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Would the REINS Act Rein In Federal Regulation?

Congress makes another effort to regain control of regulation.

BY JONATHAN H. ADLER | *Case Western Reserve University School of Law*

Over the past several decades, the scope, reach, and cost of federal regulations have increased dramatically. As the federal regulatory state has grown, legislative control over regulatory policy has declined. Long after authorizing legislation is adopted, agencies continue to adopt regulations and implement policies with relatively little legislative input or oversight. At the same time, presidential administrations of both parties have used administrative regulations to implement policies and programs that Congress failed to approve. As legislative control over regulatory policy has waned, so too has congressional accountability for the regulation.

In the past two years, several members of Congress have proposed measures to reassert legislative control and enhance congressional accountability for regulatory policy. The so-called Regulations of the Executive in Need of Scrutiny (REINS) Act would prevent federal agencies from implementing major regulatory initiatives without congressional approval. This legislation has the support of the House Republican leadership and was incorporated into the GOP's 2010 "Pledge to America" as part of a "plan to rein in the red tape factory in Washington, D.C."

REINS Act supporters hail the legislation as a needed check on federal regulatory agencies. Opponents criticize it as a poten-

tially unconstitutional attack on federal regulations that could undermine health, safety, and environmental protections. Market-oriented groups and the U.S. Chamber of Commerce believe the act contains necessary reforms. The Natural Resources Defense Council, on the other hand, calls the REINS Act a "radical" and "perilous" proposal that would hamstring needed regulatory initiatives. According to the NRDC's David Goldston, "it is hard to imagine a more far-reaching, fundamental, and damaging shift in the way the government goes about its business of safeguarding the public."

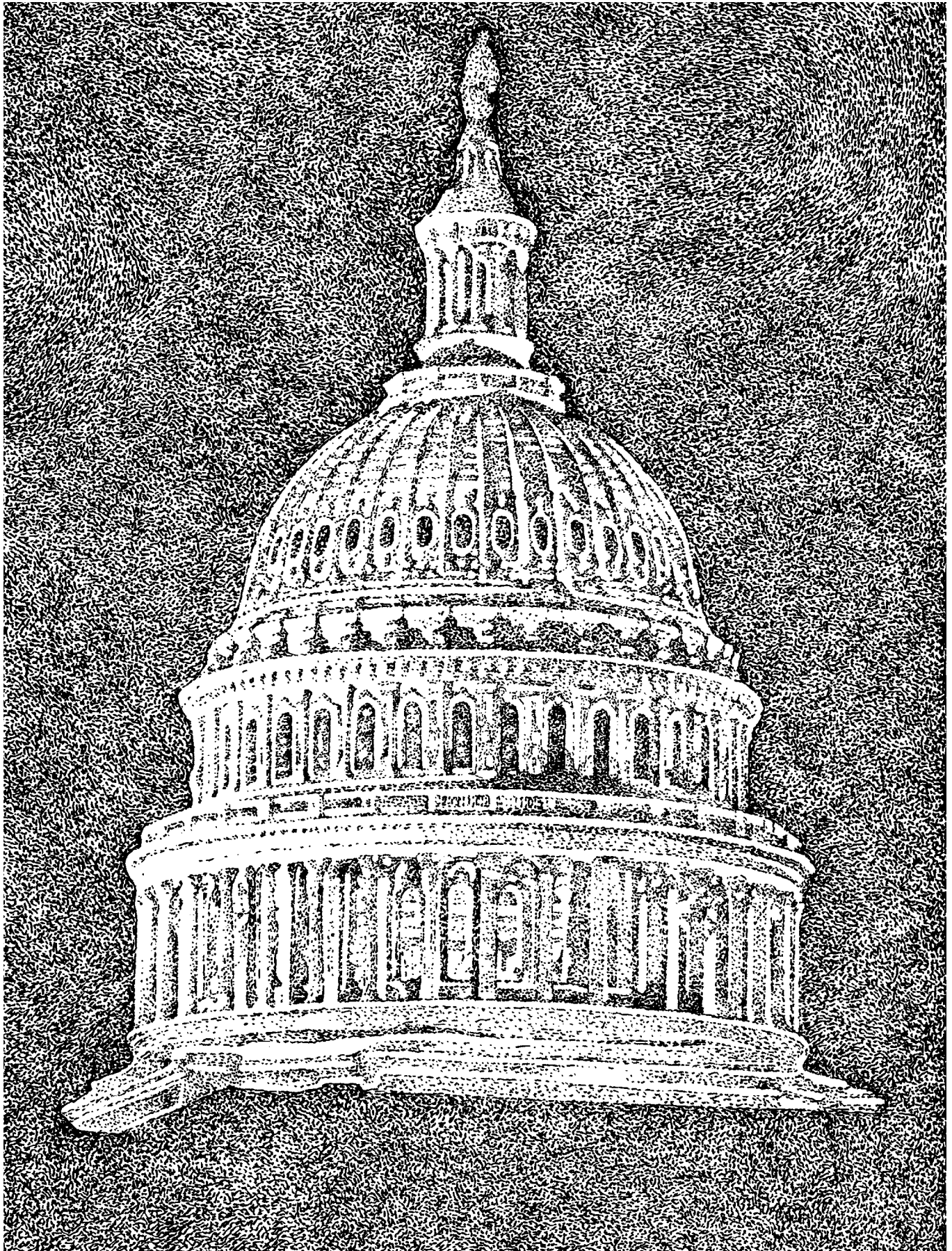
The REINS Act's most ardent supporters and defenders assume that the act would stem the flow of federal regulation from the nation's capital, but is this so? A more measured look at the act suggests that it could enhance regulatory accountability and popular input on major regulatory proposals. Less clear is whether the legislation would prove to be much of an obstacle to additional regulatory initiatives or reforms. The REINS Act would, however, retard the continuing accretion of executive authority over domestic affairs.

