

Testimony of Ronald M. Levin
William R. Orthwein Distinguished Professor of Law
Washington University in St. Louis

Before the
U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Hearing on H.R. 367, the "REINS Act of 2013":
Promoting Jobs, Growth, and American Competitiveness

March 5, 2013

SUMMARY

Under the REINS Act, no administrative agency could promulgate a “major rule” on its own. Instead, it would need to submit the rule as a “proposal” to Congress, which would have the option of adopting it by passing a joint resolution. Rejection of the “proposal” by either House of Congress would effectively nullify the rule. In practical effect, therefore, the Act would reinstate the one-house “legislative veto” that had long been thought buried by the Supreme Court decision in *INS v. Chadha* (1983).

The REINS Act would impose great strain on congressional workloads. In many instances, this would be a poor use of scarce legislative time, because the subject matter of numerous major rules is arcane and most prudently left to specialized administrators.

Other major rules do raise substantial questions that Congress would, in the abstract, have a considerable interest in resolving. However, the Act’s requirements would greatly impede the agency’s ability to carry out its mandate through rulemaking, because of the great difficulty of obtaining the active concurrence of the House, Senate, and President regarding any given major rule. That challenge would be especially daunting in the present highly polarized political environment. The effect could be to extend the current congressional dysfunction in the *enactment* of laws, so that it would also afflict the *implementation* of laws.

Finally, the constitutionality of the Act is open to question. Although it would nominally do nothing more than subject agency “proposals” to the standard lawmaking process, close analysis of the Act demonstrates that this is essentially a fiction. The reality is that the Act would in substance revive the legislative veto as a tool for controlling agency rulemaking. It is by no means clear that courts would go along with this circumvention of *Chadha*, and much separation of powers case law suggests that they would not.

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Chairman Bachus, Ranking Member Cohen, and members of the Subcommittee, it is a privilege for me to be able to appear before you today to discuss H.R. 367, the “Regulations from the Executive in Need of Scrutiny Act” or REINS Act.

By way of brief introduction, I am the William R. Orthwein Distinguished Professor of Law at Washington University in St. Louis. I have taught and written about administrative law for more than thirty years. I am the coauthor of a casebook on administrative law and have also written many law review articles in that field. In addition, I am a past Chair and longtime active member of the Section of Administrative Law and Regulatory Practice of the American Bar Association (ABA); and I currently serve as a public member of the Administrative Conference of the United States (ACUS) and chair of its Judicial Review Committee. However, I am testifying today solely in my individual capacity and not on behalf of any organization.

Background

The REINS Act would require that any “major rule” be approved by an affirmative vote of Congress through the full lawmaking process – as opposed to the present situation under the Congressional Review Act,¹ in which a proposed agency rule will go into effect unless Congress engages in the full lawmaking process in order to nullify it. The REINS Act would define a “major rule” to include, roughly speaking, any rule that the Office of Information and Regulatory Affairs concludes would have an annual effect on the economy of at least \$100 million or another significant cost to the economy.²

¹5 U.S.C. § 801 et seq. (2006).

²REINS Act § 804(2). Specifically, the definition includes:

(2) . . . any rule, including an interim final 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

The theory of the Act is that an agency should not have authority to adopt a major rule unilaterally. Instead, its proponents say, the agency should merely be able to “propose” it to Congress. Then the two Houses of Congress would consider the “proposal” using expedited procedures. The rule would go into effect if the two Houses voted for it, and the resolution of approval was then signed by the President or passed over his veto by a two-thirds vote in each chamber.

In tangible effect, the REINS Act bears a close resemblance to the “legislative veto” provisions that the Supreme Court held unconstitutional thirty years ago in *Immigration and Naturalization Service v. Chadha*.³ Proponents of the Act believe that its novel structure would distinguish it from the traditional legislative veto scheme and would give it a good chance of surviving constitutional review. I will address the constitutional issue below. For now, suffice it to say that the substance of the matter, with regard to major rules, is that the system would function very much like the one-house veto approach that was struck down in *Chadha*, because a vote against the rule by either House of Congress would kill the rule.

The basic argument in favor of the bill is that administrative rulemaking suffers from lack of accountability and insufficient oversight. Therefore, the argument goes, Congress should assert responsibility for the most important rules by taking an affirmative vote, rather than by merely acquiescing in the decisions of an unelected agency.

