
Testimony of

Lisa Heinzerling

**Professor of Law
Georgetown University Law Center**

**Vice-President
Center for Progressive Regulation**

**Before the
Committee on Government Reform
U.S. House of Representatives**

Hearing on

**The Paperwork and Regulatory Improvements Act of 2003
(H.R. 2432)**

July 22, 2003

TESTIMONY OF
LISA HEINZERLING
PROFESSOR OF LAW,
GEORGETOWN UNIVERSITY LAW CENTER
VICE-PRESIDENT,
CENTER FOR PROGRESSIVE REGULATION
BEFORE THE
COMMITTEE ON GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES

JULY 22, 2003

Thank you for the opportunity to testify before you today. My name is Lisa Heinzerling. I am a Professor of Law at the Georgetown University Law Center. I have also been a visiting professor at the Harvard and Yale Law Schools. I am a graduate of the University of Chicago Law School, where I served as editor-in-chief of the University of Chicago Law Review. After law school I clerked for Judge Richard Posner on the U.S. Court of Appeals for the Seventh Circuit, and then for Justice William Brennan of the U.S. Supreme Court. I was an Assistant Attorney General in the Environmental Protection Division of the Massachusetts Attorney General's Office for three years before coming to Georgetown in 1993. My expertise is in environmental and administrative law. I am also the Vice-President of the Center for Progressive Regulation.

The Center for Progressive Regulation is a nonprofit research and educational organization of university-affiliated academics with expertise in the legal, economic, and scientific issues related to regulation of health, safety, and the environment. CPR supports regulatory action to protect health, safety, and the environment, and rejects the conservative view that government's only function is to increase the economic efficiency of private markets. Through research and commentary, CPR seeks to inform policy debates, critique anti-regulatory research, enhance public understanding of the issues, and open the regulatory process to public scrutiny.

My testimony today concerns H.R. 2432, the “Paperwork and Regulatory Improvements Act of 2003.” This bill would require certain agencies to develop a “regulatory budget” that would limit the amount private parties could be required to spend to comply with federal rules. The regulatory budget is a bad idea, in principle and in the form proposed in this bill. The regulatory budget contemplated in this bill is a stealth tax cut, which would arbitrarily restrict the amount of money businesses must spend to limit their pollution and to engage in other activities required by law.

As I explain in detail below, H.R. 2432’s requirement of a regulatory budget suffers from these major flaws:

1. Limiting the amount of money private entities must spend to comply with federal regulatory requirements undermines those requirements without changing the laws under which the requirements arise. The regulatory budget is deregulation in disguise.
2. Regulatory budgeting is fundamentally different from the federal budgetary process: the federal budget limits the actual expenditures federal entities may make, while regulatory budgeting rests on mere estimates – which often prove wildly off the mark – of private expenditures.
3. Limiting private parties’ regulatory expenditures, without consideration of the benefits those expenditures would produce, makes no sense.

I. Deregulation in Disguise

Federal agencies impose requirements on private entities in accordance with existing laws, passed by Congress. These laws typically do not set a pre-determined limit on – or “budget” for – the expenditures private parties must make in order to comply with the law. H.R. 2432, in contrast, would impose arbitrary limits on private expenditures by setting such a pre-determined limit. The “budget” contemplated in this bill would be inconsistent with many of the existing legal obligations of private entities. Indeed, such a budget could be seen as condoning outright legal violations by private entities where compliance with the law would lead to an exceedance of the budgetary limit.

Let me provide a concrete example. One of the agencies covered by the regulatory budget created by this bill is the Environmental Protection Agency (EPA). A large portion of the environmental progress made by this agency has come through requirements for polluting facilities to install state-of-the-art pollution control technology. The Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, and other important environmental laws all have such requirements at their cores. One well-known program of the Clean Air Act, for example, requires major existing sources of air pollution to install the best available control technology when they undertake major modifications of their facilities. This is the New Source Review program.

Now suppose that, under section 1120(a) of this bill, the Office of Management and Budget, in consultation with the EPA, decided to designate New Source Review as one of the programs subject to the new regulatory budget. And suppose that they decided that the regulatory budget – the limit on the amount private polluters would be required to spend in complying with the law – would be, say, \$100 million. It is easy enough to see that this limit on private expenditures could well be insufficient to pay for private companies' legal obligations under the law. Yet nothing in H.R. 2432 prevents OMB and EPA from together limiting private parties' existing legal obligations through the device of the regulatory budget.