Regulatory Growth

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. By contrast, over the past decade federal agencies averaged over 70,000 pages per year. In 2010, the *Federal Register* contained well over 80,000 pages. Over one-quarter of

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Portions of this article are based on testimony Adler gave before the House Judiciary Subcommittee on Courts, Commercial, and Administrative Law, January 24, 2011.



those pages were devoted to final agency regulations.

The number of new final rules each year has declined from its 1970s peaks, but federal regulations are still adopted at a rapid pace. Federal agencies have finalized over 3,500 regulations per year in each of the last three years. Those 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. The 2010 Unified Agenda of Federal Regulatory and Deregulatory Actions lists over 4,000 additional regulations in various stages of the regulatory pipeline. By some estimates, the Wall Street Reform and Consumer Protection Act (better known as “Dodd-Frank”) will require over 200 federal rulemakings and the Patient Protection and Affordable Care Act will require dozens upon dozens more.

The growth of federal regulation has imposed significant costs on American business and consumers. According to some estimates, the aggregate costs of federal regulations could exceed \$1.5 trillion per year — substantially more than the total amount collected from individual income taxes annually. Regulations provide benefits as well, and many regulations may provide greater benefits than costs. But this does not make their costs irrelevant. Just like taxes, regulations may be necessary to address public ills or to provide important public benefits, but those benefits come at a cost nonetheless. 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.

Delegation

The 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 adopt rules governing private conduct if such power has been delegated to them through a valid statutory enactment.

Over the course of the 20th 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 doing 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 helps 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 that 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 non-delegation doctrine ensures that Congress remains responsible for the major policy judgments that drive regulatory decisions. In practice, however, the doctrine does not impose significant constraints on the delegation of rulemaking power. Under existing precedent, Congress need only provide federal agencies with an “intelligible principle” to guide regulatory initiatives. It does not take much to satisfy that standard; any broad statement of policy will do. The Supreme Court has found an “intelligible principle” in statutes authorizing federal agencies to set “generally fair and equitable” prices or to regulate in “the public interest.” As Justice Antonin Scalia summarized, the Court has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.” As a consequence, federal agencies are left 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. A statute’s “intelligible principle” need not even dictate a policy direction. Under existing doctrine, agencies are free to reverse course and overturn prior policies without any meaningful input from Congress.

Old Statutes, New Regulations

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 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 impact on the American economy as they threaten to affect 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, that the Supreme Court interpreted as authorizing the regulation of greenhouse gases. 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 20 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. Members of both parties decry the EPA's policies, arguing they are too lenient or strict, as if the decision whether

Though the statutes were passed by Congress, and Congress is ultimately responsible for the power the agencies wield, Congress is not particularly accountable for how agencies today exercise power granted years ago.

to regulate greenhouse gases were the agency's and the agency's alone. 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. In the meantime, the EPA has taken it upon itself to amend the Clean Air Act's numerical emission thresholds that trigger stationary source permitting requirements so as to ensure a "common sense" approach to emissions control that Congress never conceived, let alone adopted.

