

Testimony of David McIntosh, Member of Congress, Retired

Before the Subcommittee on Courts, Commercial and  
Administrative Law

of the House Judiciary Committee

Representative Howard Coble, Chairman

Representative Steve Cohen, Ranking Member

Hearing on “The REINS Act – Promoting Jobs and Expanding  
Freedom by Reducing Needless Regulations”

The 112<sup>th</sup> Congress, January 24, 2011

*Restoring Democracy in the Regulatory Process*

Chairman Coble and Ranking Member Cohen and Members of  
the Subcommittee, thank you for the opportunity to appear  
before you today. I am appearing in my own capacity and not

representing any other person<sup>1</sup>. Your hearing raises some of the most important issues facing the nation today: Does our current regulatory system undermine economic recovery and hold the private sector back from creating new jobs? And, how can we reform the regulatory process to provide more accountability and encourage better regulations that reduce their costs, thereby unleashing economic growth and the creation of more jobs?

I want to commend the Committee for taking up this topic and also applaud Representative Geoff Davis and his co-sponsors for introducing the Regulations from the Executive In Need of Scrutiny (REINS) Act (H.R. 10). As I will discuss today in my testimony, the REINS Act as it has come to be known provides an excellent opportunity for Congress to restore accountability

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<sup>1</sup> As I say the views expressed in this testimony are my own. I would like to thank my colleague, Stephen E. Sachs, for his excellent constitutional and legal analysis and help in drafting this testimony.

for regulatory decisions. In addition, it corrects significant flaws in the current regulatory system – including Constitutional issues that may arise from the improper delegation of legislative authority under the current structure. The REINS Act is also a logical next step to build upon the Congressional Review Act.

In this testimony I hope to present to the Committee several points that I hope will be useful as it pursues its oversight of the regulatory process and considers this legislation: 1. The current burden of Federal regulations is unprecedented and clearly has impeded efforts to stimulate economic growth and job creation. 2. The Congressional Review Act serves several useful purposes and should be employed by the Congress in considering new regulations promulgated by the Administration. At the same time, there is a pressing need for Congress to create a structure that ensures greater oversight of the regulatory process and

accurately reflects the legislative will of the people. 3. The REINS Act provides the proper mechanism for ensuring that legislative power under Article I remains in Congress, which will have full accountability as a democratically elected body to the citizens of the United States for the broad range of policies implemented by major regulations.

UNPRECEDENTED ECONOMIC BURDEN OF FEDERAL REGULATIONS

In the first two years of the Obama Administration, we have seen an unprecedented level of regulatory activity. In 2009 and 2010, the number of major rulemakings – those projected to impose cost on the American economy of more than \$100 million each – that were announced by various agencies averaged 66 per year. That is a 38% increase from the average

number of major rulemakings in the Bush and Clinton Administrations.<sup>2</sup>

This high pace of regulatory activity imposes a huge cost onto the American economy. Last year Federal regulations were estimated by the Obama Administration to cost U.S. consumers, businesses, and workers \$1.75 trillion annually.<sup>3</sup> For comparison, \$1.75 trillion is nearly twice the amount of all individual income taxes collected last year.<sup>4</sup> It is estimated that

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<sup>2</sup> Susan E. Dudley, *President Obama's Executive Order: Improving Regulations and Regulatory Review*, Regulatory Policy Commentary, The George Washington University Regulatory Studies Center, at 1 (Jan. 18, 2011), [http://www.regulatorystudies.gwu.edu/images/commentary/20110118\\_reg\\_eo.pdf](http://www.regulatorystudies.gwu.edu/images/commentary/20110118_reg_eo.pdf).

<sup>3</sup> Nicole V. Crain & W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, Small Business Admin., Small Business Research Summary No. 371 (Sept. 2010), <http://archive.sba.gov/advo/research/rs371.pdf>.

<sup>4</sup> See Council of Economic Advisers, *Economic Report of the President* tbl. B-81, at 426 (2010), [http://www.gpoaccess.gov/eop/2010/2010\\_erp.pdf](http://www.gpoaccess.gov/eop/2010/2010_erp.pdf); see also James L. Gattuso et al., *Red Tape Rising*, Heritage Foundation Backgrounder No. 2482, at 1 (Oct. 26, 2010), [http://thf\\_media.s3.amazonaws.com/2010/pdf/bg2482.pdf](http://thf_media.s3.amazonaws.com/2010/pdf/bg2482.pdf).

the overall cost of Federal regulation is over \$15,000 per household in the United States.<sup>5</sup> Not only is this a significant drain on the wallets and pocket books of working American families, as I will discuss below, it is a significant restraint on economic growth needed to restore full employment.

Those agencies that reported costs – by all means not all the significant regulations – reported a total of \$28 billion in new additional costs last year.<sup>6</sup> This is the highest level since such statistics have been compiled. According to the Heritage Foundation analysis, fifteen of these rulemaking procedures involved financial regulations. Another five stem from the healthcare bill adopted in early 2010. Ten others came from the

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<sup>5</sup> Dudley, *supra* note 2, at 2.

