REINS ACT—PROMOTING JOBS AND EXPANDING FREEDOM BY REDUCING NEEDLESS REGULATIONS

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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REINS ACT—PROMOTING JOBS AND EXPANDING FREEDOM BY REDUCING NEEDLESS REGULATIONS

MONDAY, JANUARY 24, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS,
COMMERCIAL AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 4 p.m., in room 2141, Rayburn House Office Building, the Honorable Howard Coble (Chairman of the Subcommittee) presiding.

Present: Representatives Coble, Smith, Gowdy, Gallegly, Franks, Reed, Ross, Cohen, Conyers, Johnson, Watt, and Quigley.

Staff present: (Majority) Daniel Flores, Subcommittee Chief Counsel; Olivia Lee, Clerk; and Carol Chodroff, Minority Counsel.

Mr. COBLE. The Subcommittee will come to order. I was going to welcome all the new Members to the Subcommittee, but Mr. Cohen and I appear to be it. So good to have you on board, Mr. Cohen, and Mr. Gowdy on my right.

Ground rules, folks. I like to start on time, and I like to end on time. I hope that is agreeable with everybody. You are familiar perhaps with the 5-minute rule. And the 5-minute rule, folks, is not done in any way to frustrate debate but rather to facilitate the process. Our jurisdictional bounds are broad, indeed, and we will hustle along and do the best we can. So when you see that red light appear, that will be your signal that your 5 minutes have elapsed. And Mr. Cohen and I will not call in the U.S. Marshal on you then, but you need to wrap up. The 5-minute rule also applies to Members of the Subcommittee. We will try to adhere to that as well.

I want to give my opening statement, and I will recognize Mr. Cohen for his opening statement. Other opening statements will be made part of the record at the conclusion. Is that agreeable with everybody?

Today marks the first hearing of the newly constituted Subcommittee on Courts, Commercial and Administrative Law. And I think we are going to have Mr. Smith with us, but he is not hereyet. Chairman Smith has provided our Subcommittee with jurisdiction over a number of important matters that I hope our Subcommittee will address during the 112th Congress.

In my view, one of the most important matters is to fine tune our regulatory process; hence, the introductory oversight hearing on the REINS Act.

Many in the private sector have alleged that the Obama administration has cast a cloud of regulatory uncertainty over some parts of the economy. While it is no secret that our economy is still soft, perhaps even dismal, unnecessary or unreasonable regulatory burdens will continue to drive business investments, in my way of thinking, abroad.

Examples of the need for improvement are prevalent in virtually every sector of government regulation. For instance, the Department of Health and Human Services' implementation of President Obama's health care reform, the financial agency's implementation of the Dodd-Frank financial reform bill, the EPA's campaign against carbon dioxide, the FDA's approach to herbicide, and the Federal Communication Commission's drive to regulate the Internet and allocate spectrum.

I only mention these examples because they are widely recognized, and the fact of the matter is that fine-tuning is needed across the entire regulatory horizon.

Our current regulatory regime has deep historic roots. Since the days of the New Deal, and especially during the 1960's and 1970's, Congress has delegated more and more of its legislative authority to Federal agencies. This has been done through broad and vaguely stated laws that allow Congress to claim credit for addressing problems but leaves it to the various agencies to fill in the crucial details through regulations. The final risk of the wrong decision thus falls on the agencies and, of course, the economy and America's job creators. Congress too often escapes both responsibility and accountability.

The Republican majority that came to Congress in 1994 attempted to address this problem through the Congressional Review Act. That act, you may recall, gave the Congress greater tools to disapprove agency regulations that harm the economy, destroy jobs, or otherwise were counterproductive. Over its history, however, the Congressional Review Act has not fulfilled its potential.

During the 108th and 109th Congresses, the Subcommittee on Commercial and Administrative Law examined ways to improve the Congressional Review Act and better assert Congress's authority over legislative regulations. One of the leading ideas for reform was to amend the Act to preclude regulations from going into effect until Congress actually approve them. That is precisely what the REINS Act does for the biggest regulations Federal agencies issue, those imposing $100 million or more in costs on our economy.

Today, more than ever, we must consider and enact reforms that vindicate Congress's authority over the laws. The REINS Act is front and center among those reforms.

Before reserving the balance of my time, I would like to extend a warm welcome to our former colleague, Congressman David McIntosh—it is good to have you back on the Hill—as well as the other witnesses.

And Mr. Cohen, I said this before our other colleagues came in, but it is good to have all Members, Republican and Democrat alike, on this Subcommittee. And now I am pleased to recognize the dis-

tinguished gentleman from Tennessee, Memphis to be specific, Mr. Cohen.

Mr. COHEN. Thank you, Mr. Chair. And I appreciate that. As you know, Tennessee was originally North Carolina, so, in some ways, we are colleagues beyond being colleagues here.

And I would like to first pay specific attention to, for the new Members and others, to my Ranking Member of the Committee, the distinguished, the venerable, the honorable, the legendary John Conyers. Nice to be with you.

And Chairman Smith and all the other Members, I look forward to serving with each of you as well, who is not legendary yet, but he is honorable and a few of those other things that we will incorporate by reference.

Mr. COBLE. Would the gentleman yield just a moment. I didn't realize that Chairman Smith had come in. I didn't mean to ignore you, Lamar.

Is Mr. Conyers here as well? Good to see you again.

Mr. COHEN. I would like to start by offering my congratulations to Mr. Coble, who assumed the Chairmanship of the Committee. And when I was Chairman, he was as nice as anybody was to me. Everybody was nice, but he was particularly nice, and I was always appreciative of that.

You are a gentleman, and I look forward to working with you.

Mr. Franks was an outstanding Ranking Member, and we worked together nicely, and I look forward to serving with him.

I am honored to be working as Ranking Member, although I would rather be working as Chairman, but that is this Congress.

Today's hearing provides us with the opportunity to debate the merits of H.R. 10, the "Regulations from the Executive In Need of Scrutiny Act," or REINS. It also gives us a chance to discuss the appropriate role of Federal regulations in American life, a conversation I suspect we will continue to have in this Subcommittee in the 112th Congress.

Although they do not explicitly say, proponents of the REINS Act appear to believe that almost all regulations are bad. All their arguments focus on the purported costs that regulations impose on society. Based on this premise, we have heard rhetoric about job killing regulation that will stifle economic growth and impair personal freedom.

What such arguments do not seem to fully appreciate is regulations can also benefit the economy by policing reckless private-sector behavior that could undermine the Nation's economic well-being, and came very, very close to doing it in 2008. Lack of regulations and the economy of the world was on a precipice, pulled off by President Bush and bipartisan Members of the Congress in passing the TARP and successive legislation with the Stimulus Act. We learned that the hard way in the 2008 financial crisis and the problems that ensued there from.

We can look back to the Great Depression, when there was even more independence from regulations and lack of regulation, and see what followed there, the Great Depression.

Regulations can facilitate economic activity by providing clarity for regulated industries where the applicable statutory language

may be too broad or too vague and lead to unnecessary confusion or even litigation.

Regulations can also serve societal values that may outweigh economic growth.

Most importantly, regulations help protect the health and safety of everyday Americans, including our children, our neighbors, our colleagues, our grandparents, and ourselves and the public at large.

The fact is that Federal regulations help ensure the safety of the food that we eat, the air that we breathe, the water that we drink, the products we buy, the medications we use, the cars we drive, the planes we fly in, and the places we work. Indeed, most Americans are able to take for granted the safety of these things assured because of the existence of Federal regulations.

The REINS Act threatens to make it harder for such beneficial regulations to be implemented. Under the Act, Congress must approve a major rule, one having an economic impact of $100 million or more, by passing a joint resolution of approval through both Houses of Congress within 90—70 legislative days after the rule is submitted to Congress. The President must then sign the joint resolution of approval before the rule can go into effect.

At the most practical level, I question whether the REINS Act could work. I have been in Congress long enough to understand that the crush of business before us will more often than not prevent us from giving due consideration and approval to the many rules that may be beneficial and even ultimately enjoy widespread support if we were to implement the REINS Act.

As with the Congressional Review Act, the underlying statute that the REINS Act seeks to amend, this idea may seem better in the abstract than it will be in practice.

Of course, I am not ready to say the REINS Act is a good idea even in the abstract. While I appreciate the attempt to reassert some congressional control over agency rulemaking, there are separation of powers that I think were spoken to Members of Congress about recently, and Justice Scalia I think led that talk. And there could certainly be constitutional objections with separation of powers to the REINS Act, which we will hear from our witnesses. There is a role for us. There is a role for the executive. There is a role for the judiciary.

I look forward to our witnesses testimony. I look forward to working with Chairman Coble and my other colleagues on the Subcommittee for hopefully a meaningful 112th Congress.

I yield back the remainder of my time.

Mr. COBLE. Mr. Cohen, I thank you.

And I thank you as well for your generous remarks at the opening. I appreciate that.

Statements of all Members will be made a part of the record, without objection.

And I am told that Mr. Smith and Mr. Conyers would like to make opening statements, and I recognize the distinguished gentleman from Texas, the Chairman of the full Committee, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

And, Mr. Chairman, thank you for chairing this particular hearing, which I think is going to be one of the most important of the year.

As you said, I also welcome our former colleague David McIntosh.

And, David, I hope we get to talk a little bit more later on, but appreciate your being here, too.

Mr. Chairman, the American people in November voted for real change in Washington. One change they want is to stop the flood of regulations that cost jobs and smothers job creation. Yet, another is to make Washington and Congress more accountable. The REINS Act makes that change a reality.

Unelected Federal officials for too long have imposed huge costs on the economy and the American people through burdensome regulations. Today, these regulatory costs are estimated to be a nearly incomprehensible $1.75 trillion dollars, roughly $16,000 per household.

Because the officials who authorize these regulations are not elected, they cannot be held accountable by the American people. The REINS Act reins in the costly overreach of Federal agencies that stifles job creation and slows economic growth. It restores the authority to impose regulations to those who are accountable to the voters, their elected Representatives in Congress.

The Obama administration has under consideration at least 183 regulations that each would impose costs of $100 million or more on the economy. And when businesses have to spend these vast sums to comply with these massive regulations, they have less money to invest to stay competitive in the global economy and to hire new employees. These costs get passed on to the American consumers. In effect, these regulations amount to stiff but unseen taxes on every American.

Last week, in a new Executive Order, President Obama reiterated the existing authority of agencies to cull outdated rules from the books and consider impacts on jobs when regulations are written. This order sounded encouraging but added little to the rules that already guide the process of regulations. In the Executive Order, "distributive impacts" and "equity" are specifically identified among benefits to be maximized. Job creation is not.

The Executive Order is specifically written not to include regulations issued to implement the Administration's health care legislation, and it carves out independent agencies charged to implement the Dodd-Frank financial reform legislation. And it won't halt the Environmental Protection Agency's drive to exercise authority it was never granted. So the most burdensome and costly regulations are exempted.

The Executive Order, I hope not, may have been all style and no substance. Until the Executive Order produces real results, it is just a string of empty words. We must watch what the Administration does, not what it says.

In 1994, Congress passed the Congressional Review Act to reassert Congress's authority over the relentless regulation of the Federal Government. The act has been used just one time to disapprove of regulation. The regulatory tide continues and rises even higher. The REINS Act is needed to reduce the cost of the flood of

regulations, free up businesses to create jobs, and make the Federal Government more accountable. Thank you, Mr. Chairman.

Mr. Chairman, before I yield back entirely, I would like to recognize my colleague sitting back of the room, Geoff Davis, who has been absolutely instrumental in promoting, advancing, and writing this legislation that we are discussing today.

Mr. COBLE. I thank the gentleman.

The Chair is pleased to recognize the distinguished gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Coble.

I join in welcoming our former colleague, Mr. McIntosh, back here. It is very important. And I ask unanimous consent that the author of the bill, Representative Davis, come forward. I think he should be able to make a couple comments about the bill. I would welcome his sitting at the table. Since there are only three people there anyway, there is plenty of room.

Mr. COBLE. Mr. Conyers, I would be pleased indeed to have Mr. Davis come forward. I don't believe, though, he would be eligible to comment. But we would be glad for him to come forward to the table if he would like.

Mr. CONYERS. You say he can't comment on his own bill in the Judiciary Committee, the keeper of the Constitution?

Mr. COBLE. Well, Mr. Conyers, he was not called as a witness. And that is why I made that statement.

Mr. CONYERS. Okay.

Well, I have got a few questions I would like to ask him after the hearing, then, if I can. I will be looking forward to doing that.

I have got a statement that I will put in the record so we can get to our witnesses. But the most important part of my statement is that I think we have a constitutional problem on our hands, and our former colleague alluded to it himself in his statement. And it is found in article II, section 1, that I refer all of the distinguished lawyers on this Committee to. And I am sure we will have enough time to go into this.

The second consideration I would like us to keep in mind as we go through this important hearing is that the REINS Act may not be tailored to the problems that it is supposed to address. We have got some big problems with whether this is feasible. The feasibility of this act is—well, let's put it like this. This would affect every law on the books. It is not prospective, but it would involve every law that is on the books currently.

Now, I don't want to suggest that the Congress isn't up to its work, but do you know how much time that that would take to go through all of the laws to get them, the regulations to the laws, okayed by the House and the other body, as we delicately refer to them? It doesn't seem very probable that that could happen.

So when you consider the fact that we don't have the author of the bill testifying—and we are glad he is here, of course—but we also don't have the Administration testifying. Why isn't somebody from the Administration here? I mean, how can we be doing this? And I have been told by staff that we are going to try to report this bill next week sometime.

So, Chairman Coble, I would like to, with all due respect, ask an opportunity to discuss with you the possibility of an additional hearing on this matter.

Mr. COBLE. Well, if the gentleman would yield. This is an oversight hearing, and there will be a legislative hearing subsequently.

Mr. CONYERS. Okay. Well, that is consoling. I am glad to find out.

Now, this is a great new process of order. We do the oversight hearing first, and then we have a hearing on the bill. That makes a lot of sense. Why don't we have a hearing on the bill first? Oh, we are oversighting the condition that has caused the bill to be created. Is that right?

Mr. COBLE. This is the oversight hearing. As I say, the legislative hearing will be scheduled.

Mr. CONYERS. Okay. All right. Well, then I don't have to ask for another hearing. There is going to be another hearing on the bill. So I am glad to know that, because I have got a witness or two in mind that I would like to have partake with all the other distinguished friends of ours that are here with us today.

So I thank you very much, Chairman Coble. And I yield back the balance of my time and ask my statement be included in the record.

[The prepared statement of Mr. Conyers follows:]

Statement of the Honorable John Conyers Jr.
for the Hearing on the REINS Act
Before the Subcommittee on Courts, Commercial and Administrative Law

Monday, January 24, 2011, at 4:00 p.m.
2141 Rayburn House Office Building

At the first hearing of the reconstituted Subcommittee on Courts, Commercial and Administrative Law, we are being asked to focus on a newly introduced bill known as the Regulations From the Executive in Need of Scrutiny Act, or the "REINS Act."

This proposed legislation would dramatically change the way rules are promulgated, by requiring all new major regulations to be affirmatively approved by both Houses of Congress and the President before they can take effect.

Federal regulations affect virtually every aspect of our lives, including regulations that impact the environment in which we live, the products we buy and consume, the economy, and the health and safety of our citizens.

In recognition of the critical role federal regulations play, most rules are subject to a very length vetting process involving the agency, the Administration and the public, through notice and hearing.

While the legislation we will discuss today may be well-intentioned, it simply misses the mark. It suffers from three fatal flaws I would like to describe today.

First, the proposed REINS Act is constitutionally infirm.

The United States Constitution explicitly assigns various responsibilities to the different branches of the federal government. The drafters of the REINS Act assert that the Constitutional authority for this legislation can be found in Section 1

of Article 1 of the Constitution, which grants all legislative powers to the Congress.

The drafters fail, however, to take into consideration an equally important provision; namely, Article II, Section 1, which grants the executive power to the President.

It is a fundamental constitutional precept that while Congress is charged with making the laws, the Executive Branch has the responsibility to "take care that the laws be faithfully executed."

This fundamental notion of the separation of powers is the essence of what our founding fathers envisioned in the Constitution of this great nation.

I am particularly concerned that the REINS Act "unduly trammels on executive authority" under the separation of powers doctrine that the Supreme Court upheld in the 1988 case, Morrison v. Olson, 487 U.S. 654 (1988), and that it is constitutionally infirm.

Second, the REINS Act is not tailored to the problems it purports to address

Supporters of the REINS Act argue that Congress has delegated too much authority over the years to unelected bureaucrats in the Executive Branch, creating a lack of accountability among federal agencies and resulting in burdensome regulations.

While I appreciate these concerns, I do not believe the REINS Act addresses the disease it purports to cure.

Some might argue that there is a legitimate need to strike a balance between protecting the safety and health of all Americans, and fostering economic growth, job creation, and competitiveness.

I believe President Obama has already anticipated this need with his issuance last week of the Executive Order on Improving Regulation and Regulatory Review, which directs the agencies to consider these concerns in promulgating rules.

The REINS Act, however, would not help to achieve that balance. Rather, it will distort the rulemaking process. It will hamper the implementation of EVERY single law on the books!

By changing the presumption in the Congressional Review Act, and requiring affirmative Congressional approval (as opposed to disapproval) for all major rules, this Act will serve as a chokehold, and stifle regulatory review, which I am afraid is the real intent of this legislation.

We must recognize how critical federal regulation is to this country. Every year, federal regulatory agencies create thousands of new rules that affect virtually every aspect of our lives, including the environment in which we live, the products we buy and consume, the economy, and the health and safety of our citizens.

Requiring all new major rules to be affirmatively approved by both Houses of Congress and the President before taking effect would make it virtually impossible to implement critical new legislation, including the Patient Protection and Affordable Care Act (health care reform) and the Dodd-Frank Wall Street Reform and Consumer Protection Act. Indeed, financial experts have attributed the cause of the financial collapse in this country to the lack of adequate regulations.

I have been a member of Congress for a very long time, and I am extremely proud of our process. But I will be the first to admit that passing legislation is neither easy, nor a speedy process. If we start to require major rules to be passed by both Houses of Congress and signed by the President, as the REINS Act would

require, the invariable delays in the lengthy process could jeopardize the health and welfare of our Nation.

Some proponents of the REINS Act have expressed concern that some statutory language is no longer current with respect to certain regulations. If that is the case, the appropriate solution is to amend the statute in question, not to stifle the rulemaking process, which is already rather cumbersome and laborious.

There are also practical concerns we must consider with a legislative approval requirement for agency rulemaking.

Congress would risk undertaking piecemeal examination of particular rules in isolation from an agency's program as a whole, without the benefit of the experience and specialized knowledge that may have shaped the elements of that program.

Also, the volume and complexity of the rules that would be subject to the proposed approval process would be time-consuming and drain already limited Congressional resources.

To put it simply, the REINS Act would create more problems than it would cure.

Third, the REINS Act is based on incomplete economic analysis, as it solely addresses the costs of regulation, while failing to account for the tremendous cost *benefits* that regulations yield.

Proponents of the REINS Act raise concerns about the financial costs imposed by regulations, and they cite eyebrow-raising figures that are troubling, especially in our current economic climate. What you will hear from at least one witness today, however, is that the sources of these numbers are not impartial

parties. Indeed, many reputable scholars and economists have criticized the problems with the assumptions and methodologies underlying these cost estimates.

These experts also cite contrary reports. For example, the Office of Management and Budget recently reported that the cost of major rules from the Executive Branch agencies is **significantly lower** than the figure cited by proponents of the REINS Act.

You will also hear what I think is of the utmost importance. A discussion solely of the *cost* of federal regulation fails to paint the whole picture; we must assess both the costs **and** the benefits of federal regulation. The Office of Management and Budget (OMB) -- in both the current Administration and in the Bush Administration -- has found that the benefits greatly exceed the costs of major federal regulations.

For example, major regulations promulgated over the ten-year period between 1998 through 2008 are estimated to have cost between $51 and $60 billion.

Notably, the benefits associated with these very same rules are estimated to be $126 to $663 billion, that is, **more than ten times their cost**!

I look forward to hearing more about the full picture, the cost benefit analysis of federal regulation, and all of these issues and concerns today.

I also think it is of the utmost importance that we have the opportunity to fully examine these issues, and that we hear from the Administration. I only just received testimony from Mr. McIntosh a few hours ago today. I would like to hold another hearing or forum on this issue, so that we have adequate time to explore the troubling Constitutional and other implications of this bill, and hear what the Administration has to say.

I look forward to more discussion of this issue. Thank you.

Mr. COBLE. And all statements of the Members of the Subcommittee will be made a part of the record, without objection.
[The prepared statement of Mr. Cohen follows:]

Statement of the Honorable Steve Cohen
For the Hearing on
"The REINS Act—Promoting Jobs and Expanding Freedom
by Reducing Needless Regulations"
Before the Subcommittee on Courts, Commercial and Administrative Law

Monday, January 24, 2011 at 4:00 pm
Room 2141, Rayburn House Office Building

I would like to start by offering my congratulations to the gentleman from North Carolina, Mr. Coble, on his assuming the Chairmanship of this Subcommittee. I am honored to be working with him as Ranking Member, having chaired this Subcommittee in the previous Congress.

