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MORITZ COLLEGE OF LAW

# **MODERNIZING THE ADMINISTRATIVE PROCEDURE ACT**

**Christopher J. Walker**

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# MODERNIZING THE ADMINISTRATIVE PROCEDURE ACT

*Christopher J. Walker\**

69 ADMINISTRATIVE LAW REVIEW \_\_ (forthcoming 2017)

*Despite dramatic changes in the modern regulatory state over the last seven decades, Congress has only amended the Administrative Procedure Act sixteen times since its enactment in 1946. The current political climate may present an ideal opportunity for much-needed bipartisan legislative action. This Essay introduces the American Bar Association’s 2016 consensus-driven recommendations to reform the APA and then concludes that the Portman–Heitkamp Regulatory Accountability Act of 2017, which incorporates seven of the ABA’s nine recommendations, is the type of common-sense, bipartisan legislation needed to modernize the APA.*

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## INTRODUCTION

The Administrative Procedure Act (APA) has set the default rules that govern the federal regulatory state since its enactment in 1946.<sup>1</sup> Over the decades, the APA has assumed quasi-constitutional status. In 1978, for instance, then-Professor Antonin Scalia remarked that “the Supreme Court regarded the APA as a sort of superstatute, or subconstitution, in the field of administrative process: a basic framework that was not lightly to be supplanted or embellished.”<sup>2</sup> Indeed, Congress has only amended the APA sixteen times in more than seven decades, the last time in 1996.<sup>3</sup> The lack of substantial legislative reform of the APA does not mean it has failed to evolve. On the contrary, the Supreme Court and the lower courts—with the D.C. Circuit playing a prominent role—have developed a number of administrative common law doctrines that have reshaped the APA’s default rules for agency action and judicial review thereof.

In recent years, however, there seems to have been more interest in Congress to reform the APA. During the Obama Administration, Republicans in Congress introduced a number of legislative proposals that had the potential to dramatically alter the administrative state.<sup>4</sup> Now that the Republicans control both chambers of Congress and the White House, one reasonably might conclude that Republican calls for regulatory reform would disappear. That hasn’t been the case. In January, for instance, House Republicans reintroduced and passed a suite of those regulatory reform proposals in an omnibus bill.<sup>5</sup> Within the first few days of taking office, moreover, President Trump issued an ambitious executive order that requires federal agencies to

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<sup>1</sup> See generally 5 U.S.C. §§ 551–59, 701–06 (2012).

<sup>2</sup> Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 363. More recently, Kathryn Kovacs has argued that the APA is a “superstatute” in Eskridge–Ferejohn sense. See Kathryn E. Kovacs, *Superstatute Theory and the Administrative Procedure Act*, 90 IND. L.J. 1207, 1209 (2015) (drawing on WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010)).

<sup>3</sup> This figure is based on the amendments listed in the Westlaw popular name table for the APA. The amendments are discussed further in Part I *infra*.

<sup>4</sup> For a compilation of regulatory reform bills introduced in Congress since 2011, see Memorandum from Administrative Conference of the United States (ACUS) Interns to ACUS Research Chief Reeve T. Bull (Jan. 30, 2017) <https://www.acus.gov/sites/default/files/documents/Regulatory%20Reform%20Legislation%20Memo%202-13-2017.pdf>.

<sup>5</sup> Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. (2017).

identify two old regulations to eliminate for every new regulation proposed and to ensure that the net costs of new regulations are offset by the elimination of other costs.<sup>6</sup> Similarly, without a Democrat in the White House and thus driving the regulatory state, Democrats in Congress should be more interested in implementing common-sense regulatory reform to require federal agencies to be more deliberative, transparent, and effective. This is particularly true if the bipartisan legislation would apply to regulation and deregulation alike. The current political climate thus may present an ideal opportunity for bipartisan legislative action to modernize the APA.<sup>7</sup>

Last year, another legislative proposal received far less attention but is of critical importance to modernizing the APA. The American Bar Association (ABA) House of Delegates passed Resolution 106B, which recommends nine consensus-driven, common-sense reforms to the rulemaking provisions of the APA.<sup>8</sup> As discussed in Part II, the ABA and others first suggested some of these recommendations over three decades earlier.<sup>9</sup> Other recommendations are more modern responses to deficiencies in the current APA.

In April, Senators Rob Portman (R-OH) and Heidi Heitkamp (D-ND), joined by Senators Orrin Hatch (R-UT) and Joe Manchin (D-WV), introduced a bipartisan regulatory reform bill entitled the Regulatory Accountability Act of 2017.<sup>10</sup> As discussed in Part III,

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<sup>6</sup> See Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Jan. 30, 2017).

<sup>7</sup> See Christopher J. Walker, *The Regulatory Accountability Act Is a Model of Bipartisan Reform*, REG. REV. (May 18, 2017), <https://www.theregreview.org/2017/05/18/walker-model-bipartisan-reform/>.

<sup>8</sup> Am. Bar Ass'n, House of Delegates Resolution 106B (adopted Feb. 8, 2016) [hereinafter ABA Resolution 106B]. I serve on the Governing Council for the ABA Section of Administrative Law and Regulatory Practice, which developed Resolution 106B and its accompanying report. See Connor N. Raso, *New ABA Administrative Law Section Resolution on Improving the APA*, YALE J. ON REG: NOTICE & COMMENT (Dec. 19, 2015), <http://yalejreg.com/nc/new-aba-administrative-law-section-resolution-on-improving-the-apa-by-connor-raso/>.

<sup>9</sup> See *The 12 ABA Recommendations for Improved Procedures for Federal Agencies*, 24 ADMIN. L. REV. 389 (1972).

<sup>10</sup> Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017); see also Press Release, Senator Rob Portman, Portman, Heitkamp Introduce the Bipartisan Senate Regulatory Accountability Act (Apr. 26, 2017), <https://www.portman.senate.gov/public/index.cfm/2017/4/portman-heitkamp-introduce-the-bipartisan-senate-regulatory-accountability-act>. On May 17, 2017, the Senate Committee on Homeland Security and Governmental Affairs favorably reported an amended version of the legislation out of committee.

this legislation focuses on reforming the rulemaking process and incorporates at least parts of seven of the nine recommendations contained in the ABA’s 2016 resolution. If enacted, the Regulatory Accountability Act would constitute the most significant reform of the APA since its enactment in 1946.

In this Essay, I argue that now is the time for Congress to modernize the APA with comprehensive, bipartisan legislation. Part I briefly recounts the evolution of the APA, in both Congress and the judicial branch. Part II outlines the ABA’s suggested reforms. Part III then turns to the various reforms included in the Portman–Heitkamp Regulatory Accountability Act. Although this Essay does not endeavor to reach a definitive conclusion as to every provision in the legislation, my general conclusion is that the Portman–Heitkamp Regulatory Accountability Act is the type of thoughtful, common-sense, bipartisan legislation needed to modernize the APA.<sup>11</sup>

## I. EVOLUTION OF THE APA

As many others have chronicled, the APA emerged in 1946 as a “fierce compromise” from a decade-long battle between those in favor of and those against the rise of the New Deal administrative state.<sup>12</sup> The APA sets the default rules for agency action and judicial review thereof.<sup>13</sup> The APA establishes detailed procedures for the two core

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<sup>11</sup>To date, the Center for Progressive Reform—through James Goodwin, Thomas McGarity, Sidney Shapiro, and Rena Steinzor—has provided the most thoughtful and comprehensive critique of the Regulatory Accountability Act. See James Goodwin, *Anything but Moderate: The Senate Regulatory Accountability Act of 2017*, CPRBLOG (May 2, 2017) (including links to a full analysis and summary of their criticisms), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=B6B0B417-E50E-5626-FCB79F4E27E24532>.

<sup>12</sup>George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U.L. REV. 1557, 1560 (1996); see also, e.g., Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219 (1986) (“The story begins in May 1933, when the American Bar Association created a Special Committee on Administrative Law under the chairmanship of Louis G. Caldwell, a highly respected Washington lawyer who had practiced ably in the telecommunications field.”); Kovacs, *supra* note 2, at 1227 (“In sum, the APA of 1946 represented Congress’s response to a conservative movement and emerged from an enthusiastic Congress following years ‘of public discussion and official deliberation’ within and between Congress, the Executive Branch, the ABA, and the public.”).

<sup>13</sup>See generally Administrative Procedure Act, 5 U.S.C. §§ 551–59, 701–09 (2012).

means of agency action—rulemaking and adjudication—while recognizing that other statutes may provide for different forms of agency action.<sup>14</sup> The APA judicial review standards apply broadly whenever Congress has made a particular agency action “reviewable by statute” and the action is “final agency action for which there is no other adequate remedy in a court.”<sup>15</sup> The statute that authorizes an agency’s action, which is commonly referred to as an agency’s organic or governing statute, may modify the APA’s default standards or even prohibit judicial review altogether.<sup>16</sup>

Since the APA’s enactment in 1946, Congress has only amended it sixteen times, most recently in 1996.<sup>17</sup> In the 1940s, the APA was amended five times to exempt from the APA definition of “agency”—and thus from the APA framework entirely—any functions conferred by certain subsequent legislation.<sup>18</sup> Similarly, two minor, conforming amendments were made in 1968 and 1978.<sup>19</sup> The other nine amendments were more substantial.

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<sup>14</sup> See *id.* § 553 (rulemaking provisions); § 554 (adjudication provisions); § 559 (recognizing that other statutes could provide additional or different agency procedures).

<sup>15</sup> *Id.* § 704.

<sup>16</sup> See *id.* § 559 (“Subsequent statute may not be held to supersede or modify [the APA], except to the extent that it does so expressly.”); § 701(a) (noting that judicial review under the APA is available “except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law”); see also Stephanie Hoffer, Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221, 243–50 (2014) (detailing further default judicial review standards and how other statutes can depart from those APA default standards).

<sup>17</sup> This figure is based on the amendments listed in the Westlaw popular name table for the APA, each of which is discussed further in this Part.

<sup>18</sup> See Act of Aug. 8, 1946, ch. 870, Title III, § 302, 60 Stat. 918 (amending 5 U.S.C. § 551(a) to exclude functions conferred by the Veterans’ Emergency Housing Act of 1946); Act of Aug. 10, 1946, ch. 951, Title VI, § 601, 60 Stat. 993 (same); Act of Mar. 31, 1947, ch. 30, § 6(a), 61 Stat. 37 (amending definition of agency in 5 U.S.C. § 551(a) to exclude functions conferred by the Surplus Control Extension Act of 1947); Act of June 30, 1947, ch. 163, Title II, § 210, 61 Stat. 201 (amending definition of agency in 5 U.S.C. § 551(a) to exclude functions conferred by the Housing Rent Act of 1947); Act of Mar. 30, 1948, ch. 161, Title III, § 301, 62 Stat. 99 (amending definition of agency in 5 U.S.C. § 551(a) to exclude functions conferred by the 1948 amendments to the Housing and Rent Act of 1947).

<sup>19</sup> Act of Oct. 22, 1968, Pub. L. No. 90–623, § 1(1), 82 Stat. 1312 (amending 5 U.S.C. § 559 to insert “of this title”); Act of Oct. 13, 1978, Pub. L. No. 95–454, § 801(a)(3)(B)(iii), 92 Stat. 1222 (amending 5 U.S.C. § 559 to replace “5362” with “5372”).

In 1966, Congress enacted the Freedom of Information Act (FOIA), landmark legislation that amended the APA to require public disclosure of certain government information.<sup>20</sup> In 1974, Congress enacted the Privacy Act, which amended FOIA to address records maintained on individuals.<sup>21</sup> The Privacy Act provisions were amended three more times in the 1980s.<sup>22</sup> In 1996, Congress updated FOIA, mainly to provide public access to information in an electronic format.<sup>23</sup>

In 1976, Congress enacted the Government in the Sunshine Act, which amended the APA to require open meetings and prohibited *ex parte* communications for certain agency actions.<sup>24</sup> Also in 1976, Congress amended the judicial review provisions of the APA to include a waiver of sovereign immunity and clarify the form and venue of an APA civil action.<sup>25</sup> In 1978, Congress changed the name of “hearing examiners” to “administrative law judges” and increased the number of those judges.<sup>26</sup>

In sum, Congress has only amended the APA sixteen times since its enactment in 1946, yet even that number is misleading. There

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<sup>20</sup> Freedom of Information Act of 1966, Pub. L. No. 89–487, 80 Stat. 250 (amending 5 U.S.C. § 552).