<sup>6</sup> Gattuso et al., *supra* note 4, at 2.

Environmental Protection Agency (EPA). Among the most costly are<sup>7</sup>:

- Fuel economy and emission standards<sup>8</sup> for passenger cars, light-duty trucks, and medium-duty passenger vehicles imposed jointly by the EPA and NHTSA.<sup>9</sup> Annual cost: \$10.8 billion (for model years 2012 to 2016). For automakers to recover these increased outlays, NHTSA estimates the standards will lead to increases in average new vehicle prices ranging from \$457 per vehicle in FY 2012 to \$985 per vehicle in FY 2016.

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<sup>7</sup> See generally Gattuso et al., *supra* note 4, at 3 (describing cost data).

<sup>8</sup> This rule represents the first time that "greenhouse gas" emissions performance was applied in a regulatory context for a nationwide program.

<sup>9</sup> See Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010).

- Mandated quotas for renewable fuels.<sup>10</sup> Annual cost: \$7.8 billion (for 15 years). Utilizing farmland to grow corn and other crops used in renewable fuels will displace food crops, leading food costs to increase by \$10 per person per year – or \$40 for a family of four, according to the EPA.
- Efficiency standards for residential water heaters, heating equipment, and pool heaters.<sup>11</sup> Annual cost: \$1.3 billion. The appliance upgrades necessary to

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<sup>10</sup> Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 75 Fed. Reg. 14,670 (March 26, 2010). The EPA projects several indirect costs in its Regulatory Impact Analysis, including food increases of \$10 per person per year, or \$3.6 billion, by 2022. This was not included in the total by Gattuso et al. See Gattuso et al., *supra* note 4, at 3 n.8; see also EPA, Renewable Fuel Standard Program (RFS2) Regulatory Impact Analysis 5 (Feb. 2010), <http://www.epa.gov/otaq/renewablefuels/420r10006.pdf>.

<sup>11</sup> Energy Conservation Program: Energy Conservation Standards for Residential Water Heaters, Direct Heating Equipment, and Pool Heaters, 75 Fed. Reg. 20,112 (Apr. 16, 2010).

comply with the new standards will raise the price of a typical gas storage water heater by \$120.

The trend of increasing regulatory burden will continue to worsen in 2011. The Dodd-Frank bill requires eleven different Federal agencies to promulgate 243 new formal rules.<sup>12</sup> The Congressional Research Service reports that the newly-enacted healthcare legislation has at least 43 provisions that create rule-making authority. These include mandatory rulemaking,

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<sup>12</sup> Gattuso et al., *supra* note 4, at 5; Davis Polk & Wardwell, LLP, Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Enacted into Law on July 21, 2010, (July 21, 2010), [http://www.davispolk.com/files/Publication/7084f9fe-6580-413b-b870-b7c025ed2ecf/Presentation/PublicationAttachment/1d4495c7-0be0-4e9a-ba77-f786fb90464a/070910\\_FinancialReform\\_Summary.pdf](http://www.davispolk.com/files/Publication/7084f9fe-6580-413b-b870-b7c025ed2ecf/Presentation/PublicationAttachment/1d4495c7-0be0-4e9a-ba77-f786fb90464a/070910_FinancialReform_Summary.pdf) (October 21, 2010).

disclosure rulemaking, procedure rulemaking, negotiating rulemaking, and other regulatory provisions.<sup>13</sup>

On December 21, 2010, the Federal Communications Commission issued its new neutrality regulation championed by Chairman Genachowski. As Commissioner Robert McDowell noted in his dissent, this regulation will cause irreparable harm to one of the most significant drivers of our modern economy. In the name of maintaining competition the rule will do the exact opposite and lead to: “Less investment. Less innovation.

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<sup>13</sup> Cong. Res. Serv., Deadlines for the Secretary of Health and Human Services in the Patient Protection and Affordable Care Act from Enactment to January 1, 2011 (October 1, 2010), at [http://coburn.senate.gov/public/index.cfm?a=Files.Serve&File\\_id=54103bf6-ae3a-47be-916e-72548ba34b5b](http://coburn.senate.gov/public/index.cfm?a=Files.Serve&File_id=54103bf6-ae3a-47be-916e-72548ba34b5b).

Increased business costs. Increased prices for consumers.

Disadvantages to smaller ISPs. Jobs lost.”<sup>14</sup>

Economists have long understood the harm to economic growth and productivity that results from costly and unnecessary regulations.<sup>15</sup>

In particular, as Congress considers various new proposals to encourage job creation, it must take a critical look at regulations

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<sup>14</sup> In the Matter of Preserving the Open Internet Broadband Industry Practices, FCC GN Docket No. 09-191, WC Docket No. 07-52, Statement of Commissioner Robert McDowell, Dec. 21, 2010.