Today's hearing provides us with the opportunity to debate the merits of H.R. 10, the Regulations from the Executive in Need of Scrutiny Act, or "REINS Act." It also gives us the chance to discuss the appropriate role of federal regulations in American life, a conversation that I suspect we will continue to have in this Subcommittee throughout the 112th Congress.

Although they do not say so explicitly, proponents of the REINS Act appear to believe that almost all regulation is bad. All of their arguments focus on the purported costs that regulations impose on society. Based on this premise, we hear the rhetoric about "job killing" regulations that "stifle" economic growth and impair personal freedom.

What such arguments do not seem to fully appreciate is that regulations can also benefit the economy by policing reckless private sector behavior that could undermine the Nation's economic well-being. We learned this lesson the hard way with the onset of the 2008 financial crisis and the deep economic problems that ensued from that crisis. Indeed, we can look back to the Great Depression to see what perils the lack of adequate regulation can bring.

Regulation can also facilitate economic activity by providing clarity for regulated industries where the applicable statutory language may be too broad or too vague and lead to unnecessary confusion or even litigation.

Regulations can also serve societal values that may outweigh economic growth. Most importantly, regulations help protect the health and safety of everyday Americans, including our children, our neighbors, our colleagues, and the public at large.

The fact is that federal regulations help ensure the safety of the food that we eat, the air that we breathe, the water that we drink, the products that we buy, the medications that we use, the cars that we drive, the planes that we fly on, and the places where we work. Indeed, most Americans are able to take for granted that the safety of these things is assured because of the existence of federal regulations.

The REINS Act threatens to make it harder for such beneficial regulations to be implemented. Under the Act, Congress must approve a "major rule" – one having an economic impact of one hundred million or more - by passing a joint resolution of approval through both Houses of Congress within 70 legislative days after the rule is submitted to Congress. The President must then sign the joint resolution of approval before the rule can go into effect.

At the most practical level, I question whether the REINS Act could work. I have been in Congress long enough to understand that the crush of business before us will more often than not prevent us from giving due consideration and approval to the many rules that may be beneficial and even ultimately enjoy widespread support if we were to implement the REINS Act. As with the Congressional Review Act – the underlying statute that the REINS Act seeks to amend – this idea may seem better in the abstract than it will be in practice.

Of course, I am not ready to say that the REINS Act is a good idea even in the abstract. While I appreciate the attempt to re-assert some Congressional control over

agency rulemaking, there may be some constitutional objections to the REINS Act, which I hope to hear more about from our witnesses.

I look forward to our witnesses' testimony. I also look forward to working with Chairman Coble and my other colleagues on this Subcommittee for what I hope will be a meaningful 112th Congress for all of us.

[The prepared statement of Mr. Johnson follows:]

Congressman Henry C. "Hank" Johnson, Jr.
Statement for the Hearing on
"The REINS Act – Promoting Jobs and Expanding Freedom
by Reducing Needless Regulations"
January 24, 2011

Thank you, Mr. Chairman, for holding this hearing on the regulatory process.

Every year federal agencies, from the Environmental Protection Agency, to the Consumer Product Safety Commission, to the Federal Communications Commission, issue thousands of new regulations.

Regulations impact every aspect of our lives. My colleagues on the other side of the aisle want to rein in government regulations, namely because of cost.

However, in many instances, the protections we receive from regulations outweigh the costs.

They have guarded us against risks like lead in paint or children's toys and poisons in our drinking water.

In fact, if better regulations were in place a few years ago, the Gulf of Mexico oil spill, and economic problems such as the collapse of the financial system and mortgage crisis, which still affect many Americans today, could have been avoided.

Lately, there have been lots of discussion surrounding regulations.

During the 2010 congressional campaign, Republican candidates, as part of their "plan to rein in the red tape factory in Washington, DC" in the "Pledge to America," promised to "require congressional approval of any new federal regulation that has an annual cost to our economy of $100 million or more."

Just last week, on January 18th, the President issued an Executive Order formally detailing guidance for considering regulations.

Specifically, it seeks to get rid of rules that are slowing economic recovery. The President has made it clear that it is not about the government choosing between meeting its responsibilities to protect the public and spur the economy to create jobs.

Rather, it is about striking the proper balance between what is needed to protect the safety and health of all Americans and what is necessary to grow our economy and create jobs.

We can all agree that our regulatory process could benefit from some improvement. The question is how should Congress reform the regulatory process to strike the proper balance.

This hearing will allow Members to consider Representative Geoff Davis' proposal, the REINS Act. Currently, the Congressional Review Act authorizes Congress to disapprove an agency rule to which it objects.

The REINS Act would amend the Congressional Review Act and require congressional approval of major rules before they can take effect.

A major rule imposes annual costs in excess of $100 million or otherwise has a significant or anticompetitive effect.

Major rules would not take effect unless Congress passes, and the President signs, a joint resolution of approval within 70 legislative days of the rule's submission to Congress.

This Act aims to revive the economy, but I am concerned about the unintended consequences that this bill may have on an administrative agency's ability to issue essential regulations to keep the public safe.

Is the 70 legislative day threshold enough time to get an integral regulation through both Houses and to the President for signature?

Are there any issues with the Separation of Powers doctrine?

Article I, Section 1 of the Constitution grants all legislative powers to Congress. Article II, Section 1, however, grants the executive power to the President.

The Executive Branch is tasked with ensuring that the laws be faithfully executed. Would the REINS Act unduly trample on the rulemaking authority of the Administration?

In reforming our regulatory process, we must make sure that we are not undercutting regulatory protections that provide for the health and safety of our constituents.

Are there any changes we can make to the REINS Act to ensure that we can make to the REINS Act to make sure that the safety and public health are definitely the top priority in the rulemaking process?

I look forward to hearing from our witnesses today on how we can develop a balanced approach that is careful enough not put corporate profits above the safety and public health of Americans. Thank you and I yield back the balance of my time.

[The prepared statement of Mr. Quigley follows:]

Opening Statement
Congressman Mike Quigley (IL)

Judiciary C-CAL Subcommittee Hearing on the
REINS Act
January 24, 2011

Thank you Mr. Chairman

The argument that a Congressman is not accountable for a regulation passed subject to a law for which he voted shows a misunderstanding of the separation of powers.

The United States Constitution assigns various responsibilities to the different branches of the federal government. It's true that Section 1 of Article 1, grants all legislative powers to the Congress.

But Section 1 of Article II grants the executive power to the President. While the Congress is to make the laws, the Executive Branch is to "take care that the laws be faithfully executed." Agencies issue regulations under their executive power pursuant to the laws that Congress passes under its legislative power. This practice executes the Constitutional vision of our forefathers, it does not undermine it.

If a statute was passed many years ago and has become antiquated, then we should amend the statute. If a legislator believes that there are provisions of the Clean Air Act that do not achieve their intended purpose, then that Congressman can draft legislation to amend the statute.

Statutes are amended all the time; Congress retains law making power over the laws passed yesterday as well as those being proposed today.

This bill would ensure that even many of the most worthy rules will not find time on the Congressional calendar.

I've never met a constituent who did not want to know that the peanut butter she bought at the supermarket was salmonella free, that the X-ray she received at the dentist office did not emit harmful amounts of radiation; the prescription drug she relies on each day does not contain accurate labeling information.

In closing, the discussion we are engaging in here today reflects a healthy tension between the legislative and executive branches.

It is a tension which has been the subject of passionate debates in these halls and others throughout our history; at the end of the day, it is a tension that strengthens our democracy.

This tension assures one of the most important Constitutional principles there is: a separation of powers between our three branches of government.

The lines that delineate these powers often are not black and white, but instead shades of grey. Nevertheless, through reflection and robust discussion, we usually achieve the proper balance.

If we diminish the power of the executive branch to take care that the laws passed by Congress be faithfully executed, we create a dangerous imbalance between these two branches.

So while this is a discussion that we should embrace, it is also one we must get right.

I am concerned that the REINS Act does not get this balance right, and I look forward to a constructive dialogue with my colleagues about how we can better achieve that balance.

Mr. COBLE. We are pleased to have our panel of three witnesses with us today.

As has been mentioned previously, Mr. McIntosh, it is good to have you back on the Hill. Mr. McIntosh now practices at Mayer Brown LLP in Washington focusing on issues before Congress and the executive branch. He is a graduate of the University of Chicago School of Law and a cum laude graduate of Yale University.

Professor Jonathan Adler teaches at the Case Western Reserve School of Law, where he is the director of Case Western Center for Business Law and Regulation.

Professor Sally Katzen is a visiting professor at New York University School of Law, and Professor Katzen also serves as senior adviser to the Podesta Group.

It is good to have each of you with us.

And we will start with Mr. McIntosh, and we recognize you, sir, for 5 minutes.

TESTIMONY OF THE HONORABLE DAVID McINTOSH, MAYER BROWN LLP

Mr. MCINTOSH. Thank you. It is a pleasure to be back.

And thank you, Mr. Cohen and Mr. Conyers, for your remarks.

Let me commend the Committee for taking up this question in the oversight hearing of the regulatory process and the urgency for looking at, are there ways of making it work better to reduce the cost of regulations?

And I want to commend Representative Davis for his work in introducing the REINS Act.

When I was a Member, the Speaker asked me to Chair a Subcommittee on oversight just on regulations in the Government Reform Committee, and we looked at a lot of the different regulatory programs, looked at the overall costs on the economy. And I have to say, as I was preparing for the testimony today after I received the invitation, I was startled at the magnitude of the cost of Federal regulations: $1.75 trillion annually of costs imposed on the economy, about $15,000 per household; and, in particular, on jobs, where for large businesses, it costs $7,700 per employee to hire a new employee to follow the regulatory dictates of the various Federal programs. And for small businesses, it is even more. It is over $10,000 per employee.

As Mr. Cohen pointed out, those are the costs. You need to look at the benefits of regulations when you are making policy decisions, and Congress does that as it passes the laws, and the agencies are required to do that under longstanding executive orders. But the problem that I see that has happened, and we worked on the Congressional Review Act as a way of addressing that, is that balancing act of the particular type of mandatory requirements that get set in a regulation versus the benefits doesn't come back to Congress for review once the legislation has been enacted and the regulatory agency has been empowered to act.

We passed in 1995 the Congressional Review Act as one way to increase that formally, but as was pointed out earlier, it has only been used one time. And it is difficult for the political configuration to work where typically you have got to have a resolution of disapproval go through both the House and the Senate and signed by the President. I think the only time it did work was when President Clinton's administration proposed a rule and Congress acted and presented a bill to President Bush about that regulation. And so you saw the political baton being handed from one party to the other and willingness for Congress and the President to act.

The REINS Act strikes me as an excellent way of really strengthening that effort. It is not applied to all regulations. It is carefully

tailored to major regulations that have a significant and major impact on the economy. It, in many ways, addresses some of the constitutional questions that come up from time to time in the various regulatory programs; specifically, whether Congress has delegated too much authority to the regulatory agency and needs to retain some of that authority in the legislative branch in order to perform its article I duties.

And also, as I point out in the testimony, there are some enhancements for Presidential authority under article II that Mr. Conyers mentioned, article II, section 1, where you have a unified Executive, because the bill applies to both regular agencies in the executive branch but also the so-called independent agencies, which the President would have some greater authority over as a result of the REINS Act.

It is also carefully tailored to fit into what this Committee is an expert at, and that is thinking about the processes that should be used for Federal regulations. It merely says Congress is going to withhold part of its delegation and gives itself an option to approve the final result before that has the force of law. It is an addition to the Administrative Procedures Act and carefully written to be narrowly tailored to fit into that procedural change. The parties still have their rights under the Administrative Procedures Act for other problems that may come up.

So I commend the Committee for taking this up. I urge Congress to favorably consider the REINS Act and will be glad to answer any questions when you need me to.

[The prepared statement of Mr. McIntosh follows:]

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 112th 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[1]. 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

[1] 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.[2]

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.[3] For comparison, $1.75 trillion is nearly twice the amount of all individual income taxes collected last year.[4] It is estimated that

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[2] 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.

[3] 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.

[4] *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; *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.

the overall cost of Federal regulation is over $15,000 per household in the United States.[5] 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.[6] 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

[5] Dudley, *supra* note 2, at 2.
[6] Gattuso et al., *supra* note 4, at 2.

Environmental Protection Agency (EPA). Among the most costly are[7]:

- Fuel economy and emission standards[8] for passenger cars, light-duty trucks, and medium-duty passenger vehicles imposed jointly by the EPA and NHTSA.[9] 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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[7] *See generally* Gattuso et al., *supra* note 4, at 3 (describing cost data).
[8] This rule represents the first time that "greenhouse gas" emissions performance was applied in a regulatory context for a nationwide program.
[9] *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.[10] 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.[11] Annual cost: $1.3 billion. The appliance upgrades necessary to

[10] 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.

[11] 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.[12] 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,

[12] 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 (October 21, 2010).

disclosure rulemaking, procedure rulemaking, negotiating rulemaking, and other regulatory provisions.[13]

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.

[13] 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.

Increased business costs. Increased prices for consumers. Disadvantages to smaller ISPs. Jobs lost." [14]

Economists have long understood the harm to economic growth and productivity that results from costly and unnecessary regulations.[15]

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

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[14] 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.

[15] *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.[16]

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

[16] 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[17] regulations. The CRA provides that a Federal rule cannot "take effect" until the

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[17] 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."[18] 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

[18] 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.[19]

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

[19] 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; *see also* Sean D. Croston, *Congress and the Courts Close Their Eyes*, 62 Admin. L. Rev. 907 (2010).

terms."[20] 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[21] 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

[20] *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).

[21] 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.[22]

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[22] *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."[23] Through the exercise of this power, Congress has created "a vast and varied federal bureaucracy."[24]

But because this discretion is vested in Congress, an agency "literally has no power to act * * * unless and until Congress confers power upon it."[25] An administrative agency "is entirely a creature of Congress" and can do only "what Congress has said it can do."[26] 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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[23] Art. I, § 8, cl. 18.
[24] *Free Enterprise Fund v. Public Company Accounting Oversight Board (PCAOB)*, 130 S. Ct. 3138, 3155 (2010).
[25] *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).
[26] *CAB v. Delta Air Lines, Inc.*, 367 U.S. 316, 322 (1961).

agency action that is "arbitrary, capricious, [or] an abuse of discretion").[27] 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.[28]

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

[27] *See* 5 U.S.C. §§ 553, 706(2)(A).

[28] *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."[29]

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

[29] *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."[30] Because the Constitution vests "[a]ll legislative Powers herein

[30] *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.[31] 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.[32]

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

[31] Art. I, §1.
[32] 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.[33] 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."[34] As a result, "Congress must abide by its delegation of authority

[33] 462 U.S. 919.
[34] *Id.* at 954.

until that delegation is legislatively altered or revoked."[35] 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.[36] 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."[37]

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

[35] *Id.* at 955.
[36] *Id.* at 946, 948.
[37] 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.[38]

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

[38] *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.[39] Consistently with the Constitution, "Congress could" then "condition[] the legal effect of exercises of authority on subsequent enactment of a confirmatory statute."[40] (Breyer even noted the possibility of a special fast-track procedure to avoid delay.[41]) 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

[39] Breyer, *supra* note 22, at 789.
[40] *Id.* at 793.
[41] *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.[42]

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

[42] 462 U.S. at 958 n.23 (internal quotation marks omitted).

Reorganization Act[43] 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.[44] 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[45] and adoption of Presidential recommendations on Congressional pay.[46] Because these procedures rely on legislation, rather than extralegislative acts, they are entirely consistent with the Constitution.

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[43] 5 U.S.C. § 901 *et seq.*
[44] *See* §§ 906(a), 909-912.
[45] *See, e.g.*, 19 U.S.C. § 2191.
[46] *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.[47] 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."[48] 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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[47] Act of June 1, 1789, ch. 1, § 2, 1 Stat. 23, 23 (codified as amended at 2 U.S.C. §§ 21-25).
[48] *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."[49] 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.[50]

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."[51] 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."[52]

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[49] *Loving v. United States*, 517 U.S. 748, 758 (1996) (citation omitted).
[50] *American Trucking*, 531 U.S. at 472.
[51] *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 23 (1825).
[52] *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."[53]

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."[54] No less an authority than Cass Sunstein – now head of the Office of Information and Regulatory Affairs –

[53] *American Trucking*, 531 U.S. at 472 (emphasis added; internal quotation marks omitted).
[54] *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."[55] 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.[56]

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

[55] 29 U.S.C. § 652(8). *See* Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 Va. L. Rev. 1407 (2008).
[56] 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."[57] When legislators delegate broad authority to a faceless bureaucracy, they can take credit for

[57] 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."[58]

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[58] *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."[59] Under the REINS Act, the "important subjects" will never be regulated without the specific authorization of the people's elected representatives.

[59] *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"[60] – and not simply because he disagrees with their policies or regulatory priorities. Without the ability to fire these officers, the President

[60] 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."[61]

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

[61] 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."[62]

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

[62] *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."[63] 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

[63] *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."[64]

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.

[64] *PCAOB*, 130 S. Ct. at 3155-56.

Mr. COBLE. Mr. Adler.

TESTIMONY OF JONATHAN ADLER, PROFESSOR, CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW, DIRECTOR, CENTER FOR BUSINESS LAW AND REGULATION

Mr. ADLER. I thank you, Mr. Chairman and Members of the Subcommittee, for the invitation to testify today. I appreciate the opportunity to appear before this Subcommittee to discuss measures Congress may take to enhance regulatory accountability.

This is a tremendously important issue. Federal regulation has been accumulating at a rapid pace for decades. In 2009 alone, Federal agencies finalized over 3,500 new Federal regulations.

The growth of Federal regulation has imposed significant costs on American consumers and businesses. According to estimates, as has been mentioned several times already, the total cost of Federal regulation exceeds $1 trillion and approaches $2 trillion per year. This is substantially more than Americans pay each year in individual income tax.

Insofar as regulations impose a substantial cost, they operate like a hidden tax. Just like taxes, regulations may be necessary. They may be important to address public ills or provide public benefits, and these benefits may be important, and it may be worthwhile to have many of these regulations. But that doesn't mean that 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.

The increase in the scope of Federal regulation has been facilitated by the legislative practice of delegating substantial amounts of regulatory authority and policy discretion to administrative agencies. All administrative agency authority to issue regulations comes from Congress. Such delegation may be expedient or even necessary at times, but it also has costs. Excessive delegation can undermine political accountability for regulatory decisions and allow regulatory agencies to adopt policies that do not align with congressional intent or public concern.

All too often, Federal regulatory agencies use their statutory authority to pursue policies that are unpopular or unwarranted, and all too often, Congress is unable or unwilling to do something about it.

This problem is magnified by the fact that agencies are often exercising authority granted years, if not decades, ago. Take one example that has certainly been discussed already today: The EPA is currently implementing regulations to control greenhouse gases under the Clean Air Act, even though Congress has never explicitly voted to support such regulation. Rather, the EPA is utilizing authority enacted decades ago. The Clean Air Act's basic architecture was enacted in 1970, and the Act has been not significantly modified since 1990. If greenhouse gas regulation is warranted, this is a decision that should be made by Congress, not an executive agency acting alone.

The REINS Act offers a promising mechanism for disciplining Federal regulatory agencies and enhancing congressional account-

ability for Federal regulatory decisions. Requiring congressional approval before economically significant rules may take effect ensures that Congress takes responsibility for that handful of regulations, usually only several dozen per year, that impose major costs and hopefully also provide major economic benefits.

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 initiative. Such an approach can enhance political accountability without sacrificing the benefits of agency expertise and specialization. Requiring regulation to be approved by a joint resolution that will be presented to the President also satisfies the constitutional requirements of bicameralism and presentment.

The central provisions of the REINS Act is similar to a proposal made by then Judge Stephen Breyer in a 1984 lecture. He noted that a congressional authorization requirement is a constitutional way to replicate the function of a one-House legislative veto. Requiring congressional approval for the adoption of new regulatory initiatives, as Breyer noted, imposes on Congress a degree of visible responsibility.

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 the agencies are generally discharging their obligations in a sensible manner, the REINS Act will have little effect. If the public supports specific regulatory initiatives, the Act will not stand in the way. Indeed, it would enhance the legitimacy of those regulations Congress approves by making it clear that such initiatives command the support of both the Legislative and the executive branches. Above all else, the REINS Act provides a means of enhancing political accountability for regulatory decisions.

Thank you again for the invitation to testify. And I am certainly open to any questions you may have.

[The prepared statement of Mr. Adler follows:]

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Prepared Statement of Jonathan H. Adler
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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

[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.

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[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.

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Mr. COBLE. And you beat the red light being illuminated, Professor. I commend you for that.

Professor Katzen, you are recognized for 5 minutes.

TESTIMONY OF SALLY KATZEN, VISITING PROFESSOR, NEW YORK UNIVERSITY SCHOOL OF LAW, SENIOR ADVISOR, PODESTA GROUP

Ms. KATZEN. Thank you Chairman Coble, Ranking Member Cohen, Members of the Subcommittee, I appreciate the opportunity to testify today.