Rulemaking Today

As some of its proponents acknowledge, the Act would constitute a dramatic alteration of our constitutional order. Before altering it, Congress should consider the way our system works today. That inquiry will indicate, I think, that the system is stable, balanced, and fairly effective.

Our governmental system rests on a fundamental division of responsibility between the political branches. Congress can choose to prescribe regulatory obligations very specifically, and it does so much of the time. When it does so, the executive branch is, of course, bound by those decisions. At other times, however, Congress writes programmatic statutes much more open-endedly. In those situations, it is the job of the *executive* branch to fill in the gaps in a reasoned fashion. There is no reason to think of these delegations as unnatural or antithetical to sound government. On the contrary, they are inevitable. In a technologically advanced and complex society of more than 300 million inhabitants, an elected legislature of 535 individuals could not conceivably make all the important decisions that need to be made if society is to keep up with

(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.

³462 U.S. 919 (1983).

changing conditions and emerging problems.⁴

As I noted, Congress has a choice about whether to delegate, but when it does, the executive branch is accountable for rules. The comparative flexibility of the rulemaking process balances off the inherent inertia of the legislative process, which *Chadha* tells us was deliberately built into its structure. It is what makes a system characterized by separated powers in our law-writing process – the bicameralism and presentment requirements – workable. This sharing of responsibility casts doubt on the premise that, as a matter of principle, Congress *must* take broader responsibility for major rules and be accountable for them. That notion rests on too hasty a notion of what Congress’s responsibilities need to be.

Meanwhile, however, Congress retains broad opportunities to influence the course of administrative rulemaking and, when it chooses, to override the executive branch’s choices. Periodic statutory reauthorization cycles, the annual appropriations and budget processes, investigations, and oversight hearings are only a few of the devices the legislative branch can employ. Moreover, agencies are also subject to vigorous oversight from the judicial branch. And the ultimate source of accountability and check is the electorate, as democratic government requires.

I do not say that any of these sources of accountability is incapable of improvement, nor that they always are sufficient in the aggregate to overcome bad administrative decisions. However, we do have a functioning system that manages over time to provide both effective action and political accountability, and Congress should be circumspect about entertaining proposals for drastic changes in that system.

Consequences of the REINS Act

In thinking about the potential advantages and disadvantages of the REINS Act, a good starting point for consideration is the sheer magnitude of the task that Congress would be setting for itself. In this Committee’s report on the REINS Act in the last Congress, the dissenting statement made the point that in 2010 the House had 116 legislative days, yet 94 major rules that would have been subject to the REINS Act were issued during that period.⁵ To say the least, Congress should not take on such a burden without careful consideration as to whether this new task would be worthwhile.

⁴*Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives”).

⁵H.R. Rep. 112-278, pt. 1, at 51-52 (2011) (dissent).

Ordinary rulemaking

On a more concrete level, one needs to think about how the Act would play out in a variety of situations. In this connection I think it is helpful to distinguish between major rules that are truly controversial and those that are more mundane. One might suppose that any regulation that meets the definition of “major rule” would by definition raise important public policy questions that Congress has a natural interest in answering, but in reality many involve relatively narrow, fact-bound questions.⁶ Requiring Congress to master these rules in order to give them affirmative approval would be a dubious burden, at least if legislators are going to study the issues carefully enough to make their votes meaningful.

Indeed, much of the work of modern rulemaking (“major” and otherwise) is to engage in very detailed analysis of legal, factual, and policy issues, many of them highly technical. This work is better suited to the subject matter specialists in the respective agencies than to the generalists who serve as our elected representatives. I think in this connection of an article published in *Politico* last year, in which William Ruckelshaus, who was administrator of EPA under Presidents Nixon and Reagan, was asked about the proposal that Congress should affirmatively approve regulations:

“I think that’ll last about 60 days,” Ruckelshaus said, suggesting members of Congress would toss the measure the first time they had to wade through the political minefield of reviewing or drafting complicated environmental regulations. “It makes no sense for Congress to try to do that.”⁷

Many of these major rules may be unlikely to elicit broad congressional opposition, yet may be so arcane as to consume substantial time if they are to be handled seriously. The fact that the REINS Act provides for expedited procedures is not a complete answer to this concern. A chamber would have to allow floor time for consideration of an approval resolution, if even only a few members wanted to discuss it.⁸ Even though the REINS Act contains exemptions from the filibuster, floor time is a scarce asset, and should not readily be committed to a substantial workload without a justifying payoff. On the other hand, if the assumption is that most members would vote to rubberstamp a rule without paying much attention, what would be the benefit of insisting on affirmative approval?