<sup>15</sup> See, e.g., Reed Garfield, *Smothering Economic Growth One Regulation at a Time*, Joint Economic Committee Report (June 1996), <http://www.house.gov/jec/cost-gov/regs/cost/regulate/regulate.htm>; Benjamin Bridgman et al., *Does Regulation Reduce Productivity? Evidence From Regulation of the U.S. Beet-Sugar Manufacturing Industry During the Sugar Acts, 1934-74*, Fed. Reserve Bank of Minneapolis, Res. Dep't Staff Report 38 (Apr. 2007), <http://www.minneapolisfed.org/research/SR/SR389.pdf>; Wayne B. Gray, *The Cost of Regulation: OSHA, EPA and the Productivity Slowdown*, 77 Am. Econ. Rev. 998 (1987).

that make it more expensive for small and large businesses to create new jobs.

Federal regulations have a significant impact on businesses' decisions to hire more employees. For large firms the regulatory cost is \$7,755 per employee. For medium-sized firms it is \$7,454 per employee. Small firms are particularly hard hit. It costs them on average \$10,585 per employee.<sup>16</sup>

#### CURRENT CONGRESSIONAL OVERSIGHT OF REGULATIONS

When I began my service in Congress in 1995, Congress had essentially three means of exerting oversight of policies developed by regulatory agency. The first was through the committees of legislative jurisdiction, which typically maintain continuous informal communication with regulatory agencies

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<sup>16</sup> Crain & Crain, *supra* note 3, at 1.

and have the authority to work on substantive legislation defining the scope of regulatory powers of agencies whose programs fall under the committees' jurisdiction. In other words, if Congress determined that a particular regulation exceeds Congressional intent, the committee of jurisdiction could and often would begin a legislative process to change the enabling legislation that authorizes the regulatory agency to promulgate legislations.

A second, more expeditious way Congress exerted its authority was to hold oversight hearings and question the regulatory agency officials and invited witnesses about the wisdom of a given regulation. This oversight often had a significant influence on the agency's approach to developing its regulations.

The third means of influencing regulations is the appropriations rider that prohibits or limits agencies from spending funds in the

development or enforcement of a given regulation. This relatively blunt policy instrument is a longstanding extension of Congress's power of the purse, by which all funds that are used to operate the Federal Government must be appropriated by the people's elected representatives.

In 1995, Congress passed and President Clinton signed the Congressional Review Act ("CRA"), which provided another mechanism for Congressional action on major<sup>17</sup> regulations. The CRA provides that a Federal rule cannot "take effect" until the

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<sup>17</sup> A major rule is defined as "any 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

(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."

agency promulgating the rule submits a report to each House of Congress and to the Government Accountability Office (“GAO”) that includes (1) a copy of the rule, (2) a description of the rule, including a determination whether it is a “major rule,” and (3) the proposed effective date. Rules that are not major rules take effect as otherwise provided by law after submission of the agency’s report to Congress.

Major rules cannot take effect until 60 days after Congress receives the report from the agency or the rule is published in the Federal Register, whichever is later. The CRA provides expedited procedures for Congress to disapprove of an agency rule through the passage of a joint resolution. Some of the most significant provisions of the CRA create discharge procedures to bring the resolution of disapproval expeditiously to the House and Senate floors respectively. In the Senate, all points of order

against the joint resolution, as well as against consideration of the resolution, are waived. The motion to proceed to the resolution is not subject to amendment or to a motion to postpone or proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to is not in order. If a motion to proceed to the consideration of the joint resolution is agreed to, the joint resolution remains the unfinished business of the Senate until final disposition of the resolution. Senate debate on the joint resolution, and on any debatable motions and appeals connected to the resolution, is limited to 10 hours.

Congress should make full use of the Congressional Review Act as it considers improvements in the regulatory process such as the REINS Act. The procedures will allow Members to ensure

that there is healthy Congressional debate of regulations and the policies that are advanced by them.

Unfortunately, as time has gone on, some problems have been revealed in the implementation of the Congressional Review Act that the REINS Act would do a great deal to fix.

*First*, the default position of the Congressional Review Act is pro-regulatory. A regulation is presumptively authorized, and it will only be prevented from taking effect if Congress enacts a specific joint resolution to disapprove it. As everyone here knows, the inertia of the legislative process means that there is a big difference between requiring Congress to act and allowing Congress to stay silent. If Congress fails to address the regulation or is preoccupied with other matters, the rule – even a major rule – will still take effect, regardless of whether it could have survived on an up-or-down vote. Moreover, because both

Houses must vote on a joint resolution of disapproval, if one House supports a rule and the other opposes it, a joint resolution of disapproval would fail, even if a joint resolution of *approval* could not be passed either. Under current law, in a case of disagreement between the Houses, the tie goes to the bureaucrats. The REINS Act would reverse that default by requiring an agency to get Congress's active permission to issue a major rule.

*Second*, the Congressional Review Act gives the President both too much and too little authority over regulation. If a major rule is proposed by an agency under the President's direct control, he presumably already favors the rule and could be expected to veto any joint resolution of disapproval. Stopping the rule would then require a *two-thirds* vote of both Houses. It's no surprise that the one time Congress has passed a resolution of disapproval, the

60-day review period spanned administrations, such that a major rule proposed under President Clinton was disapproved in a joint resolution signed by President George W. Bush. At the same time, however, if a major rule is proposed by one of the so-called independent agencies (as discussed below), the President may object strongly to the regulation, but he will have no opportunity to intervene unless Congress first presents him with a joint resolution of disapproval for his signature.