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 the 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.

Past Efforts at Legislative Control

In the mid-20th century, Congress attempted to control administrative agency decision-making through the adoption of legislative veto provisions. Between the 1930s and early 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 U.S. attorney general to allow an otherwise deportable alien to remain in the United States. 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 before 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*. The Court held 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.

Since *INS v. Chadha*, 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, all without sacrificing the practical benefits of delegation. While well-intentioned, these efforts have been largely unsuccessful.

The most recent effort to impose greater legislative control on regulatory policy was the Congressional Review Act of 1996. The CRA created an expedited process for consideration of joint resolutions to overturn regulations of which Congress disapproved. 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, to overturn the ergonomics rule adopted by the Occupational Safety and Health Administration

during the Clinton administration, 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. This is because a president is likely to veto any legislative effort to overturn a regulation issued by his own administration. As a consequence, only those rules adopted near the end of a president's term are vulnerable to CRA repeal, and the executive can reduce that vulnerability by ensuring new rules are not issued at the tail end of a presidential term. During the last year of the Bush administration, for example, agencies were put on notice that they needed to finalize new regulations early enough so that they would not be subject to repeal under the CRA.

The REINS Act

The REINS Act seeks to discipline federal regulatory agencies and enhance congressional accountability for federal regulations without replicating the problems of prior reform efforts or sacrificing the benefits of

agency expertise and specialization. The legislation's central provision provides that new major rules cannot take effect unless Congress passes a joint resolution approving the regulation within 90 session or legislative days of the rule's submission to Congress.

"Major rules" are defined as

those regulations that are anticipated by the White House Office of Management and Budget to impose annual economic costs in excess of \$100 million or otherwise have significant economic or anticompetitive effects. Joint resolutions of approval, once passed by both houses of Congress, are then forwarded to the president for his signature (or veto).

A key feature of the REINS Act is that it creates an expedited procedure to ensure prompt consideration of resolutions of approval in each house of Congress. First, it provides that such resolutions are automatically introduced into each house once a major rule is finalized by the agency. Second, legislative committees have a limited time to consider the resolution. Unlike with legislation, the failure of a committee to act does not kill the resolution; rather, after 15 session days, the resolution is automatically discharged whether the committee has acted or not. Third, the REINS Act provides that resolutions of approval are privileged, not subject to amendment, and not subject to dilatory procedural motions. Debate is limited in each house and a resolution may not be filibustered in the Senate. As introduced in the 112th Congress, the REINS Act is drafted so as to ensure that a resolution of approval is voted up or down in the committee of the whole within 70 session days of when an agency finalizes a major rule.

These provisions effectively disable the traditional means that

legislators and special interest groups use to slow or stop legislative proposals. Whereas traditional legislation can be bottled up in committee or held up by a determined handful of legislators, resolutions of approval under the REINS Act cannot be disposed of without a majority vote. This requires an additional step before new major rules can become effective, but it also requires members of Congress to openly declare their support or opposition for a specific rule.

While federal agencies promulgate over 3,000 new regulations each year, only a small percentage of these constitute "major" rules. From 1998 to 2007, federal agencies promulgated between 50 and 80 major rules per year. By comparison, a new president will nominate a few hundred people to positions that require Senate confirmation in just the first year of an administration. Most such nominees go through with minimal delay — and without obstructing or compromising other legislative business. In the case of confirmations, Senate rules and traditions provide many ways for a small minority to gum up the works. A single senator can place a hold on a controversial or undesirable nominee. No such means of obstruction are available under the REINS Act,

The REINS Act amends preexisting regulatory statutes to remove federal agency authority to unilaterally adopt regulatory measures, instead requiring agencies to forward "final" rules as proposals for congressional review.

however, so there is no way for special interests to secretly stall a resolution of approval.