⁶For detailed descriptions of the manifold varieties of major rules, see Curtis W. Copeland & Maeve P. Carey, *REINS Act: Number and Types of "Major Rules" in Recent Years*, Cong. Research Serv. R41651 (Feb. 24, 2011).

⁷Erica Martinson, *Mitt Romney’s EPA would likely look familiar*, POLITICO, May 7, 2012, <http://politi.co/IK4e7p>.

⁸REINS Act § 802(d)(2), 802(e).

Controversial rulemaking

Some major rules, of course, do involve important and contentious subjects. In the abstract, they implicate the kind of issues that members of Congress could very reasonably want to decide. My concern would be, however, that the REINS Act would give rise to enormous risks of impasse. One virtue of the existing system is that it does usually permit the executive branch to take some action to carry out the legislative mandate and be judged by the results. The process of major rulemaking is protracted, and the safeguards of administrative law serve to constrain the agency's choices, but these hurdles have evolved in a manner that generally allows business to go on. In contrast, if the REINS Act were to be enacted, the risks of debilitating stalemate would increase exponentially.

In the first place, the chances of effective rulemaking would be much diminished if the rule had to meet with the affirmative approval of the agency, the Senate, the House of Representatives, and the President. This was a common criticism of the one-House legislative veto, during the period before the Supreme Court held it unconstitutional. Critics noted that it was all too easy for a House of Congress to say "no" to the agency's proposed solution without having to take a position as to what alternative solution would be better, or even any certainty that there *was* a better solution. Indeed, the members' reasons for objecting might be mutually inconsistent. Two distinguished scholars who studied the practical results of the legislative veto as it operated at that time wrote:

Since the veto provides an easier method for altering agency policy, it reduces the incentive of the oversight committees to sponsor legislation. Because the veto is negative, and because it reduces pressure on committees to report legislation affirmatively resolving policy disputes with agencies, it increases substantially the chance that no policy will be formed by Congress or by the agency.⁹

The same critique applies to the REINS Act. Its expedited procedures might ensure that a vote would be *taken*, but not that the approval resolution (or any plausible substitute rule) would be *adopted*.

The challenge of securing agreement from all relevant actors (the agency, the Senate, the House of Representatives, and the President) would be daunting enough if they all basically agreed about the purposes to be achieved. In today's ideologically polarized environment, however, one could not assume even that much. A proposed regulation that the Republican House would endorse might well get nowhere in the Democratic Senate, and vice versa. Each side could blame the other for the failure to agree. In that respect, the bill would diffuse rather than strengthen political accountability. Meanwhile, the ensuing standoff would leave the agency unable to implement the most important building blocks in a program that it has been directed to

⁹Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1423 (1977).

put in place.

For example, suppose the REINS Act had been in effect during the past two years, as the responsible agencies were gearing up to write major rules to implement the Affordable Care Act and the Dodd-Frank Act. It might well have been literally impossible for the agencies to write rules that could pass both Houses of Congress and would lawfully implement the intentions of the legislation. I recognize that those laws are controversial and open to valid criticisms, but I believe that the most constructive way for Congress to respond to these criticisms would be to find ways to improve the laws through further legislation. The prospect of stalemate in the issuance of any and all major rules to implement these (or any other) statutes is not conducive to stable, effective government.

In any event, my argument is not limited to a few especially controversial statutes. On a broader level, the public has recently witnessed extraordinary levels of partisan and ideological divisions in Congress, including brinkmanship, political hardball, and just plain unwillingness to compromise. In fact, the recently expired 112th Congress passed nearly a hundred fewer public laws than any other Congress of the past sixty years.¹⁰ In this light, now is hardly a propitious time to consider a substantial *increase* in the responsibilities of the legislative branch. The upshot of the REINS Act could be that the dysfunction that now afflicts Congress in the *enactment* of laws would spread to the *implementation* of the laws. This is a decidedly unattractive prospect.