*Third*, and most importantly, the courts have deprived the CRA of any meaningful enforcement provisions. The CRA requires that each new rule be submitted to Congress “[b]efore [the] rule can take effect.”<sup>18</sup> But government agencies have repeatedly failed to submit their rules as the Act requires, and have enforced those regulations against Americans anyway. According to the

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<sup>18</sup> 5 U.S.C. § 801(a)(1)(A).

Congressional Research Service, from 1998 to 2008, Federal agencies failed to submit more than 1,000 substantive rules as required by the Act.<sup>19</sup>

The purpose of the Congressional Review Act was to give elected officials a say in whether Americans would be bound by new regulations. But when agencies ignore the CRA's procedures, there are no consequences. Congress is often too busy to notice the oversight, and when regulated parties challenge the regulations, the courts have refused to enforce the CRA's requirements. Instead, the courts have interpreted the judicial review provision of 5 U.S.C. § 805 to "specifically preclude[] judicial review of an agency's compliance with its

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<sup>19</sup> Curtis W. Copeland, Cong. Res. Serv., *Congressional Review Act: Rules Not Submitted to GAO and Congress* 10 (Dec. 29, 2009), [http://assets.opencrs.com/rpts/R40997\\_20091229.pdf](http://assets.opencrs.com/rpts/R40997_20091229.pdf); see also Sean D. Croston, *Congress and the Courts Close Their Eyes*, 62 *Admin. L. Rev.* 907 (2010).

terms.”<sup>20</sup> Despite the law’s clear requirements, Americans are forced to comply with regulations that have never been reviewed by Congress.

The REINS Act would give the existing approval process some teeth. Section 805(b) of the bill<sup>21</sup> adds a provision that “a court may determine whether a Federal agency has completed the necessary requirements under this chapter for a rule to take effect.” As a result, if an agency tries to enforce a major rule without Congressional authorization, or shirks its duty to submit a non-major rule to Congress, the rule can be challenged in court and held invalid. This enforcement provision is a vital part of

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<sup>20</sup> *Via Christi Regional Med. Ctr., Inc. v. Leavitt*, 509 F.3d 1259, 1271 n.11 (10th Cir. 2007); see also *Montanans For Multiple Use v. Barbouletos*, 568 F.3d 225, 229 (D.C. Cir. 2009).

<sup>21</sup> All section references are to the sections of title 5, United States Code, that would be amended by the REINS Act.

giving effect to existing law as well as bringing the regulatory apparatus under democratic control.

#### CONSTITUTIONALITY OF THE REINS ACT

The REINS Act would be a fully constitutional exercise of Congress's power to enact laws necessary and proper to the exercise of powers vested in the Federal Government. In addition, the bill would also help protect and enforce other provisions of the Constitution that have been eroded by the increasing power of administrative agencies.

##### A. The REINS Act is consistent with the Constitution.

From a constitutional perspective, the REINS Act does three things. The bill (1) limits the statutory authority of administrative agencies to implement major rules; (2) provides a mechanism for Congress to authorize major rules on a rule-by-

rule basis through joint resolutions of approval; and (3) creates a fast-track process enabling each House of Congress to vote on those confirmatory resolutions with a minimum of procedural delay. Each of these steps is itself consistent with the Constitution, and so is the process as a whole. Indeed, nearly twenty years ago Justice Stephen Breyer (then a judge on the U.S. Court of Appeals for the First Circuit) explained that a proposal like the REINS Act would be consistent with the Constitution, in a way that other attempts at restraining agency discretion were not.<sup>22</sup>

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<sup>22</sup> See Stephen Breyer, *The Thomas F. Ryan Lecture: The Legislative Veto After Chadha*, 72 Geo. L.J. 785, 789 (1984).

1. Congress has power to restrict agency authority to implement major rules.

The first aspect of the REINS Act is a limitation on the authority of administrative agencies to implement major rules. After the bill's passage, an agency with general power to regulate on a particular subject could not, of its own authority, implement any rule with a major effect on the U.S. economy. Instead, it would have to wait for Congress to grant permission on a rule-by-rule basis.

That limitation on agency power is undoubtedly constitutional. The Constitution grants Congress power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its enumerated legislative powers, as well as "all other Powers vested by this Constitution in the Government of the United

States, or in any Department or Officer thereof.”<sup>23</sup> Through the exercise of this power, Congress has created “a vast and varied federal bureaucracy.”<sup>24</sup>

But because this discretion is vested in Congress, an agency “literally has no power to act \* \* \* unless and until Congress confers power upon it.”<sup>25</sup> An administrative agency “is entirely a creature of Congress” and can do only “what Congress has said it can do.”<sup>26</sup> Thus, Congress has not only limited the substantive scope of agencies’ authority to regulate on particular subjects, but has also required agencies to act only by the use of particular procedures (such as notice-and-comment rulemaking), or subject to particular decision-making constraints (such as by prohibiting

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<sup>23</sup> Art. I, § 8, cl. 18.

