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Congress Votes on Balanced Budget Amendment

Even though the Super Committee is stealing the limelight, this summer's debt ceiling deal didn't just create the deficit-cutting committee. It also forces both the House and the Senate to vote on a balanced budget amendment to the Constitution. [On Nov. 18](#), House leadership brought an amendment to the floor, where it failed to get the two-thirds vote necessary to pass. However, the close House vote and the impending Senate vote mean that this is not the end of the balanced budget amendment.

While conservative members of the House Republican caucus were in favor of a more restrictive version, leadership brought a "clean" balanced budget amendment to the floor, one without supermajority requirements for raising taxes, although a three-fifths majority vote would have been required to raise the debt ceiling. Leadership chose the clean version in an effort to win over House Democrats, since a constitutional amendment needs the support of two-thirds of each house. This equals 290 votes in the House, meaning at least 48 Democrats would have had to have voted to approve the amendment. In the end, [only 25 Democrats](#) voted for the amendment, and four Republicans voted against it.

The Nov. 18 vote produced far fewer "yes" votes than the last time a balanced budget amendment came up in the House. [In 1995](#), a version of the amendment passed in that chamber, garnering 300 votes, 72 of them from Democrats. Much has been written about how, in recent elections, so-called Blue Dog (more conservative) Democrats have been replaced by Republicans, but this does not fully explain the difference between the most recent vote and previous attempts to pass the amendment.

Back in the 1990s, balanced budget amendments were seen by some as a tool of good government, sort of like a stronger version of [PAYGO](#), which requires that certain budget actions have offsets. As a result, members of both parties supported the amendment (although a large majority of Democrats still opposed it).

However, Republicans have recently been attempting to use balanced budget amendments as a tool to advance their ideological goals. [Newer versions](#) have included limitations on government spending levels, supermajority requirements to raise taxes, and even higher hurdles for raising the debt ceiling. These new, more radical versions of the balanced budget amendment gained strong conservative support, with groups such as Grover Norquist's Americans for Tax Reform [coming out in favor](#) of them.

A balanced budget amendment would make it more difficult for the government to react to changing economic conditions, as it requires a supermajority vote to engage in deficit spending. Deficit spending is an important tool for governments when crises occur, since it lets them spend money without raising taxes or cutting from other areas. A constitutional requirement to balance the federal budget curtails that power. For instance, the Recovery Act, which helped [create or save millions of jobs](#), would not have passed the House if a balanced budget amendment was in effect.

[For more information on balanced budget amendments, see our [resource page](#).]

Despite the demise of the most recent version of the amendment in the House, the Senate must still vote on a balanced budget amendment by the end of 2011 (several times in the past, the Senate has come within one vote of passing a balanced budget amendment). Senate leadership could bring a "liberal" version to the floor, with exceptions for Social Security, Medicare, and Medicaid. Sen. Mark Udall (D-CO), for instance, [has offered a balanced budget amendment](#) that protects Social Security and prevents unpaid-for tax cuts for the rich. Such a proposal would likely have support from some Senate Democrats, but it would be rejected by Senate Republicans.

In the end, however, any version of the balanced budget amendment would be an unnecessary constraint on the authority and flexibility of future sessions of Congress and is thus best left in the dust bin of bad ideas.

Battling Income Inequality through Smart Surtax Policies

In spite of the media's developing [critical narrative](#) of the Occupy movement, Occupy protesters have succeeded in [changing the national political conversation](#) from an obsession with debt and deficits to a focus on the growth in income inequality and the concentration of wealth.

A recent Congressional Budget Office (CBO) [study](#) has found that between 1979 and 2007, the top one percent's share of after-tax income more than doubled while the share for the bottom 99 percent shrank. One way to help fight this growing inequality is a set of targeted surtaxes on the wealthiest Americans.

Before the Occupy activities, Washington had a myopic focus on debt and deficits due to the constant drumbeat from fiscal hawks on Capitol Hill who used the economic downturn – and consequent drop in federal tax revenue – as an excuse to call for cuts in government spending. President Obama acquiesced to these concerns, creating the [National Commission on Fiscal Responsibility and Reform](#) in early 2010.