It may be thought that I am being unfair by using the current polarization in our political system to criticize legislation that might work perfectly well in the long run. Indeed, it's true that some national elections result in the selection of a President and two Houses of Congress from the same party. In fact, however, this has happened in only six of the past twenty elections.¹¹ Divided government, not unified government, is the norm in the modern era.

I do not want to leave the impression that my critique of the REINS Act is simply a brief for stricter rules. "Major rules" may result either in affirmative regulation or in deregulation, and the REINS Act, by its terms, would apply to both. If Mitt Romney had been elected President and the REINS Act had been effect during his administration, the tangible impact of the Act would have been different, but the arguments for opposing it would still stand up. It's true that,

¹⁰Amanda Terkel, *112th Congress Set To Become Most Unproductive Since 1940s*, HUFFINGTON POST, Dec. 28, 2012, <http://mr.and.us/ETkU>. For the official figures, see Office of the Clerk, U.S. House of Reps., *Résumé of Congressional Activity*, <http://library.clerk.house.gov/resume.aspx>.

¹¹The respective elections are listed in http://en.wikipedia.org/wiki/Divided_government. The number of unified governments is seven if one includes the 107th Congress, in which the House, Senate, and President were all Republican for several months, but the defection of one Republican senator thereafter resulted in divided government during most of the two-year period.

as a candidate, Governor Romney endorsed the REINS Act,¹² but I suspect that President Romney, had he attained that status, would have felt compelled to reexamine that position, because the Act would have directly interfered with his administration's ability to adopt regulations that would carry out the policies that he had been elected to pursue.

Reflection on that hypothetical situation brings to mind an article that Professor Antonin Scalia wrote shortly after Ronald Reagan was elected President. The future Justice argued that, now that the Republicans were poised to take office as the "in" party, they needed to jettison their support for various "supposed regulatory reform devices" that they had considered attractive while they were the "out" party. Such measures would now interfere with *their* ability to pursue their political agenda. Prominent among the devices he mentioned was the one-house legislative veto, because it would, if instituted, obstruct their ability to bring about deregulation. As he wrote, such "[e]xecutive-enfeebling measures . . . do not specifically deter regulation. What they deter is change."¹³ In short, governmental paralysis is not an attractive vision, regardless of which political party is in power at any given time.

Finally, the fact that the REINS Act would apply only to major rules is not an adequate answer to the concerns I am raising. Typically, a large proportion of the regulations that establish the basic parameters for a regulatory program or initiative would have broad economic impact, making them "major" within the meaning of the Act. The agency would need to put those rules into place before it could adopt non-major rules to supplement them. Thus, I do not think one could correctly say that an impasse on major rules would cause only limited inconvenience to an agency because the Act would not impede its ability to promulgate non-major rules. This would be like telling a real estate developer that, although his ability to construct the foundations for an office building might remain in limbo indefinitely, it is only a minor problem because in the meantime he would still be able to continue working on the building from the second floor upwards.

Constitutional Concerns

Apart from the policy consequences of the REINS Act, there is reason to think that the Act might not survive constitutional scrutiny. The reason I make this suggestion is that the regime that the Act would establish is, in all concrete respects, substantially equivalent to the one-house legislative veto model that the Court held unconstitutional in *Chadha*. The difference between the two is essentially formal, and I do not take it for granted that courts would look only to formal details and ignore the underlying realities.

¹²*Believe in America: Mitt Romney's Plan for Jobs and Economic Growth* 63 (2011).

¹³Antonin Scalia, *Regulatory Reform — The Game Has Changed*, REGULATION, Jan-Feb. 1981, at 13, <http://www.cato.org/regulation/janfeb-1981>.

It is readily apparent that, with regard to major rules, the Act would accomplish the same ends as the “traditional” one-house veto. It would allow a negative vote by one House of Congress to nullify an agency rule, regardless of the wishes of the other House, let alone the President. Moreover, the policy arguments used to justify the Act are essentially the same as the arguments that were formerly cited in support of the legislative veto, and in *Chadha* the Court clearly found those arguments unconvincing.¹⁴ Rather, the Court was impressed by the importance that the framers of the Constitution had attached to bicameralism and presentment as restraints on potentially arbitrary legislative action:

The decision to provide the President with a limited and qualified power to nullify proposed legislation by veto was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed. . . . The President's role in the lawmaking process also reflects the Framers' careful efforts to check whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures. . . .