<sup>24</sup> *Free Enterprise Fund v. Public Company Accounting Oversight Board (PCAOB)*, 130 S. Ct. 3138, 3155 (2010).

<sup>25</sup> *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986).

<sup>26</sup> *CAB v. Delta Air Lines, Inc.*, 367 U.S. 316, 322 (1961).

agency action that is “arbitrary, capricious, [or] an abuse of discretion”).<sup>27</sup> Similarly, Congress can require that an agency make decisions on the basis of particular types of reasons, such as by either forbidding or requiring the agency to take considerations of economic cost into account when formulating regulations.<sup>28</sup>

Here, Congress is imposing a different kind of limitation, one that addresses the *scale* of agency action – forbidding agencies, absent specific permission, to issue rules that have a major effect on the U.S. economy. That restriction is no different, constitutionally, from others that Congress has already enacted. In fact, the constraint is already present in current law in the form of the CRA, which prohibits agencies from implementing

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<sup>27</sup> See 5 U.S.C. §§ 553, 706(2)(A).

<sup>28</sup> See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 465-67 (2001) (construing section 109(b)(1) of the Clean Air Act to forbid such considerations, while other sections of the same Act require them).

major rules without submitting them to Congress and postponing their implementation for a 60-day period of review. There is no constitutional distinction between requiring a 60-day waiting period and prohibiting the regulation from going into effect altogether. Rather, “[i]t is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”<sup>29</sup>

Because the REINS Act addresses only one type of limitation on an agency’s authority, it would preserve the protections of existing statutory restraints on agencies. When Congress authorizes a major rule through the REINS Act’s procedures, it is authorizing the agency to implement a rule of a certain scale – not authorizing the rule in *all* of its respects, much less enacting the rule itself as a law. Congress has established many

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<sup>29</sup> *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

independent conditions that a rule must meet in order to have legal effect, and the REINS Act only addresses one of them. A rule that exceeds the scope of an agency's substantive authority, that was promulgated through improper procedures, or that violates an existing restraint on the agency's powers (such as a restriction on arbitrary or capricious action) is invalid.

Such a rule would not be made valid by the passage of a joint resolution of approval under the REINS Act. Under section 802(g) of the bill, the confirmatory resolution "does not serve as a grant \* \* \* of statutory authority" and does not "extinguish" any "substantive or procedural" claim based on an "alleged defect in a rule." This provision avoids any risk that agencies will abuse the fast-track procedure to bypass the normal legislative process, proposing rules that go beyond their existing

authority and that would otherwise require new laws to become effective.

That said, even if Congress's approval does not immunize a rule from challenge on these grounds, nothing prevents Congress from considering such grounds as a reason *not* to approve a rule. If a major rule appears to be arbitrary and capricious, or is contrary to law, or was imposed through improper procedures, that is a perfectly legitimate basis for Congress to decide not to authorize it. The REINS Act therefore serves as an additional check, preventing agencies from imposing unlawful regulations on the American people.

2. Congress has power to enact legislation authorizing individual major rules.

The second aspect of the REINS Act is the passage of joint resolutions, on a rule-by-rule basis, to authorize the adoption of major rules. Each of these resolutions would be supported by the same enumerated power underlying the administrative rule itself. Moreover, the process of passage and individual review also satisfies the Constitution's requirements.

There is nothing unusual, constitutionally speaking, about the Executive's suggesting that Congress authorize the implementation of an individual rule. Under Article II, Section 3, the President is obliged "from time to time" to provide information to Congress and to "recommend to their Consideration such Measures as he shall judge necessary and expedient." Under the REINS Act, the President – through his

subordinates in an administrative agency – would recommend that Congress grant authority to implement a particular major rule. Approving that individual regulation through a confirmatory resolution would be no more problematic than *disapproving* the same regulation through a resolution passed under the existing text of the CRA.

More importantly, the REINS Act provides for the enactment of that joint resolution in the constitutionally required way: passage by both Houses of Congress and presentment to the President. A joint resolution that confers authority on an agency is an exercise of legislative power. By empowering an agency to implement a rule that would otherwise be unauthorized, the resolution is “essentially legislative in purpose and effect.”<sup>30</sup> Because the Constitution vests “[a]ll legislative Powers herein

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<sup>30</sup> *INS v. Chadha*, 462 U.S. 919, 952 (1983).

granted” in Congress, “consist[ing] of [the] Senate and House of Representatives,” it is necessary that both Houses vote to enact the confirmatory resolution.<sup>31</sup> The REINS Act procedure also complies with the presentment requirements of Article I, Section 7, namely that “[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States” for his signature or veto – and that “[e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary \* \* \* be presented to the President” in the same manner as a bill.<sup>32</sup>

By requiring the proper enactment of legislation in the manner prescribed in the Constitution, the REINS Act stands in stark contrast to some previous attempts by Congress to restrain the

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<sup>31</sup> Art. I, §1.