<sup>21</sup> Privacy Act of 1974, Pub. L. No. 93–579, 88 Stat. 1896 (codified at 5 U.S.C. § 552(a)); *see also* Act of Dec. 31, 1975, Pub. L. No. 94–183, § 2(2), 89 Stat. 1057 (amending 5 U.S.C. § 552a(g)(5) to replace “to the effective date of this section” with “to September 27, 1975”). Strangely, the Westlaw popular name table for the APA lists the latter minor amendment but not the Privacy Act itself as an APA amendment. That appears to be because that statute was not officially an amendment to the APA, but only inserted into the APA code section.

<sup>22</sup> Debt Collection Act of 1982, Pub. L. No. 97–365, § 2, 96 Stat. 1749 (amending 5 U.S.C. § 552a); Congressional Reports Elimination Act of 1982, Pub. L. No. 97–375, Title II, § 201(a), (b), 96 Stat. 1821 (amending § 552a(p)); Act of Jan. 12, 1983, Pub. L. No. 97–452, § 2(a)(1), 96 Stat. 2478 (amending §§ 552a(b), 552a(m)).

<sup>23</sup> Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104–231, §§ 3–11, 110 Stat. 3049 (amending 5 U.S.C. § 552).

<sup>24</sup> Government in the Sunshine Act of 1976, Pub. L. No. 94–409, §§ 3(a), 4, 5(b), 90 Stat. 1241 (adding 5 U.S.C. § 552b and § 557(d)(1) and conforming language in §§ 551, 552, and 556).

<sup>25</sup> Act of Oct. 21, 1976, Pub. L. No. 94–574, § 1, 90 Stat. 2721 (amending 5 U.S.C. §§ 702, 703). *See generally* Kathryn E. Kovacs, *Scalia’s Bargain*, 77 OHIO ST. L.J. 1155 (2016) (providing a definitive account of legislative history leading up to these amendments).

<sup>26</sup> Act of Mar. 27, 1978, Pub. L. No. 95–251, §§ 2(a)(1), 2(b)(1)–(2), 92 Stat. 183 (amending 5 U.S.C. §§ 554, 556 and 559).

have really only been four—or perhaps five—significant statutory changes: FOIA (1966), the Privacy Act (1974), the Government in the Sunshine Act (1976), the waiver of sovereign immunity (1976), and, to a lesser extent, the renaming of administrative law judges (1978). Aside from modernizing FOIA in 1996, Congress has made no substantial change to the APA in over forty years (since 1976).

The lack of significant legislative action does not mean the APA has remained constant. The Supreme Court and the lower courts—with the D.C. Circuit leading the way—have developed a wide variety of “administrative common law” doctrines that further modify the APA.<sup>27</sup> As Kenneth Culp Davis put it in 1980, “Most administrative law is judge-made law, and most judge-made administrative law is administrative common law.”<sup>28</sup>

As for the APA’s procedures for agency action, the Supreme Court has struck down most judicial efforts to graft on additional agency procedures not required by statute. Most famously, the *Vermont Yankee* Court held that “[a]gencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them.”<sup>29</sup> More recently, in *Perez v. Mortgage Bankers*

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<sup>27</sup> See, e.g., Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1295 (2012) (defining and defending “administrative common law” as “administrative law doctrines and requirements that are largely judicially created, as opposed to those specified by Congress, the President, or individual agencies”). But see John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 152 (1998).

<sup>28</sup> Kenneth Culp Davis, *Administrative Common Law and the Vermont Yankee Opinion*, 1980 UTAH L. REV. 3, 3; cf. Jack M. Beerermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1, 4 (2011) (“The most that one can confidently say today is that administrative law contains elements that appear to be highly statutorily focused alongside elements in which courts exercise the discretion of a common law court.”). See generally Aaron L. Nielson, *Visualizing Change in Administrative Law*, 49 GA. L. REV. 757, 776–93 (2015) (detailing how administrative law has changed in various ways since the APA).

<sup>29</sup> *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978). See generally Gillian E. Metzger, *The Story of Vermont Yankee*, in ADMINISTRATIVE LAW STORIES 124, 149–50 (Peter L. Strauss ed., 2006) (observing that the *Vermont Yankee* “opinion is a masterpiece of obfuscation” on what exactly were the procedures that the agency should have implemented—including, perhaps, cross-examination, discovery, or a more robust record on which to evaluate the agency’s reasoned decisionmaking); Scalia, *supra*, note 2 at 356 (“The essential meaning of the opinion below was unclear. Indeed, the



*Ass'n*, the Court rejected another D.C. Circuit administrative common law doctrine—the requirement of notice-and-comment rulemaking to reverse certain prior agency guidance—and held that such doctrine “improperly imposes on agencies an obligation beyond the ‘maximum procedural requirements’ specified in the APA.”<sup>30</sup>

With respect to the APA’s judicial review provisions, however, extensive administrative common law remains on the books. That may well be explained, as Thomas Merrill has documented, by the fact that the APA embraces an appellate model of judicial review.<sup>31</sup> Under this model, courts review agency actions similar to how appellate courts review trial court decisions. The appellate review model in this context is based on the record in the prior proceeding, and the reviewing court does not engage in independent fact-finding. Likewise, the standard of review reflects the comparative expertise of the particular institutions, with more or less deferential review depending on whether the issue is more factual or legal.<sup>32</sup>

Unlike the intra-branch relationship between appellate and trial courts, the relationship between courts and agencies implicates separation-of-powers concerns. For instance, “The presumption that the reviewing court has superior competence to answer questions of law is rebutted by the fact that Congress often delegates law-elaboration authority first and foremost to the agency.”<sup>33</sup> Administrative law’s appellate review model has thus evolved beyond the most natural reading of the APA’s text to incorporate a number of

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first step in the Supreme Court’s analysis had to be a determination whether the basis of decision was inadequacy of procedures or inadequacy of record support. (The Supreme Court concluded that it was the former.)”).

<sup>30</sup> *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1206 (2015) (quoting *Vermont Yankee*, 435 U.S. at 524). See Kathryn E. Kovacs, *Pixelating Administrative Common Law in Perez v. Mortgage Bankers Association*, 125 YALE L.J. F. 31, 42 (2015) (“The Court should take a step back from the canvas of administrative law to see the whole picture. If it had taken a step back in *Mortgage Bankers*, it would have explained why *Paralyzed Veterans* doctrine conflicts with the APA and ended its opinion there.”).

<sup>31</sup> See Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 940 (2011).

<sup>32</sup> See Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553, 1554–57 (2014) (further describing administrative law’s appellate model).

<sup>33</sup> *Id.* at 1555 (citing, *inter alia*, *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005)).

agency deference doctrines that reflect these separation-of-powers values.<sup>34</sup> *Chevron* deference comes immediately to mind.<sup>35</sup> *Auer* deference—the command that courts defer to agency interpretations of their own regulations—is another, perhaps even less textually grounded deference doctrine.<sup>36</sup>

Administrative common law in judicial review has not been limited to judicial deference to agency legal interpretations. As John Duffy noted, exhaustion of administrative remedies and ripeness are two other areas historically rich in administrative common law.<sup>37</sup> Nicholas Bagley has identified the presumption of reviewability as another.<sup>38</sup> We also see it at play with respect to “hard look” review and judicial remedies in administrative law, such as the *Chenery* principle and remand without vacatur.<sup>39</sup> Similarly, Kathryn Kovacs

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<sup>34</sup> See Christopher J. Walker, *Avoiding Normative Canons in the Review of Administrative Interpretations of Law: A Brand X Doctrine of Constitutional Avoidance*, 64 ADMIN. L. REV. 139, 173–82 (2012) (exploring separation of powers concerns in the context of *Chevron* deference and constitutional avoidance).

<sup>35</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (instructing courts to defer to reasonable agency interpretations of ambiguous provisions in statutes the agency administers); see also Merrill, *supra* note 31, at 999 (noting that, “in response to the deregulation movement, the model was sufficiently elastic to permit a further modification in the appropriate division of authority in resolving questions of law, most prominently with the *Chevron* decision in 1984”). See, e.g., Duffy, *supra* note 27, at 189–90 (“Yet although *Chevron* was born of the common-law method, a battle is now being waged in the courts between two conceptions of *Chevron*. One side would continue the common-law reasoning of the *Chevron* opinion; the other would base the doctrine on an interpretation of specific statutory provisions . . . . The D.C. Circuit and Justice Scalia are chief defenders of the common-law version of *Chevron*, but they are losing the battle.”).

<sup>36</sup> See generally Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL’Y \_\_ (forthcoming 2018) (on file with author) (documenting criticisms of both deference doctrines).

<sup>37</sup> Duffy, *supra* note 27, at 152–81.

<sup>38</sup> Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1287 (2014) (“The ostensible statutory source for the presumption—the Administrative Procedure Act (APA)—nowhere instructs courts to construe statutes to avoid preclusion.” (footnote omitted)).

<sup>39</sup> See generally Christopher J. Walker, *Against Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. ONLINE 106, 111–16 (2017) (discussing hard look review and remedial issues in administrative law).

has identified a number of other administrative common law doctrines that arguably contravene the APA's plain text.<sup>40</sup>

This Essay does not endeavor to document, much less critique, every instance of administrative common law that has emerged since the APA's enactment in 1946. Instead, this discussion illustrates that the APA has evolved considerably over the last seven decades, just not due to congressional action. Indeed, one could reasonably argue that administrative common law has sprawled because of congressional inaction. At the very least, we can safely conclude that the judicial branch, not Congress, has played the predominant role in shaping the contours of the APA.

## II. ABA 2016 RESOLUTION TO REFORM THE APA

As noted in the Introduction, the current political climate may present an ideal opportunity for bipartisan legislation to modernize the APA. If so, as this Part details, the ABA's consensus-driven recommendations are an excellent starting place.

In 2015, the Governing Council for the ABA's Section of Administrative Law and Regulatory Practice, on which I serve, convened to evaluate a number of proposals to modernize the APA. We reviewed prior ABA recommendations on the topic as well as the recommendations the Administrative Conference of the United States (ACUS) has issued over the years. Our goal was to identify nonpartisan, consensus-driven, and common-sense reforms to the APA. We ultimately included nine such recommendations in what became ABA House of Delegates Resolution 106B.<sup>41</sup> All of these recommendations focus on the APA's rulemaking provisions. The Section approved this resolution in the fall of 2015, and the ABA House of Delegates adopted the resolution in February 2016.<sup>42</sup>

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<sup>40</sup> See Kovacs, *supra* note 2, at 1211 (identifying as administrative common law "superdeference to certain agencies despite Congress's deliberate decision to subject all agencies to the same standard of review; procedural requirements that exceed the APA's minimal rulemaking provisions; and prudential ripeness doctrine").

<sup>41</sup> In Resolution 106B, we also recommended that federal agencies further experiment with processes for allowing reply comments during rulemaking. See ABA Resolution 106B, *supra* note 8, at 1–2. That recommendation was not styled as an amendment to the APA, so it will not be discussed here.

<sup>42</sup> The words in this Part are my own, but the analysis draws substantially from our Section report to the ABA House of Delegates, which accompanied the Section's proposed resolution. See *generally* ABA SECTION OF ADMINISTRATIVE

Each recommendation will be discussed in turn.

*1. Agency Disclosure of Data, Studies, and Information*

The first recommendation provides:

Codify the requirement that an agency fully disclose data, studies, and other information upon which it proposes to rely in connection with a rulemaking, including factual material that is critical to the rule that becomes available to the agency after the comment period has closed and on which the agency proposes to rely.<sup>43</sup>

Presently, the text of the APA only requires agencies to provide public notice of “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”<sup>44</sup> Courts have expanded on this statutory provision to require the disclosure of the data and studies underlying a proposed rule. As the D.C. Circuit explained in *Portland Cement Ass’n v. Ruckelshaus*, “In order that rule-making proceedings to determine standards be conducted in orderly fashion, information should generally be disclosed as to the basis of a proposed rule at the time of issuance.”<sup>45</sup> But, as Judge Kavanaugh has argued, the *Portland Cement* disclosure doctrine “stands on a shaky legal foundation (even though it may make sense as a policy matter in some cases)” because it “cannot be squared with the text of § 553 of the APA.”<sup>46</sup>

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LAW AND REGULATORY PRACTICE, PROPOSED RESOLUTION AND REPORT (Feb. 8, 2016) [hereinafter ABA ADLAW SECTION REPORT], [http://www.americanbar.org/news/reporter\\_resources/midyear-meeting-2016/house-of-delegates-resolutions/106b.html](http://www.americanbar.org/news/reporter_resources/midyear-meeting-2016/house-of-delegates-resolutions/106b.html).

<sup>43</sup> ABA Resolution 106B, *supra* note 8, at 1.

<sup>44</sup> 5 U.S.C. § 553(b)(3) (2012).

<sup>45</sup> *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973) (“If this [initial disclosure] is not feasible, as in case of statutory time constraints, information that is material to the subject at hand should be disclosed as it becomes available, and comments received, even though subsequent to issuance of the rule—with court authorization, where necessary.”).