Commonly known as the Bowles-Simpson Commission, the fiscal committee spurred numerous think tanks, policy shops, and lawmakers to put forth their own deficit reduction proposals over the course of the next year. A number of these plans examined not only cuts to government spending, but also ways to raise more federal revenue. One of the options examined was an additional tax on the extremely wealthy.

For example:

- The Center for American Progress (CAP) [called](#) for a five percent surtax on adjusted gross income (gross income less tax deductions) over \$500,000 and a seven percent surtax on adjusted gross incomes over \$5 million. According to CAP, this proposal would bring in about \$75 billion per year, or enough revenue to close 5.8 percent of this year's \$1.3 trillion budget deficit.
- Andy Stern, former head of the Service Employees International Union (SEIU), called for a new top tax rate specifically for millionaires in his [deficit reduction proposal](#). Stern estimated that the measure would bring in roughly \$50 billion per year, or enough revenue to close 3.8 percent of this year's budget deficit.
- Both [Our Fiscal Security](#) (a deficit coalition comprised of the Economic Policy Institute (EPI), Demos, and the Century Foundation) and the [Congressional Black Caucus](#) (CBC) advocated a 5.4 percent surcharge on joint filers with an adjusted gross income of over \$1 million. The groups estimated that the measure would bring in between \$46 billion and \$57 billion per year, or enough to close between 3.5 percent and 4.4 percent of this year's budget deficit.

Though these plans differ on rates and the level at which a surtax would take effect, the proposed measures share several key attributes. First, they target the very wealthy. Only CAP's proposal would affect those earning less than \$1 million in income each year. Second, the surtax rates are small. The current top federal income tax rate is 35 percent. If the current top rate were

permanently extended, then a surtax would only bring the top income tax rate back to what it was during the Clinton era, when it topped out at 39.6 percent.

The targeting of such surtaxes is important. As the CBO study revealed, over the last thirty years, the concentration at the top of the nation's income spectrum is the main culprit of inequality.

But income taxes aren't the only taxes most workers pay. Over the past 30 years, more federal revenue has been coming from payroll taxes (and less has been coming from income taxes). Payroll taxes are regressive: low-income households, on average, pay more than eight percent of their income into systems like Social Security and Medicare while the top one percent pays, on average, less than two percent of their income in payroll taxes, largely due to high-income earners only having to pay Social Security taxes on the first \$107,000 of their earnings.

High-income households are also more likely to receive a significant portion of their income from dividends and stock (capital gains earnings). Since this income is taxed at only 15 percent, it reinforces the upside-down character of the tax system. In fact, the top one percent of households' federal income taxes (as a percentage of their income) dropped precipitously after passage of the Bush tax cuts in the early 2000s. In other words, there has been a large shift in the source of federal revenue from income to payroll taxes, leaving low- and middle-income workers shouldering a larger share of taxes than before.

As detailed in a recent *Watcher* [piece](#), researchers at the International Monetary Fund (IMF) found that high levels of inequality are correlated with slower growth. Enacting a surtax on millionaires' income would be a step toward reducing income equality and might pave the way for faster economic growth in the future. At the very least, it would help to lower deficits and ensure the wealthy pay their fair share in taxes.

Communities Across the Nation Struggle to Combat Air Pollution

Though the Clean Air Act and rules from the U.S. Environmental Protection Agency (EPA) have reduced national air pollution levels, hundreds of communities around the country still struggle with dangerously poor air quality. Released on Nov. 7, [Poisoned Places: Toxic Air, Neglected Communities](#) is an investigative journalism project that raises awareness about these communities. The project includes a series of in-depth stories and an interactive mapping tool that raise important questions at a time when Congress is seeking to weaken the act and its enforcement.

In 1970, Congress authorized the EPA to develop and enforce standards to protect the public from exposure to smog, airborne contaminants that are known to be hazardous to human health, and other types of air pollution. The Clean Air Act Amendments of 1990 expanded the agency's authority and required steps to protect communities from nearly 200 dangerous substances, such as mercury, benzene, and arsenic. Agency efforts to reduce air pollution have resulted in an [estimated 40 percent](#) drop in national toxic emissions from 1990 to 2005.