As is clear from my written statement, I am not a fan of H.R. 10.

It is presented as necessary and desirable to combat an out-of-control regulatory process, but the bill, in my view, is not tailored to the problem that it is intending to solve. It is not well-founded, and it will have serious adverse unintended consequences, including fundamentally changing our constitutional structure of government.

Now, we have had heard a lot this afternoon about the costs of regulation. Everyone is citing $1.75 trillion, which is the high end of an extremely controversial estimate. Very few have talked about the benefits in monetized form.

As someone who does cost-benefit analysis, and I was a former administrator of OIRA during the Clinton administration, you look at both sides of the equation. And OMB, during both the Obama administration and the Bush administration, filed reports to Congress in which it quantified and monetized the costs and the benefits, and consistently over time, the monetized benefits exceeded the costs by a substantial amount, consistently producing net benefits for our economy and our society. We cut back the rules, we lose the benefits.

Second, not all rules, not even all major rules, are alike. H.R. 10, in its infinite wisdom, exempts the migratory bird quota rule, because without that rule, which is a major rule, you can't shoot the birds as they fly to and from Canada. But there are lots of other rules that industry, the regulated entities, want and need, rules that provide guidance, rules that provide predictability or certainty for their operation. I give in my written statement a number of these.

There are rules that give life to programs, programs like agricultural subsidies, small business loan guarantees, or medical reimbursement. Without the eligibility and accountability provisions, which come in the form of rules, major rules, you don't have a program, even though Congress has authorized it or modified it. No rules, no program.s

Other major rules may be good because they reduce burdens. The OSHA rule, the infamous OSHA that everybody scorns, passed a rule on cranes and derricks which reduced burdens. It minimized the costs. Industry had asked OSHA for a negotiated rulemaking and supported the clarification. Yet all of these rules would be caught by the H.R. 10 net.

Now, the supporters say, as Mr. Adler did, well, there won't be any effect. They will all go through. With respect, our experience during the 111th Congress at least with the Senate suggests that it is not easy. The drafters of H.R. 10 changed H.R. 3765, its predecessor, from allowing 10 hours of debate on the debatable issues to 2 hours of debate. But you still have a quorum call. You still have

the vote, and you have nondebatable motions, which easily could exceed 4 to 5 hours.

For the 65 to 95 major rules each year, the Senate is not going to find that time. It has been unable, with due respect, to find blocks of time to process nominations of Administration officials or even judges. And so the result is that good rules, meritorious rules, important rules, will not take effect even though months, in fact years, have been spent with enormous resources devoted to sorting out the science and technical difficulties, with public participation, with analyses of all sorts of issues, with numerous checks throughout the agency, with numerous checks throughout the Administration, and subject to judicial review.

What happens if the Senate doesn't get to them? Is all the time and effort and resources to go for naught? The same rule cannot be modified once it is final agency action without starting a rulemaking process over again. To say there is no effect is not to understand the administrative process.

At a minimum, H.R. 10 introduces additional delay and uncertainty to an already lengthy and complicated process.

And, finally, for the reasons I set forth in my paper, I believe there are serious constitutional issues that are raised that fundamentally challenge the separation of powers, principles our Founding Fathers incorporated in the Constitution.

I sketch out some of the arguments. I hear people referring to Justice Breyer's speech. Since 1983 in his response to Chadha, there has been a lot of law in the Supreme Court. And the *Morrison v. Olson* test is really critical.

I know that I have only 5 minutes. My light is red. I thank you, Mr. Chairman, but I do hope somebody will pursue this during the questions so we can look at some of the existing law and practice in this field. Thank you very much.

[The prepared statement of Ms. Katzen follows:]

Statement of Sally Katzen

before the
Subcommittee on Courts, Commercial and Administrative Law
of the
House Committee on the Judiciary

on
"The REINS Act – Promoting Jobs and Expanding Freedom by Reducing Needless Regulations"

January 24, 2011

Chairman Coble, Ranking Member Cohen, Members of the Subcommittee. Thank you for inviting me to testify today. I have been privileged to appear before this Committee on a number of occasions, both as a government official and as a private citizen.

As you know, I served as the Administrator of the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) for the first five years of the Clinton Administration, then as the Deputy Assistant to the President for Economic Policy and Deputy Director of the National Economic Council, and then as the Deputy Director for Management of OMB. After leaving government service in January 2001, I taught administrative law courses at the University of Michigan Law School, George Washington University Law School, George Mason University Law School, and the University of Pennsylvania Law School, and I also taught American Government courses to undergraduates at Smith College, Johns Hopkins University, and the University of Michigan in Washington Program; this semester, I am teaching a seminar in advanced administrative law at NYU Law School and am a Senior Adviser at the Podesta Group. Before entering government service, I was the Chair of the ABA Section on Administrative Law and Regulatory Practice (1988-89), and during my government service, I was the Vice Chair (and Acting Chair) of the Administrative Conference of the United States (ACUS). I have written articles for scholarly publications and have frequently been asked to speak on administrative law in general and rulemaking in particular.

The subject of today's hearing is the H.R. 10 (similar to H.R. 3765 as introduced in the 111th Congress), known as the REINS Act. This bill, which is modeled on the Congressional Review Act (CRA), 5 U.S.C. 801 et seq., would dramatically change the way our laws are implemented by requiring virtually all new major regulations (e.g., those with an annual impact on the economy of $100 million or more) to be affirmatively approved by both Houses of Congress and the President before taking effect. In other words, major regulations would not be effective unless and until they were enacted into law. While the bill is presented as a response to what its supporters see as an out-of-control regulatory process at federal agencies, I believe this proposal is subject to some of the same criticisms that they make of agency regulations -- namely, it is not well considered, it is not tailored to the problem it is attempting to solve, and it will inevitably have unintended but nonetheless significant adverse effects on the economy and society at large, including fundamentally changing the constitutional structure of our government.

H.R. 10 is prompted, at least in part, by concerns about the costs imposed by regulations; one of the early findings in H.R. 3765 was that "such rules can have substantial compliance or other financial costs on American families, businesses, and local governments." Estimates of the cost of regulation cover a wide range, with supporters of the bill frequently citing the figure $1.75 trillion a year. However, the source(s) of the numbers they rely on are not impartial parties, and reputable scholars and economists have filled pages of print criticizing both the assumptions and the methodologies used to produce these cost estimates.

Under a Congressional mandate, OMB has estimated the costs of regulations, and it calculated substantially lower estimates. In its 2010 Report to Congress, OMB found that the cost of major rules issued by executive branch agencies over the most recent ten-year period (FY 1999-2009) was between $43 and $55 billion. These are also very large numbers, but what is missing so far – and what does not ever appear in any of the supporters' discussion of H.R. 10 or the text of H.R. 3765 --- are any estimates of the benefits from such regulations.

OMB's Report to Congress does include data on benefits, and the numbers are striking: according to OMB, the benefits from the regulations issued during the ten-year period ranged from $128 billion to $616 billion. Therefore, even if one uses OMB's highest estimate of costs and its lowest estimate of benefits, the regulations issued over the past ten years have produced net benefits of $73 billion to our society. This cannot be dismissed as a partisan report by the current administration, because OMB issued reports with similar results (benefits greatly exceeding costs) throughout the George W. Bush Administration (e.g., for FY 1998-2008, major regulations cost between $51 and $60 billion, with benefits estimated to be $126 to $663 billion dollars). Given that the benefits of regulations consistently exceed the costs, the need for any legislation that would make the issuance of regulations more difficult or time consuming is certainly in question.

In evaluating H.R. 10 (and debating whether additional restraints on the agencies are necessary or desirable), it is important to understand the many existing constraints (or checks) on federal agencies in developing and issuing regulations. First (and critically important), federal agencies are not free agents; they can only do what Congress has authorized them to do. Stated another way, federal regulatory agencies are not at liberty to do whatever they think might be a good idea – they can only issue regulations that implement existing law -- that is, laws that are duly enacted (passed by both Houses of Congress and signed by the President).

In addition, the process (as opposed to the substance) of rulemaking is already subject to several prescriptive federal statutes. The Administrative Procedure Act (APA), 5 U.S.C. 551 et seq., generally requires that agencies give notice of what they intend to do, along with their supporting data and analysis; that there be a meaningful opportunity for those affected by the proposal to comment (and to critique the data/methodology/details of the proposal/estimates of anticipated benefits and costs, etc.); and that the agencies respond to significant comments, explaining whether (and why) they agree or disagree with the comments received. Further, in the mid-1990's, Congress enacted the Unfunded Mandates Reform Act, 2 U.S.C. 1501 et seq., and it amended the Regulatory Flexibility Act with the Small Business Regulatory Enforcement Fairness

Act, 5 U.S.C. 601, et seq., to name only two of several such statutes that require agencies to consult with entities that might be affected by proposed regulations and to do specific analyses regarding the impact of their proposals on those entities.

Regulatory agencies in the executive branch are also subject to Executive Order 12866, 58 Fed.Reg. 51735 (1993), which provides procedural and decisional criteria for developing major regulations. Among other things, agencies are to specify the legal authority under which they are proceeding, the problem(s) they are seeking to rectify, the estimated benefits and costs (both quantifiable and those that cannot be quantified), any less burdensome or costly alternatives to achieving the objectives, and ensure that the benefits of the proposal(s) justify the costs or explain why that cannot be achieved. E.O. 12866 and its salient principles, including centralized regulatory review, were explicitly reaffirmed by President Obama last week. The office that conducts the review of draft proposed and final regulations to ensure that they are consistent with the President's policies and preferences and the principles of E.O. 12866 is OIRA, which not only conducts its own review but also presides over an inter-agency process so that the input and perspectives of other federal agencies (often with conflicting mandates) can be taken into account. Similarly, interested or affected non-governmental entities can meet with officials at OIRA to present their views to an adviser to the President, who is ultimately the one accountable to the electorate for the actions of the federal regulatory agencies.

After the agencies have completed their work on a regulation (and there is final agency action within the meaning of the APA), the Congressional Review Act, another statute that originated with the Contract with America, kicks in. If the agency has gone beyond what Congress intended and there is agreement (simple majority vote) in both Houses of Congress (with expedited procedures in the Senate) and the concurrence of the President, that rule will be disapproved and be of no effect. A number of commentators have argued that the CRA has not been as effective as its proponents had hoped, and the findings in H.R. 3765 recited the fact that it "has only been exercised by Congress once since its enactment in 1996 to reject a rule." The number of disapprovals may not be indicative of the effect of the Act (especially because the original concept was to catch only the most egregious overreaching). At the same time, I do not doubt that its

effectiveness could be enhanced by, for example, limiting its scope to major rules (from 50-100 a year) as opposed to the Congress' being inundated by all rules (several thousand a year), and/or by limiting the distribution of copies of each rule to only one committee of jurisdiction in each House rather than all committees of jurisdiction, so that attention could more easily be focused on the rules that warrant such attention.

Federal regulatory agencies are also subject to check by the courts. I need not belabor this point before this Committee, but any *ultra vires* action would not withstand judicial challenge, nor would any rule that is procedurally defective or substantively unsupported. We are a very litigious nation, and experience shows that those affected by new regulations are not the least bit reticent to seek judicial relief from what they perceive to be onerous rules issued by federal agencies. Indeed, virtually all controversial rules are challenged in court because there is little downside risk to mounting such an effort and hope seems to spring eternal even in the face of a robust supportive record.

While many major rules are controversial, there are other important rules that are not but that nonetheless would be captured by H.R. 10. Perhaps the best example of non-controversial rules which are actually eagerly awaited each year by the regulated entities are those issued by the Department of Interior setting an annual quota for migratory bird hunting under the Migratory Bird Treaty; absent an implementing rule, no one could shoot game birds as they fly to or from Canada. Having been identified as a favored activity during the debate on the CRA, rules that affect a "regulatory program for commercial, recreational, or subsistence activity related to hunting, fishing, or camping" achieved the unique status of being exempt from many of the federal statutes enacted in the 1990s, and the drafters of H.R.10 have in like fashion carved out an exception specifically for these rules.

Although "hunting, fishing, or camping" rules are exempt from H.R. 10 (as are rules relating to monetary policy), many other types of rules favored by regulated entities are not exempt. It may be counter-intuitive to some, but it is not unusual for regulated entities to support or even champion certain rules – such as those that provide needed

guidance or provide certainty or regularity for operations for the foreseeable future. For example, the automobile companies supported the Environmental Protection Agency (EPA)/Department of Transportation (DOT) joint rules for "Passenger Car and Light Truck Corporate Average Fuel Economy Standards for MY 2012-2016;" industry stakeholders supported the Department of Labor rule updating the Occupational Health and Safety Administration's "Cranes and Derricks" rule; the same for the Department of Energy's rule on "Weatherization Assistance for Program for Low Income Persons," which, among other things, reduced procedural burdens on evaluating certain housing applications.

There are also rules that specify the structure or eligibility for government programs, such as the Department of Education's rule on "Investing in Innovation Fund," and the Department of Defense (DOD) rule relating to the "Homeowners Assistance Program;" these rules enable the programs authorized and funded by Congress to begin to operate as they were envisioned or modified by Congress, and they are often eagerly awaited by the potential participants in the program. In a similar vein, there are multiple so-called transfer rules (which primarily cause transfers from taxpayers to program beneficiaries as specified by Congress), such as the Department of Agriculture's rules on the "Sugar Program," the "Emergency Loss Assistance and Livestock Forage Disaster Programs," and the "Biomass Crop Assistance Program," as well as the Department of Veterans Affairs' rule on the "Post 9/11 GI Bill." Delay in issuing the rules means delay in starting up or carrying on the programs.

Regulated entities may have been less enthusiastic about other rules issued during the Obama Administration, but the hands of the regulatory agencies are sometimes tied by the authorizing legislation. Examples of recent instances where the agency has scrupulously followed the provisions of the authorizing act – virtually no discretion was provided for, or exercised by, the agency -- include the DOT rule on "Positive Train Control," and the DOD rule on "Retroactive Stop Loss Special Pay Compensation." These rules simply carried out the law as passed by Congress, but if H.R. 10 is enacted, similar rules in the future would still need to be approved by both House of Congress and the President before they become effective.

Another category of rules worth considering are those that are important to public health and safety, which may be controversial with some, but highly desired by the vast majority. Examples include the Food and Drug Administration's "Shell Egg" rule dealing with salmonella; the DOT rules on "Reduced Stopping Distances for Truck Tractors" and "Standards for Increasing the Maximum Allowable Operating Pressure for Gas Transmission Pipelines;" and, in terms of equities, the Department of Justice (DOJ) rules on non-discrimination on the basis of disabilities.

In addition, in the foreseeable future, it is likely that several agencies would review exiting rules (the retrospective look-back called for by President Obama last week) and propose to eliminate currently effective major rules; their attempt to do so, which would clearly be supported by the regulated entities, would nonetheless get caught in the H.R. 10 net, along with any deregulatory rules issued by this or a subsequent administration. (See Motor Vehicle Manufacturer Assn. v State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983))

The proponents of H.R. 10 may argue that those rules that are acceptable (accordingly to a majority of then-current Members of Congress) will be approved, and only the objectionable ones will be stopped. Consider that the total number of major rules issued in CY 2010 was 94. Assuming that the Senate does not use its constitutional right (acknowledged in H.R. 10) to change the rules relating to the procedures of the Senate, and that the full time authorized in the bill -- for debate in the Senate on all debatable motions and appeals, the single quorum call, and the vote on the joint resolution itself (easily over four hours) --will be used for each rule considered, it is inconceivable that the Senate, with its other constitutional responsibilities (such as consideration of presidential nominations, work on appropriations bills from the House, etc.), could possibly find 90 blocks of time, or 50 or 25 or even 10 blocks of time sufficient for this process. Experience during the 111th Congress compels the conclusion that there will not be time to consider and approve even the most worthy rules. The "cost" to the economy and to society as a whole in terms of delay, uncertainty, and actual harm as a result of highly beneficial rules being held up or abandoned could be substantial, whereas the marginal "benefit" of having another significant procedural step

before a major rule becomes effective -- as opposed to relying on the CRA process for a joint resolution of disapproval -- is likely to be minuscule.

Finally, but importantly, if most or even some final major regulations issued by federal agencies are barred from taking effect because one or both Houses of Congress do not – because of time constraints or philosophical or practical objections – explicitly approve the issuance of the regulations, then this bill would change dramatically the constitutional structure of our government. At the beginning of the 112th Congress, Members of this Chamber read aloud the Constitution, which assigns various responsibilities to the different branches of the federal government. The drafters of H.R.10 cite Section 1 of Article 1, which grants all legislative powers to the Congress. But equally important is Section 1 of Article II, which grants the executive power to the President. While the legislative branch is to make the laws, the executive branch is to "take care that the laws be faithfully executed."

Constitutional objections to this bill can be cast in at least two ways. First, assume that the Senate passes a joint resolution under H.R. 10 approving a major rule from a federal agency. The bill then goes to the House for a vote and the joint resolution is defeated. Can this easily be distinguished from INS v. Chadha, 462 U.S. 919 (1983), where the Supreme Court held that a determination by the Attorney General to suspend deportation that was disapproved by a one-House veto was unconstitutional, notwithstanding that the act authorizing the Attorney General's determination had specifically reserved a one-House veto in the event either House of Congress disagreed with the Attorney General's determination? It may not be enough to say that H.R. 10 incorporates bi-cameral and presentment (the requirements for constitutionality in Chadha) because in the case described above, one House alone would stop final agency action from becoming effective. Conceivably the supporters of H.R. 10 would argue that the agency action is not final (that is, the rule has no force or effect) because the intent and effect of H.R. 10 is to amend the underlying delegation of rulemaking authority to require explicit approval of any major rules by the Congress and the President. If this is their argument, then truth in legislating would call for being very clear – that these few pages of text in H.R. 10 are amending literally hundreds, in not thousands, of duly

enacted laws – however long they have been on the books (i.e., for days or decades) – that delegated rulemaking authority (whether permitting or directing rulemakings) of every kind (eligibility criteria, standard setting, reporting requirements, articulation of enforcement policy) to every regulatory agency (executive branch or independent regulatory commissions).

Such an assertion leads to a somewhat more nuanced argument that H.R. 10 on its face may run afoul of the separation of powers principles our founding fathers embodied in the Constitution. In Morrison v Olson, 487 U.S. 654 (1988), Chief Justice Rehnquist set forth several tests for evaluating a statutory scheme under the separation of powers doctrine. One is that a statute is suspect if it "involves an attempt by Congress to increase its own powers at the expense of the executive branch." Much of the discussion surrounding H.R. 10 suggests that that may be an apt characterization of the sponsors' intent. Another test is whether an act of Congress "impermissibly interferes with the President's exercise of his constitutionally appointed function," which clearly includes the obligation to "take care that the laws be faithfully executed." For over a century, the executive branch has taken care to faithfully execute the laws by, among other things, developing and issuing regulations implementing legislation. Justice Scalia, who of all the Justices most aggressively guards the President's authority, relied in both Morrison v Olson and in Mistretta v. United States, 488 US 361 (1989), on the fact that the activities at issue in those cases were ones in which the executive had traditionally engaged. That characterization is clearly applicable here as well.

It is beyond dispute that if Congress were to require that the initiation of any prosecution by a U.S. Attorney or the Department of Justice would have to be approved by Congress before the prosecution could begin, such an act would be inconsistent with separation of powers. Does the same analysis hold for an act requiring prior approval of major regulations implementing duly enacted laws? Would such a requirement be viewed as an attempt by one branch to aggrandize itself at the expense of another? Would it be viewed as an attempt by one branch to impermissibly interfere with the ability of another branch to carry out its constitutional powers? Would it be viewed as an action that, again quoting from Morrison v. Olson, "unduly trammels on executive

authority"? These questions, I believe, are not easily answered, nor are the concerns easily dismissed.

Thank you again for the opportunity to testify today. I look forward to answering any questions you may have.

Mr. COBLE. I thank the witnesses for their testimony.

We will now have Members questioning the witnesses, and we will apply the 5-minute rule to ourselves as well.

I recognize myself for 5 minutes.

Mr. McIntosh, in your view, what current regulatory efforts most highlight the need for reforms like those in the REINS Act and why?

Mr. MCINTOSH. One, Mr. Adler mentioned the regulation of carbon dioxide. And my memory there was Mr. Dingell and I tried to present to the previous EPAs the full legislative history of the Clean Air Act amendment that made it very clear carbon was not to be regulated. And there was a lot of back and forth, and ultimately, the courts have forced their hand. But, to me, that shows an example of where, if Congress had a procedure in place, they could reassert that intent, even when the courts are driving the agencyin a direction that perhaps the agency itself wasn't initially intending to go down.

A second one would be the net neutrality regulations that the FCC has proposed. I think there will be a lot of litigation about the agency exceeding its statutory authority. I think if Congress had a procedure in place where they could easily pass that bill, and I think you could get bipartisan support for a bill nullifying that regulation under the REINS Act procedure, I think that would save a lot of time and expense and uncertainty in the private sector as that litigation ultimately goes forward. And I think, and in talking to my partners who specialize in the FCC Act, that that very likely could be thrown out, that it once again would be a great example of how Congress could effectively ensure there is economic progress that is made by paying attention to and having a part to play in that regulation.