<sup>46</sup> *See* Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 246 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part); *see also* Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 894 (2007) (arguing that the *Portland Cement* doctrine is “a violation of the basic principle of *Vermont Yankee* that Congress and the agencies, but not the courts, have the power to decide on proper agency procedures” (citing *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978))).

Congress should amend the APA to make clear that federal agencies must “provide public notice of, and access to, all data, studies, and other information considered or used by the agency in connection with its determination to propose the rule that is not protected from disclosure.”<sup>47</sup> Not only would this amendment codify longstanding judicial precedent and administrative practice; it would also advance the important policy goal of making the public comment process meaningful. Affected individuals should have the opportunity to evaluate the inputs that led to the proposed rule in order to comment on whether the agency has engaged in reasoned decisionmaking and whether the proposed rule will advance the public interest and the agency’s statutory mandates.

## 2. *The Agency Rulemaking Record*

The second recommendation is related to the first. It suggests that the APA expressly require federal agencies to develop a complete and publicly accessible rulemaking record:

Provide for the systematic development by the agency in each rulemaking of a rulemaking record as a basis for agency factual determinations and a record for judicial review. The record should include any material that the agency considered during the rulemaking, in addition to materials required by law to be included in the record, as well as all comments and materials submitted to the agency during the comment period. The record should be accessible to the public via an online docket, with limited exceptions allowed, such as for privileged, copyrighted, or sensitive material.<sup>48</sup>

The APA currently seems to contemplate an agency record, as its judicial review provisions instruct that “the court shall review the whole record or those parts of it cited by a party.”<sup>49</sup> The Supreme Court has repeatedly emphasized that an agency’s action must be judged based on the “administrative record made.”<sup>50</sup> But the APA does not expressly require agencies to maintain a publicly available record for notice-and-comment rulemaking proceedings.

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<sup>47</sup> ABA AdLaw SECTION REPORT, *supra* note 42, at 1.

<sup>48</sup> ABA Resolution 106B, *supra* note 8, at 1.

<sup>49</sup> 5 U.S.C. § 706 (2012).

<sup>50</sup> *Vermont Yankee*, 435 U.S. at 549 (citing, *inter alia*, *Camp v. Pitts*, 411 U.S. 138 (1973)); *accord* *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) (“The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”).

This agency-record recommendation is not a new one. The ABA has been making it since at least 1981.<sup>51</sup> And for good reason. An agency record, made publicly available during the comment period, allows the public to fully assess and effectively comment on the agency's proposed rule.<sup>52</sup> It also ensures that the reviewing court can assess the propriety of the agency's rulemaking process and of the final rule. Although ABA Resolution 106B is limited to the APA's rulemaking provisions, a similar record requirement would make good sense in the informal adjudication context—whenever there is potential judicial review of an agency action.

### 3. *Minimum Comment Period*

The third recommendation suggests that Congress amend the APA to “[e]stablish a minimum comment period of 60 days for ‘major’ rules as defined by the Congressional Review Act, subject to an exemption for good cause.”<sup>53</sup> The APA sets no minimum (or maximum) time for the public comment period, yet it is crucial that interested individuals have sufficient time to respond to a proposed rule, especially for a “major” rule.<sup>54</sup>

This too is not a new recommendation, as the ABA has insisted on a minimum comment period since at least 1981.<sup>55</sup> More recently, both the Obama Administration and ACUS have similarly recommended a minimum comment period. As President Obama's Executive Order on Improving Regulation and Regulatory Review details, “To the extent feasible and permitted by law, each agency

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<sup>51</sup> See 106 ABA ANN. REP. 549, 785 (1981).

<sup>52</sup> See, e.g., William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 39 (1975) (“Rulemaking procedures should provide for compiling and organizing an administrative record while rulemaking is in process, with use of a discovery system to ensure that no material which properly should be included is left out.”).

<sup>53</sup> ABA Resolution 106B, *supra* note 8, at 1.

<sup>54</sup> See 5 U.S.C. § 804(2) (2012) (defining a “major rule” as “any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—(A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets”).

<sup>55</sup> See Marion Edwyn Harrison, 106 ANN. REP. A.B.A. 783, 785 (1981).

shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.”<sup>56</sup> In 2011, ACUS recommended a minimum comment period of 60 days for “significant regulatory actions” and 30 days for all other rules.<sup>57</sup>

#### 4. Definition of “Rule”

The fourth recommendation encourages Congress to clean up the definition of rulemaking throughout the APA to “[c]larify the definition of ‘rule’ by deleting the phrases ‘or particular’ and ‘and future effect’; update the term ‘interpretative rules’ to ‘interpretive rules’; and substitute ‘rulemaking’ for ‘rule making’ throughout the Act.”<sup>58</sup>

In other words, the statutory definition of “rule” in § 551(4) of the APA would be replaced with the following:

“rule” means the whole or a part of an agency statement of general applicability that interprets, implements or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.<sup>59</sup>

The ABA and ACUS have recommended this definition change since the 1970s to conform the statutory definition to common usage in administrative practice.<sup>60</sup>

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<sup>56</sup> Exec. Order No. 13,563, 76 Fed. Reg. 3,821, 3,821–22 (Jan. 21, 2011).

<sup>57</sup> ACUS Recommendation 2011–12, 76 Fed. Reg. 48,789, 48,791 (Aug. 9, 2011) (“Agencies should set comment periods that consider the competing interests of promoting optimal public participation while ensuring that the rulemaking is conducted efficiently. As a general matter, for ‘[s]ignificant regulatory action[s]’ as defined in Executive Order 12,866, agencies should use a comment period of at least 60 days. For all other rulemakings, they should generally use a comment period of at least 30 days. When agencies, in appropriate circumstances, set shorter comment periods, they are encouraged to provide an appropriate explanation for doing so.”).

<sup>58</sup> ABA Resolution 106B, *supra* note 8, at 1.

<sup>59</sup> ABA ADLAW SECTION REPORT, *supra* note 42, at 5.

<sup>60</sup> See *The 12 ABA Recommendations for Improved Procedures for Federal Agencies*, 24 ADMIN. L. REV. 389, 389–91 (1972); see also Statement of the Administrative Conference on ABA Resolution No. 1 Proposing to Amend the Definition of “Rule” in the Administrative Procedure Act, 39 Fed. Reg. 4,846,

### 5. *Midnight Rules*

Increased regulatory activity near the end of a presidential administration poses unique problems to the modern administrative state. This problem has been coined “midnight regulation,” alluding “to the Cinderella story in which the magic wears off at the stroke of midnight.”<sup>61</sup> The APA presently does not address this more recent phenomenon.

ACUS has recently studied the issue at length and recommended that an incoming presidential administration should have statutory authority to delay the effective date of such midnight rules.<sup>62</sup> The ABA’s fifth recommendation agrees with ACUS and urges Congress to amend the APA to

[a]uthorize a new presidential administration to (i) delay the effective date of rules finalized but not yet effective at the end of the prior administration while the new administration examines the merits of those rules, and (ii) allow the public to be given the opportunity to comment on whether such rules should be amended, rescinded or further delayed.<sup>63</sup>

This recommendation modernizes the APA to take account of this growing phenomenon, in order to discourage outgoing presidential administrations from engaging in regulatory activities that the incoming administration (and thus arguably the American public) would not support. As Katherine Watts has observed, this type of “soft [regulatory] moratoria” can “help[] to further notions of

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4,849 (Feb. 7, 1974). This recommendation strikes me as much less important than the others included in ABA Resolution 106B, but any modernization of the APA might as well improve the wordsmithing. *But see* Ronald M. Levin, *The Case for (Finally) Fixing the APA’s Definition of “Rule”*, 56 ADMIN. L. REV. 1077, 1077 (2004) (arguing that the APA’s definition of “rule” “may be the most blatantly defective provision in the” APA and “is, and always has been, completely out of synch with commonly understood usage”).

<sup>61</sup> Jack M. Beermann, *Midnight Rules: A Reform Agenda*, 2 MICH. J. ENVTL. & ADMIN. L. 285, 286 (2013); *see also id.* at 290–300 (documenting phenomenon of midnight regulation in the rulemaking context). *See generally* Jerry Brito & Veronique de Rugy, *Midnight Regulations and Regulatory Review*, 61 ADMIN. L. REV. 163 (2009).

<sup>62</sup> ACUS Recommendation 2012–2, 77 Fed. Reg. 47,802, 47,803 (Aug. 10, 2012).

<sup>63</sup> ABA Resolution 106B, *supra* note 8, at 1.



democratic accountability when used for a brief period of time by the executive branch following a change in administration.”<sup>64</sup>

### 6. Retrospective Review

The ABA’s sixth recommendation addresses retrospective review. There has been a growing call in recent years—with bipartisan support—to encourage federal agencies to systematically review existing rules and revise or withdraw old rules when appropriate. For instance, in 2011 President Obama’s “regulatory czar” Cass Sunstein issued a memorandum that encouraged agencies to engage in such retrospective review.<sup>65</sup> Similarly, the Trump Administration’s Executive Order on Reducing Regulation and Controlling Regulatory Costs reinforces the importance of retrospective review by instructing agencies that “for every one new regulation issued, at least two prior regulations be identified for elimination.”<sup>66</sup> ACUS, moreover, recently conducted an extensive study of retrospective review and issued recommendations “intended to provide a framework for cultivating a ‘culture of retrospective review’ within regulatory agencies.”<sup>67</sup>

Despite broad consensus on the importance of retrospective review, the APA does not address it. The ABA thus recommends that Congress amend the APA to require agencies:

- a. When promulgating a major rule, to publish a plan (which would not be subject to judicial review) for assessing experience under the rule that describes (i) information the agency believes will enable it to assess the effectiveness of the rule in accomplishing its objectives, potentially in conjunction with other rules or other program activities, and (ii) how the agency intends to compile such information over time; [and]
- b. On a continuing basis, to invite interested persons to submit, by electronic means, suggestions for rules that warrant review and possible modification or repeal.<sup>68</sup>

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<sup>64</sup> Kathryn A. Watts, *Regulatory Moratoria*, 61 DUKE L.J. 1883, 1888 (2012).

<sup>65</sup> See Office of Mgmt. & Budget, Final Plans for Retrospective Analysis of Existing Rules, (June 14, 2011).

<sup>66</sup> Exec. Order No. 13,771, 82 Fed. Reg. 9,339, 9,339 (Jan. 30, 2017).

<sup>67</sup> ACUS Recommendation 2014-5, 79 Fed. Reg. 75,114, 75,114 (Dec. 17, 2014).

<sup>68</sup> ABA Resolution 106B, *supra* note 8, at 1–2.

The ABA's recommendation expressly provides that neither of these statutory obligations would be subject to judicial review.<sup>69</sup>

### 7. Unified Regulatory Agenda

The seventh recommendation involves codifying parts of the Unified Regulatory Agenda. Executive Order 12,886 establishes the Unified Regulatory Agenda by requiring federal agencies to submit their planned rulemaking activity semiannually to the Office of Information and Regulatory Affairs (OIRA), which then makes the plans available to the public.<sup>70</sup> This Unified Regulatory Agenda is a critical resource for the public to understand an agency's regulatory plans for the near future. The APA does not address the Unified Regulatory Agenda.

Accordingly, the ABA recommends that Congress codify Executive Order 12,866's Unified Regulatory Agenda requirements and apply them to all agencies. The ABA, moreover, recommends that Congress codify a number of ACUS recommendations regarding the Unified Regulatory Agenda,<sup>71</sup> such that the APA:

would require each participating agency to (i) maintain a website that contains its regulatory agenda, (ii) update its agenda in real time to reflect concrete actions taken with respect to rules (such as initiation, issuance or withdrawal of a rule or change of contact person), (iii) explain how all rules were resolved rather than removing rules without explanation, (iv) list all active rulemakings, and (v) make reasonable efforts to accurately classify all agenda items.<sup>72</sup>

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<sup>69</sup>There may well be sound reasons for Congress to consider allowing for some form of limited judicial review (or presidential review), especially of an agency's decision not to review a rule identified by the public.

<sup>70</sup>Exec. Order No. 12,866, § 4(b), 58 Fed. Reg. 51,735, 51,738 (Sept. 30, 1993) ("Each agency shall prepare an agenda of all regulations under development or review, at a time and in a manner specified by the Administrator of OIRA. The description of each regulatory action shall contain, at a minimum, a regulation identifier number, a brief summary of the action, the legal authority for the action, any legal deadline for the action, and the name and telephone number of a knowledgeable agency official."). *See generally* Cary Coglianese & Daniel E. Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 68 ADMIN. L. REV. 93 (2016).

<sup>71</sup>*See* ACUS Recommendation 2015-1, 80 Fed. Reg. 36,757, 36,758 (June 26, 2015).