However, despite the act and the progress made since 1990, air pollution continues to threaten the lives and health of millions of people in various communities throughout the United States. [A recent report](#) indicates that just over one half of the American people is exposed daily to toxic chemicals from industrial facilities, such as power plants, refineries, and cement plants. The pollution levels are frequently too dangerous to breathe, and exposure to the pollutants often leads to cancer, birth defects, asthma, and other serious health issues.

The *Poisoned Places* Project

Poisoned Places, a collaborative project of the Center for Public Integrity (CPI) and National Public Radio (NPR), seeks to present air pollution data in a new way and to tell the stories of communities around the country fighting to protect their health and environment from polluters and lax enforcement of standards. As part of the project, CPI and NPR make public for the first time an internal EPA watch list of the most serious or chronic violators of the Clean Air Act. The list of 464 facilities, obtained through a Freedom of Information Act request, reveals that most of the violators have not faced any formal enforcement action for at least nine months, or in some cases, years.

The project also launched a new interactive online map, providing data on more than 16,000 facilities nationwide that release harmful chemicals. The interactive map integrates existing government data from [four EPA datasets](#) relating to sources of air pollution, including: the Clean Air Act watch list, the Air Facility System (AFS), the Toxics Release Inventory (TRI), and the Risk Screening Environmental Indicators model (RSEI). Users of the site can find facilities near them and easily see what level of risk each poses.

Communities Struggle to Combat Toxic Air Pollution

Many communities have struggled for decades to get air pollution standards enforced. They have encountered industries that are disinterested in air quality and government officials tasked with clean air enforcement who have limited resources and are constrained by rules that restrict their actions.

The stories highlight how air pollution problems can be well known and yet difficult to address. For instance, in [Ponca City, OK](#), the Continental Carbon Company pumped out carbon black, a black powdery substance that can cause cancer and other illnesses, such as asthma. For over 10 years, residents, including the Ponca Indian tribe, filed over 700 formal complaints to state and federal regulators about how carbon black had affected their health and community. However, state rules prevented regulators from taking action unless officials directly witnessed the pollution leaving the facility. Emissions declined only after residents sued the company and won almost \$20 million in settlements. The company, which still claims not to have caused any pollution, purchased and then razed the homes closest to the plant.

Some *Poisoned Places* stories demonstrate how toxic emitters exploit loopholes that allow them to pollute legally. In [Chanute, KS](#), a town of roughly 9,000 people, the Ash Grove cement plant was the second largest emitter of mercury in the state in 2004. A federal loophole permits

cement kilns to burn hazardous waste without the same pollution control requirements of commercial hazardous-waste incinerators. Despite complaints of pollution and health problems by local residents, regulators have insisted that the Ash Gove plant is technically compliant with the pollution requirements that apply to the facility.

Another problem the stories have highlighted is that companies are allowed to self-report their own pollution and estimate the quantity of toxic chemicals they release. This system not only leads to erroneous reporting, but allows companies to underreport their pollution levels. In [Tonawanda, NY](#), for example, the Tonawanda Coke plant reported releasing between three and five tons of benzene, a known human carcinogen. After decades of inaction by local and state officials, residents, suffering from a host of illnesses, including fibromyalgia, breathing problems, rashes, infertility, and various forms of cancer, began conducting their own air tests. In 2009, the EPA charged the company with violating the Clean Air Act, finding that benzene emissions were over 90 tons annually, 30 times what the plant reported and well beyond emissions limits.

A Tool to Increase Public Awareness

Public awareness of pollution has proven a powerful tool in forcing more responsible actions by industry and government. Without access to information on pollution and compliance that is easy to understand, citizens are often left to complain for years with little or no results. When informed about the toxics in their air, residents are better able to organize and demand investigations from government agencies and improvements from companies.

Keith Epstein, CPI Managing Editor, [explained the empowering effect of the project](#). "Users can start learning the health risks in their neighborhood," he said. "People who are worried about the air – and complacency of regulators – can learn how to test it themselves." Local ["bucket brigades"](#) have proven incredibly important in confirming community suspicions and leveling the playing field when facilities misreport their pollution levels.

[The project](#), in particular the watch list and map, has also been especially useful to reporters around the country. The data has inspired local reporting on air pollution in [Minnesota](#) and [California](#). Elizabeth Shogren, NPR environmental correspondent, [believes](#) that the watch list "could be a good source of leads for stories," alerting reporters to the facilities that are known violators of the Clean Air Act.

