



WRITTEN STATEMENT OF MICHAEL MANDEL, PHD

CHIEF ECONOMIC STRATEGIST
PROGRESSIVE POLICY INSTITUTE

U.S. House Committee on the Judiciary
Subcommittee on Courts, Commercial and Administrative Law
"Clearing the Way for Jobs and Growth: Retrospective Review to
Reduce Red Tape and Regulations"

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SUMMARY

How can we reduce the economic burden of regulation without losing its benefits? Many presidents have tried retrospective regulatory review, and the results have always fallen well short of expectations.

This statement draws extensively on a policy brief that I wrote for the Progressive Policy Institute, where I am Chief Economic Strategist. In this statement, I will first explain the reasons why retrospective regulatory review is doomed to failure. I will then describe an alternative approach for lowering the regulatory burden, the Regulatory Improvement Commission.

STATEMENT

Mr. Chairman, Ranking Member Cohen, members of the subcommittee. Thank you very much for the opportunity to address the problems with retrospective regulatory review, and alternative mechanisms for reducing the burden of regulation without losing its benefits.

Much of my testimony is drawn from a policy brief published in February 2011 by the Progressive Policy Institute, where I am Chief Economic Strategist.¹ I am also affiliated with the Mack Center for Technological Innovation at Wharton as a senior fellow. Until 2009, I served as Chief Economist at BusinessWeek, where I helped direct the magazine's domestic and international economic coverage. I've written three books on uncertainty, innovation and growth, and one basic economics textbook.

One of my major concerns as an economist is the link between innovation and regulation. On the one hand, innovation is the key force propelling growth and creating jobs. On the other hand, regulation is essential for making our economy work smoothly. This balancing act is crucial in every industry—telecom, Internet, pharmaceuticals, manufacturing. It affects both big companies and small.

Unfortunately, if the regulatory burden is too heavy, it can tend to suppress the innovation and entrepreneurial energy that we need. So if we care about the long-term performance and competitiveness of the American economy, we have to focus on periodically lightening the regulatory load.

¹ The policy brief “Reviving Jobs and Innovation: A Progressive Approach to Improving Regulation” (Progressive Policy Institute, February 2011) is submitted as an attachment.

This is not a new idea. It's not even terribly controversial. Reaching back to Jimmy Carter, every president, Democrat and Republican, has instructed his agencies to reconsider and review existing regulations.

Yet without exception, all of these attempts at retrospective review seem to have produced considerably less than the desired result. One might almost say that they failed. Certainly none of them succeeded.

The question: Why is retrospective review so hard to do effectively? One issue is foot-dragging by agencies. But that isn't the whole story. In fact, two other problems undermine the usefulness of retrospective reviews.

First, the retrospective review process consists of analyzing the costs and benefits of each regulation individually. Starting with a list of regulations that are candidates for reform, the agency goes down the list one-by-one and asks if the benefits exceed the costs.

The problem is that it's possible for every individual regulation to pass a cost-benefit test, while the total accumulation of regulation creates a heavy burden on Americans. The number of regulations matter, even if individually all are worthwhile.

I call this the 'pebble in the stream' effect. Thrown one pebble in the stream, nothing happens. Throw two pebbles in the stream, nothing happens. Throw one hundred pebbles in the stream, and you have dammed up the stream. Which pebble did the damage? It's not any single pebble, it's the accumulation.

Business people complain about the accumulation of regulations all the time. They say: “I understand why I had to apply for a permit, but why do I need five permits?” Each permit probably makes sense, on its own terms, but in total they create a large drag.

Some may disagree, but in my view it’s hard to point to “bad” regulations—regulations that by themselves are job-destroying or innovation-inhibiting. As a result, a regulatory review process looking to eliminate “bad” regulations will not find many candidates.

The other issue is that the very structure of the regulatory process makes it more expensive and difficult to undo regulations than to create them in the first place. When the original regulation is put in place, the agency can use whatever evidence is available, including small-scale academic experiments. By contrast, after the regulation has been in place for a while, the agency has to do a cost-benefit analysis using real data on actual outcomes and costs. That requires a sizable and expensive data collection effort, which may feel like an additional imposition for the companies affected by the regulation.

The good news is that we don’t need wholesale deregulation, or a complete overhaul of existing regulations. What we need is to scrape away some of the excess accumulation of rules, while leaving the most effective ones alone.

It’s like scraping barnacles off the bottom of a boat. It’s a thankless chore that must be done, or else the boat gradually slows down. When you scrape barnacles off the bottom of a boat, you don’t stop and think about each barnacle individually, you just do it. (The big difference, of

course, is that regulatory ‘barnacles’ do a lot of complaining.)

So we need a process that allows us to tackle the accumulation of regulation, without having to fight over each one individually. What PPI has proposed is an independent Regulatory Improvement Commission modeled somewhat along the successful process set up for the Base Realignment and Closure (BRAC) Commission.

The Regulatory Improvement Commission would be given the task of coming up each year with a package of 10-20 regulations to undo, rewrite or otherwise improve. They can be very small regulations, or large ones. The package is sent to Congress for an up or down vote, and then if passed, sent to the president for his signature.

What are the benefits of the Regulatory Improvement Commission over retrospective review?

First, it would get us away from agencies reviewing their own regulations. The Commission would draw on expertise from the different agencies, but it would be able to make an independent decision.

Second, if the experience with BRAC is any guide, voting on a package of regulatory reforms would be easier than hand-to-hand fights over individual regulations.

Third, and perhaps most important, having Congress vote on the package of reforms legally allows us to short-circuit the cumbersome regulatory review process. The Regulatory Improvement Commission would hold hearings, but because the package of reforms would need the approval of Congress, the hearings wouldn’t have to be arduous, compared to the process

that an agency would have to follow.

The bottom line is that the Regulatory Improvement Commission needs the combined efforts of both the legislative and executive branches to be effective. The executive branch by itself cannot get a grip on the problem. That's why retrospective review doesn't work, no matter who the President is.

The February 2011 policy brief lays out more details about how the Regulatory Improvement Commission could be structured. For example, the scope of the Commission can be restricted to stay away from environmental regulations, or can be expanded to encompass agencies such as the FCC. The Commission could be made temporary, like the BRAC Commissions, so that it regularly has to be re-authorized. The Commission could set up a website where businesses and individuals could submit suggestions for which regulations to undo or change.

In truth, there's a lot of different ways to make a Regulatory Improvement Commission work. The key is to set up a mechanism that offers a systematic and objective process for identifying a package of regulations to be undone or fixed, while acknowledging that Congress has to be an essential part of the process.

Thank you.