In fact, one might go further and say that the *only* plausible purpose of the regulatory budget is to deregulate, and to do so opaquely so as to avoid the political ramifications of reductions in environmental protection and other governmental benefits. To see this point, consider the three general levels at which the regulatory budget might be set.

First, the regulatory budget for a program might be set at a level that exceeds the expenditures that would be expected given current legal obligations. In this case, the regulatory budget would have no effect on existing legal arrangements; indeed, there would be no point in a budget that had this effect. Second, the budget could be set just at the level expected to be spent under existing legal obligations. In this case, too, again, the budget would have no operative effect; it would merely reiterate private parties' existing obligations. Third and finally, the regulatory budget could be set at a level *below* the amount that would be spent by private entities under existing regulatory requirements. This result is clearly the aim of this bill.

Certainly, this approach would give the regulatory budget operative effect (unlike the other two approaches just described), but only by lessening private parties' obligations under existing law. The regulatory budget is thus deregulation in disguise: its only purpose and effect would be silently to relax rules set under other laws.

II. The Regulatory Budget Is Not A Real Budget

The federal budget places a limit on the actual expenditures the federal government may make in a given year. The budget describes the actual financial outlays that will be made. It is fundamentally different from the regulatory "budget" contemplated in this bill.

"Regulatory budgeting" and the "regulatory budget" are not defined in H.R. 2432 (part of a pattern of vagueness in this bill). However, these terms are typically used to refer to limits on the amounts private parties can be required to spend to comply with regulatory requirements. These limits are set in advance of actual expenditures. The limits are therefore *estimates* of regulatory costs. They are not, as is the case with the federal budget, limits on the amount of money regulated entities will actually spend.

This distinction between the federal budget and regulatory budgets is of enormous significance. Ex ante estimates of regulatory costs are notoriously unreliable. Empirical studies have demonstrated that actual costs often end up being far lower than the costs estimated in advance of regulation. There are a number of reasons for this pattern, including: cost estimates are usually provided by the regulated entities themselves, and these entities have an incentive to exaggerate costs to avoid regulation; after regulation, technological innovation often produces compliance at a lower cost than anticipated; and unanticipated efficiencies associated with regulation can achieve compliance at a lower cost. Whatever the reason, the fact remains that regulatory costs estimated in advance of regulation tend to be overstated. Thus regulatory budgets based on such estimates will be unreliable predictors of actual costs. Most likely, regulated entities will end up spending far less than their "budgeted" amount because the estimates on which the budget is based will likely be too high.

For a comprehensive analysis of these issues, see Thomas O. McGarity and Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation*, 80 TEXAS LAW REVIEW 1997 (2002).

III. Ignoring Benefits

Many federal regulatory programs cost a lot of money but also do a lot of good. The Clean Air Act as a whole, for example, has required large regulatory expenditures, but it also produced \$22 trillion in net benefits in the first 20 years of its operation. (EPA, *The Benefits and Costs of the Clean Air Act, 1970 to 1990*, at ES-8 (Oct. 1997).) It would be foolish to limit the amount private parties must spend on controlling, say, air pollution without considering the health and environmental benefits that would be lost in doing so. The only effect of such a limit would be to enrich corporate polluters at the expense of the public.

Yet this is exactly what H.R. 2432 appears to do. The bill provides no guidance for how regulatory budgets are to be set, and certainly does not require that budgets be set with careful attention to the benefits that might be lost under the regulatory budgets. Indeed, H.R. 2432 appears to contemplate that regulatory benefits will be considered only *after* the regulatory budgets are set. Section 1120(b) of the bill requires the “regulatory budgets” to “present, for one or more of the major regulatory programs of the agency, the varying levels of costs and benefits to the public that would result from different budgeted amounts.” This provision seems to assume that regulatory budgets will first be set – according to some mysterious, unnamed criterion – and then those already-established budgets will be compared by considering the varying cost-benefit profiles of the budgets.

This approach makes no sense, as it would allow OMB to limit expenditures for programs that are highly beneficial. The bill also gives completely unfettered discretion to OMB, “in consultation with” the agencies, to set these regulatory budgets. OMB should not be entrusted with this much power. On other occasions when OMB has taken it upon itself to target regulatory programs for reform, it has done so in a patently political fashion: recall the regulatory “hit list” OMB infamously developed in its 2001 report on the costs and benefits of federal regulation. In OMB’s hands, the regulatory budget has a very good chance of becoming just another hit list favored by private industry.