Poisoned Places has already begun to result in new actions by government officials. In fact, just days after the article series covered the [Asarco copper smelter](#) in Hayden, AZ, the EPA declared the facility was breaking the law by releasing illegal amounts of lead, arsenic, and eight other dangerous compounds for six years. The finding also suggests that the state of Arizona, which has primary responsibility for federal Clean Air Act enforcement in the state, has failed to take meaningful action against the smelter.

Protecting Clean Air in the Face of Congressional Attacks

The investigative series also brings to mind serious questions about congressional efforts to weaken and delay enforcement of the Clean Air Act. In the House, representatives passed the Transparency in Regulatory Analysis of Impacts on the Nation (TRAIN) Act ([H.R. 2401](#)) in September. The TRAIN Act would block clean air safeguards designed to curb mercury emissions from power plants and limit air pollution that travels across state lines. In the Senate, Democrats recently blocked a [bill](#) that would have rescinded EPA controls on toxic emissions from industrial boilers and cement factories.

It is disappointing that, despite the clear agreement on the [need for clean air](#), Congress would consider creating more loopholes and exemptions, especially when the *Poisoned Places* project makes clear that we have more work to do on air quality and that many communities continue to live with health risks from the air they breathe.

Global Studies Highlight U.S. Transparency Strengths, Weaknesses

Several recently published studies compare the policy and practice of transparency in the United States and other countries. Such studies provide useful measures of U.S. openness relative to real-world conditions, in addition to highlighting global best practices and alternative approaches. The U.S. ranked in the middle range in the studies, demonstrating how other countries have met the challenges of 21st-century transparency while the U.S. has lagged in some areas.

The studies examined the Freedom of Information Act (FOIA) and the transparency of foreign aid spending. Openness in those areas is essential to building a more accountable, efficient government. The Obama administration is attempting to improve U.S. performance in these areas through its participation in the global [Open Government Partnership](#) (OGP) and other initiatives.

Transparency of government activities typically brings increased accountability and improved performance. The current work of the U.S. government – putting Americans back to work, protecting our families from harm, rebuilding our infrastructure – is too important to allow excessive secrecy to weaken our performance.

FOIA

On Nov. 17, the Associated Press (AP) published an [audit of FOIA laws](#) in 105 countries and the European Union; according to the AP, it was the first worldwide test of such laws. The AP filed requests in each country for information on terrorism arrests and convictions as part of an investigation into how anti-terrorism laws have been used globally since the Sept. 11 attacks. Certainly, the public deserves to know how effectively governments have combated terrorism – and whether they have abused their authority.

Unfortunately, the U.S. fared poorly in the audit. The AP graded the U.S. as "partially responsive," along with countries such as Canada, France, and Peru. Meanwhile, countries such as Mexico, Turkey, and India were scored as "responsive." In some of these countries, governments took only days to respond to the AP's request. In the U.S., however, the Federal Bureau of Investigation (FBI) responded six months late – with only a single page of information.

Globally, more than half the countries audited did not release any information in response to the request. In a notable trend, newer democracies performed better than more established ones. This may indicate that more recent democracies have been able to establish better policies and practices, essentially leapfrogging the problems of entrenched secrecy that have developed in older democracies.

That result is echoed by another FOIA study, the [Global Right to Information Rating](#) released in September by [Access Info Europe](#) and the [Centre for Law and Democracy](#). The authors claim that the rating is "the first detailed analysis of the legal framework for the right to information in 89 countries." The study examined 61 indicators across seven categories, such as the procedures to make a request and to appeal a denial.

The analysis found that countries with more recently adopted FOIA laws generally had stronger policies. The U.S., which adopted one of the first FOIA laws in 1966, ranked 36th out of the 89 countries studied. The U.S. received demerits for, among other reasons, excluding the legislative and judicial branches from the law; not having to show a risk of actual harm in order to withhold information; and not having a binding, independent appeals process. Overall, the report noted that "it is quite possible that this score undervalues the true openness of the United States government. Nonetheless, there are significant problems with the USA's access regime."

