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Hearing on the REINS Act – Promoting Jobs and Expanding Freedom by Reducing Needless Regulations

Subcommittee on Courts, Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives

January 24, 2011

Thank you, Mr. Chairman and members of this subcommittee, for the invitation to testify on the REINS Act. My name is Jonathan H. Adler, and I am a Professor of Law and Director of the Center for Business Law and Regulation at the Case Western Reserve University School of Law, where I teach various courses in administrative, environmental and constitutional law. I appreciate the opportunity to appear before this subcommittee to discuss measures Congress may take to exercise greater control over the cost and reach of federal regulations and enhance political accountability.

The Need for Regulatory Accountability

Over the past several decades, the scope, reach and cost of federal regulations have increased dramatically. From the 1950s through the 2000s, the amount of federal regulatory activity, as measured by pages in the *Federal Register*, has increased more than six-fold. In the 1950s, federal agencies published an average of just under 11,000 pages in the *Federal Register* per year. From 2001-2009, federal agencies averaged over 73,000 pages per year. [1] In 2010, the *Federal Register* contained over 82,000 pages, the greatest number in over a decade and the third highest total in our nation's history. The number of new final rules each year has declined, but federal regulations are still adopted at a rapid pace. In 2008 and 2009 federal regulatory agencies adopted 3,830 and 3,503 final rules, respectively.[2] These rules cover everything from greenhouse gas emission reporting and proxy disclosures to electronic fund transfers and the energy and water use of home appliances. Substantially more regulation is on the way. By some estimates, the Wall Street Reform and Consumer Protection Act alone will require over 200 federal rulemakings.[3]

The growth of federal regulation has imposed significant costs on American business and consumers. According to recent estimates, the total cost of federal regulation exceeds $1.1 trillion dollars per year.[4] This is substantially more than the total amount of individual income taxes paid by Americans each year.[5] Insofar as they impose substantial costs, regulations are like a hidden tax. Just like taxes, regulations may be necessary to address public ills or to provide important public benefits, but this does not mean they are free. The fact that regulations, like taxes, can both impose substantial costs and generate substantial benefits makes it that much more important that there be political accountability for federal regulatory decisions.

This dramatic increase in the scope of federal regulation has been facilitated by the practice of delegating substantial amounts of regulatory authority and policy discretion to federal regulatory agencies. Federal regulatory agencies have no inherent powers. Article I, section 1 of the Constitution vests all legislative power in the Congress. Federal agencies only have the power to

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[1] *See* Clyde Wayne Crews, *Ten Thousand Commandments: A Snapshot of the Federal Regulatory State* (2010 edition), at 16.
[2] *Id*. at 38.
[3] *See* "Summary of the Dodd–Frank Wall Street Reform and Consumer Protection Act, Enacted into Law on July 21, 2010," Davis Polk & Wardwell, LLP, July 21, 2010, *available at* http://www.davispolk.com/files/Publication/7084f9fe-6580-413b-b870-b7c025ed2ecf/Presentation/PublicationAttachment/1d4495c7-0be0-4e9a-ba77-f786fb90464a/070910_Financial_Reform_Summary.pdf
[4] *See* Crews at 6.
[5] *Id*. at 9-10.

adopt rules governing private conduct if such power has been delegated to them through a valid statutory enactment. As the Supreme Court has explained, "It is axiomatic that an administrative agency's power to promulgate legislative regulation is limited to the authority delegated by Congress."[6]

Over the course of the twentieth century, Congress has delegated ever greater amounts of regulatory authority to an ever-expanding array of federal agencies. Congress has often had good reasons for this. The economic, environmental and other problems Congress sought to address were complicated and often necessitated careful study and analysis. Delegation of regulatory authority to expert agencies with the time and expertise to focus on specific problems was a way to ensure that federal regulations were adopted to address the nuances and particulars of specific problems.

Delegation may have been expedient, or even necessary, but it has also had a cost. The delegation of broad and far-reaching regulatory authority has undermined political accountability for regulatory decisions and has allowed for regulatory agencies to adopt policies that did not always align with Congressional intent or contemporary priorities. When Congress delegates broad regulatory authority to executive or independent agencies, it inevitably loses some degree of control over how that authority is exercised. If a federal agency is instructed to adopt measures that serve the public interest or control a given environmental problem as far as is practicable, the federal agency retains substantial discretion to determine what sorts of measures should be adopted and at what cost. Judicial review serves to ensure that agencies play by the rules set out by Congress – that agencies provide adequate notice and opportunity for public participation, provide sufficient explanations for the rules they adopt, observe the limits of their regulatory jurisdiction, and so on. Yet judicial review does not delve into the policy choices agencies make – nor should it. Whether a given agency is following the best course is ultimately a decision for the political branches.