<sup>72</sup>ABA Resolution 106B, *supra* note 8, at 2.

The ABA further recommends that Congress amend the APA to require that “[a]ll agencies with rulemaking plans for a given year should also participate in the annual Regulatory Plan published in the spring Unified Agenda.”<sup>73</sup> Similar to the amendments regarding retrospective review, the ABA recommends that these procedural requirements would not be subject to judicial review.<sup>74</sup>

### 8. *Outmoded Rulemaking Exemptions*

The eighth recommendation renews the ABA’s longstanding call to “[r]epeal the exemptions from the notice-and-comment process for ‘public . . . loans, grants [and] benefits’ and narrow the exemptions for ‘public property [and] contracts’ and for ‘military or foreign affairs functions.’”<sup>75</sup> The ACUS has made similar recommendations with respect to these outdated rulemaking exemptions.<sup>76</sup>

There is no legitimate reason to shield generally applicable policies regarding public loans, grants, and benefits from notice-and-comment rulemaking.<sup>77</sup> Likewise, rules addressing military and foreign affairs functions should be subject to notice-and-comment rulemaking unless they would be exempt as classified information under the Freedom of Information Act (FOIA).<sup>78</sup> As we noted in our Section report to the ABA House of Delegates, this recommendation “that rules in the subject areas of both exemptions must be issued through the normal notice-and-comment process would harmonize

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*; accord 6 ABA ANN. REP. 783–84, 788–89 (1981).

<sup>76</sup> See, e.g., ACUS Recommendation 69-8, 38 Fed. Reg. 19,782, 17,785 (1969) (asserting that the removal of statutory exemptions for rules promulgated in relation to “public property, loans, grants, benefits, or contracts” will lead agencies to exercise their rulemaking authority more fairly); ACUS Recommendation 73-5, 39 Fed. Reg. 4,846, 4,847 (1974) (recommending removal of the rulemaking exemption for military and foreign affairs).

<sup>77</sup> See ABA ADLAW SECTION REPORT, *supra* note 42, at 8–9 (“We fear that the adverse effect of these exemptions will only increase now that the Department of Agriculture (USDA) has revoked its policy—dating back to 1971—of voluntarily employing notice-and-comment in rulemakings that fall within the terms of the former exemption.”) (citing 78 Fed. Reg. 64,194 (Oct. 28, 2013)).

<sup>78</sup> See 5 U.S.C. § 552(b)(1) (2012) (exempting matters from FOIA obligations that are “(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order”).

well with this recommendation's overall emphasis on promoting public participation and agency accountability in rulemaking."<sup>79</sup>

### *9. Post-Promulgation Notice-and-Comment Rulemaking*

The final recommendation concerns the troubling growth of interim final rulemaking. When there is "good cause," the APA allows federal agencies to promulgate a rule without first providing notice and allowing for public comment.<sup>80</sup> The APA defines "good cause" as when "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."<sup>81</sup>

Agency use of this "good cause" exception has risen exponentially in recent years. For instance, a 2012 study by the Government Accountability Office found that federal agencies from 2003 through 2010 skipped the notice-and-comment process for 35% of "major" rules and 44% of non-major rules.<sup>82</sup> Of those major rules issued without notice and comment, the agencies engaged in post-promulgation notice-and-comment processes 65% of the time.<sup>83</sup>

Building on an ACUS recommendation,<sup>84</sup> the ABA recommends that Congress amend the APA to

[r]equire that when an agency promulgates a final rule without notice-and-comment procedure on the basis that such procedure is impracticable or contrary to the public interest, it (i) invite the public to submit post-promulgation comments and (ii) set a target date by which it expects to adopt a successor rule after consideration of the comments received.<sup>85</sup>

The APA should further require that agencies explain any failures to meet the designated target dates and that "[t]he preamble and rulemaking record accompanying the successor rule should support the lawfulness of the rule as a whole, rather than only the

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<sup>79</sup> ABA ADLAW SECTION REPORT, *supra* note 42, at 9.

<sup>80</sup> 5 U.S.C. § 553(b)(3)(B).

<sup>81</sup> *Id.*

<sup>82</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-21, FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS 1, 36 (2012) [hereinafter GAO REPORT]. See generally Kristin Hickman & Mark Thomson, *Open Minds and Harmless Errors: Judicial Review of Post-Promulgation Notice and Comment*, 101 CORNELL L. REV. 261 (2016).

<sup>83</sup> GAO REPORT, *supra* note 82, at 24–25.

<sup>84</sup> See ACUS Recommendation 95–4, 60 Fed. Reg. 43,108, 43,110–13 (1995).

<sup>85</sup> ABA Resolution 106B, *supra* note 8, at 2.

differences between the interim final rule and the successor rule.”<sup>86</sup> Judicial review would not be available as to these new provisions, “but existing judicial remedies for undue delay in rulemaking would be unaffected.”<sup>87</sup>

### III. REGULATORY ACCOUNTABILITY ACT OF 2017

Since the new Congress arrived in January, we have seen a wide range of legislation introduced to reform the administrative state. Legislation in both the House and the Senate has been introduced to limit the use of settlements to force agency regulatory activities,<sup>88</sup> to better facilitate congressional review of midnight rules,<sup>89</sup> and to codify the Trump Administration’s one-in, two-out executive order.<sup>90</sup> Similarly, the REINS Act, which would require congressional approval via joint resolution of major rules, has been reintroduced in both the House and the Senate.<sup>91</sup>

In January, House Republicans, with five Democrats joining, passed the Regulatory Accountability Act.<sup>92</sup> This omnibus legislation

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* As I have argued elsewhere, if the court finds there was no good cause to skip the notice-and-comment process, there should be a strong presumption of prejudice or perhaps the error should be deemed structural such that no prejudice showing is required. Walker, *supra* note 39, at 118–19 & n.75; *see also* Hickman & Thomson, *supra* note 82, at 311 (“[A] strong presumption against the validity of postpromulgation notice and comment best respects the balance between an express statutory command for prepromulgation notice and comment and a particularized harmless error rule.”).

<sup>88</sup> Sunshine for Regulatory Decrees and Settlements Act of 2017, S. 119, 115th Cong. (2017); Sunshine for Regulations and Regulatory Decrees and Settlements Act of 2017, H.R. 469, 115th Cong. (2017).

<sup>89</sup> Midnight Rules Relief Act of 2017, S. 34, 115th Cong. (2017); Midnight Rules Relief Act of 2017, H.R. 21, 115th Cong. (2017).

<sup>90</sup> RED Tape Act of 2017, S. 56, 115th Cong. (2017); One In, One Out Act, H.R. 674, 115th Cong. (2017); *see also* Exec. Order No. 13,771, § 2, 82 Fed. Reg. 9,339 (Jan. 30, 2017).

<sup>91</sup> Regulations from the Executive in Need of Scrutiny (REINS) Act of 2017, S. 21, 115th Cong. (2017); REINS Act of 2017, H.R. 26, 115th Cong. (2017). *See generally* Jonathan H. Adler, *Placing “Reins” on Regulations: Assessing the Proposed REINS Act*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 1 (2013); Ronald M. Levin, *The REINS Act: Unbridled Impediment to Regulation*, 83 GEO. WASH. L. REV. 1446 (2015); Jonathan R. Siegel, *The REINS Act and the Struggle to Control Agency Rulemaking*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 131 (2013).

<sup>92</sup> Roll Call Vote, Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. (Jan. 11, 2017) (listing 223 “yea” votes from Republicans (with another 7 not

contains six separate bills: (1) the All Economic Regulations Are Transparent Act (ALERT Act), which would require agencies to publish online timely information about regulations in development; (2) the Providing Accountability Through Transparency Act, which would require agencies to publish online plain-language summaries of new proposed rules; (3) the Evaluation Before Implementing Executive Wishlists Act (REVIEW Act), which would allow for pre-enforcement judicial review of new billion-dollar rules; (4) the Separation of Powers Restoration Act, which would eliminate *Auer* and *Chevron* judicial deference to agency legal interpretations; (5) the Small Business Regulatory Flexibility Improvements Act, which would require agencies to better account for impacts of new regulations on small businesses; and (6) the Regulatory Accountability Act, which is further discussed below.<sup>93</sup> Senate Republicans have introduced companion bills for many of these,<sup>94</sup> in addition to a number of other regulatory reform bills.<sup>95</sup>

This Essay does not attempt to chronicle every regulatory reform bill that has been introduced to date in the 115th Congress. Instead, this Part focuses on the one comprehensive, bipartisan bill to modernize the APA: the Senate version of the Regulatory Accountability Act of 2017.<sup>96</sup> Senators Rob Portman (R-OH) and Heidi Heitkamp (D-ND), joined by Senators Orrin Hatch (R-UT) and Joe Manchin (D-WV), introduced this legislation in April.<sup>97</sup> The

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voting), 5 “yea” votes and 183 “nay” votes from Democrats (with another 6 not voting)), <http://clerk.house.gov/evs/2017/roll045.xml>.

<sup>93</sup>These summaries draw on the Congressional Research Service’s bill summary, which is available here: <https://www.congress.gov/bill/115th-congress/house-bill/5>.

<sup>94</sup>*See, e.g.*, Providing Accountability Through Transparency Act of 2017, S. 577, 115th Cong. (2017); Small Business Regulatory Flexibility Improvements Act, S. 584, 115th Cong. (2017); REVIEW Act of 2017, S. 919, 115th Cong. (2017).

<sup>95</sup>*See, e.g.*, Better Evaluation of Science and Technology (BEST) Act, S. 578, 115th Cong. (2017) (identifying certain scientific standards for all rulemaking); Early Participation in Regulations Act of 2017, S. 579, 115th Cong. (2017) (requiring agencies to provide advance public notice of proposed rulemaking for major rules); Truth in Regulations Act of 2017, S. 580, 115th Cong. (2017) (establishing certain procedures for agency issuance of guidance documents).

<sup>96</sup>Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017).

<sup>97</sup>*See* Press Release, Senator Rob Portman, Portman, Heitkamp Introduce the Bipartisan Senate Regulatory Accountability Act (Apr. 26, 2017), <https://www.portman.senate.gov/public/index.cfm/2017/4/portman-heitkamp-introduce-the-bipartisan-senate-regulatory-accountability-act>.

Senate Committee on Homeland Security and Governmental Affairs favorably reported an amended version of the bill out of committee in May.<sup>98</sup>

This Part proceeds as follows: Part III.A reviews the legislation’s incorporation of (at least in part) seven of the nine recommendations contained in the ABA’s 2016 resolution. Part III.B details how the legislation would codify rulemaking best practices that all presidents have embraced since the 1980s, whereas Part III.C explores its new procedures for major and high-impact rules. Part III.D details the legislation’s codification of agency guidance procedures, with Part III.E outlining its new agency public advocacy restrictions. Part III.F concludes with a discussion of the legislation’s reforms to the APA’s judicial review standards.

#### A. Adoption of ABA Recommendations

The Portman–Heitkamp Regulatory Accountability Act of 2017 adopts at least parts of seven of the nine ABA recommendations to modernize the APA discussed in Part II.

First, embracing ABA Recommendation No. 1, the legislation would require agencies to disclose “all studies, models, scientific literature, and other information developed or relied upon by the agency” by the time of publication of the notice of proposed rulemaking.<sup>99</sup> It similarly appears to adopt ABA Recommendation No. 2’s record requirement by instructing that these materials “be placed in the docket for the proposed rule and made accessible to the public.”<sup>100</sup> Similar disclosure and record docketing requirements would apply to publication of a final rule.<sup>101</sup>

With respect to a minimum public comment period (ABA Recommendation No. 3), the legislation would amend the APA to expressly require a comment period of at least 60 days for regular

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<sup>98</sup> See Homeland Security and Governmental Affairs Committee Record, at 2 (May 17, 2017) (noting that S. 951 was “reported favorably by roll call vote (9 Yeas, 5 Nays) as amended by the Portman Substitute Amendment”), <https://www.hsgac.senate.gov/hearings/business-meeting-05/17/2017>.

<sup>99</sup> S. 951, § 3, 115th Cong. (2017) (amending 5 U.S.C. § 553(c)(2)(A)); *cf. supra* Part II.1.

<sup>100</sup> S. 951, § 3, 115th Cong. (2017) (amending 5 U.S.C. § 553(c)(2)(A)); *cf. supra* Part II.2.

<sup>101</sup> See S. 951, § 3 (amending 5 U.S.C. § 553(c)(2)(A)).

rules and at least 90 days for “major” and “high-impact” rules.<sup>102</sup> The ABA had only recommended a 60-day minimum comment period for major rules.<sup>103</sup> Importantly, the legislation would include a “good cause” exception to these minimum comment periods when compliance would be “unnecessary, impracticable, or contrary to public interest.”<sup>104</sup>

With respect to ABA Recommendation No. 4, the legislation would not clarify the definition of “rule” in the APA or spell “interpretive” correctly, but it would make “rulemaking” one word throughout the APA.<sup>105</sup> Hopefully the final version of the legislation, if enacted, will embrace these other wordsmithing suggestions.