Mr. COBLE. I thank you, sir.

Professor Adler, in improving upon the Congressional Review Act, is not requiring Congress to approve at least some agency rules the next logical step? And in taking that step, what are the keys to ensuring that the REINS Act or any similar reform remains constitutional under the rule of *INS v. Chadha*?

Mr. ADLER. I do think it is the next logical step. I think a mechanism that forces Congress to actually say yea or nay to substantial regulatory proposal is the next logical step to ensure that there is political accountability for major regulatory decisions.

In terms of the constitutional questions, I think *INS v. Chadha* is very clear that all that is required is bicameral presentment. The Supreme Court has said explicitly time and again that it is axiomatic, that is their word, that all authority for a Federal agency to adopt legislative type regulation comes from Congress, and that agencies have no such authority absent congressional enactment. So, unlike a case like *Morrison v. Olson,* where you are dealing with enforcement authority or arguably, at least in some context, there is some residual of inherent executive authority or some inherent authority that executive agencies may have, there is no inherent authority in any Federal agency to issue regulatory type rules absent a congressional delegation.

And if Congress wants to delegate less, if Congress wants to put conditions on the exercise of that delegated authority, it surely can.

And not only did then Judge Breyer note that in his 1984 lecture or Larry Tribe, the noted constitutional law professor at Harvard who was, until very recently, an official in the Obama Justice Department, who likewise said that a requirement of this sort would be purely constitutional.

The last point I will just make very quickly, Mr. Chairman, is that we have seen this already in areas that are far more sensitive in regulation, in the trade context, using this sort of process for Fast Track Trade Authority is arguably a far more—a far greater intrusion on executive authority than anything regarding domestic regulation because trade implicates the Foreign Affairs Authority. And I don't think many people argue that Fast Track Trade Authority——

Mr. COBLE. I want to kind of beat the red light with Professor Katzen, if I may.

Pardon me for cutting you off, Mr. Adler.

Professor Katzen, you indicate that executive orders already constrain agency discretion to promulgate too many rules. But those orders haven't prevented a flood of regulation, and they can be withdrawn by the President, can they not?

Ms. KATZEN. Mr. Chairman, an executive order can be withdrawn by the President or his successor. But 12866 has been in existence since 1993, September 1993. And while there may be a flood, in your terms, of rules that have been issued, as I said, OMB has documented, during the Bush administration as well, that the benefits exceed the costs consistently over time.

And I would just mention that Mr. Smith mentioned last week President Obama reaffirmed the Executive Order in his own Executive Order. And in fact, the very first sentence says that, in order to promote the public health, safety, and the environment while protecting economic growth, innovation, and job creation—it was the first sentence of his Executive Order. So I think the record should be clear.

Mr. COBLE. My time has expired.

I recognize the distinguished gentleman from Tennessee, Mr. Cohen.

Mr. COHEN. Thank you, Mr. Chairman. I appreciate it.

Let me ask one question. I may not understand this fully. As I understand it, Mr. Davis introduced this in the 111th and the 112th Congress. Was it introduced, either to your knowledge or to anybody's knowledge, before that?

Ms. KATZEN. Last year as H.R. 30765.

Mr. COHEN. In the 111th. But before the 111th, was it introduced?

Was it, Mr. Adler?

Mr. ADLER. I don't know if it is the exact same language, but similar types proposals have been proposed at various times.

Mr. COHEN. That required a positive approval by the Congress?

Mr. ADLER. Yes.

Mr. COHEN. When?

Mr. ADLER. In the 1984 article that——

Mr. COHEN. Forget 1984. Let's come back to recent history.

Mr. ADLER. I don't know, prior to last Congress, when the last time such a proposal had been introduced. But I know then Con-

gressman Nick Smith from Michigan had an article about legislation.

Mr. COHEN. When was that?

Mr. ADLER. I want to say 1996, maybe 1997. I am not exactly sure.

Mr. COHEN. And how about you, Mr. McIntosh? Do you know of anything?

Mr. MCINTOSH. I am not aware of——

Mr. COHEN. So, basically, during the Bush years, it was all like wonderful, and nobody even thought about this, and the executive authority was great, and we didn't need this. It is only since Mr. Obama was elected President that we need to do this. That seems to be the situation. For 8 years, it was wonderful with Mr. Bush, and the executive did everything great.

Let me ask you this question. You said—I think it was Mr. Adler—you said this isn't going to present a problem, that Congress can do it. Do you understand in the Senate that they have held up like 50 or 60 judges? And you know—what is it called? A blue slip? Do you know what a blue slip is? Can you imagine the Senators? I mean, that is the last "don't ask, don't tell." You don't ask what you are going to get for it, and you don't tell what you get for your blue slip. They still have that in the Senate. How is that going to work? All these regulations, they do a blue slip. I need a park in my district. Done. Don't you think that is going to invite basically what I would think some nefarious type—one Senator can hold it up.

Mr. Adler, is that right? One Senator under the rules we know today can hold up appointments, can hold up rules and regulations?

Mr. ADLER. Yes. Under the way the rules are typically applied, they can. But blue slips are a courtesy afforded to home State Senators for nominations. They are not applied to legislation. And my read of the bill would not allow holds of joint resolutions——

Mr. COHEN. Mr. Adler, are you suggesting that we can write a bill over here that is going to restrict or change the Senate rules?

Mr. ADLER. I think that if the House and the Senate both passed a bill that is signed into law by the President that codifies changes to the rules for both Chambers, as has been done for the Base Closure Commission, for the Fast Track Trade Authority, for——

Mr. COHEN. You understand that one Senator can hold up a bill?

Mr. ADLER. If the rules allow for it, yes. But I also know that there are probably about a dozen examples of the House and Senate passing legislation limiting the rules to prevent those sorts of holds by limiting debate and by requiring votes to occur on a scheduled basis. And the two most prominent examples are with the Base Closures Commission and with the Fast Track Trade Authority.

Mr. COHEN. Thank you, sir.

Ms. Katzen, let me ask you a question. You were here when we read the Constitution. Did you watch us read the Constitution from the floor of the well?

Ms. KATZEN. Actually, I did.

Mr. COHEN. You did.

And did you hear—I don't know who read it; I am sure it was somebody—the article II, section 1, something about all power being vested in the executive to carry out the laws. Tell us a little primer of what that means about the executive. And can they have the ability to execute our laws without rules? Could they do it without having any rules?

Ms. KATZEN. I think that is a serious problem, because section 1 of article II vests all executive power in the President. That power includes the power to take care that the laws be faithfully executed. That is a quote from the Constitution. That means that when Congress passes the law, it is up to the President and the subsequent President and the subsequent President after that, whether they agreed with that law or not, to carry out the law.

Now, for over a century, administrative agencies have been implementing or carrying out the law by issuing regulations. That is how it is done. And so for that reason, I believe that an attempt by Congress to strip the President of that authority with respect to major rules is tantamount to an act of Congress—I am using Chief Justice Rehnquist's words from *Morrison v. Olson*—of one branch self-aggrandizing at the expense of another branch. Or, again using Chief Justice Rehnquist's words, an act of Congress which would impermissibly interfere with the President's exercise of his constitutionally appointed functions. These are serious questions.

I wouldn't be so presumptuous as to say that I know how the Supreme Court would rule, but if they want to invoke Justice Breyer, I would refer them respectfully to Justice Scalia as well, who has been, among all the Justices, the guardian of the President's powers.

Mr. COHEN. Thank you.

Mr. Chairman, I yield back the remainder of my time beyond the red light.

Mr. COBLE. You didn't violate it too badly.

The Chair recognizes the gentleman from South Carolina, Mr. Gowdy.

Mr. GOWDY. Thank you, Mr. Chairman.

Mr. Chairman, I would like to make my opening statement be part of the record, with your consent.

I want to thank all three of our panelists.

Mr. McIntosh, I will start with you.

Mr. COBLE. Without objection.

[The prepared statement of Mr. Gowdy follows:]

PREPARED STATEMENT OF THE HONORABLE TREY GOWDY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF SOUTH CAROLINA, AND MEMBER, SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW

Thank you, Mr. Chairman. I appreciate your holding this hearing on this important legislation, and I am grateful our witnesses are here to share their expertise.

One of my first actions upon taking this office was to reach out to businesses in South Carolina's Fourth District to hear how they have been affected by regulations established by executive agencies. I look forward to continuing this dialogue with my constituents and with others around the country with the goal of improving governmental efficiency, promoting a government of limited size and scope, addressing unintended consequences of executive regulations, and fostering a pro-growth business environment while remaining within constitutional bounds. I believe this hearing is an important step in this critical dialogue. Furthermore, I believe the REIGNS Act (Regulations from the Executive In Need of Scrutiny) is a significant step towards mitigating the deleterious effects of burdensome regulations on businesses by ensuring Congress has proper oversight over regulatory actions with broad economic implications.

I look forward to hearing from our witnesses on this legislation, and I thank you for the opportunity to speak.

Mr. GOWDY. Thank you, Mr. Chairman.

What, in your judgment, is the proper balance between the executive branch and the legislative branch when it comes to rulemaking and enforcement?

Mr. MCINTOSH. Let me point out that the Administrative Procedure Act also constrains how the executive branch writes its regulations, the processes it must use before they can have the force of law. So there is a long tradition in our modern history of Congress asserting constraints over how the President and the executive branch can issue regulations. It is fully compatible with that for Congress to say, Before this regulation that you are proposing, Mr. President, or the agency, it has to come back to Congress and sit there for Congress to give its approval of the content of that regulation.

I think it is fully within Congress's power to do that. I would point out that for the century prior to the last century, there were no regulatory authorities or bodies, and the President was fully capable of exercising his duty under the Constitution to take care that the laws were faithfully executed.

So I think this act, perhaps it would be hubris to say that it goes as far as to restrain the President's executive authority because it simply doesn't do that. There are ways you can argue that, in fact, it enhances it, as I mentioned earlier, vis-a-vis the so-called independent agencies, because his signature on the bill approving the regulation gives him control over those agencies and the policies that they develop.

Mr. GOWDY. Mr. Adler, I may have heard you incorrectly. And if I did, I want to give you a chance to correct. I wrote down that you said there have been 3,500 regulations promulgated in the past?

Mr. ADLER. In 2009, I think the exact number is 3,503. And, of those, I don't remember the exact number, but several dozen of those were major. But the 3,500 number was all regulations in, I believe, 2009.

Mr. GOWDY. All right. I am just a prosecutor, so forgive me for not knowing much about civil law. But would the violation of a Federal regulation be evidence of negligence in a civil suit?

Mr. ADLER. It depends.

Mr. GOWDY. It depends on what?

Mr. ADLER. I mean, it depends on the nature of the regulation; it depends on what is at issue. But, I mean, there are instances in which that could be evidence of that. It would depend. I guess it would really depend on a lot of factors, including what the State laws are.

Mr. GOWDY. Are there any criminal penalties connected with violations of Federal regulations?

Mr. ADLER. There often are criminal penalties associated with violating——

Mr. GOWDY. How can Congress abdicate its responsibility for criminal enforcement to a nonelected entity?

Mr. ADLER. Well, I think you have hit on the key issue here, is that Congress, for expedience, has delegated lots of authority to administrative agencies to develop rules of conduct in a wide range of detailed and complex areas. And I think what we have over-

looked is that it is ultimately Congress that is responsible for that authority.

And especially when you have rules that are going to carry criminal sanctions or, as in the case of the REINS Act, rules that are estimated to have a substantial effect on the economy, which is a rough proxy for a really major policy decision that will affect a large part of the country, I think it is certainly reasonable to say that we should make sure the people who are the source of the legislative power in the first place, Congress, where all legislative power is vested under article 1 of the Constitution, is accountable for that decision and that members of the public know whether or not their representatives believe that imposing that sort of rule is or is not a good idea.

Mr. GOWDY. Ms. Katzen, you do not challenge the constitutionality of congressional oversight, correct?

Ms. KATZEN. Not at all.

Mr. GOWDY. You don't even challenge the wisdom of congressional oversight.

Ms. KATZEN. I endorse it wholeheartedly.

Mr. GOWDY. So when you mentioned that there are constitutional infirmities in this bill, which, as I read it, is Congress reclaiming its responsibility/authority for oversight, what do you mean by "constitutional infirmities?"

Ms. KATZEN. I think the REINS Act goes well beyond oversight. And the Chairman talked about, in his opening statement, fine-tuning the regulatory system. I think the REINS Act is a blunt instrument that goes well beyond oversight. What it says is that Congress must affirmatively approve an action that it has already delegated and on which a lot of work, effort, and resources have been spent in refining and developing and issuing a rule.

Mr. GOWDY. But you would agree with me, Congress could reclaim that delegation in the first place, right?

Ms. KATZEN. Absolutely. And that is through—the Congressional Review Act does exactly that, because it satisfies the bicameral and presentment part of Chadha, and it says Congress is saying: You can't do that. That is very different from saying: Before you do anything in this area, you must come back, even though we have already delegated it to you, you must come back and get our permission.

Mr. GOWDY. What is the constitutional distinction between doing the two?

Mr. COBLE. The gentleman's time is expired.

Ms. KATZEN. I think there is a significant——

Mr. GOWDY. I apologize, Mr. Chairman.

Mr. COBLE. You may answer that quickly, Ms. Katzen.

Ms. KATZEN. I think there is a significant difference between the two. And that is why the Congressional Review Act was originally crafted as it was, to be a change of the law, not a filter before which implementing a pre-existing law can go forward.

Mr. GOWDY. Thank you, Mr. Chairman.

Mr. COBLE. Thank you, Mr. Gowdy.

Mr. Conyers?

Mr. CONYERS. Thank you, Chairman Coble.

My ex-prosecutor colleague asked why the Congress doesn't enforce the laws. Well, as McIntosh and Davis and I know, we pass the laws, we oversight the laws, we do not enforce the laws. There is a little Federal agency called the Department of Justice that enforces the laws. So that is my criminal justice lesson for the day.

Now, this $1.75 trillion annually that has been raised here, I would like to ask Ms. Katzen, how does that comport with the issues of the Congressional Budget Office, which has a different set of figures here? OMB said that major regulations promulgated over the 10-year period between 1998 and 2008 are estimated to have cost between $51 billion and $60 billion.

Ms. KATZEN. I would love to answer the question, but I know the red light will go off before I even get halfway there.

The 1.75 comes from a study that was presented in the mid-1990's that immediately raised all sorts of flags, both as to the assumptions, the methodology, et cetera. CRS did a very careful analysis, which I would commend to you, that shows the different problems that exist.

Now, Congress ordered OMB to do the same thing, to do a real study. And what OMB did was to come up with the numbers that you had. They are very large numbers, but they are much smaller than the 1.75 trillion numbers.

Congress, in its wisdom, said, determine the costs and determine the benefits. So, as you talk about the $43 billion to $55 billion in costs, they found $128 billion to $616 billion in benefits. So even if you use the highest end of the costs and the lowest end of the benefits, you still have net benefits of $73 billion.

Mr. CONYERS. All right. Let me ask you this. Who was it that made this authoritative statement, allegedly, about over a trillion dollars? Do you know?

Ms. KATZEN. It originally came from a Tom Hopkins study and then a gentleman whose name I——

Mr. CONYERS. Mr. Adler, do you know?

Mr. ADLER. I don't know off the top of my head.

But I would just note that the OMB numbers that have been referenced exclude independent agencies and exclude non-major rules, which are over 90 percent of the regulations that are finalized each year. So to compare the OMB numbers with the other estimates is not——

Mr. CONYERS. Mr. McIntosh, do you know?

Mr. MCINTOSH. Unconstitutional is the subject that Ms. Katzen has referred to——

Mr. CONYERS. But who——

Mr. MCINTOSH. And lots of people in the literature have cited that as they have discussed the cost of Federal regulation.

Mr. CONYERS. So everybody says that somebody said it once and it is in a study somewhere, and so that is about it, huh?

Ms. Katzen, did you want to add anything to this?

Ms. KATZEN. Someone just handed me something which uses the name Mark Crain and Thomas Hopkins, and I think they are the co-authors of this $1.75 trillion—whatever.

Mr. CONYERS. All right. Let me ask this question. If this REINS Act, which is high up on the list of our new leadership's agenda—it is the fourth piece of legislation introduced—what would this do

to health-care reform? How would you take an enormous piece of legislation like this—and I think "ObamaCare" is going to be a congratulatory remark in history—how would this affect it? Wouldn't it just stop it in its tracks?

Mr. ADLER. It depends on what Members of Congress feel about it. If the majority of those in both houses of Congress support the regulations that are necessary to implement that law, then it would go on as before.

The only thing that would stop it, under the REINS Act, would be is if the majorities of Congress don't support those regulations. It ensures, essentially, that the American people get the sort of regulatory policy that the American people want. And I would think that that is a step toward greater political accountability and——

Mr. CONYERS. Now, well, wait a minute. The majority of the Congress already passed the bill, and the President signed it into law.

Mr. ADLER. But congressional opinions change. Congress repeals statutes, revokes statutes, alters statutes.

Mr. CONYERS. Well, that is——

Mr. ADLER. And one of the problems is you don't really have legislation that was enacted last year——

Mr. CONYERS. Can I ask unanimous consent for 1 additional minute?

Mr. COBLE. Certainly.

Mr. CONYERS. Thank you, sir.

Now, look, gentlemen and lady, you all know that any one of us, to challenge a regulation, all they have to do is walk into the nearest Federal district court and sue away. And we have regulations that get reviewed and modified or kicked out. What is wrong with that?

Mr. ADLER. Nothing. But courts don't want to review the policy merits of regulation. Courts don't ask, is this regulation a good idea? Are the costs worth the benefits? Is this something the American people support?

What courts look at is the nonpolicy questions: Were the rules followed? Was there—and those are two separate questions. This body is responsible for the policy questions.

Mr. CONYERS. But, look, we just passed health care months ago. You mean we got to go back and look at it again?

Mr. ADLER. I think that when you have major legislation and agencies are implementing that legislation, it is a good idea for Congress to——

Mr. CONYERS. Do you know what this sounds like to me now? It sounds like a backdoor way of legislating again, when they are charged with actually just making the rules to implement a bill already signed into law.

Mr. COBLE. Mr. Conyers, your minute is over.

Mr. CONYERS. Thank you very much, Mr. Chairman, for your generosity.

Mr. COBLE. Mr. Reed? Mr. Reed is up next for 5 minutes.

Mr. REED. Oh, thank you, Chairman.

I would like to follow up on the comment that was just made by Mr. Conyers, when he said the individual, whoever is objecting to the rule, can sue away. Who pays for that? Who is the person who

has to bring that lawsuit? Usually, it is the small-business owner. Is it a farmer, is it a gentleman who is objecting to that regulation?

I will ask Mr. McIntosh that question.

Mr. MCINTOSH. Yes, sir, you are exactly right. It is the private party that has been affected by the regulation.

And their recourse is, in fact, very limited, in they have to argue that the agency failed to follow its own procedures or acted arbitrarily and capriciously, not that they disagree with or they feel it is unfair that the regulation imposes burdens, say, on wheat farmers but not on corn farmers.

And the law says to the agency, the Department of Agriculture, you go and allocate what should be planted on the land and, you know, do it in a way that maximizes the return for agriculture. Well, if the farmer who is adversely affected by that wants his day in court, all he can say is, "Well, sure, they allocated it, but they didn't give me my allocation." The courts say, "Sorry, you lose. They had to make that decision."

And I think Mr. Conyers's later remark reflects correctly that what the REINS Act would do is say that decision, who gets which allocation for what crops to do, should actually be a legislative decision. And so, in many ways, what the bill does is correct a constitutional deficiency that is inherent in the regulatory program, where the accountability for legislative decisions like those never comes back to Congress.

Mr. REED. Then correct me if I am wrong, Mr. McIntosh. That bureaucrat who is creating that rule, he is not an elected official, correct?

Mr. MCINTOSH. No. He would be typically a civil servant or assigned by a person appointed by the President.

Mr. REED. So when I go talk to my small-business constituent or my farmer in my district and he objects to the policy, I can't go to him, "Well, we will vote that guy out the next time around because we disagree with that policy." He is essentially stuck with that rule, other than the courts that are available to him. Is that a fair assessment?

Mr. MCINTOSH. His political recourse would be to join others to vote enough Members of Congress to change the law or to vote a new President who would change the regulation, direct his agency.

Mr. REED. Okay. I appreciate that.

There has been a lot of objection that I am hearing in this testimony that one of the problems is the workload that would be put on Congress, finding the time to go through and develop that.

Wouldn't we face that same problem if we went through the enabling legislation and amended the enabling legislation? Wouldn't that be a tremendous workload on Congress, to go back?

No one objects to the fact that Congress would have that authority to do it, do you? We could go back through each of the pieces of legislation, change the enabling authority and clarify our intent as to what we meant from Congress. No one objects to that, correct?

Mr. MCINTOSH. No.

Mr. ADLER. Right.

Mr. REED. So that burden on Congress would be bigger, I would argue. Am I farfetched on that conclusion, that that would be a huge burden on Congress?