In principle, the delegation doctrine ensures that Congress remains responsible for the major policy judgments that drive regulatory decisions.[7] In practice, however, the doctrine does not serve this purpose very well. Under existing precedent, Congress need only provide federal agencies with an "intelligible principle" to guide regulatory initiatives, and it does not take much to satisfy this standard. Any broad statement of policy will do, leaving federal agencies with tremendous amounts of discretion in how they exercise their regulatory power, including whether to exercise such power at all and even when, if ever, to change their mind. Under existing doctrine agencies are free to reverse course and overturn prior policies without any meaningful input from Congress.

The difficulty of ensuring that agencies remain accountable for their policy choices is magnified by time. Agencies today continue to exercise authority granted decades ago. To take a current example, the Environmental Protection Agency is in the midst of implementing a series of

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[6] Bowen v. Georgetown University Hospital, 488 U.S. 204 208 (1988); *see also* Louisiana Public Service Commission v. FCC, 476 U.S. 355, 374 (1986)("an agency literally has no power to act . . . unless and until Congress confers power upon it.").

[7] *See* Loving v. United States, 517 U.S. 748, 757 (1996) ("The delegation doctrine [was] developed to prevent Congress from forsaking its duties"); *see also* Industrial Union Dept., AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring) (the doctrine ensures that "important choices of social policy are made by Congress, the branch of our Government most responsible to the popular will.").

regulations governing the emission of greenhouse gases from mobile and stationary sources. These regulations are intended to address an important environmental concern and will have a tremendous effect on the American economy as they threaten to impact literally hundreds of thousands of facilities across the nation. The EPA's authority for these regulations is a statute passed by Congress, the Clean Air Act. Yet there is no indication that the current or recently concluded Congresses support the EPA's actions.

The Clean Air Act's basic architecture was enacted in 1970. Key provisions were added in 1977 and 1990, and the Act has not been amended to any significant degree in over twenty years. According to the EPA, these decades-olds provisions authorize (if not compel) it to regulate greenhouse gas emissions from cars and trucks, utilities, factories, and other sources. According to the EPA, the legislative grant of authority it received decades ago drives its decisions today, even though Congress was not at all focused on global warming when the relevant provisions of the Clean Air Act were adopted, relatively few members of Congress who voted for the Clean Air Act remain in Congress today, and Congress has never taken any action to affirmatively approve such regulation in the years since the Act was adopted or amended. Although the EPA is exercising authority ostensibly delegated by Congress, Congress is not politically accountable for the EPA's actions. Further, insofar as some maintain that the EPA's actions are based upon a misreading of Congressional intent, it is difficult for Congress to correct the agency's course without going through the lengthy and time-consuming process of amending statutes that are on the books.

The above is hardly an isolated example. Numerous federal agencies continue to exercise substantial regulatory authority under old and often outdated statutes. Though the statutes were passed by Congress, and Congress is ultimately responsible for the power these agencies wield, Congress is not particularly accountable for how agencies today exercise power granted years ago. Agency authority, once granted, is difficult to modify or repeal. Drafting and adopting new legislation to revise existing agency authority is a laborious process not well suited to active agency oversight and control.

Executive oversight of federal agencies is certainly important, but it is no substitute for legislative oversight and control. Regulatory agencies get their power from Congress, not the President, and it is ultimately Congress' responsibility to make sure that this responsibility is exercised properly. Executive Branch review to ensure agency rules are cost-effective or line-up with Presidential priorities does not mean that such initiatives are supported by Congress, or the American people. The Congress, and the House of Representatives in particular, is more responsive to the people – and therefore more politically accountable – than the executive branch. Further, there are many agencies – so-called independent agencies – that are not subject to meaningful executive oversight, making the need for legislative oversight and control that much greater.

Executive oversight also does not ensure that agencies are acting in accord with Congressional intent. Indeed, Executive Branch and independent agencies often seek to evade legislative oversight and control. With increasing frequency the executive branch has sought to achieve through regulation what it has been unable to achieve through legislation. After failing to get Congress to pass desired legislation, each of the last two administrations resorted to the administrative process to achieve their desired policy ends. Such end-runs around the legislative

process appear to be on the rise, and the deferential nature of judicial review of agency action has hardly slowed such efforts. As a consequence the Executive Branch and independent agencies increasingly escape legislative control and political accountability for their actions.