The Regulatory Accountability Act also tackles the problem of midnight rulemaking (Recommendation No. 5). It would amend § 553 of the APA to add a subsection to address “rules adopted at the end of a presidential administration”:

(A) IN GENERAL.—During the 60-day period beginning on a transitional inauguration day (as defined in section 3349a), with respect to any final rule that had been placed on file for public inspection by the Office of the Federal Register or published in the Federal Register as of the date of the inauguration, but which had not become effective by the date of the inauguration, the agency issuing the rule may, by order, delay the effective date of the rule for not more than 90 days for the purpose of obtaining public comment on whether—

(i) the rule should be amended or rescinded; or

(ii) the effective date of the rule should be further delayed.

(B) OPPORTUNITY FOR COMMENT.—If an agency delays the effective date of a rule under subparagraph (A), the agency shall give the public not less than 30 days to submit comments.<sup>106</sup>

As the proposed text indicates, this provision tracks closely the ABA recommendation but would also wisely limit the length of delay to no more than 90 days.

The legislation also addresses retrospective review (ABA

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<sup>102</sup> S. 951, § 3, (amending 5 U.S.C. § 553(c)(4)(B)); *cf. supra* Part II.3. The definition of “high-impact” rule is discussed in Part III.C.

<sup>103</sup> ABA Resolution 106B, *supra* note 8, at 1.

<sup>104</sup> S. 951, § 3 (amending 5 U.S.C. § 553(g)(3)); *cf. supra* Part II.4.

<sup>105</sup> *See* S. 951, §§ 3–4, 7; *cf. supra* Part II.4.

<sup>106</sup> S. 951, § 3 (amending 5 U.S.C. § 553(f)(5)); *cf. supra* Part II.5.



Recommendation No. 6). Specifically, it would amend the APA to provide for a right to petition to “give interested persons the right to petition for the issuance, amendment, or repeal of a rule” and to “on a continuing basis, invite interested persons to submit, by electronic means, suggestions for rules that warrant retrospective review and possible modification or repeal.”<sup>107</sup> As further discussed in Part III.C, the legislation would also require agencies to include in proposed and final major and high-impact rules a framework for assessing the effectiveness of the rule, including identifying a methodology, a plan for data collection, and a specific time frame within a decade of the rule’s publication.<sup>108</sup> If the major or high-impact rule remains in place after retrospective review, the legislation would require public notice of the retrospective review results and ongoing periodic retrospective review.<sup>109</sup> Judicial review would be limited to whether an agency published the retrospective review framework and completed it on time.<sup>110</sup> The legislation also instructs agencies to recommend statutory changes to Congress, where appropriate, in light of their retrospective review.<sup>111</sup>

Finally, the Regulatory Accountability Act addresses the problem of post-promulgation, notice-and-comment rulemaking (ABA Recommendation No. 9) by adding provisions regarding direct final rules and interim final rules.<sup>112</sup> For direct final rules, the legislation would require publication of the text of the final rule with notice of the effective date and establish a comment period of at least 30 days; if “significant adverse comments” are lodged, the agency must withdraw the rule and engage in the normal notice-and-comment rulemaking process.<sup>113</sup> For interim final rules, the legislation would, like the ABA recommends, require a post-promulgation public comment period. The legislation, moreover, would require the agency within 180 days of publishing the interim final rule to: (1) rescind the

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<sup>107</sup> S. 951, § 3 (amending 5 U.S.C. § 553(i)); *cf. supra* Part II.6.

<sup>108</sup> S. 951, § 3 (amending 5 U.S.C. § 553(l)).

<sup>109</sup> *Id.* (amending 5 U.S.C. § 553(l)(2)(C)-(D)).

<sup>110</sup> *Id.* (amending 5 U.S.C. § 553(l)(7)).

<sup>111</sup> *Id.* (amending 5 U.S.C. § 553(l)(4)).

<sup>112</sup> *Id.* § 3 (amending 5 U.S.C. § 553(g)(3)); *cf. supra* Part II.9. The legislation would expressly exempt any rulemaking or guidance “that concerns monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee.” S. 951, § 3 (amending 5 U.S.C. § 553(g)(4)).

<sup>113</sup> S. 951, § 3 (amending 5 U.S.C. § 553(g)(3)(B)).

interim rule; (2) initiate full notice-and-comment rulemaking; or (3) adopt a final rule.<sup>114</sup> Failure to act within 180 days would invalidate the rule.<sup>115</sup>

Which ABA recommendations does the Regulatory Accountability Act not address? First, it does not attempt to codify the Unified Regulatory Agenda (ABA Recommendation No. 7),<sup>116</sup> despite, as discussed in Part II.B, codifying a number of other best practices embraced by executive order. Second, it does not rework the outmoded rulemaking exemptions for public loans, grants, and benefits and for military and foreign affairs exceptions (ABA Recommendation No. 8).<sup>117</sup> Third, as noted above, it does not implement several of the wordsmithing suggestions (ABA Recommendation No. 4).<sup>118</sup> Hopefully, Congress will address these ABA recommendations as well, as it deliberates on the Regulatory Accountability Act or via separate bipartisan legislation.

#### B. Codification of Executive Order 18,666

The Regulatory Accountability Act would codify many of the principles of effective rulemaking that presidents of both parties have developed and implemented since the 1980s.<sup>119</sup> In 1981, President Reagan issued Executive Order 12,291, which created procedures by which the Office of Management and Budget (OMB) would review proposed agency regulations to improve the quality and consistency of agency rulemaking.<sup>120</sup>

President Clinton superseded President Reagan's order in 1993 with Executive Order 12,866.<sup>121</sup> But these best practices remained central in the new order.<sup>122</sup> Under Executive Order 12,866, "in deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the

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<sup>114</sup> *Id.* § 3 (amending 5 U.S.C. § 553(g)(3)(B)(ii)(I)).

<sup>115</sup> *Id.* § 3 (amending 5 U.S.C. § 553(g)(3)(B)(ii)(II)).

<sup>116</sup> *See supra* Part II.7.

<sup>117</sup> S. 951, § 3 (amending 5 U.S.C. § 553(f)(5)); *cf. supra* Part II.8.

<sup>118</sup> *See supra* Part II.4.

<sup>119</sup> This discussion draws substantially from PAUL ROSE & CHRISTOPHER J. WALKER, *THE IMPORTANCE OF COST-BENEFIT ANALYSIS IN FINANCIAL REGULATION* 4–5 (U.S. Chamber of Commerce ed., 2013), <https://ssrn.com/abstract=2231314>.

<sup>120</sup> Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981).

<sup>121</sup> Exec. Order No. 12,866, 3 C.F.R. § 638 (1994).

<sup>122</sup> *See* Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 6 (1995).

alternative of not regulating.”<sup>123</sup> Like its predecessor, Executive Order 12,866 declares that agencies must perform economic analysis and choose the regulatory approach that maximizes net benefits.<sup>124</sup>

Over the years, OMB has provided agencies with extensive guidance on performing such cost-benefit analysis, particularly in Circular A–4.<sup>125</sup> OMB Circular A–4 identifies three key elements to a sound regulatory analysis: (1) a statement of the need for the proposed regulation; (2) discussion of alternative regulatory approaches; and (3) an analysis of both qualitative and quantitative costs and benefits of the proposed action and the leading alternatives. The analysis should attempt to express both benefits and costs in a common measure—monetary units—to facilitate the assessment. When benefits or costs cannot be quantified in monetary terms, the agency should describe them qualitatively. To ensure agencies properly perform cost-benefit analysis and select the most cost-effective regulatory options, the White House (via OIRA, an office within OMB) reviews agency economic analysis before certain proposed regulations—“significant regulatory actions”—take effect.<sup>126</sup>

President Obama reaffirmed these best practices for agency rulemaking. In January 2011, he issued Executive Order 13,563, which reiterated the principles of Executive Order 12,866 and mandated that “each agency must . . . propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify).”<sup>127</sup>

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<sup>123</sup> Exec. Order No. 12,866, § 1(a), 3 C.F.R. § 639.

<sup>124</sup> *Id.* See generally Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 176–78 (1994) (comparing the Reagan and Clinton executive orders and concluding that “[t]he Clinton order focuses on a similar mandate, but describes it with greater nuance”).

<sup>125</sup> OFFICE OF MGMT. & BUDGET, EXEC OFFICE OF PRESIDENT, CIRCULAR NO. A–4, REGULATORY ANALYSIS (2003).

<sup>126</sup> Exec. Order No. 12,866, § 2(b), 3 C.F.R. §§ 640–41, 645 (noting that normally the review process only covers “significant regulatory actions,” which Executive Order 12,866 variously defines).

<sup>127</sup> Exec. Order No. 13,563, 76 Fed. Reg. 3,821, 3,821 (Jan. 18, 2011); see also *id.* (“[E]ach agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.”). For an early analysis of President Obama’s approach to cost-benefit analysis, see Helen G. Boutrous, *Regulatory Review in the Obama Administration: Cost-Benefit Analysis for Everyone*, 62 ADMIN. L. REV. 243, 260–61 (2010).

As Paul Rose and I have noted, “with the bipartisan support of five presidential administrations, cost-benefit analysis has become an essential aspect of federal regulation.”<sup>128</sup>

The Regulatory Accountability Act would codify a number of the best practices from these executive orders. For instance, it would require agencies when rulemaking to consider “[t]he nature and significance of the problem the agency intends to address with a rule” as well as “[w]hether existing Federal laws or rules have created or contributed to the problem the agency may address with the rule and, if so, whether those Federal laws or rules could be amended or rescinded to address the problem in whole or in part.”<sup>129</sup> It would require the agency to consider a “reasonable number of alternatives,” “including substantial alternatives or other responses identified by interested persons.”<sup>130</sup> Critically, consideration of three alternatives would be deemed presumptively reasonable.<sup>131</sup>

The legislation would require the agency to provide a summary of these considerations as part of the notice of the proposed rulemaking.<sup>132</sup> As noted in Part III.A, the agency would have to disclose any information, data, or studies developed or relied on in the agency rulemaking record. For a proposed rule that “rests upon scientific, technical, or economic information,” moreover, the legislation would require that the agency “propose the rule on the basis of the best reasonably available scientific, technical, or economic information”<sup>133</sup>—another core principle of Executive Order 12,866.<sup>134</sup>

The Regulatory Accountability Act would further codify OIRA’s role in promoting careful analysis in agency rulemaking. It would charge the OIRA Administrator with establishing guidelines for assessment of agency cost-benefit analysis in rulemaking, including

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<sup>128</sup> ROSE & WALKER, *supra* note 119, at 5.

<sup>129</sup> S. 951, § 3, 115th Cong. (2017) (amending 5 U.S.C. § 553(b)(2)–(3)).

<sup>130</sup> *Id.* (amending 5 U.S.C. § 553(b)(4)).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* (amending 5 U.S.C. § 553(c)(1)(D)).

<sup>133</sup> *Id.* (amending 5 U.S.C. § 553(c)(3)).

<sup>134</sup> Exec. Order No. 12,866, § 1(b)(7), 3 C.F.R. § 639 (1994) (“Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.”).

the use of risk assessment.<sup>135</sup> Critically, it would codify a proportionality principle for economic analysis in agency rulemaking: “The rigor of the cost-benefit analysis required by the guidelines established [by the OIRA Administrator] shall be commensurate, as determined by the Administrator, with the economic impact of the rule.”<sup>136</sup> The OIRA Administrator would be required to update these guidelines at least once a decade,<sup>137</sup> and would also be charged with issuing guidelines to simplify rules<sup>138</sup> and to encourage consistency in rulemaking.<sup>139</sup>

In sum, these amendments are welcome and important additions to modernize the APA, essentially codifying the best practices identified by the presidents of both parties over nearly four decades. Agencies should already be engaged in such analysis when regulating, but codification of these principles should encourage smarter and more effective regulation.<sup>140</sup> As Jonathan Masur has concluded, “the bill thus represents a significant and positive step in the direction of rational and cost-justified regulation.”<sup>141</sup>

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<sup>135</sup> S. 951, § 3 (amending 5 U.S.C. § 553(j)(1)(A)); *see id.* (amending 5 U.S.C. § 553(j)(1)(B)(ii)) (detailing guidelines for risk assessment).

<sup>136</sup> *Id.* (amending 5 U.S.C. § 553(j)(1)(B)(i)).

<sup>137</sup> *Id.* (amending 5 U.S.C. § 553(j)(1)(C)).