The bicameral requirement of Art. I, §§ 1, 7, was of scarcely less concern to the Framers than was the Presidential veto and indeed the two concepts are interdependent. By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the Framers reemphasized their belief, already remarked upon in connection with the Presentment Clauses, that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials.¹⁵

The Court believed that these values were implicated by the impact of the one-House legislative veto on executive action. I am not convinced that the Supreme Court would accept what amounts to a 180 degree reversal in this important area of constitutional law, simply because the one-house veto has been repackaged in a superficially different format.

The theory behind the REINS Act is that Congress does not have to confer rulemaking authority in the first place and can withdraw it at any time. It can, therefore, withdraw each agency's authority to issue major rules and instead empower it to “propose” a rule for Congress's consideration. The legislature would then be free to accept or reject the proposal, but the bicameralism and presentment requirements of Article I, § 7 would have to be satisfied in order for this “proposal” to be converted into law.

¹⁴In its report on the REINS Act in the previous Congress, this Committee suggested that the Act is distinguishable from what *Chadha* forbids because it would apply only to major rulemaking. H.R. Rep. 112-278, pt. 1, at 15 (2011). However, the precise nature of the executive action exposed to the veto was not germane to the grounds for the Court's decision, and *Chadha* has not been subsequently understood as applying only to adjudications or to minor matters. *See, e.g.,* *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987). Indeed, only three weeks after *Chadha*, the Court summarily affirmed a lower court judgment holding unconstitutional a one-house veto of FERC incremental pricing rules. *Process Gas Consumer Group v. Consumer Energy Council*, 463 U.S. 1216 (1983). These rules, which shifted natural gas costs from residential users to industrial users, would undoubtedly have been “major” within the meaning of the REINS Act.

¹⁵*Chadha*, 462 U.S. at 947-49.

I suggest, however, is that this legal fiction is so strained that the courts might be disinclined to take it at face value. The reality is that the Act is intended to enable a single House of Congress to control the implementation of the laws through the rulemaking process. Such a scheme transgresses the very idea of separation of powers, under which the Constitution entrusts the *writing* of laws to the legislative branch and the *implementation* of the laws to the executive branch. As the Court has said, “The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts.”¹⁶ The plain lesson of *Chadha* is that an agency is free to use its delegated authority until such time as Congress repeals it.

Three features of the REINS Act, in particular, support the view that the so-called “proposal” is a thinly disguised fiction. First, the Act would apply only to the issuance of major rules; the agency would retain full authority to promulgate non-major rules. Under this highly counterintuitive approach, it would be impossible for an agency to know in advance of rulemaking proceedings – let alone to describe in a coherent manner – what it does and does not have jurisdiction to regulate. Presumably, the agency would lack jurisdiction to promulgate a rule that OIRA expects would result in a \$150 million impact on the economy; but if the agency were to split the rule into two rules with an impact of \$75 million each, its authority would exist as before. The other components of the definition of “major rule” would be even more elusive, as they would depend entirely on OIRA’s judgment as to what effects on costs or prices would be “major” or what adverse effects on competition, employment, etc., would be “significant.” The artificiality of the distinctions that the REINS Act would superimpose on longstanding grants of authority is readily apparent.

Second, major rules would have to undergo the entire rulemaking process, with all the requirements prescribed by modern administrative law, before being placed before Congress. This is not, obviously, the kind of process that one ordinarily associates with legislative “proposals.” Indeed, the REINS Act’s definition of “rule” is based on the APA definition,¹⁷ and the “major rules” governed by the Act are referred to as “rules” throughout the Act itself. Undoubtedly, the agency, legislators, and members of the public would continue to think of and treat these statements as “rules” for every purpose other than the REINS Act itself.

Third, the Act expressly provides that major rules would be subject to full judicial review under the APA on all grounds currently available.¹⁸ This is perhaps the most telling sign of all that, in reality, Congress regards the so-called “proposals” as agency rulemaking and aspires through this bill to assert congressional control over the *execution* of the laws. Under any other

¹⁶*Bowsher v. Synar*, 478 U.S. 714, 722 (1986). Of course, this language refers only to legally binding action by Congress and does not negate informal persuasion or pressure of agency officials by legislators.