Aid Transparency

Three recent studies rank the U.S. on the transparency of its foreign aid spending. [According](#) to aid transparency advocates Publish What You Fund, lack of transparency "leads to waste, overlap and inefficiency. It impedes efforts to improve governance and reduce corruption and makes it hard to measure results." Those effects weaken public trust in donor countries and cause unnecessary hardship for the intended recipients of aid: those suffering from disease, malnutrition, and lack of opportunity in developing countries.

Using different methodologies, the three studies arrived at different rankings but the same conclusion: the U.S. is not following best practices in aid transparency. The [Quality of Official Development Assistance](#) report, published Nov. 14 by the Brookings Institution and the Center for Global Development, ranked the U.S. 12th out of 31 donors in its Transparency and Learning category. While not a leader, this represented a significant improvement from the [2010 study](#), in which the U.S. scored 24th out of 31.

However, a [study by Anirban Ghosh and Homi Kharas](#), published in the November issue of the journal *World Development*, ranked the U.S. 22nd out of 31 donors. Meanwhile, Publish What

You Fund's [Aid Transparency Index](#), published Nov. 15, examined 58 donor agencies, including six U.S. government agencies, which varied widely in their scores. The Millennium Challenge Corporation scored highest among U.S. agencies at 7th place, while the Defense Department ranked 46th and the Treasury Department's Office of Technical Assistance scored 49th.

Other Indices

These global studies join a short list of others, including the [Open Budget Survey](#) and the [Revenue Watch Index](#), that systematically compare certain aspects of transparency across countries. Such studies can help advocates and public officials identify areas for improvement while demonstrating that increased transparency is achievable.

| U.S. Ranking in Transparency Indices | |
|--|--------------------------------------|
| AP FOIA audit (2011) | 2nd category / 5 |
| Global Right to Information Rating (2011) | 36 / 89 |
| Aid Transparency Index (2011) | varies per agency, from 7 to 49 / 58 |
| Ghosh/Kharas aid transparency ranking (2011) | 22 / 31 |
| Quality of Official Development Aid, Transparency and Learning category (2011) | 12 / 31 |
| Revenue Watch Index (2010) | 11 / 41 |
| Open Budget Survey (2010) | 7 / 94 |

Learning from Others' Examples

The U.S. has expressed some willingness to learn from the successes of other countries, most notably in its role leading the multilateral [Open Government Partnership](#) (OGP). The national action plans each country produces under OGP form an implicit "race to the top," and the partnership also provides for the exchange of ideas and experience between countries. For instance, the U.S. OGP plan includes a commitment to join the international Extractive Industries Transparency Initiative, which would shed additional light on government revenues from mining and drilling, and implementation efforts are [already under way](#). The U.S. also formed a bilateral [partnership with India](#) in 2010, and White House officials have expressed admiration of India's FOIA law. Nonetheless, these recent studies demonstrate that, despite recent progress, the U.S. still requires significant improvements to become an international leader on open government.

Regulatory Accountability Act Threatens Essential Public Protections

For the past six decades, our nation's system of public protections has developed safeguards that protect us from health and safety threats. Now, however, the misleadingly titled Regulatory Accountability Act could turn this system on its head, allowing more special interest influence and inviting endless rounds of litigation.

The Regulatory Accountability Act ([RAA](#)) is an attempt to fundamentally rewrite and expand the Administrative Procedure Act ([APA](#)), a sixty-five-year-old statute that can be considered a kind of constitution for administrative agencies and the regulatory process. There are now more than 110 separate procedural requirements in the rulemaking process; the RAA would add more than 60 new procedural and analytical requirements. For the country's most important rules, the RAA would add no fewer than 21 to 39 months to the rulemaking process.

The RAA would grind to a halt the rulemaking process at the core of implementing the nation's public health, workplace safety, and environmental standards. Rules that somehow make it through the RAA's process would tilt against the public interest and in favor of powerful special interests.

While the additional requirements would add tremendous cost and many years of delay to the process, they would do little to actually improve the quality of rules generated. In fact, experts in administrative law [have written](#) that they "seriously doubt that agencies would be able to respond to delegations of rulemaking authority or to congressional mandates to issue rules if this bill were to be enacted." The current Office of Information and Regulatory Affairs (OIRA) Administrator, Cass Sunstein, once wrote that "the costs of investigation and inquiry are never zero; to the contrary, they are often very high." The costs of these delays should be counted not just in days and dollars, however: regulations save lives, prevent illness and injury, and stabilize our economy.