In effect, the REINS Act amends preexisting regulatory statutes to remove federal agency authority to unilaterally adopt regulatory measures, instead requiring agencies to forward "final" rules as proposals for congressional review. Requiring congressional approval before economically significant rules may take effect ensures that Congress takes responsibility for major regulatory policy decisions. Adopting an expedited legislative process, much like that which has been used for fast-track trade authority or base closings, enhances transparency and prevents a congressional review requirement from unduly delaying needed regulatory initiatives.

Criticism | In a recent article in *The New Republic* critical of the REINS Act, University of Richmond law professor Noah Sachs posed the following hypothetical:

Imagine if the board of a Fortune 500 company required the company's vice presidents to obtain board approval before implementing any decision. Now imagine that the board is highly polarized and its members are at each other's throats. A recipe for corporate gridlock, right?

If Professor Sachs' hypothetical were analogous to what the

REINS Act proposes, it would be a devastating critique — but it is not. Imagine instead if the board of a Fortune 500 company required the company’s vice presidents to obtain board approval before implementing the two or three percent of decisions that are most important and potentially costly. This would not surprise, nor produce “gridlock.” Rather, it is what we would expect from a responsible board — and it is all that the REINS Act would do. The approval requirement only applies to “major rules,” which are those rules expected to cost over \$100 million annually and represent less than five percent of the federal regulations promulgated in any given year. Asking Congress to take responsibility for this portion of federal rulemaking is not unreasonable, nor is it a major imposition.

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Overcoming *Chadha*

An obvious question for REINS Act supporters is how can the congressional approval requirement be constitutional if a unicameral legislative veto, such as that considered in *INS v. Chadha*, is not. After all, in either case an agency determination is effectively vetoed if a majority of either house disapproves. The legislative veto in *Chadha* enabled either house to block an agency ruling by its own initiative. Under the REINS Act, both houses must vote in the affirmative for a major rule to take effect. For practical purposes, each requires bicameral consent for the agency decision to stand. For constitutional purposes, however, the formal difference is significant.

As then-Judge Stephen Breyer explained in a 1984 lecture, a congressional authorization requirement could replicate the function of the legislative veto invalidated in *Chadha* without the veto’s constitutional infirmity. 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 initiatives “imposes on Congress a degree of visible responsibility” for new regulatory initiatives. Harvard Law School’s Laurence Tribe likewise concluded at the time that such a requirement would be constitutional, even if he also thought it would be a bad idea.

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 in both the House and Senate and signed into law by the president or, if vetoed by the president, re-passed by two-thirds majorities in each house. It further provides that “Every 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. Just like any other bill, a joint resolution requires the approval of both houses of Congress and is presented to the president.

In some respects the REINS Act is more limited than the unicameral legislative vetoes at issue in *Chadha* or the congressional approval requirement considered by Breyer, 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. 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.

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Restraining Executive Authority?

Some members of Congress, such as Rep. John Conyers (D, Mich.), have expressed the concern that the REINS Act unduly interferes with executive authority. Sally Katzen, former director of the Office of Information and Regulatory Affairs in the Clinton administration, citing *Morrison v. Olson*, has argued that “a statute is suspect if it ‘involves an attempt by Congress to increase its own powers at the expense of the executive branch.’”

It is reasonable to see the REINS Act as an effort to constrain the executive — just look at the bill’s full title and findings. The problem with these arguments is that they ignore the distinction between executive and legislative functions.

The power to “enforce” the laws — that is, the power to take action to see that legal rules are complied with — is distinct from the power to make the rules pursuant to a delegation of authority from Congress. So, for instance, the EPA’s power to impose fines or other sanctions on companies that violate emission limitations is distinct from the EPA’s power to set the emission limits. A requirement that federal regulatory agencies obtain congressional approval before major rules may take effect requires congressional assent for the latter, but has no effect on the former.

The powers to investigate and prosecute are core executive functions. Any effort by Congress to limit such powers and aggrandize its own is problematic. This point was made not only in *Morrison* (in which the Court upheld the statute in question, despite its intrusion on executive power), but in other cases as well. The executive power is distinct from the power to adopt legislative-type rules, however. The latter is not a core executive function. Rather it is a quasi-legislative power that must be delegated by Congress. As the Supreme Court has noted repeatedly, “It is axiomatic that an administrative agency’s power to promulgate legislative regulation is limited to the authority delegated by Congress.”