¹⁷REINS Act § 804(4).

¹⁸See REINS Act § 805(c) (“The enactment of a joint resolution of approval under section 802 . . . shall not extinguish or affect any claim, whether substantive or procedural, against any alleged defect in a rule. . .”).

circumstances, Congress would expect that a measure that it has adopted through bicameralism and presentment would be evaluated in court by the highly deferential standards applied to economic legislation, like other exercises of congressional power. The fact that the Act provides for APA review (including, no doubt, review of the rule's legality, factual basis, reasoned decisionmaking, and procedural validity) confirms that the sponsors of the Act think of these measures as executive actions, not legislative actions.

The real question, therefore, is whether courts would turn a blind eye to the fact that the proposed Act seeks to institute the substance of the device that the Court doubtless thought it was declaring impermissible in *Chadha*.¹⁹ I suspect not. In the first place, the principles of *Chadha* have stood the test of time. The Court has never indicated that it is discontent with them, nor has it read the case restrictively. Indeed, it has repeatedly invoked its principles in new contexts when Congress has appeared to be altering longstanding divisions of responsibility between the legislative and executive branches. For example, in a 1991 case,²⁰ Congress had set up a so-called "Board of Review" with the power to override the promulgation of regulations and other executive planning decisions regarding the airports in the Washington, D.C. region. The Board was to be composed of nine members of Congress who served on the legislative committees with jurisdiction over transportation issues. The Court relied on *Chadha* in invalidating this structure as a violation of separation of powers. The Court also relied on *Chadha* when it invalidated the Line Item Veto Act, by which Congress had attempted to give Presidents the power to cancel individual items in appropriations bills.²¹ Many governors have such power, but the Court found that the federal Constitution, as interpreted in *Chadha*, did not allow a similar plan on the federal level.

Moreover, I suspect that proponents of the REINS Act overestimate the extent to which courts are likely to share the goals that have led many members of Congress to favor a statute of this type. It is easy for members of a legislative body to persuade themselves of the need for broader or easier legislative oversight of the executive branch. But judges, situated as they are in a separate and independent branch of government, have often recognized that these assessments may be influenced by institutional self-interest, and they will not necessarily accept these perceptions at face value. *Chadha* itself is the best evidence of this observation, but by no means the only evidence. It is noteworthy that when state legislatures have instituted legislative veto schemes, the overwhelming majority of state appellate courts have found them unconstitutional

¹⁹In *Chadha* itself, Justice White, in dissent, tried to defend the legislative veto by claiming that (in the majority's paraphrase) "the Attorney General's action under § 244(c)(1) suspending deportation is equivalent to a proposal for legislation." The majority dismissed this ingenious but highly artificial theory in a footnote, remarking that "[t]he legislative steps outlined in Art. I are not empty formalities." *Chadha*, 462 U.S. at 958 n.23 (opinion of the Court).

²⁰*Metropolitan Washington Airports Authority v. Citizens for the Abatement of Airport Noise, Inc.*, 501 U.S. 252 (1991).

²¹*Clinton v. City of New York*, 524 U.S. 417 (1998).

under their respective state constitutions.²² Some of these holdings rested on enactment clause requirements, similar to the reasoning of *Chadha*, and others on broader separation of powers themes. Either way, however, the pleas of legislators that they need more control over executive decisionmaking have not carried the day.

Particularly relevant to this discussion is *State ex rel. Meadows v. Hechler*,²³ a decision in which the West Virginia Supreme Court of Appeals unanimously found a violation of separation of powers in the face of arguments that strongly resembled the ones used to support the REINS Act. The state Board of Health finalized regulations to govern “personal care homes” that provided nursing care to impaired individuals. The agency submitted them to the legislature for approval, as required by a statute. The statute provided that if the legislature failed to approve the rules, the agency could take no action to implement them.²⁴ However, a proposal to approve the rules died in the state senate. The court found, therefore, that “this unchecked legislative veto power over administrative agency rules impermissibly encroaches upon the functioning of the executive branch in violation of the separation of powers provision of our constitution.” Its reasoning is of particular importance:

[T]he legislative Respondents contend that: "The agency was never authorized to act, only to propose a rule. The agency has no power to promulgate the rule until such time as the Legislature . . . has authorized the promulgation." Based on this view that the executive branch lacks authority to promulgate regulations, the legislative Respondents deny the existence of a legislative veto arising from the provisions of West Virginia Code § 29A-3-12(b). In other words, until the Legislature approves of proposed regulations, no delegation of executive authority has occurred and therefore, no separation of powers problem comes into existence.