Past Efforts to Enhance Legislative Control and Political Accountability

Over the years Congress has adopted various reforms aimed at restoring political accountability, disciplining federal agencies, and ensuring that federal regulatory policy is responsive to contemporary legislative priorities, without sacrificing the practical benefits of delegation. Indeed, legislative oversight and review has, in many respects, facilitated greater delegations of regulatory authority, as Congress may be more comfortable delegating substantial amounts of power if it is assured that it retains a degree of oversight and control.[8] While well-intentioned, these efforts have been largely unsuccessful.

In the mid-twentieth century, Congress attempted to control administrative agency decision-making through the adoption of legislative veto provisions. Between the 1930s and 1980s, Congress enacted legislative veto provisions into nearly 300 statutes. These provisions enabled Congress to delegate broad legislative-like authority to administrative agencies while retaining the unilateral authority to overturn administrative decisions through legislative action, but without Presidential assent or a veto-proof majority.

A typical legislative veto provision was contained in the Immigration and Nationality Act, which authorized either House of Congress to invalidate a decision by the Attorney General to allow an otherwise deportable alien to remain in the United States with a simple resolution passed by majority vote. By allowing either House to override an agency decision, the legislative veto provisions effectively required concurrent agreement by the President and both houses of Congress for an agency decision could take effect, for dissent by either the Senate or the House of Representatives was enough to veto the action. Such provisions were popular, but they were not long-lived.

In 1983 the Supreme Court invalidated unicameral legislative vetoes in *Immigration and Nationalization Service v. Chadha*.[9] The Court held (correctly in my view) that it was unconstitutional for a single house of Congress to overturn an administrative action taken pursuant to a valid grant of legislative authority. Overturning an administrative action was, in effect, a legislative act. Under Article I of the Constitution, legislative acts require bicameralism and presentment – the concurrence of both Houses of Congress and presentation before the President for his signature or veto, the latter of which could be overturned by super-majorities in both legislative chambers.

[8] *See* INS v. Chadha, 462 U.S. 919, 974 (1983) ("the Executive has . . . [generally] agreed to legislative review as the price for a broad delegation of authority") (White, J. dissenting). *See also* Michael Herz, *The Legislative Veto in Times of Political Reversal:* Chadha *and the 104th Congress*, 14 CONSTITUTIONAL COMMENTARY 319, 324 (1997) (noting that the legislative veto was developed "as a means of allowing massive concessions of authority to the executive" by ensuring Congress would retain the ability to review and control such delegations).
[9] 462 U.S. 919 (1983).

A more recent example of legislative efforts to control the regulatory process and increase political accountability was the Congressional Review Act, enacted in 1996. The CRA created an expedited process for consideration of joint resolutions to overturn regulations of which Congress disapproved. Unlike the unicameral vetoes voided in *Chadha*, resolutions of disapproval under the CRA must be passed by both Houses and presented to the President for signature. In effect, the CRA created a framework for Congress to enact new laws to overturn or correct administrative implementation of previously enacted laws.

The CRA created a mechanism whereby Congress could, at its own initiative, act to overturn administrative action. Yet the CRA has not been particularly effective – and this should not surprise. There is tremendous inertia within the legislative process, and if Congress is required to take the initiative to overturn an unjustified or excessive regulation, it is unlikely to happen. Other priorities compete for legislators' time and attention, and members of Congress are not always eager to cast a vote for or against a controversial or high-profile regulation. As a consequence, the CRA has only been used once, and it is not widely considered to have disciplined agency action or increased Congressional accountability for regulatory initiatives. One particular problem is that the CRA effectively requires a super-majority in Congress to overturn an administrative action as, in all likelihood, a sitting President will veto a resolution overturning one of his own administration's regulatory initiatives.[10] Only those rules adopted near the end of a President's term are particularly vulnerable to CRA repeal, and the Executive can reduce the vulnerability of regulations to CRA review by ensuring new rules are not issued at the tail end of a presidential term.

The REINS Act

The Regulations from the Executive in Needs of Scrutiny (REINS) Act offers a promising mechanism for disciplining federal regulatory agencies and enhancing Congressional accountability for federal regulations. Requiring Congressional approval before economically significant rules may take effect ensures that Congress takes responsibility for major economic policy decisions of the sort that are embodied in the most significant federal regulations. Adopting an expedited legislative process, much like that which is used for fast-track trade authority, ensures transparency and prevents a Congressional review process from unduly delaying needed regulatory initiatives. Such an approach can enhance political accountability without sacrificing the benefits of agency expertise and specialization.