<sup>32</sup> Art. I, § 7, cl. 2-3.

discretion of administrative agencies. After the New Deal, Congress frequently attempted to impose a “legislative veto” on agency decision-making, whereby a single House of Congress (or sometimes both Houses together) could vote to bar an agency from taking action that the agency was otherwise authorized to take. These legislative vetoes were recognized as unconstitutional in the *Chadha* decision in 1983, which concerned the House of Representatives’ veto of the Attorney General’s decision to allow a deportable immigrant to remain in the United States.<sup>33</sup> As the Supreme Court pointed out, Congress’s previous “choice to delegate authority to an agency” (here the Attorney General) had been given the force of law by enactment “in accordance with the procedures set out in Art. I.”<sup>34</sup> As a result, “Congress must abide by its delegation of authority

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<sup>33</sup> 462 U.S. 919.

<sup>34</sup> *Id.* at 954.

until that delegation is legislatively altered or revoked.”<sup>35</sup>

Because the Constitution requires that “no law [may] take effect without the concurrence \* \* \* of both Houses,” and that “all legislation [must] be presented to the President before becoming law,” a vote of a single House, or of both Houses without presentment to the President, was insufficient to override the previous grant of legal authority.<sup>36</sup> As the Court later put it in *Bowsher v. Synar*, “once Congress makes its choice in enacting legislation,” it can “thereafter control the execution of its enactment only \* \* \* by passing new legislation.”<sup>37</sup>

The same reasons why the legislative veto was struck down in *Chadha* explain why the REINS Act procedures pass constitutional muster. Unlike the legislative veto, the REINS

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<sup>35</sup> *Id.* at 955.

<sup>36</sup> *Id.* at 946, 948.

<sup>37</sup> 478 U.S. 714, 733-34 (1986).

Act requires both bicameral agreement of the Houses and formal presentment to the President. A joint resolution under the REINS Act is not merely an expression of the opinion of a single House, but a valid exercise of the legislative power vested in Congress and exercised through the mechanism of Article I, Section 7. As such, the new legislation can override the previous limitation on agency authority by granting permission to implement a particular major rule. The REINS Act therefore satisfies the requirement that Congress “pass[] new legislation” in order to “control the execution” of old legislation.<sup>38</sup>

Indeed, in a lecture given shortly after the opinion issued in *Chadha*, then-Judge Stephen Breyer outlined a version of the REINS Act as a constitutional replacement for the legislative veto. As Breyer explained, by enacting limitations on an

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<sup>38</sup> *Bowsher*, 478 U.S. at 733-34.

“agency’s exercise of \* \* \* authority,” Congress could make new rules “ineffective unless Congress enacts a confirmatory law within” a set period of time.<sup>39</sup> Consistently with the Constitution, “Congress could” then “condition[] the legal effect of exercises of authority on subsequent enactment of a confirmatory statute.”<sup>40</sup> (Breyer even noted the possibility of a special fast-track procedure to avoid delay.<sup>41</sup>) Because the REINS Act uses, rather than evades, the required procedures for enacting legislation, it would avoid the defects that imperiled the legislative veto.

Functionally, of course, there are certain similarities between the REINS Act and the unconstitutional legislative veto. If a major rule is proposed and a single House of Congress votes *not* to

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<sup>39</sup> Breyer, *supra* note 22, at 789.

<sup>40</sup> *Id.* at 793.

<sup>41</sup> *Id.*

authorize it, the rule is defeated. The same would have been true under the one-house veto scheme of *Chadha*. However, these superficial similarities do not have any constitutional consequence. The same thing could be said of *any* bill proposed for Congress's consideration: the requirement of bicameralism means that both the House and the Senate must agree to make new law, so a single House has complete power to prevent a bill from becoming law. *Chadha* itself cautioned against "analogiz[ing] the effect of the [legislative veto] to the failure of one house to vote affirmatively on a private bill"; the latter complies with the Constitution's requirements, while the former does not.<sup>42</sup>

In fact, the REINS Act would not be the first time that Congress has required specific legislation of this form. The

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<sup>42</sup> 462 U.S. at 958 n.23 (internal quotation marks omitted).

Reorganization Act<sup>43</sup> provides that a reorganization plan proposed by the President will take effect only if Congress approves a confirmatory joint resolution through a fast-track procedure within 90 days.<sup>44</sup> This is precisely the same mechanism used by the REINS Act: executive proposal and legislative enactment. Congress has previously used similar mechanisms for fast-track trade authority<sup>45</sup> and adoption of Presidential recommendations on Congressional pay.<sup>46</sup> Because these procedures rely on legislation, rather than extralegislative acts, they are entirely consistent with the Constitution.

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<sup>43</sup> 5 U.S.C. § 901 *et seq.*

<sup>44</sup> *See* §§ 906(a), 909-912.

<sup>45</sup> *See, e.g.*, 19 U.S.C. § 2191.

<sup>46</sup> *See, e.g.*, 2 U.S.C. § 359.