Experience at the state level has demonstrated that an RAA-style approach not only wastes time and resources, but actually harms the rulemaking process. After California adopted an RAA-like set of requirements in 1979, the state's rulemaking process became slow, cumbersome, and resource-intensive. State agencies generate boilerplate findings because they do not have the time or resources to perform meaningful analyses. The process is so technical that experienced, specialized lawyers have to supervise every step. As a result, agencies can complete work on fewer regulations – and public health and safety is threatened.

Making the "Least Costly" Rule the Default Choice

The RAA requires that an agency default to the "least costly" rule unless it can demonstrate – out of all the possible alternatives – that additional benefits of a more costly alternative justify the additional costs and offer a public health, safety, environmental, or welfare justification clearly drawn from the authorizing statute. This would override more than two dozen deliberate

and long-honored precedents – in fact, most well known health, safety, and environmental statutes – that direct agencies to prioritize health and safety criteria to protect Americans.

The "least costly" default requirement is not a novel idea but is closely analogous to the standard found in the Toxic Substances Control Act (TSCA). This act has actually kept toxic substances from being regulated. For example, even though everyone agrees that asbestos is a serious threat to human health, the U.S. Environmental Protection Agency (EPA) has not been able to issue a rule that meets the TSCA standard and could protect Americans from asbestos. In fact, the CEO of SC Johnson has said, "Your child has a better chance of becoming a major league baseball player than a chemical has of being regulated [under TSCA]."

Super-Mandating Cost-Benefit Analysis

The RAA's requirement that, for any proposed rule, agencies consider all of the "potential costs and benefits associated with potential alternative rules ... , including direct, indirect, and cumulative costs and benefits," would apply "[n]otwithstanding any other provision of law." This would rewrite "much, perhaps most, of the safety and health legislation now on the books." The problems with the RAA's emphasis on cost-benefit analysis as the most important deciding factor are only compounded by how the analyses would be performed. The RAA omits language, found in [Executive Order 12866](#) and other executive orders, that reiterates that some of the most important considerations cannot be quantified. Certain types of benefits are difficult to quantify, and certain types of costs are inherently speculative. In addition, [empirical research](#) has demonstrated not only that the economic benefits of most rules vastly outweigh their costs, but also that cost-benefit analyses typically overestimate costs and underestimate benefits.

In a telling example of the problems with the RAA's cost-benefit analysis super-mandate, the U.S. Supreme Court has ruled that the Occupational Safety and Health Act prohibits the Occupational Safety and Health Administration (OSHA) from basing health standards on a strict cost-benefit determination, since protection of health should be the primary consideration. The RAA would override this requirement, making it more difficult to protect workers from chronic health hazards like silicosis.

Shifting to Formal Rulemaking Processes

It is no accident that most agencies now use informal (i.e., notice-and-comment) rulemaking. Formal rulemaking is generally considered to be expensive, time-consuming, and an inefficient way to resolve most issues during rulemaking. Both the American Bar Association and the Administrative Conference of the United States have denounced formal rulemaking as inappropriate for virtually all agency decisions.

Overall, formal rulemaking cuts agencies off from everyone except special interests with the resources to invest in achieving a particular outcome. Nevertheless, the RAA would automatically require formal rulemaking processes for rules with projected annual costs of more than \$1 billion and would allow any interested party to demand formal rulemaking for major rules (those estimated to have annual costs of \$100 million or more). The hearings would

encompass not only the issues laid out in the RAA, but also any other issues raised by an interested person (unless the agency can determine within 30 days of the request that a hearing would be unproductive or would unreasonably delay completion of the rulemaking).

One of the most infamous examples of how formal rulemaking procedures fail to achieve any purpose aside from wasting resources and delaying regulations is the Food and Drug Administration's (FDA's) peanut butter rule. In 1961, FDA proposed a rule that peanut butter must contain 90 percent peanuts. The industry petitioned for a formal hearing to argue for the standard to be set at 87 percent. The formal hearing alone added almost five months to the rulemaking process and resulted in a transcript of approximately 8,000 pages primarily discussing whether peanut butter should contain 87 percent or 90 percent peanuts. FDA finalized the standard in July 1968 – yet the battle continued on for another two years while the industry challenged the rule in court. Formal rulemaking allowed the peanut butter industry to drag out the public's demand for accurate labeling of products by nine years.