<sup>138</sup> *Id.* (amending 5 U.S.C. § 553(j)(2)).

<sup>139</sup> *Id.* (amending 5 U.S.C. § 553(j)(3)).

<sup>140</sup> It is worth noting that this bipartisan legislation addresses most of the concerns raised by the ABA Section of Administrative Law and Regulatory Practice with respect to a 2011 Republican version of the legislation. *See* Am. Bar Ass’n Section of Admin. Law & Regulatory Practice, *Comments on H.R. 3010, The Regulatory Accountability Act of 2011*, 64 ADMIN. L. REV. 619, 625–29, 631–42 (2012) [hereinafter ABA AdLaw Section 2011 Comments]. Although I was not on the Governing Council for the Section at that time and played no role in drafting those comments, I agree with my Section colleagues that the better solution would be to harmonize and produce a “net decrease” in “the collective burdens of required analyses” prescribed by the entire statutory scheme, including the APA, the Regulatory Flexibility Act, the Small Business Regulatory Enforcement Fairness Act, the Unfunded Mandates Reform Act, the Paperwork Reduction Act, and the National Environmental Policy Act—to name just a few. *Id.* at 636–37.

<sup>141</sup> Jonathan Masur, *The Regulatory Accountability Act, Or: How Progressives Learned to Stop Worrying and Love Cost-Benefit Analysis*, YALE J. ON REG.: NOTICE & COMMENT (May 4, 2017), <http://yalejreg.com/nc/the-regulatory-accountability-act-or-how-progressives-learned-to-stop-worrying-and-love-cost-benefit-analysis-by-jonathan-masur/>.

### C. Procedures for Major and High-Impact Rules

The headline-grabbing part of the Regulatory Accountability Act concerns its delineation between regular rules and “major”/“high-impact” rules, and the accompanying more rigorous proceedings for the latter category.<sup>142</sup> The APA standards for regular rules would remain basically the same, except for the economic analysis provisions discussed in Part III.B and the scope of judicial review discussed in Part III.F. But the legislation would change substantially for major and high-impact rules.

The legislation would amend the APA to define “high-impact rule” to include “any rule that the [OIRA] Administrator determines is likely to cause an annual effect on the economy of \$1,000,000,000 or more.”<sup>143</sup> Similarly, the legislation would define “major rule” as any rule the OIRA Administrator determines “is likely to cause”: (1) “an annual effect on the economy of \$100,000,000 or more”; (2) “a major increase in costs or prices for consumers, individual industries, Federal, State, local, or tribal government agencies, or geographic regions”; or (3) “significant adverse effects on competition, employment, investment, productivity, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.”<sup>144</sup> The definition of “major rule” embraces the “major rule” definition in the Congressional Review Act,<sup>145</sup> and it is similar to, though narrower than, Executive Order 12,866’s definition of a “significant regulatory action.”<sup>146</sup> The

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<sup>142</sup> See, e.g., Michael F. Jacobson, Center for Science in the Public Interest (Mar. 13, 2017) (“The so-called Regulatory Accountability Act would threaten every existing and future law protecting consumers from unsafe food, dirty water and air, dangerous toys, toxic chemicals, and so on.”), <https://cspinet.org/news/%E2%80%9Cregulatory-accountability-act%E2%80%9D-biggest-threat-consumer-safety-pending-congress-20170313>; Martha Roberts, *The Misguided Regulatory Accountability Act*, REG. REV. (Mar. 29, 2017) (“By tying up essential safeguards in enormous amounts of red tape, the legislation would covertly undermine longstanding protections for child safety, food safety, auto safety, and other broadly shared values.”), <https://www.theregreview.org/2017/03/29/roberts-misguided-regulatory-accountability-act/>.

<sup>143</sup> S. 951, § 2 (amending 5 U.S.C. § 551(16)).

<sup>144</sup> *Id.* (amending 5 U.S.C. § 551(18)).

<sup>145</sup> See 5 U.S.C. § 804(2) (2012).

<sup>146</sup> Exec. Order No. 12,866, § 3(f), C.F.R. § 638 (1994) (“‘Significant regulatory action’ means any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy,

definition of both the high-impact rule and major rule, however, would include an adjustment for inflation every five years.<sup>147</sup>

The U.S. Chamber of Commerce, which strongly supports the legislation, reports that, of the 32,882 final rules issued between 2008 and 2016, only 28 rules would have been characterized as “high-impact” one-billion-dollar rules and another 112 final rules would have been characterized as major rules per the hundred-million-dollar criteria.<sup>148</sup> Accordingly, the Chamber argues that less than one-half percent of final rules would be subject to the Regulatory Accountability Act’s more rigorous procedures.<sup>149</sup> In other words, the Chamber argues, “the genius of the RAA is that it leaves in place the parts of the regulatory system that keep the proverbial trains running on time while requiring agencies to do more homework on the most costly and transformational rules.”<sup>150</sup>

So what are these additional procedures? First, unless contrary to the existing law,<sup>151</sup> for major and high-impact rules the agency

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productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.”)

<sup>147</sup>S. 951, § 2 (amending 5 U.S.C. § 551(16)) (noting that the monetary threshold for a “high-impact” rule is “adjusted once every 5 years to reflect increases in the Consumer Price Index for All Urban Consumers, as published by the Bureau of Labor Statistics of the Department of Labor”); *accord id.* (amending 5 U.S.C. § 551(18) (same for major rules).

<sup>148</sup>See William Kovacs, Why Senators Portman’s and Heitkamp’s Regulatory Accountability Act Will Make History (May 18, 2017, 2:34 PM) (citing U.S. CHAMBER OF COMMERCE, TAMING THE ADMINISTRATIVE STATE: IDENTIFYING REGULATIONS THAT IMPACT JOBS AND THE ECONOMY (2017)).

<sup>149</sup>Another 3,121 final rules with less than a one-million-dollar impact were classified as a “significant regulatory action” under Executive Order 12,866. *Id.* Some of these perhaps would be considered a “major” rule under the Regulatory Accountability Act. *Cf.* Exec. Order No. 12,866, § 3(f), 3 C.F.R. § 638 (defining “significant regulatory action” to include “major rule” but to also encompass a much broader swath of agency rules).

<sup>150</sup>Kovacs, *supra* note 148.

<sup>151</sup>Importantly, the legislation would not amend the APA to trump rulemaking procedures in other statutes that conflict with the new APA procedures. Instead, “the requirement or prohibition, as applicable, in that other Federal Law shall apply to the agency in the rulemaking.” S. 951, § 3 (amending 5 U.S.C. § 553(g)). This “savings clause” addresses yet another of the

must provide advance notice of its intention to initiate rulemaking, establish a publicly available electronic docket, and allow for public comment concerning potential regulatory approaches.<sup>152</sup> The agency must publish a timetable for the rulemaking process and must report to Congress and OMB if it fails to meet this timetable.<sup>153</sup>

As for the proposed rule itself, the agency must engage in a rigorous quantitative and qualitative cost-benefit analysis of the proposed rule and the identified reasonable alternatives.<sup>154</sup> This analysis must be included in the notice of proposed rulemaking.<sup>155</sup> Moreover, the agency generally must “adopt the most cost-effective rule that—(i) is considered under subsection (b)(4) [the proposed rule and reasonable alternatives]; and (ii) meets relevant statutory objectives.”<sup>156</sup> The agency would be able to adopt a more costly rule if “the additional benefits of the more costly rule justify the additional costs,” “the agency specifically identify each additional benefit . . . and the cost of each such additional benefit,” and “the agency

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major concerns the ABA Section of Administrative Law and Regulatory Process had with prior versions of this legislation. See ABA AdLaw Section 2011 Comments, *supra* note 140, at 639–43.

<sup>152</sup>S. 951, § 3 (amending 5 U.S.C. § 553(d)). Similarly, if the agency needs to reclassify a regular rule as a major or high-impact rule, it must provide public notice and allow for comment. See *id.* (amending 5 U.S.C. § 553(c)(5)). Despite recognizing the value of “extensive pre-notice exchanges of views and information to assist the agency in the development of a realistic and workable rulemaking proposal,” the ABA Section of Administrative Law and Regulatory Practice objected to a blanket advanced notice requirement for major and high-impact rules in a prior version of this legislation because there may be instances where such advanced notice would be inappropriate. ABA AdLaw Section 2011 Comments, *supra* note 140, at 643–46 (quoting 106 A.B.A. ANN. REP. 549, 789–90 (1981)). These concerns seem misplaced as to the current version of the legislation, as the good cause exception, discussed in Part III.A, applies to the advance notice provisions as well when the agency determines such advance notice would be “unnecessary, impracticable, or contrary to the public interests” and the agency includes “brief statement with respect to the reasons for that finding in the final rule or interim final rule.” S. 951, § 3 (amending 5 U.S.C. § 553(g)(3)).

<sup>153</sup>S. 951, § 3 (amending 5 U.S.C. § 553(d)(4)). If the agency determines not to issue a major or high-impact rule after providing notice, it must provide a notice of determination of other agency course. *Id.* (amending 5 U.S.C. § 553(d)(5)).

<sup>154</sup>*Id.* (amending 5 U.S.C. § 553(b)(5)).

<sup>155</sup>*Id.* (amending 5 U.S.C. § 553(c)(1)(e)).

<sup>156</sup>*Id.* (amending 5 U.S.C. § 553(f)(1)(a)).



explains why the agency adopted a rule that is more costly than the most cost-effective alternative.”<sup>157</sup>

Perhaps the most controversial provisions for high-impact rules and *certain* major rules concern the availability of a public hearing.<sup>158</sup> The Regulatory Accountability Act would amend the APA to allow interested individuals to petition for a public hearing and require the agency to include in the rulemaking record an explanation for any denial of such petition.<sup>159</sup> For high-impact rules (i.e., greater than one-trillion dollar), the agency must grant petition for a public hearing unless there is no genuine dispute as to factual issues.<sup>160</sup> For qualifying major rules (i.e., greater than one-hundred-million dollars), however, the agency has broader authority to deny the petition if the hearing “would not advance the consideration of the proposed rule by the agency” or “would, in light of the need of agency action, unreasonably delay the completion of the rulemaking.”<sup>161</sup>

The public hearing would be limited to the disputed factual issues raised in the granted petition(s), as well as other factual issues the agency so designates.<sup>162</sup> The following procedures are outlined in the legislation: (1) The burden of proof would be on the rule’s proponent; (2) evidence would be admitted unless the agency determines it is “immaterial or unduly repetitious evidence”; (3) an agency official would preside over the hearing, there would be a reasonable and adequate opportunity for cross-examination; and (4) a full record of the hearing would be maintained.<sup>163</sup>

If this process sounds somewhat familiar, that is because it is a slimmed-down version of formal rulemaking—a procedural device that still exists on the books yet has virtually disappeared in

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<sup>157</sup> *Id.* (amending 5 U.S.C. § 553(f)(1)(b)).

<sup>158</sup> Unlike the other provisions that would apply to all major and high-impact rules, the only major rules subject to this public hearing provision would be one-million-dollar rules, not rules that have a lesser economic impact but would otherwise qualify as a major rule under the Congressional Review Act definition. *See id.* (amending 5 U.S.C. § 553(e)(1)(C)(i)).

<sup>159</sup> *Id.* (amending 5 U.S.C. § 553(e)).

<sup>160</sup> *Id.* (amending 5 U.S.C. § 553(e)(1)(B)(ii)).

<sup>161</sup> *Id.* (amending 5 U.S.C. § 553(e)(1)(C)(ii)).

<sup>162</sup> *Id.* (amending 5 U.S.C. § 553(e)(3)(A)).

<sup>163</sup> *See id.* (amending 5 U.S.C. § 553(e)(3)(B)-(C)).

administrative practice.<sup>164</sup> It is also a procedure that has been widely criticized. For instance, in a report to Congress commenting on the 2011 Republican version of the Regulatory Accountability Act, the ABA Section of Administrative Law and Regulatory Practice colorfully noted that “we have not identified a single scholarly article written in the past thirty years that expresses regret about the retreat from formal rulemaking.”<sup>165</sup>

The Section further explained that formal rulemaking has died “because experience has shown that it leads to substantial delays and unproductive confrontation and because courtroom methods are not generally suited to resolution of legislative-type issues.”<sup>166</sup> For many of the reasons Aaron Nielson advances in his subsequent defense of formal rulemaking,<sup>167</sup> I am not as convinced as my Section colleagues regarding the flaws of formal rulemaking. To be sure, there are substantial costs in terms of resources and time. But, as Professor Nielson argued, “formal rulemaking has powerful benefits too, including the potential to uproot an agency’s faulty assumptions and increase the public’s confidence in the regulatory process.”<sup>168</sup>

More to the point, the bipartisan Portman–Heitkamp Regulatory Accountability Act is more narrowly tailored than prior Republican versions of the legislation that would have applied the formal rulemaking provisions to major rules. This bipartisan legislation requires a public hearing only for a subset of disputed factual issues with respect to the costliest rules (with an economic impact of at least one-hundred-million dollars), and even then provides the agency with substantial discretion for rules with an economic impact less than one-billion dollars. Indeed, this legislation appears to be even narrower than recommendations the ABA and ACUS made

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<sup>164</sup> See 5 U.S.C. §§ 556–57 (setting forth the APA’s formal rulemaking and adjudication proceedings). As others have explored, the Supreme Court essentially killed formal rulemaking in *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 237–240 (1973). See, e.g., Kent Barnett, *How the Supreme Court Derailed Formal Rulemaking*, 85 GEO. WASH. L. REV. ARGUENDO 1, 5–10 (2017); Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 247–53 (2014).