3. The Houses of Congress have power to create fast-track procedures.

The final aspect of the bill is the fast-track procedure it creates for enacting a joint resolution to approve a major rule. This aspect, too, falls comfortably within the powers of the two Houses of Congress. Article I, Section 5, Clause 2 states that “[e]ach House may determine the Rules of its Proceedings.” As is described in section 802(h)(1) of the bill, in passing the REINS Act each House would be using its own internal rule-making powers to adopt the fast-track procedure. That adoption is made conditional on the Act’s ultimate passage, through approval by the other House and presentment to the President. Under the Constitution, each House has the right to determine its own procedures, as well as to condition its adoption of those procedures on the passage of confirmatory legislation.

The two Houses of Congress have adopted internal rules jointly in the form of statutes since the earliest days of the Republic. In fact, the very first statute enacted by the First Congress on June 1, 1789, addressed the procedures for administering oaths in the House and Senate, a matter that was within the power of each House to determine independently.<sup>47</sup> As the Supreme Court has recognized, the decisions of the First Congress provide “contemporaneous and weighty evidence of the Constitution's meaning since many of the Members of the First Congress had taken part in framing that instrument.”<sup>48</sup> And as noted above, Congress has exercised the power to create a fast-track procedure many times since then, including in the existing text of the CRA.

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<sup>47</sup> Act of June 1, 1789, ch. 1, § 2, 1 Stat. 23, 23 (codified as amended at 2 U.S.C. §§ 21-25).

<sup>48</sup> *Bowsher*, 478 U.S. at 723-24.

Moreover, the REINS Act does not restrict either House's constitutional power to determine "the Rules of its Proceedings" in the future. Instead, section 802(h)(2) of the bill "recogni[zes] \* \* \* the constitutional right of either House to change the rules" of its internal procedures "at any time." Even after the bill's passage, each House retains the authority to amend its rules through the normal procedure. But the REINS Act's procedures would remain fully valid until amended, and would serve both as a common reference point and as a useful means of coordination between the Houses.

B. The REINS Act would help to enforce the Constitution's separation of powers.

In requiring specific Congressional approval for major agency rules, the REINS Act is not merely itself consistent with the requirements of the Constitution. Rather, the bill would also

help ensure that the rules themselves are consistent with the Constitution's separation of powers. In particular, the bill would make elected officials accountable for the work of unelected bureaucrats – enforcing Article I's exclusive vesting of legislative power in Congress, and Article II's exclusive vesting of executive power in the President.

1. The REINS Act would enforce the vesting of legislative power in Congress.

By requiring major agency rules to receive Congressional approval, the REINS Act would significantly assist in enforcing the non-delegation doctrine. That doctrine stands for the simple principle that under our Constitution, "the lawmaking function belongs to Congress, and may not be conveyed to another branch

or entity.”<sup>49</sup> Article I, Section 1 of the Constitution states that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” The text “permits no delegation of those powers” to an administrative agency.<sup>50</sup>

Of course Congress may, in the exercise of its powers under the Necessary and Proper Clause, lay down a “general provision” by enactment and then require the Executive Branch to “fill up the details.”<sup>51</sup> But as Chief Justice John Marshall wrote, Congress may not simply hand over to the bureaucracy crucial policy decisions on “those important subjects, which must be entirely regulated by the legislature itself.”<sup>52</sup>

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<sup>49</sup> *Loving v. United States*, 517 U.S. 748, 758 (1996) (citation omitted).

<sup>50</sup> *American Trucking*, 531 U.S. at 472.

<sup>51</sup> *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 23 (1825).

<sup>52</sup> *Id.*

Since Chief Justice Marshall wrote, courts have struggled to draw a line between the questions that Congress may decide and those that may be delegated to administrative agencies. Under current law, a delegation of regulatory authority will be upheld so long as it “lay[s] down \* \* \* an *intelligible principle* to which the person or body authorized \* \* \* is directed to conform.”<sup>53</sup>

But the “intelligible principle” standard has done little to constrain the discretion of administrative agencies. Instead, the courts have essentially abandoned the field of enforcing the nondelegation doctrine – unanimously upholding, for example, a statute authorizing any air quality standards “requisite to protect the public health.”<sup>54</sup> No less an authority than Cass Sunstein – now head of the Office of Information and Regulatory Affairs –

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<sup>53</sup> *American Trucking*, 531 U.S. at 472 (emphasis added; internal quotation marks omitted).

<sup>54</sup> *Am. Trucking*, 531 U.S. at 473.

has questioned whether the Occupational Safety and Health Act is constitutional, because it delegates the power to implement any standard that is “reasonably necessary or appropriate to provide safe or healthful employment and places of employment.”<sup>55</sup> This acceptance of vague legislation and unrestricted agency authority has led some to question whether *any* statute – even one requiring agencies to promote “goodness and niceness” and authorizing them to regulate accordingly – could be invalidated today on non-delegation grounds.<sup>56</sup>

The REINS Act would not solve the non-delegation problem entirely. As section 802(g) of the bill makes clear, the approval vote only satisfies one of many conditions that a regulation must meet in order to have legal effect. If the rule is a product of an

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<sup>55</sup> 29 U.S.C. § 652(8). See Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 Va. L. Rev. 1407 (2008).