This formal rulemaking process would also be adversarial in nature and allow for endless challenges to agency evidence and findings. It would make rulemaking more complicated, more litigious, and more costly. It would tilt the process in favor of employer interests that have the ability to expend significant legal resources on the process and disadvantage workers and small businesses that do not have similar resources.

Allowing Judicial Review of All Agency Judgments

The RAA would greatly expand the courts' ability to review agency judgments, empowering parties to challenge virtually every agency decision to proceed with a rule. If an agency decides to proceed with a review or makes a decision that the rule is not "high-impact" or "major," its decision can be reviewed by the courts. However, if the agency decides not to act, no request for judicial review can be made. In other words, the RAA discourages agencies from acting and turns judges into "super-regulators" who are empowered to substitute their own opinions for the findings of agencies.

Under the RAA, EPA's greenhouse gas endangerment finding, which, on Sept. 28, the EPA's Inspector General found "met statutory requirements for rulemaking," could be delayed and challenged in court. The IG noted that EPA should have made public its review of a technical support document used in the endangerment finding, even though EPA determined that the document was not a "highly influential scientific assessment" as defined by OMB's guidelines under the [Information Quality Act](#) (IQA). Even without the IG's findings, under the RAA, anyone could have called for an IQA hearing to publicly debate this point. The results of the hearing would be judicially reviewable. Moreover, even if someone did not petition for a hearing, he or she still could challenge EPA's science in court.

Guidance Documents

The RAA would create a much more stringent process for agencies to issue guidance documents. Before issuing a "major" guidance document, an agency would have to consider certain issues

prescribed by the RAA – including, for example, a cost-benefit analysis considering all the direct, indirect, and cumulative costs associated with the guidance – and consult with OIRA. These requirements would likely lead agencies to delay issuing guidance, or in some cases forgo them altogether.

Nearly all guidance documents are welcomed, if not requested, by regulated entities because guidance allows an agency to explain and interpret the rules it is responsible for enforcing. Thus, making it harder for agencies to issue guidance would do little more than create unnecessary regulatory uncertainty. For example, statutory language that states that guidelines are non-binding would seriously undermine the ability of OSHA to enforce against serious hazards.

Conclusion

There may be hundreds of examples that demonstrate the combined impact of all of the RAA's provisions, but one is a pending rule at the U.S. Department of Agriculture (USDA) that would declare six highly-virulent, pathogenic strains of *E. coli* "adulterants" in beef products. The American Meat Institute opposed the USDA action in 2010. One of its arguments was that the new rule would "significantly impact international trade" with countries whose beef has been denied access to U.S. markets. The rule, according to this argument, would lead to retaliation, blocking the export of U.S. meat. If the RAA were in effect, the meat industry would have many new avenues to challenge and delay not only the rule itself, but also the USDA's scientific findings and its cost-benefit analyses.

The USDA rule has been roundly applauded by food safety advocates for protecting the American public from tainted meat. However, if the Regulatory Accountability Act were enacted, USDA would be forced to divert resources from finalizing and implementing the rule in a timely fashion and shifting them to performing cost-benefit analyses on every alternative that the industry (and its legions of attorneys) could devise and defending scientific findings to non-expert judges. Ultimately, the agency would be required to develop the final rule based on what would be cheapest for producers. More importantly, Americans would continue to be sickened and killed by *E. coli* infections that could have been prevented.

At its core, our system of standards and safeguards has been developed to protect Americans against very real threats to their health, safety, and well-being. The Regulatory Accountability Act is nothing less than an attempt to roll back our critical public safeguards and promote industry interests instead of protecting American citizens.

Editor's note: This article is based on [Impacts of the Regulatory Accountability Act: Overturning 65 Years of Law and Leaving Americans Less Protected](#), a paper published by the [Coalition for Sensible Safeguards](#) on Nov. 16. OMB Watch's [Jessica Randall](#) was the lead author of the paper.

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