Mr. MCINTOSH. Yes, it would. I mean, back in 1995, we thought about doing that to address a lot of the regulatory problems, and some of them got dealt with and others didn't.

Let me take, though, 2 seconds to——

Mr. REED. Please.

Mr. MCINTOSH [continuing]. Brag about you all. I actually think Congress can handle that burden. Now, the Senate continues to mystify me, but the people who are——

Mr. REED. You are not alone.

Mr. MCINTOSH [continuing]. In that body say they get things done by unanimous consent, ultimately. But I think it can be done.

Mr. REED. Thank you.

I yield the balance of my time.

Mr. COBLE. I thank the gentleman.

The gentleman from Georgia, Mr. Johnson, is recognized.

Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. Adler, isn't it correct that regulations that pertain to clean air, these are the regulations that you are speaking of being able to stop?

Mr. ADLER. Well, any regulations that——

Mr. JOHNSON. Yeah. Air quality, water quality?

Mr. ADLER. The examples I gave there weren't——

Mr. JOHNSON. Well, no, no, no, no. I just want you to answer my questions. Now, water quality, air quality, correct?

Mr. ADLER. Yes. Congress should be held accountable for those.

Mr. JOHNSON. What about food safety?

Mr. ADLER. I think Members of Congress should be willing to vote to be held accountable.

Mr. JOHNSON. What about drug safety?

Mr. ADLER. I think Members of Congress should be held accountable by voting on whether or not those regulations are a good idea.

Mr. JOHNSON. What about financial reform?

Mr. ADLER. Again, Congressman, I don't think Members of Congress——

Mr. JOHNSON. I mean, that is covered under—these are regulations that are brought to bear on big business and industry——

Mr. ADLER. Yes.

Mr. JOHNSON [continuing]. Primarily.

Mr. ADLER. Primarily. And I think——

Mr. JOHNSON. All right. And so——

Mr. ADLER.—Members of Congress should be held more accountable——

Mr. JOHNSON. So things like the health and safety of workers, do you want to be able to stop those kinds of regulations from becoming the force of law?

Mr. ADLER. No. I want my Member of Congress to have to vote on that decision. I want to know if my Member of Congress supports it.

Mr. JOHNSON. Well, tell me now. You contend that, what, $1 trillion per year is what all of these regulations cost? How many new

regulations are promulgated yearly that have that economic significance?

Mr. ADLER. That is the aggregate effect. Between 2000 and 2009, the number of major rules that would be affected by the REINS Act has been between 50 and 80 per year.

Mr. JOHNSON. Okay. And you are familiar with the attributes of the Senate——

Mr. ADLER. Yes.

Mr. JOHNSON [continuing]. In terms of them doing their work.

Mr. ADLER. Yes. And that is why the REINS Act——

Mr. JOHNSON. And you are aware of the fact that one of those attributes is not the ability to move quickly, is that correct?

Mr. ADLER. I think that the REINS Act addresses that.

Mr. JOHNSON. You heard that before, and you know that to be a fact. Isn't that correct?

Mr. ADLER. It is correct.

Mr. JOHNSON. That the Senate does not move quickly?

Mr. ADLER. The Senate has to be forced to move quickly, and I think the REINS Act accomplishes that.

Mr. JOHNSON. And so an obscure regulation, you think, would be enough to cause them to set aside all of their judicial appointments and other important—treaties that need to be ratified, all of the legislation that Mr. McIntosh gives us credit for for producing here in the House, but, because of an obscure regulation, they would suddenly spring into action. Is that what you want us to believe?

Mr. ADLER. I don't believe regulations dealing with clean air or clean water or financial services or some of the examples you gave that cost more than $100 million a year, by the executive branch's own estimates, is an obscure regulation.

Mr. JOHNSON. Well, let's talk about obscure regulations. Who would decide—or, how would it be decided that a regulation should be subjected to the congressional review under the REINS Act?

Mr. ADLER. The executive branch's cost estimates would determine that.

Mr. JOHNSON. Okay. Who would bring that to the attention of Congress?

Mr. ADLER. The REINS Act has a procedure where that information is automatically transmitted to both houses of Congress with the regulation once it is finalized.

Mr. JOHNSON. Who would do that?

Mr. ADLER. I would have to check. I think both——

Mr. JOHNSON.Would it be the U.S. Chamber of Commerce?

Mr. ADLER. The agency does it, and I believe the comptroller general that heads the Government Accountability Office is responsible for submitting that to both houses. And then, within 3 days, legislation is automatically introduced, or the joint resolution is automatically introduced in both houses. The last draft that I recall reading in legislation——

Mr. JOHNSON. So there is some ability for politics to infect the process of actually producing the legislation then.

Mr. ADLER. Actually, no. The way the REINS Act is drafted, there is no amendment——

Mr. JOHNSON. Well, it would be a government bureaucrat that would do that?

Mr. ADLER. I spend a lot of time doing regulatory policy and——

Mr. JOHNSON. How do we get——

Mr. ADLER [continuing]. Much worried about the backroom deals in regulatory agencies than any up-or-down votes on the floor of the body of the whole.

Mr. JOHNSON. How will we get politics, Mr. Adler, out of the rule-making process?

Mr. ADLER. We——

Mr. JOHNSON. And aren't we, by subjecting the rule-making process to congressional dictates, aren't we, by the very nature of what we do here in the House, subjecting these rules to politics——

Mr. ADLER. Well, rules——

Mr. JOHNSON [continuing]. And influence, political influence, with campaign contributions and whatnot?

Mr. ADLER. Rules that govern private behavior are things that political officials should be held accountable for. And I believe that sunlight is the best disinfectant, and requiring all Members of Congress to vote up or down in the body of the whole is far less subject to special-interest manipulation than leaving things in the halls of regulatory agencies. Your small-business man, your small homeowner isn't spending time at the FCC or the EPA or the USDA lobbying on regulations. I really deserve to know how Members of Congress feel and then vote.

Mr. JOHNSON. We just want to remove all regulatory action here in Congress—less government. Let's cut government, let's cut regulation, and let's allow the members of the U.S. Chamber of Commerce and other large businesses that traditionally shut out small business——

Mr. COBLE. The gentleman's time is expired.

Mr. JOHNSON [continuing]. Just to run roughshod over society, and whatever will be will be.

I appreciate it. Thank you, sir.

Mr. COBLE. The Chair recognizes the gentleman from Arizona, Mr. Franks.

Mr. FRANKS. Well, thank you, Mr. Chairman.

And thank all of you for being here today.

I guess, Mr. McIntosh, my first question will be to you, sir. It occurs to me that not only the process here but the mindset in which agencies write their regulations could be one of the most significant advantages of this legislation. Because, you know, if I were the director of an agency and I were writing regulations and I knew that it was going to be subjected to the scrutiny and oversight of Congress, that Congress is going to have to prove it, I would be pretty careful how I wrote that. I would make sure that it was a regulation that would comport with a lot of common sense and that could withstand the rigors of the legislative process itself.

So, with that, since it only requires Congress to approve major rules but it could affect and change the culture of the agency, in what way do you think that that would improve all rule-making? Or do you think I am just all wet here?

Mr. MCINTOSH. No, I think you are exactly right, that the prospect of having the work product that the agency does in developing a regulation be scrutinized in a debate in Congress and voted up or down will have, as it does on every other decision the agency

makes where Congress has expressed an interest, has an impact on their thinking and their calculation about it. And that provides more accountability, provides more accountability ultimately to the citizens, who vote on Members of Congress.

That same accountability, by the way, is also in the Congressional Review Act. It is more attenuated. But you can still, by having a discharge position in the House to stop a rule, rather than the presumption of it—with the presumption being that it goes forward, or 30 Members of the Senate can have a discharge position, the mere prospect of a debate, even if everyone assumes that won't pass, I think, can also have a salutatory effect on the agencies and their deliberations. So I am encouraging Members of Congress, while you are deliberating the REINS Act, to use your authority under the Congressional Review Act, as well.

But, again, it comes down to sunshine, which Mr. Adler mentioned. Bringing things out into the public debate has a tremendous benefit on all of the actors involved.

Mr. FRANKS. Well, thank you, sir.

You know, I know there is going to be, as already manifest here, some debate as to the constitutionality of the legislation. I, for one, am fundamentally convinced that it is constitutional, but I want to, you know, be open to potential dissent here.

Those who cite article 2, section 1 of the Constitution obviously are citing that Executive power should be vested in the President. And, of course, some of us would cite article 1, section 1, that the legislative power is vested in the Congress. And it seems to me that regulation certainly has a lot of the same characteristics as legislation, so if you are going to make that case, it is important to consider.

But in constitutional terms, Mr. Adler, is there any critical substantive difference between the REINS Act and a statute that treats new regulations as simply proposed recommendations to Congress for legislative action?

Mr. ADLER. No, I don't think there is any significant difference, and I think both are clearly constitutional under existing precedent.

Mr. FRANKS. I am going to give Ms. Katzen an opportunity, actually, here in a moment. But I wanted to find out, what is your—why do you postulate that this is constitutional? Is there anything that you would point out in particular?

Mr. ADLER. Well, a couple things. I mean, the bicameral and presentment requirements have to be satisfied. Both would satisfy that.

I think that the Supreme Court has made clear, repeatedly, in numerous opinions, as have lower courts, that all authority to issue regulations must be expressly granted. There is no residual authority to issue regulations that comes with other grants of authority of agencies. It is not something that is seen as inherently Executive. It is something that, for the most part, the majority of Federal agencies did not enjoy until the 1970's. There were some exemptions.

And the presumption had been that, unless agencies are expressly granted the authority to issue legislative-type rules, that is an authority they lack. And Congress is not obligated to delegate

that authority. And if Congress wants to restrain that authority in some way, such as it does here, there is no constitutional problem. And it doesn't create the sorts of concerns that might be raised if, for example, Congress sought to impose similar limits on the exercise of, say, prosecutorial discretion or other things that are closer to the court——

Mr. FRANKS. I understand. No, that is a good answer.

Quickly then, Ms. Katzen, Justice Breyer and Professor Tribe of Harvard have both published articles supporting a view that the REINS Act is constitutional. And I know you know that. But could you specify for us why you think Mr. Adler is wrong or why Justice Breyer or Professor Tribe are wrong? And do you think there is any merit to their views whatsoever?

Ms. KATZEN. Well, thank you for that open invitation. And the light is red, but if I may answer?

Mr. COBLE. Briefly, if you will, Professor.

Ms. KATZEN. I will try.

I think Justice Breyer, who was then a judge, not a justice, was engaging in what he often does, which is extremely creative, more-theoretical-than-practical analysis in this article, which I have read very carefully.

And I think one of the most important things is that he sees it as a replacement for the one-house veto, which was invalidated in Chadha. And he saw it as a case by case, going through each of the statutes, rather than an across-the-board, blanket provision.

But, most importantly, when he finishes, he makes it very clear that it is neither practical nor desirable. He questions the wisdom of it. And if you read the entire article, it is a, "Well, we could do this kind of stuff, and we could think about these kinds of—"

Mr. FRANKS. So, in other words, he thinks it is stupid but constitutional?

Ms. KATZEN. He thinks that it is——

Mr. COBLE. The gentleman's time has expired.

Ms. KATZEN. But this was before the last several decades of Supreme Court decisions—in *Morrison v. Olson, Mistretta,* a few other cases—in which the Court has been very clear that separation of powers has a life beyond. They are looking at it on a functional basis——

Mr. COBLE. The time has expired, Professor. If you will wrap it up.

Mr. FRANKS. Thank you, Mr. Chairman.

Mr. COBLE. The time has expired.

Ms. KATZEN. Yes, sir.

Mr. COBLE. The gentleman from Illinois.

Mr. QUIGLEY. Thank you, Mr. Chairman.

You know, I am still relatively new here, but I learn something new every day. Today I learned that it is not good when someone who is not elected is enforcing our laws, especially criminal ones. So the next time a police officer stops me, I am going to say, "Who elected you?" Or FBI agents or State's attorneys or—just go on down the line.

In the end, the only person who is elected in the executive branch is the Executive. At the county level, I suppose that is the

State's attorney. But in the end, there is some delegation. This isn't 1776. It is a far more complicated world.

And, ladies and gentlemen, I would respectfully suggest or defy you to say, I am not going to think about regulation today. When I get on this commuter airliner, I am not going to wonder or worry about how many hours' sleep that pilot got last night. When you come to my hometown in Chicago, the morbidity and mortality capital of the United States for asthma, don't think about regulation. Or if you drink our tap water in Chicago, which has chromium levels—not in the lake, but in the drinking water—three times higher than the new—I know it is a bad word—regulation proposed in California. It is the Erin Brockovich chemical, if you will recall.

So you can decide now or you can decide when you have your eggs in the morning—a million cases of salmonella last year. I understand, we all understand, that the President was trying to strike a balance here. That over-200-year friction between the executive branch and the legislative branch. And it gnaws on you when you don't like what they do, so you want to change the rules when it bothers you.

So I looked at it. And I talk about the President striking a balance. Mr. McIntosh, Mr. Adler, how many rules do you think this President's EPA has proposed or finalized in his first 21 months? Just a guess, if you want.

Mr. ADLER. Major rules or all rules?

Mr. QUIGLEY. All rules. EPA only, Clean Air Act.

Mr. ADLER. Just under the Clean Air Act?

Mr. QUIGLEY. Yeah.

Mr. ADLER. My guess would be, just under the Clean Air Act, probably under a dozen.

Mr. QUIGLEY. It is much higher. It is 87. And I was appalled. I couldn't believe it. And I thought, well, who could be more liberal than—maybe the Clinton administration. The first 2 years, what do you think his numbers were? A hundred and fifteen. It just shows a trend here. I looked further. George W. Bush, first 2 years, 146—146.

So, Mr. McIntosh, you used the expression, I believe—and I don't want to misquote you, former Member—that the courts "forced their hand" on carbon. Does that mean you just disagreed with them?

Mr. MCINTOSH. No. What I meant by that was the Court, I think, incorrectly interpreted the bill.

Mr. QUIGLEY. But isn't that—go back to the Constitution. Now you are disagreeing with two out of three branches. Didn't the Constitution say that the executive enforces and then the Supreme Court interprets, and they interpreted. So you are upset with both of them now.

Mr. MCINTOSH. Well, at the time, the executive branch didn't share the Court's interpretation. And I think there was a fair amount of evidence in the legislative history that Congress didn't intend that when they passed the Clean Air Act amendments.

Mr. QUIGLEY. Well, just, if I could, sir, please, let me just read you the language that you had a problem with, section 202(a)(1): "which, in its judgment, causes"—we are talking about carbon here, that you don't have a problem with—"which, in its judgment,

causes or contributes to air pollution which may reasonably be anticipated to endanger public health or welfare."

So we were talking generalities before, but now we are talking specifics. You don't think that language implies that there could be a problem that someone in the EPA could reasonably interpret to endanger the public health or safety?

Mr. MCINTOSH. No. That section of the Clean Air Act was intended to give EPA the authority to regulate when substances that were, at the time that bill was passed, not known to be problematic for the health become known to them.

But, at the time, people knew of carbon dioxide. And I would recommend you check with John Dingell, who was the author of it. They did not intend for that provision of the Clean Air Act to give authority for EPA to regulate carbon dioxide. They talked about it in other parts of the bill, decided not to give that authority.

But let me—the language you cited I think is also a really important point for another issue that is very key to this whole debate. And that is, how specific should Congress be when it delegates the legislative authority to the regulatory agencies? And there has always been a debate back and forth about whether general language, like the language you cited, is appropriate. The consensus is that it has been in the Clean Air Act, in the language cited there.

But I would point you to an article that I referred to in my testimony by a professor at Boston University, Gary Lawson, where he points out that, if you had the "Goodness and Niceness Act" and said to the regulatory agency, "Promulgate rules for goodness and niceness, and figure out what the punishment should be," that that would be too broad a delegation.

So somewhere in there, there is a spectrum. And the Constitution says, no, the legislature can't delegate all of its legislative authority to the agencies. The REINS Act gives you the benefit of protecting against that, because for major regulations they come back to Congress and then there is a vote.

Mr. QUIGLEY. Only if you disagree.

Mr. GOWDY. [presiding.] Mr. McIntosh, I apologize, but the gentleman's time is expired.

The Chair would recognize the gentleman from Florida, Mr. Ross.

Mr. ROSS. Thank you, Mr. Chairman.

You know, it is interesting when we talk about the regulatory environment. And, as a businessman, one of the things I have learned is that, if I want to be profitable, if I want to make sure that I have the right environment, I try to manage my risks. And the risks I look at, of course, are, you know, there are some insurance risks, there is the market risk, there is my resource risk. But one of the things I have learned is the regulatory risk that exists is almost not manageable. And the reason it is not manageable is because there are no trends. There is no way you can anticipate what the regulatory environment is ever going to be if you want to start or operate a business.

And, in my particular State, there is a numeric nutrient water criteria that the EPA is trying to impose, coincidentally just on Florida, that my ag industry has indicated that it will cost over

14,000 full- and part-time jobs, lost over $1 billion annually, cost my phosphate and fertilizer industry $1.6 billion in capital costs and $59 billion in operating costs.

It would seem to me that this act, this REINS Act, would allow at least some sense of risk management over the regulatory environment. Wouldn't you agree, Mr. Adler?

Mr. ADLER. Oh, certainly.

Mr. ROSS. And with regard to even more imposition of regulatory schemes, I am reminded back years ago when I was in the legislature—and this is on a smaller scale—but I was active in a Boy Scout group that had a summer camp. And they had had this property for 50 years. But they wanted to put an outhouse on there for the summer camp. But what they found out is that, even though they had no running water and no electricity, they had to go get architectural drawings, engineer-designed approved plans. The DEP had to do a soil sampling. And by the time they were able to even get anything in order to meet with the regulatory system, summer camp was over.

And what it taught me, though, was that logic and reason isn't always there. Now, I know that H.R. 10 exempts camping, hunting, and fishing. But without logic and reason, I think you also lack accountability.

And one of the things—I want to ask you this, Ms. Katzen. Would not the REINS Act allow for a greater sense of accountability to where it should belong, and that is in the congressional oversight of the regulatory environment?

Ms. KATZEN. As I said earlier, Mr. Ross, I strongly endorse the notion of congressional oversight. I have no qualms whatsoever with your Committees calling up the—you call them bureaucrats; I would call them committed, career civil servants and political appointees at the agencies—and ask them, what are you doing and why are you doing it and what is the support for it? I think that is wholly appropriate.

But I would answer your earlier question to Mr. Adler differently. If you are worried about no trend, his answers to Mr. Quigley's question, was that there is no trend. Last year Congress passed a health-care bill. This year, it is going to be implemented, but it is going to come back up. And if one, not both, but just one house decides they don't like it, then it is not going to happen. And in 2 years, there will be another election, and maybe the other chamber will feel differently.

And the ability to predict what each election—and elections do have consequences, I do believe that, and I agree with that. But are you going to change, then, every 2 years the possibility that the rule is on, the rule is off, the rule is on, the rule is off, the rule is on, the rule is off? I think that leads to more uncertainty, less predictability. And——

Mr. ROSS. So you would suggest that the status quo is more certain, in terms of assessing the regulatory risk?

Ms. KATZEN. The regularity of process. You pass a bill; you then turn it over to the executive branch to faithfully carry out the laws and to issue the regulations. I agree with Mr. Adler, an agency is not a free agent, cannot do whatever it likes. It can only do what Congress has said. But if Congress says, set the limits at this level,

and the agency does that, it is faithfully carrying out the decision that Congress enacted.

Mr. ROSS. But wouldn't you agree that, in terms of accountability, that you have a greater degree of accountability where you have elected representation?

Ms. KATZEN. Yes. And the initial statute that was passed that authorizes the agencies is one that is fully accountable because it was bicameral and presentment. It was passed by both houses of Congress, and it was signed by the President.

And the fact that now one house may think differently about it does not lead to greater accountability. What about the other house, which may like the idea? You have gridlock, you have problems. And I think those problems create greater uncertainty for businesses.

Mr. ROSS. But with regard to gridlock—and, again, just to point out something real quickly here—in terms of the bill, the content of the bill says that, within 3 days of the regulatory rule, that Senate shall introduce their joint resolution. So there would not be—there would be an expedited fashion. So I take issue with you, there being gridlock there.

But I see my time has expired. Thank you.

Mr. GOWDY. Thank you.

On behalf of all of us, we would like to thank our witnesses for their testimony today.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond as promptly as they can so their answers may be part of the record.

Without objection, all Members will have 5——

Mr. CONYERS. Mr. Chairman, I ask unanimous consent to enter into the record the CRS report on total costs and benefits of rules.

Mr. GOWDY. Without objection.

Mr. CONYERS. Thank you.

