision, nor did OIRA undertake public review of the regulatory budgets' performance and effects in their first four years of operation. Congress should undertake such a review itself and should consider enacting a regulatory budget framework through legislation.

And finally, at a time when the basic process for judicial review of agency action is increasingly complicated by forum shopping, nationwide injunctions, and basic questions over whether the Administrative Procedure Act allows or forbids

[57] Adam White, *Retrospective Review, for Tomorrow's Sake*, Yale J. Reg.'s Notice & Comment Blog (Nov. 28, 2016), *at* https://www.yalejreg.com/nc/retrospective-review-for-tomorrows-sake/.

[58] Exec. Order 13992 (Jan. 20, 2021), revoking Exec. Order 13771 (Jan. 30, 2017).

Chevron deference, Congress should legislate modern procedures and clearer standards for judicial review.[59]

These are, to be sure, second-best solutions. But they would be good and overdue improvements over our current situation.

They are no panacea, because many of these reforms would make the administrative process steadier but also slower. As I emphasized at the outset, our constitutional system needs administration that is both steady and swift. But this can be achieved only by Congress legislating clearer regulatory commands, enabling the administration to focus on execution more than quasi-legislative policymaking. In the current era, the main problem in administration is not a lack of energy, but a lack of steadiness. Congress should proceed accordingly.

I am grateful for the opportunity to testify, and I welcome the Committee's questions.

[59] Adam White, *Congress Should Fix the Nationwide Injunction Problem with a Lottery*, Yale J. Reg.'s Notice & Comment Blog (Feb. 11, 2020), *at* https://www.yalejreg.com/nc/congress-should-fix-the-nationwide-injunction-problem-with-a-lottery/.