As then-judge Stephen Breyer explained in a 1984 lecture, a congressional authorization requirement of this sort could replicate the function of the legislative veto invalidated in *Chadha* without the veto's constitutional infirmity.[11] By observing the formal requirements for legislation in Article I, he explained, congressional oversight of agency activity could be maintained without violating constitutional principles of separation of powers. In addition, unlike the legislative veto, requiring Congressional approval for the adoption of new regulatory

[10] *See* Nick Smith, *Restoration of Congressional Authority and Responsibility Over the Regulatory Process*, 33 HARVARD JOURNAL ON LEGISLATION 323, 326 (1996); *see also* Michael Herz, *The Legislative Veto in Times of Political Reversal:* Chadha *and the 104th Congress*, 14 CONSTITUTIONAL COMMENTARY 319, 323 (1997) ("Requiring presidential approval (or a two-thirds majority to override) is hardly a formality.").

[11] *See* Stephen Breyer, *The Legislative Veto After* Chadha, 72 GEORGETOWN LAW JOURNAL 785, 793-96 (1984).

initiatives "imposes on Congress a degree of visible responsibility" for new regulatory initiatives.[12]

The presentment clause in Article I, section 7 of the Constitution provides that, for a bill to become law, it must be passed by a majority of both the House and Senate and signed into law by the President or, if vetoed by the President, repassed by two-thirds majorities in each house. It further provides that "[e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States" for his signature or veto. The REINS Act complies with this requirement, and is therefore constitutional.[13] Just like any other bill, a Joint Resolution requires the approval of both houses of Congress and is presented to the President.[14]

In some respects the REINS Act is more limited than Breyer's suggested proposal for congressional resolutions of approval for regulatory measures or the unicameral legislative vetoes at issue in *Chadha*, as the REINS Act would only require congressional approval for so-called "major rules." The unicameral legislative veto often operated as a replacement for targeted "private bills" affecting the interests of a few.[15] By contrast, those regulations subject to the REINS Act would, by definition, be only those that have broader impacts on large segments of the country, if not the nation as a whole. Only those rules deemed to be "economically significant" are covered, and such rules are a small, but important, portion of federal regulatory activity. From 1998-2007, the number of major rules promulgated by federal administrative agencies ranged between fifty and eighty per year.[16]

One objection to requiring Congressional approval before major rules may take effect is that regulatory initiatives could be subject to procedural delays, particularly in the Senate, and that such a requirement would make it too easy for a determined minority or special interest group to block desirable regulations. The REINS Act seeks to address this concern by creating an expedited process for consideration of a joint resolution approving major rules in both the House and Senate. A joint resolution of approval is automatically introduced into both houses within three days of a federal agency's submission of a major rule to Congress, and legislative committees have only fifteen days to consider the resolution before it is automatically discharged. Debate on the resolution is limited, and other motions that could postpone or prolong debate are prohibited, as are amendments to the rule, so as to ensure that each House votes up-or-down on the resolution shortly after it is presented to Congress. Similar processes are used in other contexts, as with fast-track trade negotiation authority, so there is no reason why such a process could not be used here as well.

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[12] Breyer, at 794.

[13] *See also* Laurence H. Tribe, *The Legislative Veto Decision: A Law by Any Other Name?* 21 HARVARD JOURNAL ON LEGISLATION 1, 19 (1984) (noting that a congressional approval requirement for agency regulations would be constitutional).

[14] The only exception to this rule is a Joint Resolution used to propose a constitutional amendment. Such a resolution is instead submitted to the states for ratification. *See* http://www.senate.gov/reference/glossary_term/joint_resolution.htm.

[15] In *Chadha*, the House of Representatives voted to overturn six of 340 cases in which the Attorney General had concluded an otherwise deportable alien should be allowed to remain in the United States.

[16] Crews, at 28.

The REINS Act provides a means of curbing excessive or unwarranted regulation, but it is not an obstacle to needed regulatory measures supported by the public. If agencies are generally discharging their obligations in a sensible manner, REINS Act-type controls will have little effect. If the public believes that more regulations are necessary, or supports regulatory initiatives of a particular type, requiring a resolution of Congressional approval will not stand in the way. Indeed, it would enhance the legitimacy of those regulations Congress approves by making clear that such initiatives command the support of both the legislative and executive branches. Above all else, the REINS Act provides a means of enhancing political accountability for regulatory policy.

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Mister Chairman and members of this committee, I recognize the importance of these issues to you and your constituents. I hope that my perspective has been helpful to you, and I will seek to answer any additional questions you might have. Thank you.