[The information referred to follows:]

Order Code RL32339

Federal Regulations: Efforts to Estimate Total Costs and Benefits of Rules

Updated May 14, 2004

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Federal Regulations: Efforts to Estimate Total Costs and Benefits of Rules

Summary

Cost-benefit analysis has long been used to try and measure the effects of individual regulatory actions, and underlies at least part of many attempts to assess the cumulative effects of regulations on society. Some policy makers have expressed an interest in cost-benefit analysis and in developing an accurate measure of total regulatory costs as a first step in developing a "regulatory budget" that would set a cap on compliance costs. Although measuring total regulatory costs and benefits is inherently difficult (e.g., determining what effects would have occurred in the absence of the regulation and aggregating the results of studies with different methodologies and quality), estimates of regulatory costs have been used in support of legislation (e.g., H.R. 2432 in the 108th Congress) and are widely cited by policymakers, the media, and others. This report examines one such study to illustrate the complexities of this type of analysis.

In 2001, W. Mark Crain and Thomas D. Hopkins estimated total regulatory costs at $843 billion in 2000. To arrive at that figure, the authors developed estimates for different types of regulations (environmental, workplace, economic, and tax compliance) using various sources and sometimes making assumptions to adjust the results from previous studies. For example, to estimate the cost of environmental rules, the authors used only the upper end of a previous estimate range ($96 billion to $170 billion) that had been produced by the Office of Management and Budget (OMB), and then they adjusted it further upward. Also, the authors' estimate of the cost of economic rules ($435 billion) is heavily dependent on the accuracy of estimates from a previous study. The Crain and Hopkins study (as well as other studies) also indicated that federal regulations cost small businesses more per employee than larger businesses.

Since 1997, OMB has been required to issue an annual report containing, "to the extent feasible," an estimate of the aggregate costs and benefits of federal regulations. OMB's estimate of regulatory costs for 2000 ($146 billion to $229 billion) was significantly smaller than the Crain and Hopkins estimate ($843 billion) because OMB considered it inappropriate to include certain types of costs that the authors used (transfers and tax compliance). More recently, OMB has concluded that aggregate estimates of regulatory costs and benefits are not feasible, and instead has provided a 10-year rolling summary of costs and benefits only for certain major rules. OMB's draft report for 2004 indicated that the estimated costs of 85 major rules that the office reviewed from October 1993 through September 2003 ranged from $34 billion to $39 billion, with benefits estimated at between $62 billion and $168 billion.

Although accurate measures of the costs and benefits of all federal rules would be useful, decisionmakers using studies of aggregate regulatory costs and benefits to guide public policy need to be aware of those studies' conceptual and methodological underpinnings. This report will be updated periodically to reflect changes in OMB's estimates of regulatory costs and benefits, as well as the estimates developed by parties outside of the federal government.

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Federal Regulations: Efforts to Estimate Total Costs and Benefits of Rules

Regulation, like taxing and spending, is a basic function of government. Unlike taxing and spending, though, the costs that nonfederal entities pay to comply with federal regulations are not accounted for in the federal budget process. Cost-benefit analysis has long been used to try to account for the effects of individual regulatory actions, and underlies at least part of most attempts to assess the cumulative effects of regulations on society. Policy makers have long expressed an interest in cost-benefit analysis and in developing an accurate measure of total regulatory costs. Some have suggested that the federal government use that information to adopt a "regulatory budget" that could limit the total volume of regulatory programs, expenditures, and compliance costs, by setting a cap on the compliance costs each agency could impose on the economy. However, measuring total regulatory costs and benefits is inherently difficult. For example, researchers must determine the baseline for measurement (i.e., what effects would have occurred in the absence of the regulation) and aggregating the results of studies with different methodologies and quality can be highly problematic. Some observers, including the Office of Management and Budget (OMB), currently doubt whether an accurate measure of total regulatory costs and benefits is possible.

Nevertheless, estimates of total regulatory costs in the hundreds of billions of dollars are widely cited by policymakers, business interest groups, the media, and others. This report provides information on how one widely cited study was developed to illustrate the complexities associated with this type of analysis. The report also provides information on how OMB's estimates of aggregate federal regulatory costs were developed and have varied over time, and on estimates that have been made of aggregate regulatory costs to businesses. Finally, the report indicates that estimates of aggregate regulatory costs need to be interpreted and used carefully. First, however, the report provides some background regarding the types of rules that federal agencies issue and current cost-benefit analysis requirements.

Background

Each year, about 60 federal agencies issue more than 4,000 final rules or regulations on topics ranging from the timing of bridge openings to the permissible levels of arsenic and other contaminants in drinking water. The federal government has long regulated economic activity, often through independent regulatory agencies or commissions. Although economic regulation is often dated to the creation of the Interstate Commerce Commission in the late 1800s, it began in earnest during the 1930s with the creation of such agencies as the Securities and Exchange Commission (SEC), the Federal Deposit Insurance Corporation (FDIC), and the Federal Communications Commission (FCC). Social regulation in such areas as

environmental quality, workplace safety, and consumer protection grew rapidly during the 1960s and 1970s with the creation of such agencies as the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), and the Consumer Product Safety Commission (CPSC).

In addition to these regulatory agencies, most cabinet departments and other agencies issue regulations that affect the public in a variety of ways. For example, the Department of Agriculture regulates the price, production, import, and export of agricultural crops; the safety of meat, poultry, and certain other food products, and broad-reaching welfare programs. Agencies within the Department of Transportation set safety standards for highways and heavy trucks (Federal Highway Administration), automobiles and light trucks (National Highway Traffic Safety Administration, or NHTSA), and railroads (Federal Railroad Administration). Taken together, federal regulations now affect virtually every person, business, and government in the United States.

Types of Rules

The types of regulations that federal agencies issue have been categorized into the following groups:

- *economic* regulations that directly restrict businesses' pricing and output decisions as well as limit the entry or exit of businesses into or out of certain types of industries. These regulations often affect the agriculture, trucking, banking, or communications industries, among others, and (as mentioned previously) have often been administered by independent regulatory agencies such as the SEC or the FCC;

- *environmental* regulations that focus on protecting or improving the quality of the environment, and include those issued by EPA as well as the Departments of Transportation, Energy, and the Interior;

- *other social* regulations that are designed to advance the health and safety of consumers and workers, promote social goals such as equal opportunity, provide equal access to facilities, and protect the public from fraud and deception. Examples include regulations issued by OSHA, NHTSA, and the Food and Drug Administration;

- *process* regulations that involve paperwork, such as income tax forms, applications for procurement contracts, and immigration papers. The Internal Revenue Service currently accounts for about 80% of the governmentwide paperwork estimate; and

- *transfer* regulations that move payments from one group in society to another, such as federal Social Security payments (from taxpayers to recipients) and agricultural price supports (from taxpayers to farmers).

Each of these types of regulations may have direct or indirect costs and benefits. For example, direct costs of environmental or other social regulations include the capital equipment and labor needed to meet the environmental or health and safety standard. Indirect costs can include lost productivity or competitive disadvantages caused by the need to pay for the direct compliance costs. Most cost and benefit estimates for non-economic rules do not include indirect effects because they are extremely difficult to measure (and therefore may understate the total effects of the rules). Estimates for economic rules are primarily indirect.

In general, the benefits of regulation are harder to measure than regulatory costs, particularly in dollar terms. For example, the benefits of environmental protection are often presented in terms of improved health, quality of life, preservation of ecosystems, and other outcomes of environmental quality that are not traded in the marketplace. As a result, the value of these benefits is often estimated by economists through indirect "willingness to pay" models and statistical techniques. These estimation methods have been strongly criticized by some who consider placing a value on human life or health inappropriate, particularly when regulatory benefits occur in the future and are discounted in present value terms.[1]

Cost-Benefit Analysis

Some form of cost-benefit analysis underlies at least some part of most attempts to assess the cumulative effects of regulations on society. Conceptually, cost-benefit analysis is a rigorous procedure that involves systematically weighing the costs and benefits of various alternatives to a proposed action. The analysis is supposed to account for all of the effects of a regulatory action, including effects that are difficult to quantify or monetize. Although most economists view cost-benefit analysis as a useful tool in making decisions about a particular rule, others consider the technique inherently flawed because (among other things) they believe that the difficulty associated with measuring regulatory benefits often causes those benefits to be understated.

Since 1981, cabinet departments and independent agencies such as EPA have been required to prepare cost-benefit analyses before issuing "major" or "economically significant" rules (e.g., rules with a $100 million impact on the economy).[2] Independent regulatory agencies such as the SEC and the FCC are generally not required to conduct those analyses, and no agency is required to do so for rules that are not major or economically significant. Also, as the Supreme Court affirmed in 2001, some statutes prohibit the consideration of costs when setting certain health standards.[3]

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[1] See, for example, Lisa Heinzerling and Frank Ackerman, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection* (Washington: Georgetown University, 2002).

[2] The most widely applicable cost-benefit analysis requirements currently in place are in Executive Order 12866, "Regulatory Planning and Review," 58 *Federal Register* 51735, Oct. 4, 1993.

[3] *Whitman v. American Trucking Associations*, U.S., No. 99-1257, Feb. 27, 2001.

The cost-benefit studies that agencies conduct are almost always done before the rules are promulgated. These "ex ante" studies are often heavily dependent on assumptions, particularly regarding long-term or uncertain effects where subtle interactions between various factors are often not well understood or directly measurable. Very few "ex post" studies are done after rules are promulgated to try and determine whether the previous estimates were accurate.

Hopkins' Estimates of Aggregate Regulatory Costs

As discussed in greater detail later in this report, for the past several years, Congress has required OMB to prepare a report each year on the aggregate costs and benefits of federal rules. Others outside of government have also published studies during the past 15 years attempting to measure total regulatory costs. Some of the most commonly cited of those studies have been published by Thomas D. Hopkins,[4] and he has consistently concluded that the annual cost of federal regulations is in the hundreds of billions of dollars. For example, in 1991, Hopkins concluded that "federal regulation may be costing American taxpayers $400-$500 billion dollars annually (in 1988 dollars) over and above those costs of government that show up in the budget. This works out to an average of roughly $4,000-$5,000 per household."[5] Hopkins also concluded in this study that total regulatory costs had declined from 1977 to 1988, but had risen steadily thereafter. He also asserted that costs associated with environmental and process rules were rising more quickly than other types of regulatory costs.

Hopkins has updated his estimates of total regulatory costs several times over the years, with the results consistently indicating that those costs were growing rapidly. For example, in 1993 he estimated that total regulatory costs in 1991 were $542 billion.[6] In 1995, Hopkins concluded that "some $600 billion annually is spent by those regulated to comply with all federal regulation."[7] In 1996, Hopkins said that total regulatory costs stood at $668 billion (in 1995 dollars), and predicted that those costs would rise to more than $720 billion by the year 2000.[8]

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[4] Hopkins is the Dean of the College of Business at the Rochester Institute of Technology in Rochester, NY. In the early 1980s he served as deputy administrator of the Office of Information and Regulatory Affairs within OMB.

[5] Thomas D. Hopkins, "Cost of Regulation," report prepared for the Regulatory Information Service Center (Washington: Aug. 1991), p. 1. Specifically, Hopkins estimated that the total annual cost of regulation in 1990 (in 1988 dollars) was between $392 billion and $510 billion.

[6] Thomas D. Hopkins, *Federal Regulatory Burdens: An Overview*, RIT Public Policy Working Paper, Rochester Institute of Technology, Rochester, NY, 1993.

[7] Statement of Thomas D. Hopkins before the Committee on Governmental Affairs, United States Senate, Feb. 8, 1995, p. 1.

[8] Thomas D. Hopkins, *Regulatory Costs in Profile*, Policy Study Number 132, Center for the Study of American Business, Aug. 1996.

Most recently, in a 2001 report prepared for the U.S. Small Business Administration, Hopkins and W. Mark Crain estimated that the total cost of regulations was $843 billion in 2000.[9] This $843 billion estimate has been cited in support of regulatory reform legislation (e.g., H.R. 2432, the "Paperwork and Regulatory Improvements Act of 2003"), and has been widely quoted by policy makers, the Small Business Administration, business interest groups such as the Chamber of Commerce, academicians, the media, and others.[10] In some cases, the study is cited with a high degree of certainty. For example, some articles simply state that "regulations cost the economy $843 billion."[11] Less widely discussed, however, is how Crain and Hopkins developed that $843 billion estimate.

How the $843 Billion Estimate Was Developed

In their study, Crain and Hopkins presented estimates of both total regulatory costs ($843 billion) and for four types of federal regulations that comprised that total:

- environmental rules ($197 billion),
- economic rules ($435 billion),
- workplace rules ($82 billion), and
- tax compliance rules ($129 billion).

The authors used a variety of sources of information to develop estimates for these types of rules, sometimes using multiple sources and making multiple assumptions for a single estimate. Crain and Hopkins' estimation methods for each type of regulation are summarized below.

Environmental Regulations. To develop their estimate of environmental costs, the authors used the upper end of a cost estimate range that OMB had reported

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[9] W. Mark Crain and Thomas D. Hopkins, *The Impact of Regulatory Costs on Small Firms*, a report for the Office of Advocacy, U.S. Small Business Administration (2001). For a copy of this study, see [http://www.sba.gov/advo/research/rs207tot.pdf]. This study not only updated Hopkins' estimates of the overall cost of regulations, but also a 1995 study by Hopkins on the effect of regulations on small businesses. See Thomas D. Hopkins, *Profiles of Regulatory Costs: Report to the U.S. Small Business Administration* (Washington: National Technical Information Service, Nov. 1995).

[10] See, for example, Ashlea Ebeling, "The Other Federal Budget," *Forbes*, Oct. 1, 2003; testimony of Thomas M. Sullivan, Chief Counsel for Advocacy, U.S. Small Business Administration, before the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, Committee on Government Reform, U.S. House of Representatives, Feb. 25, 2004; and testimony of William P. Kovacs, Vice President, U.S. Chamber of Commerce, before the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, Committee on Government Reform, U.S. House of Representatives, Feb. 25, 2004.

[11] See, for example, Cait Murphy, "Where Does Washington Go From Here?," *Fortune Small Business*, Mar. 4, 2004.

in 2000 for rules issued through April 1999 ($96 billion to $170 billion),[12] and adjusted it further upward to account for rules issued in 1999 and 2000. The OMB estimate of environmental costs was initially based on a 1991 study by Robert W. Hahn and John A. Hird of regulatory costs in 1988, which was itself based on a compilation of previous studies and original research.[13] In its 2000 report, OMB said it used the information in the Hahn and Hird study (after making some adjustments and supplementing it with cost information from rules issued after 1988) even though it recognized that there were gaps and weaknesses in underlying studies that the authors relied on for their estimates.

Crain and Hopkins said their decision to use only the upper-end of the OMB estimate of environmental costs ($170 billion instead of, for example, the mid-point of the $96 billion to $170 billion range) reflected "a judgment on our part that cost estimates are absent for important environmental regulations and that government agencies tend to be conservative in estimating regulatory costs."[14] The authors' decision to adjust this upper-end estimate further upward to account for more recent rules stands in contrast to the approach that OMB took in its 2001 report. OMB said that it did not adjust its estimate for more recent rules because, among other things, inclusion of some of those rules would have constituted double counting when combined with estimates from prior years.[15]

Economic Regulations. To estimate costs associated with economic regulations, Crain and Hopkins combined data from various sources and made certain assumptions. For example, the authors based their estimate of the cost of domestic commerce regulations on a study by the Organization for Economic Cooperation and Development that had estimated that reforms in the transportation, energy, and telecommunications sectors would increase the U.S. gross domestic product (GDP) by 1%.[16] Because the GDP in 2000 was $10.1 trillion, Crain and Hopkins multiplied that number by 0.01 and therefore estimated an efficiency cost of domestic commerce regulation at $101 billion. Because a previous study suggested that transfer costs of rules could be at least twice as large as efficiency costs, the authors doubled the efficiency cost estimate and therefore estimated domestic transfer costs at $202 billion. Combining these two sets of estimates, they concluded that the total economic cost associated with domestic commerce regulations was $303 billion ($101 billion plus $202 billion).

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[12] Office of Management and Budget, Office of Information and Regulatory Affairs, *Report to Congress On the Costs and Benefits of Federal Regulations*, 2000.

[13] Robert W. Hahn and John A. Hird, "The Costs and Benefits of Regulation: Review and Synthesis," *Yale Journal on Regulation*, vol. 8 (Winter 1991), pp. 233-280. This study provided estimates of the costs and benefits of economic and social regulation for 1988. Most of the studies that the authors relied on had been conducted between 1975 and 1990.

[14] Crain and Hopkins, p. 9.

[15] Office of Management and Budget, Office of Information and Regulatory Affairs, *Making Sense of Regulation: 2001 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, 2001, p. 10.

[16] Organization for Economic Cooperation and Development, *Regulatory Reform in the United States* (Paris: OECD, 1999).

Crain and Hopkins used a similar approach to estimate the economic costs associated with international trade regulations. Citing previous studies indicating that removal of U.S. trade barriers would reduce costs by 1.3 % of the GDP, the authors estimated that the economic cost of those trade barriers in 2000 was $132 billion (1.3% of $10.1 trillion). Combining the domestic and international estimates, Crain and Hopkins therefore estimated that the total cost of economic regulations in 2000 was $435 billion ($303 billion plus $132 billion).

The authors' estimates of economic costs are heavily dependent on the accuracy of the previous studies' estimates. For example, if the OECD study had concluded that reforms in the transportation, energy, and telecommunications sectors would increase the GDP by one-half of 1% instead of 1%, Crain and Hopkins' estimate of the cost of domestic commerce regulations would have been 50% lower (about $152 billion instead of $303 billion). Because Crain and Hopkins' estimates of economic costs represent more than half of their estimate of all regulatory costs, these changes would have had a dramatic effect on their aggregate estimate.

It is also notable that the 1999 OECD study that Crain and Hopkins cite as the source of their estimate of the efficiency cost of domestic commerce regulation does not itself provide an estimate of economic costs in this manner. Instead, it cites a 1998 OMB study that concluded that "regulations on entry and prices still cost consumers and producers $70 billion annually."[17]

Tax Compliance Regulations. To estimate tax compliance costs, Crain and Hopkins relied on a November 2000 report by the Tax Foundation, which the authors said had used data from the Internal Revenue Service (IRS) on the number of hours of compliance time associated with tax paperwork.[18] The number of compliance hours was multiplied by various hourly wage rates (reflecting either the value of the preparer's time or the rate for a tax professional) to derive the estimated cost of tax compliance. The Tax Foundation study concluded that tax paperwork required 4.3 billion hours in 1999 and multiplied that by an average wage rate of about $29 per hour, yielding a tax compliance estimate of about $125 billion. Crain and Hopkins adjusted that figure upward to $129 billion for 2000.

To develop its estimate of 4.3 billion hours, the Tax Foundation added together the IRS estimates of compliance hours for a number of tax forms in 1999. However, in April 2000, IRS estimated the tax compliance burden as of September 30, 1999, at nearly 5.9 billion hours — more than 35% higher.[19] It is unclear why the Tax Foundation and Crain and Hopkins used the 4.3 billion-hour estimate based on certain forms instead of the 5.9 billion-hour estimate for all forms. Also, OMB had

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[17] OECD, p. 36.

[18] J. Scott Moody, *The Cost of Complying with the U.S. Federal Income Tax*, Background Paper No. 35 (Washington: The Tax Foundation, Nov. 2000). The Tax Foundation is a tax-exempt education organization founded in 1937 by a group of business executives and funded by voluntary contributions from philanthropic foundations, corporations, and individuals.

[19] See U.S. General Accounting Office, *Paperwork Reduction Act: Burden Increases at IRS and Other Agencies*, GAO/T-GGD-00-114, Apr. 12, 2000, p. 4.

previously used a wage rate of about $26.50 per hour to estimate tax compliance costs, somewhat less than the $29 average cost that the Tax Foundation used. Had Crain and Hopkins used the IRS estimate of its compliance hours (about 5.9 billion hours) and the OMB wage rate ($26.50), the authors' estimate of tax compliance costs would have been about $155 billion instead of $129 billion.

Workplace Regulations. To estimate the costs of workplace regulations, Crain and Hopkins relied on a 2001 study by Joseph Johnson covering 25 statutes and executive orders governing such issues as labor standards, employee benefits, occupational safety and health, and civil rights.[20] This study summarized the available research on each of the statutes and executive orders, selecting the studies that the author considered to be the most accurate. For example, Johnson noted that the Department of Labor and the General Accounting Office estimated the annual cost to employers of the Family and Medical Leave Act at $825 million, but that the Chamber of Commerce estimated the cost at between $3.9 billion and $24 billion. The author used the $3.9 billion estimate, noting that the $24 billion estimate assumed an unrealistically high rate of leave taking by employees and that it diverged significantly from the government estimates. However, Johnson did not explain why the government estimate — nearly five times lower than the estimate he used — was inappropriate.

Johnson reported that occupational safety and health regulations represented the largest single element of workplace costs, and said the Occupational Safety and Health Act was by far the largest component within this category. Johnson said that, based on OSHA's regulatory analyses, 31 major rules associated with the act imposed a total of $7.4 billion in annual costs. Because another author[21] had estimated that total costs (including fines for violations and costs for nonmajor rules) were actually at least 5.55 times these direct costs, however, Johnson used $41 billion as his best estimate of costs associated with the act ($7.4 billion times 5.55). Use of this multiplier had a dramatic effect on not only the estimated cost of regulations associated with Occupational Safety and Health Act regulations, but also the estimate for all workplace regulations. It is also unclear why fines for *violations* of OSHA rules should be considered *compliance* costs.