Federal agencies have no authority to promulgate regulations beyond that which has been given by Congress — and what Congress has given, it may take back. Restraining the exercise of such authority, whether by adopting rules for the exercise of regulatory authority (as under the Administrative Procedure Act or the Congressional Review Act) or limiting the scope of such authority, is perfectly acceptable so long as other constitutional requirements (such as bicameralism and presentment) are satisfied. As the REINS Act satisfies such requirements, there is no problem. The REINS Act does not curtail executive power so much as it places limits on the legislative-like power delegated to

the executive branch by Congress. While the REINS Act would reduce the discretion of executive and independent agencies to adopt far-reaching regulatory measures, it would not interfere with executive oversight of rulemaking and regulatory policy.

A more serious constitutional question about the REINS Act is whether a statute may impose binding legislative process rules on either house of Congress. Article I, Section 5 of the Constitution provides that “Each House may determine the Rules of its Proceedings.” According to some scholars, this means that each house has exclusive, unilateral control over its own rules, and that it would be unconstitutional to preempt such authority with a statute subject to presentment to the executive. If so, this would mean that a subsequent House or Senate could unilaterally repeal the procedural rules the REINS Act creates for expedited consideration of resolutions of approval. Yet such concerns have not stopped Congress from enacting numerous other statutes creating special procedural rules for special types of legislation, including fast-track trade authority and base closing decisions, and Congress appears to have stuck to the terms of such deals. There is a well-established practice of legislative compliance with statutorily enacted rules.

Toward Greater Congressional Accountability

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. Indeed, even if federal regulatory agencies are overzealous, the REINS Act may not curtail federal regulation all that much. The legislation would apply only to new major rules, so existing regulations would remain untouched, and it would constrain regulatory and deregulatory initiatives alike. Perhaps more significantly, it is not clear that members of Congress would be so quick to condemn regulatory proposals once they know they will be required to back up their criticisms with an on-the-record vote.

It is easy to claim the EPA has adopted an overly expensive rule, but may be more difficult to vote against pollution controls if it means a legislator has to take responsibility for a lack of federal action. As New York University law professor David Schoenbrod has argued, administrative delegation has often resulted in less environmental protection than there would have been had Congress been required to take responsibility for federal policy. Based on his experience as a litigator for the NRDC, Schoenbrod believes lead would have been phased out of gasoline much earlier were it not for Congress’s ability to punt. Corporate interests have far more influence on agency rulemakings than open votes on the floor, largely because the former are far more insulated from public view.

Some REINS Act critics argue the reform is unnecessary because federal regulatory agencies are already subject to sufficient oversight. Federal agencies are not out of control as demonstrated by studies that conclude that the benefits of federal regulations outweigh their costs. This may be so, but it is irrel-

evant. That a government analysis concludes that a given rule is net beneficial does not by itself mean that the rule is good policy. Regulations commandeer private resources, forcing them to be allocated to one purpose or another. Sometimes this is necessary or wise, but a simple cost-benefit analysis alone does not demonstrate this fact, nor can such studies show that one regulatory approach is superior to available alternatives. We cannot afford every net-beneficial idea anymore than the federal government or a private firm can afford to make every investment that is expected to yield a positive return. Moreover, cost-benefit analyses are notoriously manipulable and imprecise, as progressives like to remind us, and they cannot account for normative concerns.

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. If environmental regulation is as popular as environmentalist groups claim, then there is really nothing to fear from the REINS Act. Even if the legislation allows conservatives in Congress to vote down some new major rules — a plausible scenario now that Republicans control the House of Representatives — anti-regulatory members of Congress will suffer for opposing the regulatory protections Americans want. The REINS Act forces major regulatory decisions onto the floor of Congress and into the open, which provides greater popular accountability than backroom deal-making or the administrative rulemaking process. Above all else, the REINS Act provides a means of enhancing political accountability for regulatory policy.

Conclusion

Federal regulation reaches nearly all aspects of modern life and is pervasive in the modern economy. Much of this regulation may be necessary or advisable, and nothing in the REINS Act would hinder a sympathetic Congress from approving new federal regulations. In all likelihood, however, the REINS Act’s congressional approval process would prevent the implementation of particularly unpopular or controversial regulatory initiatives. The primary effect of the legislation would be to make Congress more responsible for federal regulatory activity by forcing legislators to voice their opinion on the desirability of significant regulatory changes. R

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