<sup>165</sup> ABA AdLaw Section 2011 Comments, *supra* note 140, at 651. *But see* Nielson, *supra* note 164, at 240 (arguing that “[t]he time has come for the scholarly discussion to be reopened”).

<sup>166</sup> ABA AdLaw Section 2011 Comments, *supra* note 140, at 626.

<sup>167</sup> See Nielson, *supra* note 164, at 259–289.

<sup>168</sup> *Id.* at 292.

decades ago.<sup>169</sup> The current legislation, moreover, arguably meets the ABA’s 2011 call for “a carefully limited framework for oral proceedings where a need for cross-examination on specified narrow issues is affirmatively shown.”<sup>170</sup>

In sum, a fair number of critics will no doubt bemoan the major/high-impact rule provisions in the Regulatory Accountability Act for, among other things, a foolish return to formal rulemaking.<sup>171</sup> To be sure, reasonable minds can disagree on whether the legislation strikes the right balance between expediency and efficiency, on the one hand, and accountability and effectiveness, on the other. But such criticisms may be overstated for four main reasons.

First, if we are going to make federal agencies more transparent and publicly accountable for their regulatory activities, it makes sense to draw a line between highest-impact rules (the top half percent of regulations) and the regular rules—only requiring

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<sup>169</sup> See 106 A.B.A. ANN. REP. 549, 785 (1981) (recommending oral proceeding with cross-examination “only to the extent that it appears, after consideration of other available procedures including oral and written rebuttal, that such cross-examination is essential to resolution by the agency of issues of specific fact critical to the rule”); ACUS Recommendation 72–5, 38 Fed. Reg. 19,782, 19,792 (July 23, 1973) (recommending that Congress by statute “may appropriately require opportunity for oral argument, agency consultation with an advisory committee, or trial-type hearings on issues of specific fact”).

<sup>170</sup> ABA AdLaw Section 2011 Comments, *supra* note 140, at 2. *But see* Am. Bar Ass’n Section of Admin. Law & Regulatory Practice, Comments on S. 1029, The Regulatory Accountability Act of 2013, at 5–6, 9–11 (Dec. 16, 2014) [hereinafter ABA AdLaw Section 2013 Comments] (continuing to raise concerns about some aspects of the public hearing provisions of the 2013 bill, which is more similar to the 2017 bipartisan bill than the 2011 bill), [https://www.americanbar.org/content/dam/aba/administrative/administrative\\_law/s\\_1029\\_comments\\_dec\\_2014.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/administrative_law/s_1029_comments_dec_2014.authcheckdam.pdf).

<sup>171</sup> See, e.g., Richard J. Pierce, Jr., *A Good Effort, with One Glaring Flaw*, REG. REV. (May 8, 2017) (criticizing the Regulatory Accountability Act’s public hearing provisions), <https://www.theregreview.org/2017/05/08/pierce-good-effort-glaring-flaw/>; William Funk, *Requiring Formal Rulemaking Is a Thinly Veiled Attempt to Halt Regulation*, REG. REV. (May 18, 2017) (responding to Barnett *infra*), <https://www.theregreview.org/2017/05/18/funk-formal-rulemaking-halt-regulation/>. *But see* Kent Barnett, *Looking More Closely at the Platypus of Formal Rulemaking*, REG. REV. (May 11, 2017) (responding to Funk *supra*), <https://www.theregreview.org/2017/05/11/barnett-platypus-formal-rulemaking/>; Kent Barnett, *Giving the Platypus of Formal Rulemaking a Second Look, Again*, REG. REV. (June 5, 2017) (responding to Funk *supra*), <https://www.theregreview.org/2017/06/05/barnett-platypus-formal-rulemaking-again/>.

agencies to be more deliberate for the highest-impact rules. Second, aside from the public hearing requirement, OIRA/OMB already require agencies to engage in these good governance activities—i.e., rigorous cost-benefit analysis per OMB Circular A–4. The proposed legislation merely codifies many of these best practices, and such procedures would apply to both high-impact regulation and deregulation alike.

Third, the public hearing requirement is not a return to full-fledged formal rulemaking. It is more narrowly tailored to be available upon request for the highest-impact rules, and then only for issues of disputed fact. Finally, this legislation comes at a time when some on the right would prefer fewer procedural hurdles to a “deconstruction of the administrative state.”<sup>172</sup> Republicans control both chambers of Congress and, more importantly, the White House. Republicans are thus well positioned to roll back many of the Obama Administration’s regulations with which they disagree on policy grounds. The Regulatory Accountability Act, however, makes no distinction between regulation and deregulation. If this legislation would make it harder and more time intensive for agencies to regulate, the same would be true of efforts to deregulate.<sup>173</sup>

#### D. Codification of Agency Guidance

One of the hottest topics in administrative law today is agency use of guidance documents. Critics of agency guidance have colorfully labeled it “regulatory dark matter.”<sup>174</sup> The APA presently does not

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<sup>172</sup> See, e.g., Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for “Deconstruction of the Administrative State”*, WASH. POST (Feb. 23, 2017), [https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643\\_story.html?utm\\_term=.42acd2fa2892](https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html?utm_term=.42acd2fa2892).

<sup>173</sup> I first made this final point in Walker, *supra* note 7; accord Masur, *supra* note 141 (“Most importantly, progressives must realize that these new requirements *would apply to deregulation just as much as they do to new regulation*. If an agency were to deregulate—if, for instance, the EPA were to reverse President Obama’s Clean Power Plan—that deregulatory act would require a new major rulemaking.”).

<sup>174</sup> See, e.g., CLYDE WAYNE CREWS, JR., MAPPING WASHINGTON’S LAWLESSNESS 2016: A PRELIMINARY INVENTORY OF “REGULATORY DARK MATTER” 1, 17 (2015); Hester Pierce, *Backdoor and Backroom Regulation*, HILL (Nov. 10, 2014, 6:30 AM), <http://thehill.com/blogs/pundits-blog/finance/223472-backdoor-and-backroom-regulation> (“Too often, however, agencies opt for short-cuts. Rather than bothering with the burdensome rule-making process, they use faster and

extensively address agency guidance, other than to exempt “interpretative rules, general statements of policy, [and] rules of agency organization, procedure, or practice” from the APA’s rulemaking provisions.<sup>175</sup>

The Regulatory Accountability Act would amend the APA to better address agency use of guidance documents. It would define “guidance” as “an agency statement of general applicability that—(A) is not intended to have the force and effect of law; and (B) sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue.”<sup>176</sup> It would further define “major guidance” as any guidance that would meet the definition of a “major” rule in terms of economic impact or other economic significance.<sup>177</sup>

The legislation would require agencies to make guidance publicly available and to note that it is not legally binding and cannot “be used by the agency to foreclose consideration of issues as to which the guidance expresses a conclusion.”<sup>178</sup> The legislation would also require agencies to follow certain procedures for “major guidance,” and to confer with the OIRA Administrator with respect to such major guidance.<sup>179</sup> As discussed in Part III.F, the legislation would also eliminate *Auer* deference for agency regulatory interpretations in guidance documents, instead instructing courts to review such interpretations under the less-deferential *Skidmore* standard.

Much more work needs to be done to address agency guidance, including more extensive empirical analysis before effective policy reforms can take place. But the Regulatory Accountability Act’s express recognition of agency guidance in the APA and the

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more flexible means [i.e., agency guidance] of imposing mandates.”). *But see* Connor N. Raso, Note, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782, 787 (2010) (“Analysis of this data suggests that agencies do not frequently abuse guidance documents to avoid issuing significant legislative rules. Concern over agency abuse of guidance documents has therefore been overstated in both the policy world and the administrative law literature.”).

<sup>175</sup> 5 U.S.C. § 553(b)(A) (2012). *See generally* Ronald M. Levin, *Rulemaking and the Guidance Exemption 1* (Wash. U. of St. Louis Legal Studies Working Paper No. 17-04-05, 2017), <https://ssrn.com/abstract=2958267>.

<sup>176</sup> S. 951, § 2, 115th Cong. (2017) (amending 5 U.S.C. § 551(15)).

<sup>177</sup> *See id.* (amending 5 U.S.C. § 551(17)).

<sup>178</sup> *See id.* § 3 (amending 5 U.S.C. § 553(k)(1)).

<sup>179</sup> *See id.* (amending 5 U.S.C. § 553(k)(2)).

delineation between regular and major guidance are important first steps to address the rise of guidance in agency policymaking.

#### E. Agency Public Advocacy Restrictions

As Elizabeth Porter and Kathryn Watts have recently chronicled, federal agencies have begun to utilize social media and other channels to explain and promote their preferred regulatory outcomes during the public comment period on a proposed rule.<sup>180</sup> Porter and Watts argue that “visual rulemaking” has the potential to increase transparency, public participation, and thus democratic accountability in the rulemaking process, but that it also risks introducing distorting, anti-democratic effects.

Perhaps to address these concerns of undue agency influence during the public participation stage of rulemaking, the Regulatory Accountability Act would prohibit certain advocacy activities by the agency, any individuals speaking in an official capacity on behalf of the agency, and any person who receives federal funding from the agency (from using that federal funding in such communications) after the notice of proposed rulemaking.<sup>181</sup> In particular, it would prohibit those actors from communicating during the comment period “through written, oral, electronic, or other means, to the public with respect to the proposed rule” if such communication (1) “directly advocates, in support of or against the proposed rule, for the submission of information that will form part of the record for the proposed rule”; (2) “appeals to the public, or solicits a third party, to undertake advocacy in support of or against the proposed rule”; or (3) “is directly or indirectly for the purpose of publicity or propaganda within the United States in a manner that Congress has not authorized.”<sup>182</sup>

Importantly, the legislation would exempt “a communication that requests comments on, or provides information regarding, a proposed rule in an impartial manner.”<sup>183</sup> Similarly, as quoted above, this advocacy restriction on persons receiving federal funding applies only to the use of that federal funding for such communication activities,

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<sup>180</sup> See Elizabeth G. Porter & Kathryn A. Watts, *Visual Rulemaking*, 91 N.Y.U. L. REV. 1183, 1198–1230 (2016) (documenting rise of visual rulemaking).

<sup>181</sup> S. 951, § 3 (amending 5 U.S.C. § 553(c)(6)).

<sup>182</sup> *Id.* (amending 5 U.S.C. § 553(c)(6)(A)).

<sup>183</sup> *Id.* (amending 5 U.S.C. § 553(c)(6)(B)).

not to the use of other funding to engage in such communications during the public comment period.<sup>184</sup>

At least one scholar has criticized this provision, fearing that it will result in “proposed rules going undefended from attack from increasingly sophisticated ‘propaganda’ campaigns initiated by certain limited segments of the general public.”<sup>185</sup> These fears seem misplaced. The agency gets the first word in its notice of proposed rulemaking and the final word in its final rule (subject to judicial review or congressional override). The public comment period is—as the term suggests—for the public, not the agency, to provide its input on the proposed rule. The agency can and should combat “increasingly sophisticated ‘propaganda’ campaigns” with facts, data, logic, and policy justifications in its final rule.

#### F. Scope of Judicial Review

Finally, the Regulatory Accountability Act would make a number of important improvements to the judicial provisions of the APA.

First, it would codify the administrative common law doctrine of remand without vacatur, which allows an agency rule to remain in effect on judicial remand.<sup>186</sup> In particular, it would amend § 706 of the APA to allow the court not just to “set aside” an agency action, but also to, “when appropriate, remand a matter to an agency without setting [it] aside.”<sup>187</sup> Most scholars agree that remand without vacatur should be allowed in some circumstances, but there is greater debate about when such remand is appropriate.<sup>188</sup> At least now courts will further develop the doctrine’s propriety based on an APA statutory provision rather than administrative common law.

Second, a fair amount of ink has been spilled figuring out what the APA’s “substantial evidence” review entails and how that

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<sup>184</sup> *Id.* (amending 5 U.S.C. § 553(c)(6)(A)).