Hopkins' Cautionary Notes

Although some have treated Hopkins' estimates of regulatory cost as matters of certainty, the author himself has frequently cautioned readers that his estimates of regulatory costs are just that — estimates — and noted the sometimes limited nature of the data available. For example, in his 1991 report Hopkins said that, other than some general observations about the overall trends in regulatory activity, the report

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[20] Cited in the Crain and Hopkins report as Joseph Johnson, *The Cost of Workplace Regulations* (Arlington, VA: Mercatus Center, April 2001). Johnson later published a similar paper entitled *A Review and Synthesis of the Cost of Workplace Regulations* (Arlington, VA: Mercatus Center, Aug. 30, 2001).

[21] Harvey S. James, Jr., "Estimating OSHA Compliance Costs," Policy Study No. 135 (St. Louis: Center for the Study of American Business, Oct. 1996).

> begins to resemble a patchwork quilt with some important patches missing and others in rather thread-bare condition. For the available sources of cost information ... are spotty in their coverage, diverse in their objectives, and inconsistent in a host of ways, including definitions, methodology, and data adequacy. Existing studies do not utilize the same cost concepts, and they do not for that matter share a common view of what is to be considered a regulation.

More recently, in their 2001 report, Crain and Hopkins noted that some experts do not consider transfer costs to be regulatory costs,[22] and therefore presented estimates later in their report showing regulatory costs without transfers. Their estimate of the cost of economic regulation dropped from $435 billion to $145 billion, and the cost of workplace regulations dropped from $82 billion to $24 billion. Their estimate of overall regulatory costs went from $843 billion to $495 billion — more than 40% lower. However, the cost figures from the Crain and Hopkins study that are quoted by others (and the only figures reported in the authors' executive summary) are the costs including transfers.

Also, although none of Hopkins' studies of regulatory costs contained information on the benefits that regulations provide, he has consistently recognized that many regulations provide substantial benefits to society. For example, in his 1991 study Hopkins said "these benefits must be assessed before a balanced picture of regulation can be produced," and went on to say that, if commensurate benefits are being provided, rising regulatory costs were "not necessarily troublesome and may indeed be laudable."[23] In their 2001 report, Crain and Hopkins said developing data on regulatory benefits "would be a logical next step toward building a more rational regulatory system."

OMB Reports on Regulatory Costs and Benefits

As noted previously, for the past several years, Congress has required OMB to submit annual reports on the costs and benefits of federal regulations. The first such requirement was in section 645 of the Treasury, Postal Service and General Government Appropriations Act, 1997 (Public Law 104-208), which required the director of OMB to submit a report by September 30, 1997, that provided (among other things) "estimates of the total annual costs and benefits of federal regulatory programs, including quantitative and nonquantitative measures of regulatory costs and benefits." Similar requirements were contained in other appropriations bills in subsequent years.

More recently, section 624 of the Treasury and General Government Appropriations Act, 2001, (31 U.S.C. 1105 note), sometimes known as the "Regulatory Right-to-Know Act," put in place a permanent requirement for an OMB

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[22] These critics (including OMB) argue that, because transfer regulations move payments from one group in society to another, one group's cost represents another group's gain. As a result, the net cost to society as a whole is zero.

[23] Thomas D. Hopkins, "Cost of Regulation," report prepared for the Regulatory Information Service Center (Washington: Aug. 1991), p. 7.

report on regulatory costs and benefits. Specifically, it requires OMB to prepare and submit with the President's budget an "accounting statement and associated report" containing an estimate of the total costs and benefits (including quantifiable and nonquantifiable effects) of federal rules and paperwork, to the extent feasible, (1) in the aggregate, (2) by agency and agency program, and (3) by major rule. The accounting statement is also required to contain an analysis of the impacts of federal regulation on state, local, and tribal governments, small businesses, wages, and economic growth.

OMB's Estimates of Total Regulatory Costs and Benefits

For the first several years, OMB provided estimates of total regulatory costs and benefits, and those estimates (particularly the benefits estimates) varied substantially from year to year.

- In its 1997 report, OMB estimated total federal regulatory costs in 1997 at $279 billion, and estimated the benefits of federal regulations at $298 billion.
- In its 1998 report, OMB estimated federal regulatory costs at between $170 billion and $230 billion (in 1996 dollars as of 1998), and estimated regulatory benefits at between $260 billion and $3.5 trillion.[24] The dramatic increase in the benefits estimate (by a factor of 12) was almost entirely due to the inclusion of an EPA estimate of the benefits associated with the Clean Air Act.[25] Many observers had serious questions regarding the use of this EPA estimate, and EPA itself said it had only a small probability of being correct.

- In its 2000 and 2001 reports, OMB estimated the cost of all social regulations at between $146 billion and $229 billion (in 1996 dollars as of 1999), and estimated benefits at between $254 billion and nearly $1.8 trillion.[26] The nearly 50% drop in the upper-bound benefits estimate (from $3.5 trillion to $1.8 trillion) was primarily caused by a significant drop in the previously-mentioned EPA estimate of the benefits of the Clean Air Act (from $3.2 trillion to $1.45 trillion), which OMB said was EPA's more accurate "expected value estimate."

Each year, OMB presented its aggregate cost and benefit estimates with strong caveats. For example, in its first report in 1997, OMB said "it is extremely difficult,

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[24] Office of Management and Budget, Office of Information and Regulatory Affairs, *Report to Congress on the Costs and Benefits of Federal Regulations*, 1998.

[25] U.S. Environmental Protection Agency, *The Benefits and Costs of the Clean Air Act, 1970-1990* (Oct. 1997).

[26] Office of Management and Budget, Office of Information and Regulatory Affairs, *Report to Congress On the Costs and Benefits of Federal Regulations*, 2000; Office of Management and Budget, Office of Information and Regulatory Affairs, *Making Sense of Regulation: 2001 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, 2001.

if not impossible, to estimate the actual total costs and benefits of all existing Federal regulations with any degree of precision."[27] The next year OMB said "there is not yet a professional consensus on methods that would permit a complete, consistent accounting of total costs and benefits of Federal regulation."[28] Some of the methodological problems that OMB pointed out included the following:

- The baseline for measurement is often not clear (i.e., what costs and benefits would have occurred in the absence of the regulation).
- It is difficult to attribute costs or benefits to federal regulations as opposed to state or local rules, voluntary standards organizations, insurance requirements, or the tort system.
- Technological change can make previous estimates of benefits and costs extremely inaccurate.
- Regulatory requirements sometimes become standard business practice (e.g., requirements to remove lead from gasoline or to put air bags in automobiles), so cost or benefit reductions would be unlikely to occur if the rules were eliminated entirely.
- Aggregating the results of different studies is highly problematic, as the studies vary in the quality, methodology, and types of regulatory impacts they include.
- It is unclear which rules should be included in any tabulation of regulatory costs and benefits (e.g., "transfer" regulations such as crop subsidy payments).

In developing its estimates, OMB did not include "transfer" rules (which OMB said were about $140 billion in costs and benefits in 1997) because it considered them to be payments that reflect a redistribution of wealth rather than social costs to society as a whole. OMB also excluded the costs associated with filling out tax paperwork (which OMB estimated were about $140 billion in 1997) because it did not consider filling out income tax forms "regulations" in the traditional sense. Neither did it include estimates for rules published after 1987 for which agencies did not conduct cost-benefit analyses (e.g., rules with less than a $100 million impact on the economy).

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[27] Office of Management and Budget, Office of Information and Regulatory Affairs, *Report to Congress On the Costs and Benefits of Federal Regulations*, Sept. 30, 1997.

[28] Office of Management and Budget, Office of Information and Regulatory Affairs, *Report to Congress On the Costs and Benefits of Federal Regulations*, 1998.

Comparison of OMB's and Crain and Hopkins' Estimates of Regulatory Costs

Table 1 below compares the estimates of regulatory costs that were developed by Crain and Hopkins for 2000 with the estimates that OMB used in its report for 2000. Comparisons within the types of rules are not always possible, as somewhat different categories were used in the two studies. For example, whereas OMB presented "transportation" and "other social" regulations separately, they appear to be included in the Hopkins-Crain estimates as part of the economic regulations estimate. Where estimates were presented for similar types of rules in both studies (environmental and workplace/labor), the Crain and Hopkins estimates were usually larger. As noted previously, the significant difference between the two studies' aggregate estimates are primarily because Crain and Hopkins included certain costs that OMB did not — the transfer costs associated with economic regulations[29] and the costs associated with tax paperwork. (In its report, OMB provided separate estimates for both economic regulations and tax paperwork, but said they should not be added to the estimates for other types of rules.)

Table 1. Comparison of Regulatory Cost Estimates for Calendar Year 2000 in the Crain and Hopkins Study and the OMB Study

Type of regulation	Crain and Hopkins estimate (in billions)	OMB estimate (in billions)
Environmental	$197	$96 - $170
Workplace/Labor	82	18 - 19
Transportation	---	15 - 18
Other social	---	17 - 22
Economic	435	---
Tax compliance	129	---
All rules	**843**	**146 to 229**

Sources: W. Mark Crain and Thomas D. Hopkins, *The Impact of Regulatory Costs on Small Firms*, a report for the Office of Advocacy, U.S. Small Business Administration (2001); and Office of Management and Budget, Office of Information and Regulatory Affairs, *Making Sense of Regulation: 2001 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, 2001.

OMB No Longer Reports Estimates for All Rules

OMB's reports since 2001 that were developed pursuant to the Regulatory Right-to-Know Act have differed from the office's previous reports in that they have not presented cost or benefit estimates for all rules in existence. Instead, OMB has presented information for all regulations that it reviewed within a particular time-

[29] As noted previously, Crain and Hopkins also presented data later in their study showing significantly lower costs of regulation if transfer costs were excluded. However, the more commonly quoted estimates were those including transfer costs.

frame that (1) had costs or benefits of at least $100 million annually and (2) the costs and benefits had been monetized by either the rulemaking agency or OMB. Specifically:

- OMB's report for 2002 presented information on the costs and benefits of all regulations meeting those criteria that it reviewed for a six-and-one-half year period from April 1, 1995, to September 30, 2001.[30] OMB said the total cost of those rules was about $50 billion to $53 billion (in 2001 dollars), and the benefits ranged from $48 billion to $101 billion.

- In its 2003 report, OMB provided estimates of the costs and benefits of 107 regulations meeting the above criteria that it reviewed during the 10-year period from October 1992 through September 2002.[31] OMB estimated that the total costs of these rules ranged from nearly $37 billion to nearly $43 billion (in 2001 dollars), with benefits ranging from $146 billion to $230 billion. OMB noted that four rules issued by EPA accounted for a substantial fraction of the aggregate benefits for all 107 rules.

In its 2002 report, OMB said its decision to present data for only certain rules during a limited time-frame was driven by the inconsistent and increasingly aged nature of many of the studies used to develop aggregate estimates. OMB went on to say that "we do not believe that the estimates of the costs and benefits of regulations issued over ten years ago are reliable or very useful for informing current policy decisions." Therefore, OMB said that "in keeping with the spirit of OMB's new information-quality guidelines, we have decided not to reproduce the aggregate estimates that were contained in Appendix C of the draft report."[32] The report went on to say that the total costs and benefits of all federal rules then in effect "could easily be a factor of ten or more larger." In its 2003 report, OMB said that estimates prepared for rules adopted prior to the 10-year period "are of questionable relevance now."

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[30] Office of Management and Budget, Office of Information and Regulatory Affairs, *Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, 2002.

[31] Office of Management and Budget, Office of Information and Regulatory Affairs, *Informing Regulatory Decisions: 2003 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, 2003.

[32] Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001, generally known as the "Data Quality Act" or the "Information Quality Act," amended the Paperwork Reduction Act and directed OMB to issue government-wide guidelines that "provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies." OMB issued a final version of those guidelines in February 2002. The act also required agencies to establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency.

OMB's 2004 Draft Report

In February 2004, OMB released a draft of its 2004 report on the costs and benefits of federal regulation.[33] This report focused on the 85 major rules that OMB reviewed from October 1, 1993, to September 30, 2003. OMB said the estimated costs of these rules ranged from $34 billion to $39 billion, and said the estimated benefits were from $62 billion to $168 billion (all in 2001 dollars). As Table 2 below illustrates, EPA's rules accounted for more than half of the benefits and about two-thirds of the costs of these rules, with the bulk of EPA's costs and benefits attributable to what OMB described as "a handful of EPA clean-air rules that reduce public exposure to fine particulate matter." With the exception of the Department of Homeland Security (DHS), all of the agencies' largest cost estimates are always smaller than the smallest benefits estimate.[34] OMB said the substantial drop in the benefits estimates from the previous report (from $230 billion to $168 billion at the upper end of the range) was caused by one EPA rule (implementing the sulfur dioxide limits of the acid rain provisions in the 1990 amendments to the Clean Air Act) that fell out of the 10-year window because it was issued in the 1992-1993 period.

Table 2. Estimates of Total Annual Benefits and Costs of 85 Major Federal Rules Reviewed by OMB Between Oct. 1, 1993, and Sept. 30, 2003

Agency	Benefits (in millions)	Costs (in millions)
Agriculture	$2,933 - $6,123	$1,634 - $1,656
Education	655 - 813	361 - 610
Energy	3,990 - 4,058	1,836
Health and Human Services	8,742 - 12,138	3,025 - 3,121
Homeland Security	62	899
Housing and Urban Development	190	150
Labor	1,264 - 3,645	806
Transportation	6,608 - 9,386	3,814 - 5,854
Environmental Protection Agency	37,647 - 131,682	21,629 - 24,024
All agencies	**62,091 - 168,098**	**34,156 - 38,958**

Source: Office of Management and Budget, *Informing Regulatory Decisions: 2004 Draft Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, Feb. 2004.

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[33] Office of Management and Budget, *Informing Regulatory Decisions: 2004 Draft Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, Feb. 2004.

[34] OMB noted that all of these DHS rules had been issued by the Coast Guard, and said that "the benefits of a reduced risk of terrorism have proven very difficult to quantify and monetize."

As in previous reports, OMB said that the total costs and benefits of all federal rules currently in effect "could easily be a factor of ten or more larger" than the estimates it provided for the 10-year period. Some have questioned why OMB only includes rules in its estimates that it reviewed within the previous 10 years.

Estimates of Regulatory Costs to Businesses

In addition to developing estimates of total regulatory costs, the 2001 Crain and Hopkins study also provided estimates of those costs to businesses. Specifically, the authors estimated that $497 billion of the $843 billion in aggregate regulatory costs in 2000 were imposed on businesses. To develop this estimate, Crain and Hopkins assumed that business costs were 65% of environmental costs, 50% of economic costs, 100% of workplace costs, and 54% of tax compliance costs. The environmental and tax cost assumptions were reportedly informed by previous studies, but the authors said the 50-50 division of economic costs was "a default judgment." The allocation for workplace regulations was based "on the simple fact that these only apply to business enterprises."

Regulatory Costs on Small Business and Manufacturers

In what they described as their most important finding, Crain and Hopkins also concluded that small businesses experienced about 60% greater costs per employee than larger firms — nearly $7,000 per employee in firms with fewer than 20 employees compared to less than $4,500 per employee in larger firms. As Table 3 below illustrates, Crain and Hopkins reported that environmental regulations and tax compliance paperwork were more than twice as costly per employee to small firms than to larger firms. In contrast, they said that the cost of economic regulations fell most heavily on large firms, and the costs of workplace regulation were slightly greater per employee to medium-sized firms.

Table 3. Crain and Hopkins' Estimates of Total Federal Regulatory Costs Per Employee by Size of Firm, Calendar Year 2000

Type of regulation	Firms with fewer than 20 employees	Firms with 20 to 499 employees	Firms with 500 or more employees	All firms
Environmental	$3,328	$1,173	$717	$1,213
Economic	1,616	1,648	2,485	2,065
Workplace	829	873	698	779
Tax compliance	1,202	625	562	665
All types of regulation	**6,975**	**4,319**	**4,463**	**4,722**

Source: W. Mark Crain and Thomas D. Hopkins, *The Impact of Regulatory Costs on Small Firms*, a report for the Office of Advocacy, U.S. Small Business Administration (2001), p. 3.

Crain and Hopkins also reported the per-employee costs of regulation by type of firm — manufacturing, trade (wholesale and retail), services, and all other types of firms. As Table 4 below illustrates, the authors concluded that regulations were most costly to manufacturing and "other" firms (including such businesses as coal mining, ore mining, oil and gas extraction, coal gasification, and electric utilities), and they were particularly hard-hit by environmental regulations in comparison to their trade and service counterparts. Manufacturing and other firms also had somewhat higher compliance costs per employee for workplace regulations. In contrast, service firms reportedly experienced the least regulatory cost, particularly with regard to environmental and economic regulations.

Table 4. Crain and Hopkins' Estimates of Total Federal Regulatory Costs Per Employee by Type of Firm, Calendar Year 2000

Type of regulation	Manufacturing firms	Trade firms	Service firms	Other firms
Environmental	$3,691	$0	$33	$2,823
Economic	2,553	2,166	847	3,704
Workplace	838	734	747	845
Tax compliance	822	698	273	1,193
All types of regulation	**7,904**	**3,598**	**1,900**	**8,564**

Source: W. Mark Crain and Thomas D. Hopkins, *The Impact of Regulatory Costs on Small Firms*, a report for the Office of Advocacy, U.S. Small Business Administration (2001), p. 27.

Crain and Hopkins also provided estimates of regulatory costs per firm and as a percentage of receipts. Both of these measures indicated that regulations were more costly for manufacturers than for other types of firms. For example, the authors reported that, on average, U.S. firms spend nearly $90,000 per firm to comply with federal regulations, but said manufacturers' costs were more than $440,000 per firm. In contrast, they said regulatory costs for the service sector were less than $32,000 per firm.

Finally, combining the two previous perspectives, the authors reported that small manufacturing firms appeared to be the most affected by regulatory costs on a per-employee basis. For example, they said that manufacturing firms with fewer than 20 employees averaged nearly $17,000 in regulatory costs per employee, whereas regulatory costs in manufacturing firms with 500 or more employees were just over $7,000 per employee. In the service sector, they said regulations cost more than $2,200 per small firm but less than $1,800 per large firm.

Manufacturers and Workplace Regulations

In December 2001, W. Mark Crain and Joseph Johnson reported the results of a survey that they conducted of 100 manufacturers concerning the cost of workplace regulations (e.g., those governing worker health and safety, employee benefits, civil

rights, labor standards, and labor-management relations).[35] Crain and Johnson said that, in 2000, complying with those regulations cost those 100 manufacturers an average of $2.2 million per firm, or about $1,700 per employee. The authors also said that there were significant differences in regulatory costs by firm size. For example, in small manufacturing firms (those with fewer than 100 employees), the authors reported that compliance with workplace regulations cost nearly $2,600 per employee. In large firms (those with 500 or more employees) they said the cost was $1,530 per employee, and in medium-size firms (those with 100 to 499 employees) the cost was about $1,360 per employee. They said that if the results from these 100 firms were extrapolated to all manufacturing firms in the U.S. (about 300,000), the total cost of compliance with workplace rules for manufacturers would be $32 billion.[36]

The overall conclusion that the authors drew from this study is consistent with the conclusion in the previously mentioned study by Crain and Hopkins — that regulatory costs per employee are greater for small businesses than for larger businesses. The actual costs reported in these studies differ substantially. For example, whereas Crain and Hopkins found that compliance with workplace regulations in 2000 cost less than $47,000 per manufacturing firm, Crain and Johnson concluded that workplace regulations cost they manufacturers in their study an average of about $2.2 million per firm — about 50 times higher.

Aggregate Cost and Benefit Estimates Need Careful Interpretation

The differences in the estimates resulting from studies of aggregate regulatory costs or benefits suggest that users of those estimates would be wise to understand how they were developed. Most of the studies attempt to aggregate the results of previous studies, which may themselves be aggregations of previous studies with significantly different methodologies. Slight changes in these studies' assumptions or data can yield vastly different results, even when done by the same author. For example, the addition of one study, or even one rule, has caused OMB's estimates to fluctuate significantly from year to year. There are also substantial differences of opinion regarding which types of rules should be included in these tabulations; while some studies include transfer costs and costs associated with tax paperwork, others do not, yielding cost estimates for the same year that differ by hundreds of billions of dollars. Still other studies rely on surveys of regulated entities, asking them to self-report their regulatory costs. The use of self-reported information from regulated entities about the costs associated with regulatory compliance may be problematic in the absence of corroborating data.

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[35] W. Mark Crain and Joseph M. Johnson, *Compliance Costs of Federal Workplace Regulations: Survey Results for U.S. Manufacturers* (Arlington, VA: Mercatus Center, Dec. 2001).

[36] This figure includes both recurring costs and one-time costs such as lawsuits. If only recurring costs are included the authors said the cost of compliance would drop to $28 billion.