*Not only do we find this argument to be spurious, but as Petitioners observe, such a position "is the most extreme assertion of legislative authority." As we explained in *Barker*,*

²²Appellate cases in at least twelve states have found legislative veto statutes unconstitutional. *Blank v. Dept. of Corrections*, 564 N.W.2d 130 (Mich. Ct. App. 1997); *Gilliam County v. Dept. of Env'tl. Quality*, 849 P.2d 500, 505 (Ore. 1993) (en banc); *Mo. Coalition for the Environment v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125 (Mo. 1977); *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769 (Alaska 1980); *Maloney v. Pac.*, 439 A.2d 349 (Conn. 1981); *Gary v. United States*, 499 A.2d 815 (D.C. 1985); *State ex rel. Stephan v. Kansas House of Reps.*, 687 P.2d 622 (Kan. 1984); *Legis. Research Comm'n v. Brown*, 664 S.W.2d 907 (Ky. 1984); *General Assembly v. Byrne*, 448 A.2d 438 (N.J. 1982); *Commonwealth v. Sessoms*, 532 A.2d 775 (Pa. 1987); *State ex rel. Barker v. Manchin*, 279 S.E.2d 622 (W.Va. 1981); *Opinion of the Justices*, 431 A.2d 783 (N.H. 1981). One other court upheld a statute that provided for *temporary* legislative committee suspension of a rule, pending further review, but stated expressly that “only the formal bicameral enactment process coupled with executive action can make permanent a rule suspension.” *Martinez v. Dept. of Indus. Relations*, 478 N.W.2d 582, 586 (Wis. 1992).

The only state appellate court that has squarely upheld a legislative veto scheme, in the absence of a special constitutional provision authorizing it, was that of Idaho. Even that court was not especially deferential to the legislature, however, because it went on to hold that, in the case at bar, the legislature’s exercise of that device had been unlawful. *Mead v. Arnell*, 791 P.2d 410 (Idaho 1990).

²³462 S.E.2d 586 (W.Va. 1995).

²⁴*Id.* at 588-89.

"When the Legislature delegates its rule-making power to an agency of the Executive Department, as it did here . . . , it vests the Executive Department with the mandatory duty to promulgate and to enforce rules and regulations."²⁵

In other words, the court looked through form to substance and recognized that, in every essential feature, the agency had engaged in a standard rulemaking process. The legislature had sought to enable a subset of itself to nullify the agency's rule without satisfying the prerequisites of bicameralism and presentment, and this was tantamount to a legislative veto. It seems reasonable to predict that federal judges might bring a similar perspective to their evaluation of the REINS Act. Indeed, the *Chadha* decision, which has proved influential and durable, suggests that this is what would happen.

Certainly there are constructive ways in which Congress could seek to improve the process by which it oversees agency rulemaking. For example, some years ago the American Bar Association endorsed a thoughtful and balanced package of proposals to revise the Congressional Review Act,²⁶ and these ideas still would merit congressional consideration.

I do not believe, however, that the REINS Act offers a promising alternative. No one can predict with certainty how the Act would fare if it were enacted and tested in the courts for constitutionality. I believe, however, that the sponsors have been overly confident about its viability. When I put the constitutional uncertainties together with doubts about the legislative workload that the Act would entail and the difficulties of forging consensus that would allow major rulemaking to go forward, I think there are ample reasons not to proceed with H.R. 367.

This concludes my prepared statement, and I would be happy to respond to any questions you may have. Thank you again for the invitation to testify.

²⁵*Id.* at 590 (emphasis added).

²⁶122-2 ABA ANN. REP. 465 (Aug. 1997),
http://www.americanbar.org/content/dam/aba/directories/policy/1997_am_107a.authcheckdam.pdf