<sup>56</sup> Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 345, 355 (2002).

unconstitutional delegation of power, the approval vote will not cure that flaw.

What the REINS Act will do, however, is prevent some of the greatest dangers of excessive delegation, by ensuring that Congress remains accountable for the rules that are promulgated in its name. In public life, as Alexander Hamilton knew, “[i]t often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall. It is shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author.”<sup>57</sup> When legislators delegate broad authority to a faceless bureaucracy, they can take credit for

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<sup>57</sup> The Federalist No. 70.

someone else's success and shift responsibility for someone else's failure. That is a recipe for over-regulation.

By contrast, under the REINS Act, every time a new rule takes effect the public will know which of their representatives deserve the praise or blame – and how to respond on Election Day. Even if Congress has improperly delegated its decision-making power to unelected officials, Members of Congress will still have to take individual responsibility for the decisions those officials make. That increased accountability does a great deal to restore the Constitution's vision of legislative power being vested in a Congress responsible to the people. "The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty."<sup>58</sup>

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<sup>58</sup> *Bowsher*, 478 U.S. at 730.

The REINS Act properly applies its highest level of scrutiny to major rules with a major impact on Americans' lives. That kind of rule should not just be approved by bureaucrats with civil service protections, but by representatives who are regularly held accountable at the voting booth. In this way, it follows Chief Justice Marshall's distinction between "those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."<sup>59</sup> Under the REINS Act, the "important subjects" will never be regulated without the specific authorization of the people's elected representatives.

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<sup>59</sup> *Wayman*, 23 U.S. at 23.

2. The REINS Act would enforce the vesting of executive power in the President.

The REINS Act would also help to enforce the Executive Vesting Clause of the Constitution, which vests the Federal Government's executive powers in the President of the United States. Section 804(1) of the bill applies its requirements to rules from any administrative "agency," as that term is used in 5 U.S.C. § 551(1). That includes agencies staffed by executive officers whose tenure is said to be protected from Presidential removal. For example, according to statute, the President can remove members of the Federal Trade Commission only "for inefficiency, neglect of duty, or malfeasance in office"<sup>60</sup> – and not simply because he disagrees with their policies or regulatory priorities. Without the ability to fire these officers, the President

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<sup>60</sup> 15 U.S.C. § 41.

cannot control what their agencies do – even though they wield executive power, and even though the Constitution provides that “[t]he executive Power shall be vested in a President of the United States of America.”<sup>61</sup>

Just as members of Congress may avoid blame for the actions of bureaucracies they empower, the President is currently able to escape responsibility for the actions of independent officers who ostensibly exercise power on his behalf. When tenured officials at the FTC, the Consumer Product Safety Commission, the Federal Energy Regulatory Commission, or the National Labor Relations Board issue wide-ranging new regulations affecting millions of Americans, there is little the President can do to stop them. And because these officials do not stand for election, the voting public can do even less. As the Supreme Court recently

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<sup>61</sup> Art. II, § 1, cl. 1.

explained, “[t]he growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive’s control, and thus from that of the people.”<sup>62</sup>

The REINS Act would not interfere with the statutory tenure protections of independent agency officials. But it would do a great deal to restore the President’s constitutional responsibility for the actions of the Executive Branch. Under the REINS Act, major rules enacted by independent agencies – no less than major rules enacted by agencies subject to the President’s control – would have to be authorized by legislation, passed by both Houses of Congress, and presented to the President for his review. If the President disapproves of a rule, he can veto its authorizing resolution; if he endorses it, he can allow it to take

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<sup>62</sup> *PCAOB*, 130 S. Ct. at 3156.

effect. Either way, the President is forced to take ownership of the independent agency's action and will be held accountable by the people for his choice.

Under our Constitution, the President "cannot delegate ultimate responsibility or the active obligation to supervise that goes with it," because Article II "makes a single President responsible for the actions of the Executive Branch."<sup>63</sup> The REINS Act enhances that responsibility by forcing the President to decide whether every major regulation, even those proposed by officers with statutory tenure protections, will go into effect. This mandate preserves the Constitution's "require[ment] that a

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<sup>63</sup> *Clinton v. Jones*, 520 U. S. 681, 712-13 (1997) (Breyer, J., concurring in judgment).

President chosen by the entire Nation oversee the execution of the laws.<sup>64</sup>

In conclusion, I urge the Committee to continue its examination of the regulatory procedure – especially given the enormous burden that Federal regulations place on the private economy. In addition, I recommend the adoption of the REINS Act as an excellent means of ensuring greater accountability for regulatory policy and to strengthen the constitutionality of the regulatory process. In the meantime, I would urge Members of Congress to make full use of Congress's oversight powers, the power of the purse, and the Congressional Review Act to put the brakes on new, costly regulations and in so doing increase economic growth and job creation. Thank you very much.

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<sup>64</sup> *PCAOB*, 130 S. Ct. at 3155-56.