<sup>185</sup> Daniel E. Walters, *Ditch the Flawed Legislative Proposal to Police Agency Communications*, REG. REV. (May 10, 2017), <https://www.theregreview.org/2017/05/10/walters-proposal-agency-communications/>.

<sup>186</sup> See Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 75 (1995) (defining remand without vacatur).

<sup>187</sup> *Id.* § 4 (amending 5 U.S.C. § 706(a)(2)).

<sup>188</sup> See generally STEPHANIE J. TATHAM, THE UNUSUAL REMEDY OF REMAND WITHOUT VACATUR (Admin. Conf. of U.S. ed., 2014); Ronald M. Levin, “Vacation” at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291 (2003).

standard differs from the APA's arbitrary and capricious review standard.<sup>189</sup> The Regulatory Accountability Act would finally provide a statutory definition for "substantial evidence": "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of the record considered as a whole."<sup>190</sup> In other words, the legislation would codify the definition provided by the Supreme Court in *Universal Camera Corp. v. NLRB*.<sup>191</sup> Hopefully this definition will help clarify matters, though I fear courts will continue to struggle to distinguish between substantial evidence and arbitrary and capricious review.<sup>192</sup> The legislation would extend the substantial evidence standard beyond formal rulemaking and adjudication to also cover review of high-impact, one-billion-dollar rules (though not major rules).<sup>193</sup>

Third, although the legislation would leave unchanged the APA's arbitrary and capricious standard of review in § 706, other provisions in the Regulatory Accountability Act suggest that the amended APA would embrace "hard look" review. Hard look review, as the Court instructed in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Insurance*, requires reasoned decisionmaking:

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<sup>189</sup> See, e.g., Henry J. Friendly, "Some Kind of Hearing", 123 U. PA. L. REV. 1267, 1313 (1975) (noting that "the degree of difference between the substantial evidence test and the arbitrary and capricious test can readily be exaggerated"); Matthew J. McGrath, Note, *Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review During Informal Rulemaking*, 54 GEO. WASH. L. REV. 541, 543 (1986) ("This convergence theory contradicts a large body of established case law, and requires a new look at the relationship between the two standards of review."); Pedersen, *supra* note 52, at 48–49 ("The invitation to make a searching and careful inquiry into the facts also has been enthusiastically accepted. The result has been to transform the arbitrary or capricious test into something very close to substantial evidence review.").

<sup>190</sup> S. 951, § 5 (amending 5 U.S.C. § 701(b)(4)).

<sup>191</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) ("[S]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (internal quotation marks omitted)).

<sup>192</sup> See, e.g., ABA AdLaw Section 2011 Comments, *supra* note 140, at 670 ("The main problem with the apparent goal of the bill is that the case law has generally abandoned the assumption that substantial evidence review is a 'slightly higher standard' than arbitrary-capricious review.").

<sup>193</sup> S. 951, § 4 (amending 5 U.S.C. § 706(a)(3)). Relatedly, the legislation would preclude judicial review of determinations of whether a rule is a "major" rule. *Id.* (amending 5 U.S.C. § 706(c)).



[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>194</sup>

For instance, the legislation would require the agency to consider whether “existing Federal laws or rules have created or contributed to the problem”;<sup>195</sup> to assess “[a] reasonable number of alternatives [with three alternatives being presumptively reasonable] . . . , including substantial alternatives or other responses identified by interested persons”;<sup>196</sup> to publicly disclose “all studies, models, scientific literature, and other information developed or relied upon by the agency”;<sup>197</sup> and to rely on, when applicable, “the best reasonably available scientific, technical, or economic information.”<sup>198</sup> To be sure, judicial review of an agency’s full-fledged cost-benefit analysis would be limited to major and high-impact rules.<sup>199</sup> But these other provisions would provide a firmer statutory foundation for assessing whether the agency has acted in an arbitrary and capricious manner by failing to engage in reasoned decisionmaking.

Fourth, the legislation addresses judicial review of agency guidance and agency interpretations of its own rules that are contained in such guidance. As a preliminary matter, the legislation would amend the APA to constrain judicial review of “[a]gency guidance that does not interpret a statute or rule” to whether it was issued “without observance of procedure required by law.”<sup>200</sup>

The more significant change concerns agency interpretations of their own rules. The legislation would add to the end of § 706 of the APA the following provision:

The weight that a reviewing court gives to an interpretation by an agency of a rule of that agency shall depend on the thoroughness

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<sup>194</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 43 (1983).

<sup>195</sup> S. 951, § 3 (amending 5 U.S.C. § 553(b)(3)).

<sup>196</sup> *Id.* (amending 5 U.S.C. § 553(b)(4)).

<sup>197</sup> *Id.* (amending 5 U.S.C. § 553(c)(2)).

<sup>198</sup> *Id.* (amending 5 U.S.C. § 553(c)(3)).

<sup>199</sup> *Id.* (amending 5 U.S.C. § 553(b)(5)).

<sup>200</sup> *Id.* § 4 (amending 5 U.S.C. § 706(d); citing 5 U.S.C. § 706(2)(d)); *see also* 5 U.S.C. § 706(2)(d) (providing judicial review regarding whether the agency action is “without observance of procedure required by law”).

evident in the consideration of the rule by the agency, the validity of the reasoning of the agency, and the consistency of the interpretation with earlier and later pronouncements.<sup>201</sup>

In other words, the legislation would basically codify *Skidmore* deference<sup>202</sup> in place of the controlling administrative common law of *Auer* (or *Seminole Rock*) deference.<sup>203</sup>

As I have explored elsewhere, there has been a growing call for Congress—or the Supreme Court—to eliminate both *Chevron* and *Skidmore* deference.<sup>204</sup> For instance, Senate Republicans in the last Congress introduced the Separation of Powers Restoration Act, which would have amended the APA to replace these deference doctrines with de novo review.<sup>205</sup> As discussed at the outset of this Part, the House Republicans in this Congress passed that bill again as part of its omnibus Regulatory Accountability Act.<sup>206</sup>

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<sup>201</sup> S. 951, § 4 (amending 5 U.S.C. § 706(e)).

<sup>202</sup> See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (instructing courts to accord “weight” to an agency legal interpretation under *Skidmore* based “upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control”). As Kent Barnett has chronicled, this is not the first time Congress has codified *Skidmore* deference. See Kent Barnett, *Codifying Chevron*, 90 N.Y.U. L. REV. 1, 14–15 (2015). Interestingly, the legislation excludes *Skidmore*’s final language: “and all those factors which give it power to persuade, if lacking power to control.” It is unclear whether this is an intentional omission meant to signify a somewhat less-deferential standard of review than *Skidmore* itself. Cf. ABA AdLaw Section 2013 Comments, *supra* note 170 (“We believe the adoption of multiple incarnations of the *Skidmore* test may prompt confusion as to whether they have independent meanings or the same meaning as the evolving interpretations of *Skidmore*. Surely the world does not need a ‘rule interpretation *Skidmore*’ that is different from the ‘statutory interpretation *Skidmore*.’”).

<sup>203</sup> See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (instructing courts that an agency’s interpretation of its own regulation is given “controlling weight unless it is plainly erroneous or inconsistent with the regulation”); accord *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

<sup>204</sup> See Walker, *supra* note 36 (providing literature review of attacks on both deference doctrines).

<sup>205</sup> See Separation of Powers Restoration Act, S. 2724, § 2, 114th Cong. (2016); see also Christopher J. Walker, *Courts Regulating the Regulators*, REGBLOG (Apr. 25, 2016), <http://www.regblog.org/2016/04/25/walker-courts-regulating-the-regulators/> (examining how the Separation of Powers Restoration Act is an outgrowth of recent Supreme Court criticism of *Chevron* deference).

<sup>206</sup> See Regulatory Accountability Act of 2017, H.R. 5, Title II, 115 Cong. (Jan. 12, 2017).

The Portman–Heitkamp Regulatory Accountability Act is much narrower than its House counterpart.<sup>207</sup> It would not disrupt *Chevron* deference—the bedrock doctrine that courts should defer to an agency’s reasonable interpretation of an ambiguous statute the agency administers.<sup>208</sup> Second, it would not replace *Auer* deference with de novo review, but instead still command courts to review under the *Skidmore* deference standard.<sup>209</sup> To provide some additional context, Kent Barnett and I just concluded our review of every published circuit court decision that cites *Chevron* deference from 2003 through 2013. We found that the agency won 77.4% of the time when courts applied the *Chevron* framework compared to 56% under *Skidmore* deference, and 38.5% under de novo review.<sup>210</sup> In other words, agencies will likely prevail less often under *Skidmore* than *Auer*, but still much more often than under de novo review.<sup>211</sup>

The propriety of *Auer* deference has been the subject of extensive debate of late. For instance, last year the *Yale Journal on Regulation* hosted an online blog symposium, which collected two dozen different

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<sup>207</sup> Cf. *id.* Title II, § 202 (directing that courts review de novo all agency interpretations of law, thus eliminating both *Chevron* and *Auer* deference).

<sup>208</sup> *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

<sup>209</sup> A number of scholars have similarly recommended that *Auer* be replaced with *Skidmore*. See, e.g., Kent Barnett, *Why Bias Challenges to Administrative Adjudications Should Succeed*, 81 MO. L. REV. 1023, 1039 (2017); Nicholas R. Bednar, Comment, *Defying Auer Deference: Skidmore as a Solution to Conservative Concerns in Perez v. Mortgage Bankers Association*, MINN. L. REV.: DE NOVO (June 24, 2015); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 681 (1996); Jeffrey A. Pojanowski, *Seminole Rock Revisited*, 16 GEO. J.L. & PUB. POL’Y (forthcoming 2018) (on file with author); Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock’s Domain*, 79 GEO. WASH. L.J. 1449, 1458 (2011).

<sup>210</sup> Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 115 MICH. L. REV. (forthcoming 2017), <https://ssrn.com/abstract=2808848>.

<sup>211</sup> That will be the case unless, of course, agencies react to the legislative change by advancing less aggressive interpretations of their own regulations or by engaging in rulemaking to make more substantial changes to their regulatory frameworks. Cf. Christopher J. Walker, *Chevron Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 715–28 (2014) (presenting survey responses of 128 agency rule drafters which suggest to some extent that their agency is more aggressive in its interpretive efforts if it believes the reviewing court will apply *Chevron* deference as opposed to *Skidmore* deference or de novo review). For the full findings of that study, see Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999 (2015).

perspectives on *Auer* deference.<sup>212</sup> As that symposium nicely illustrates, there are reasonable arguments on both sides of the *Auer* debate. The Regulatory Accountability Act would chart a middle ground of replacing *Auer* with *Skidmore* deference. For reasons that exceed the ambitions of this short Essay, I believe it is an important move in the right direction to recalibrate agency use of guidance documents in lieu of notice-and-comment rulemaking.<sup>213</sup>

### CONCLUSION

We have seen extensive changes in the modern administrative state since Congress enacted the APA in 1946, including the spread of administrative common law that has reshaped the contours of the APA. Yet Congress has taken little action, having amended the APA only sixteen times—not once since 1996 with the last substantial amendment before that occurring over forty years ago in 1976.

The current political climate seems primed for much-needed comprehensive, bipartisan legislation to modernize the APA. The ABA's 2016 consensus-driven recommendations are a critical starting point for any such reform. And the Portman–Heitkamp Regulatory Accountability Act of 2017 wisely incorporates most of the ABA's recommendations, as well as a number of other common-sense reforms. Although reasonable minds may disagree as to some of its provisions, the Regulatory Accountability Act is the type of thoughtful, bipartisan legislation needed to modernize the APA. It deserves serious consideration and careful examination. If enacted, it would certainly constitute the most significant reform of the APA since that “fierce compromise”<sup>214</sup> was enacted in 1946.

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<sup>212</sup> See Aaron Nielson et al., *Reflections on Seminole Rock: The Past, Present, and Future of Deference to Agency Regulatory Interpretations*, YALE J. ON REG.: NOTICE & COMMENT (2016), <https://ssrn.com/abstract=2847668>.

<sup>213</sup> Indeed, the legislation may well strike an important balance by retaining *Chevron* yet eliminating *Auer*. In particular, one may reasonably worry that the legislation's more rigorous rulemaking provisions could encourage agencies to abandon rulemaking in favor of less-formal agency guidance. Eliminating *Auer* deference to agency regulatory interpretations in agency guidance documents—while maintaining *Chevron* deference for agency statutory interpretations promulgated in rules—should encourage agencies to continue to utilize rulemaking, to obtain greater deference under *Chevron*. Such agency incentives may well have been weakened if the legislation had also eliminated *Chevron* deference.

<sup>214</sup> Shepherd, *supra* note 12, at 1557.