In 1996, the General Accounting Office (GAO) attempted to collect information from companies regarding their regulatory compliance costs.[37] GAO discovered that none of the more than 50 companies it contacted could provide reliable information on regulatory costs. Part of the problem was that companies found it difficult to identify incremental regulatory costs — i.e., the costs that would not have been borne in the absence of federal regulation. For example, even if they were not required by OSHA, most companies would take steps to protect their workers from obvious hazards. Therefore, the real cost of regulation is what those companies are required to spend over and above what they would have done anyway. None of the companies that GAO contacted had a database capable of capturing incremental costs, probably because there is no regular business use for such data. The companies also had difficulty developing a list of federal regulations applicable to their firms and differentiating federal regulatory costs from costs associated with requirements issued by other jurisdictions and other entities. GAO concluded that objectively measuring the aggregate cost of federal regulations in a single company was extremely difficult, and said "decisionmakers using studies that attempt to measure total current regulatory costs to guide public policy need to be aware of those studies' conceptual and methodological underpinnings."[38]

Studies of aggregate regulatory costs can provide some useful perspective on the effects that federal regulations have on the economy in general and businesses in particular. Although reliant on numerous assumptions and sometimes dated information, the aggregate estimates of regulatory costs are the best measure of those effects currently available. The estimates derived from those studies can vary widely, and depend heavily on the quality of the information used and how the data are adjusted and combined. The fragility of those estimates is further underscored by the fact that OMB no longer considers it feasible to report the costs and benefits of all federal regulations. Also, to provide a full picture, estimates of regulatory costs should be accompanied by estimates of regulatory benefits. Unfortunately, regulatory benefits are even more difficult to measure than regulatory costs. Differences in the cost and benefit estimates derived from those studies illustrate the degree to which they should be viewed as providing interesting, but not necessarily definitive, information.

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[37] U.S. General Accounting Office, *Regulatory Burden: Measurement Challenges and Concerns Raised by Selected Companies*, GAO/GGD-97-2, Nov. 18, 1996.

[38] Previously, GAO concluded that estimates of regulatory compliance costs reported in the banking industry were of little value due to serious methodological deficiencies. See U.S. General Accounting Office, *Regulatory Burden: Recent Studies, Industry Issues, and Agency Initiatives*, GAO/GGD-94-28, Dec. 13, 1993.

Mr. GOWDY. Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion into the record.

With that, on behalf of all of us, thank you for your expertise, for your time, and your participation.

This hearing is adjourned.

[Whereupon, at 5:35 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

RESPONSES TO POST-HEARING QUESTIONS FROM SALLY KATZEN, VISITING PROFESSOR, NEW YORK UNIVERSITY SCHOOL OF LAW, SENIOR ADVISOR, PODESTA GROUP

Response to Questions for the Record Re The Reins Act

Question 1: What do you think the likely effect of the Reins Act would be if it were enacted in law?

Answer: The Reins Act is intended to increase congressional accountability and to reduce the regulatory burden of what its proponents view as an out-of-control regulatory system. If enacted in law, I believe it would have the opposite effect – namely, diminish the public's confidence in the Congress and essentially freeze in place the regulatory status quo that its sponsors find so objectionable.

On the first point, we have experienced divided government for most of the last three decades, where one political party controls one or both houses of Congress and the other party controls the White House. If the pattern holds and if the Reins Act were enacted in law, one House alone would be able to block any major rule proposed by an Administration – whether because a majority of that body is opposed to the rule on the merits or because of a lack of time on the calendar to process each of the major rules that year in a timely (as defined by the Reins Act) basis - leaving duly enacted legislation (representing the will of that Congress or a previous one) as an empty promise on the books; the public would have been told that it is the law, but the law would not be implemented and therefore not in effect. The public will rightly wonder whether what Congress does matters at all.

On the second point, many major rules are controversial, and while the proponents of the Reins Act focus on those who may object to the rule, there are often others who believe it is necessary or desirable (and possibly not sufficiently rigorous). Consider then when an Administration seeks to revise a rule to make it less stringent or to rescind it completely. The revocation (or streamlining) of a major rule, like the adoption of a rule in the first place, must not only proceed through the notice and comment process, but also would be subject to the Reins Act, and just as the opponents of a proposed rule could effectively block promulgation of the rule so long as they control at least one of the three actors – the House, the Senate or the White House -- so too, the proponents of a revised or rescinded rule could block its taking effect so long as they control one of the three decision makers. The likely result will thus be a standoff or the preservation of the status quo.

Question 2: Please respond to Professor Adler's contention that executive branch and independent regulatory agencies often seek to evade legislative oversight and

controls, thereby undermining what checks currently exist with respect to the substance of regulations issued by such agencies.

Answer: I am not aware of the basis for Professor Adler's assertion that agencies seek to evade legislative oversight. He did not cite any studies or provide any examples, so I cannot tell whether his contention is purely theoretical, based on his academic studies, or reflects real life experience in the federal government. Based on my experience (roughly 10 years in the executive branch in various capacities) I would say that congressional oversight is respected and expected as a legitimate part of the process. Agencies are fully aware that their authority comes from Congress and that Congress controls the purse strings, and that which is given can be taken away. During my tenure, I testified before various committees of Congress around 50 times and had appreciably more meetings and phone calls with individual Members on matters of interest to them. Congressional oversight is often very helpful for those in the agencies, especially in terms of their understanding how their activities are perceived by others.

REPORT FROM THE CENTER FOR PROGRESSIVE REFORM (CPR)

Setting the Record Straight:

The Crain and Crain Report on Regulatory Costs

by CPR Member Scholar Sidney A. Shapiro (University Distinguished Chair in Law, Wake Forest University School of Law),
Ruth Ruttenberg (Professor, National Labor College),
and CPR Policy Analyst James Goodwin

February 2011

Setting the Record Straight: The Crain and Crain Report on Regulatory Costs

Introduction

Critics of health, safety, and environment regulation have sought to buttress the case against regulation by citing a 2010 report by economists Nicole Crain and Mark Crain called *The Impact of Regulatory Costs on Small Firms*[1] ("the Crain and Crain report"). The Crain and Crain report is the fourth in a series of reports that have been produced under contract for the Small Business Administration's (SBA) Office of Advocacy since 1995, each of which has attempted to calculate the total "burden" of federal regulations, and to demonstrate that small businesses in all economic sectors bear a disproportionate share of that burden.[2]

Among the Crain and Crain report's findings is one that has become a centerpiece of regulatory opponents' rhetoric: the "annual cost of federal regulations in the United States increased to more than $1.75 trillion in 2008."[3] This figure is several orders of magnitude larger than the estimate generated by the Office of Management and Budget (OMB)—the official estimate of the aggregate costs and benefits of federal regulations prepared annually for Congress. The 2009 OMB report found that in 2008 annual regulatory *costs* ranged from $62 billion to $73 billion.[4] The authors of the Crain and Crain report attribute this massive difference to the fact that their report considers many more rules than do the annual OMB reports, including rules with estimated costs less than $100 million, rules that were put on the books more than 10 years ago, and rules issued by independent regulatory agencies.[5]

As this report demonstrates, however, much more is at work than that. In areas where the OMB and Crain and Crain calculations overlap, Crain and Crain use the same cost data as OMB, but, unlike OMB, which presents regulatory costs as a range, Crain and Crain always adopt the upper end of the range for inclusion in their calculations, a departure that is not justified as we explain in this report. Further, Crain and Crain's calculations for the regulations not covered by OMB's report appear to be based largely on a decidedly unusual data source for economists—public opinion polling, the results of which Crain and Crain massage into a massive, but unsupported estimate of the costs of "economic" regulations. Because Crain and Crain have refused to make their underlying data or calculations public—apparently even withholding them from the SBA office that contracted for the study—it is difficult to know precisely how they arrived at the result that economic regulation has a cost of $1.2 trillion dollars, comprising more than 70 percent of the total costs in their report. Nevertheless, even based on what Crain and Crain reveal, their calculation of the cost of economic regulations is deeply flawed, as we also explain.

In addition, the OMB report accounts for an equally relevant figure that the Crain and Crain's $1.75 trillion figure simply omits: the economic benefits of regulation. OMB's 2009 recent report found that in 2008 annual *benefits* of regulation ranged from $153 billion to $806 billion.[6] And, as a series of CPR reports have explained, the OMB reports likely overestimate regulatory costs and underestimate regulatory benefits, including omitting from its calculations altogether significant benefits that happen to defy monetization.[7] In contrast, the Crain and Crain report makes no effort to account for regulatory benefits. If, for example, a regulation imposes $100 in

costs on a business, but provides twice that in benefits, the Crain and Crain report would still tally that as $100 cost to society, even though it provides substantial net benefits.

It's easy to see why the anti-regulatory critics have seized on the Crain and Crain report and its findings.[8] The $1.75 trillion figure is a gaudy number that was sure to catch the ear of the media and the general public. Upon examination, however, it turns out that the $1.75 trillion estimate is the result of transparently unreliable methodology and is presented in a fashion calculated to mislead.

This report points out the severe flaws with the effort by Crain and Crain to estimate total regulatory costs. These flaws include:

- **Omitted benefits of regulation**. A discussion of regulation is inherently incomplete—and distorted—if it focuses on costs without also considering benefits. Simply put, OMB's calculations demonstrate that regulation has a positive net effect on the economy, and not by a little. The Crain and Crain report simply ignores the benefits of regulation, focusing solely on one half of the equation. But, claiming to present a compilation of regulatory costs, without also presenting a compilation of regulatory benefits, is fundamentally misleading. Indeed, using Crain and Crain's methodology, practically any economic transaction—from the purchase of a loaf of bread to the construction of a manufacturing plant—would be counted as a drain on the economy, because they only include the costs not the benefits.* The Crain and Crain report's failure to include an accounting of regulatory benefits is particularly puzzling, since virtually every source the authors rely on for estimates of costs also provide estimates of benefits as well.
- **Questionable assumptions and flimsy data**. The report's estimate of "economic regulatory" costs—financial regulations, for example—which account for 70 percent of the total regulatory costs, is not based on actual cost estimates. Instead, this estimate is based on the results of public opinion polling concerning the business climate of countries that has been collected in a World Bank report. The authors of the World Bank report warn that its results should not be used for exactly the type of extrapolations made by Crain and Crain, because their underlying data are too crude. Crain and Crain nevertheless enter the World Bank data into a formula, which they appear to have created out of whole cloth, that purports to describe a relationship between a country's regulatory stringency and its Gross Domestic Product (GDP). OMB has repeatedly warned against

* While comparing costs and benefits is beyond the scope of this paper, it is notable that the 2009 OMB report found that total regulatory benefits are far larger than total regulatory costs. *See infra* endnote 4 and *supra* accompanying text. This finding refers to total aggregate net benefits, which means that some individual regulations may not have benefits that exceed costs. But, this result usually arises from the difficulty of monetizing regulatory benefits, rather than the lack of actual benefits. *See* comments cited *infra* endnote 7; *see also* Rena Steinzor et al., *A Return to Common Sense: Protecting Health, Safety, and the Environment Through "Pragmatic Regulatory Impact Analysis"* (Ctr. for Progressive Reform, White Paper 909, 2009), *available at* http://www.progressivereform.org/articles/PRIA_909.pdf; John Applegate et al., *Reinvigorating Protection of Health, Safety, and the Environment: The Choices Facing Cass Sunstein* (Ctr. for Progressive Reform, White Paper 901, 2009), *available at* http://www.progressivereform.org/articles/SunsteinOIRA901.pdf; Frank Ackerman et al., *Applying Cost Benefit Analysis to Past Decisions: Was Protecting the Environment* Ever *a Good Idea?* (Ctr. for Progressive Reform, White Paper 401, 2004), *available at* http://www.progressivereform.org/articles/Wrong_401.pdf.

trying to reduce the complex relationship between these two concepts to such simplistic terms, yet this is precisely what Crain and Crain do.

- **Opaque calculations**. Contrary to academic and government norms, Crain and Crain do not reveal their data or show the calculations they used to arrive at their cost estimates. Neither is the information available from the SBA Office of Advocacy. Moreover, Crain and Crain declined to furnish their data to CPR despite several requests. As a result, it is impossible to replicate their results, a flaw so significant it would prevent the publication of their paper in any respectable academic journal.
- **Slanted methodology**. The Crain and Crain report suffers from several methodological problems, all of which tilt the results towards an overstatement of regulatory costs. These problems are itemized and explained further below.
- **Overstated costs**. To estimate the cost of non-economic regulation, Crain and Crain almost always used the agency estimates of such costs that were submitted to OMB. Although OMB presents these costs as a range, Crain and Crain always used the upper bound estimate, effectively eliminating the agencies' careful efforts to draw attention to the uncertainties in these calculations. Moreover, cost estimates are typically based on industry data, and regulated entities have a strong incentive to overstate costs in this circumstance. As discussed below, empirical studies have shown that such estimates are usually too high.
- **Peer review rendered meaningless.** The peer review process used by the SBA Office of Advocacy does not support the reliability of the report. Only two people examined the document. The authors ignored a significant criticism raised by one of the two reviewers concerning their estimate of economic regulatory costs. As for the second person, the entire review consisted of the following comments: "I looked it over and it's terrific, nothing to add. Congrats[.]"[9]

For the reasons that follow, we conclude that the Crain and Crain report is sufficiently flawed that it does not come close to justifying regulatory reform efforts, such as the REINS Act,[†] which seek to limit protection of people and the environment. If Crain and Crain had used a more straightforward and generally accepted methodology, they likely would have reached a figure that was several orders of magnitude smaller. And, if Crain and Crain had properly considered regulatory benefits, they likely would have found that regulation is a net economic plus for society. Such findings, however, would not comport with the political agenda of the SBA's Office of Advocacy or of the opponents of regulation in general.

[†] Regulations from the Executive in Need of Scrutiny (REINS) Act, H.R. 10, 112th Cong. (2011). Under this bill, no new "economically significant" regulations would take effect unless Congress affirmatively approved the regulation within 90 days of receiving it, by means of a joint congressional resolution of approval, signed by the President. For more information on the REINS Act, see Sidney Shapiro, *The REINS Act: The Conservative Push to Undercut Regulatory Protections for Health, Safety, and the Environment* (Ctr. for Progressive Reform, Backgrounder, 2011), *available at* http://www.progressivereform.org/articles/CPR_Reins_Act_Backgrounder_2011.pdf.

The Crain and Crain Report's Methodology

The Crain and Crain report purports to provide a complete accounting of all regulatory costs. It divides the regulatory universe into four categories: economic regulations; environmental regulations; tax compliance regulations; and occupational health and safety and homeland security regulations. Notably, the report never provides a clear definition of the term "regulation," nor does it provide clear definitions of each of the four regulatory categories. Next, the authors employ different methodologies to calculate the total costs of regulation in each category. Finally, they add up the costs of regulation for each category to derive a total cost of federal regulations.

The report provides only a part of the data, equations, assumptions, extrapolations, and calculations that would be necessary for replicating the report's results. The authors of this white paper made several attempts to obtain the missing additional materials from the authors of the Crain and Crain report, as well as from the SBA Office of Advocacy, which funded the report, so that we could fully understand and verify the methodologies, data, and assumptions that were employed. The authors of the Crain and Crain report provided us with only very general responses and have given no indication that they would furnish us with the missing information.

Remarkably, a staff member at the SBA Office of Advocacy explained that his office did not have access to any of the additional materials, since it had only contracted to receive the final report from the authors.[10] Thus, the SBA Office of Advocacy entered into an agreement with Crain and Crain to spend taxpayer money on a report whose findings it could not then have verified in any significant way—not even checking the arithmetic.[‡]

Because this underlying information is unavailable, the Crain and Crain report is a political document, rather than an academic study. No academic author would submit such a study for publication without revealing the data and calculations on which the scholar relied. No academic publication would accept such a study unless such information was released. Academic reports also acknowledge and discuss potential weaknesses in their calculations, a modesty that is absent from the Crain and Crain report.

Methodological Problems

Economic Regulation Costs

To calculate the total cost of economic regulations, Crain and Crain employ a regression analysis that purports to establish a correlation between a country's score on the World Bank's "Regulatory Quality Index" (RQI) and the size of the country's economic activity, as measured by GDP per capita.[11] According to the World Bank report, the RQI seeks to measure public "perceptions of the ability of the government to formulate and implement sound policies and regulations that permit and promote private sector development."[12] Crain and Crain have

[‡] If the SBA Office of Advocacy contracts to have similar reports performed in the future, we strongly urge it to obtain all the data, equations, assumptions, extrapolations, and calculations as part of the contract, and to make these materials readily available in a useable format on its website.

interpreted the RQI as measuring how friendly a country is to business interests.[13] The World Bank researchers did not intend for the RQI to be used as a proxy measure for regulatory burden or as a tool for critiquing a particular country's regulatory stringency.[14] Nevertheless, Crain and Crain use the RQI in precisely this fashion.

As the World Bank report explains, the RQI is based on public opinion polling, not quantitative data. It is derived from a composite of 35 opinion surveys that asked questions about the regulatory climate of approximately 200 countries.[15] Given its subjective origins, the World Bank researchers responsible for the RQI designed it with a few limited applications in mind—namely, to make meaningful cross-country comparisons as well as to monitor a single country's progress over time. At the same time, these researchers strongly caution against using the RQI for developing specific policy prescriptions in particular countries.[16]

Crain and Crain provide no justification defending their use of the RQI to estimate regulatory costs, nor do they ever acknowledge the myriad theoretical or empirical problems with calculating such costs based on public opinion polling. Significantly, one of the peer reviewers of the Crain and Crain report raised this objection, stating "I am concerned that the index may not measure what the authors say it measures, and even if it does, it may overstate the costs of regulation when used in conjunction with the other measures."[17] The authors do not appear to have revised the report in response to this comment.

As noted above, the Crain and Crain report uses the RQI, which the authors have converted into a proxy measure for a country's regulatory stringency, as the main variable in their formula for calculating the cost of a country's economic regulations—that is, the supposed reduction in that country's GDP caused by the regulations. The authors do not explain how they devised this formula, nor do they provide any of the underlying data, calculations, and assumptions that they used to devise it. Consequently, no one can verify whether or not the formula provides a reasonable model of reality, nor can anyone verify their calculations.

Using this formula, Crain and Crain calculate the loss in GDP the United States suffers because of economic regulation. It is unclear whether Crain and Crain calculate the loss in GDP as compared to the country with the highest RQI score or whether they calculate the loss in GDP attributed to all regulation. The latter baseline would reflect the GDP in a hypothetical United States that had no economic regulations. Whichever baseline they use, Crain and Crain thus conclude that the cost of economic regulations in the United States in 2008 was $1.236 trillion, "as reflected in lost GDP."[18]

Crain and Crain do not clearly define the category of "economic regulations," other than to note it is broadly inclusive.[§] The lack of a clear definition opens up the possibility that the category of "economic regulations" also includes the other categories of regulations identified by Crain and Crain. If, for example, this category includes some environmental regulation costs, those costs are also the subject of a separate calculation in the report. This would mean that some of

[§] The report indicates that the category of economic regulations is broad enough to include "a wide range of restrictions and incentives that affect the way businesses operate—what products and services they produce, how and where they produce them, and how products and services are priced and marketed to consumers." CRAIN & CRAIN, *infra* endnote 1, at 17.

these regulation costs would be counted twice (once as an economic regulation and once as an environmental regulation), leading to an exaggeration of total regulation costs. Some of the polling data used by the authors of the World Bank study in the calculation of the RQI asks questions of environmental and safety regulations, although the majority of the questions are about tax and price control regulations, trade barriers, access to capital, and regulatory barriers to starting a new business.[**]

One other significant problem in this category of costs is that the regression analysis used in the report assumes an overly simplistic relationship between regulatory stringency and GDP. As noted above, the Crain and Crain report's formula implies that increases in regulatory stringency *cause* a reduction in a country's economic activity, which are reflected in a decreased GDP. The actual relationship between regulatory stringency and a country's economic activity is not so clear-cut, however, because measurements of GDP do not include regulatory benefits. On this subject, the 2009 OMB report to Congress notes:

> The relationship between regulation and indicators of economic activity raises a number of complex questions, conceptual, empirical, and normative. A key issue involves identification of the appropriate measures. For example, is GDP the appropriate measure? As we have seen, many regulations have favorable net benefits, and by hypothesis, such regulations are desirable on standard economic grounds. Of course it would be useful to understand the effects on GDP of particular regulations and of classes of regulations. But while important, GDP is hardly a complete measure of relevant values, and some of the benefits of regulation, such as environmental protection, are not adequately captured by changes in GDP.[19]

Finally, the report's use of the RQI is misleading because it gives the false impression that the U.S. regulatory burden is especially high. In fact, the United States has one of the highest RQI scores, ranking eleventh out of more than 200 countries.[20] The United States ranks higher than many of its competitive trading partners, including China, Germany, Japan, Mexico, South Korea, and Taiwan, and its RQI score has remained fairly constant since 1996, when these scores were first developed.[21] But Crain and Crain's use of the RQI, and the SBA's use of the Crain and Crain report, imply that the U.S. is inferior to these other countries as an excellent place to do business.

Environmental Regulation Costs

To calculate the costs of environmental regulations, the Crain and Crain report adds up the estimated costs of environmental regulations found in each of OMB's annual reports to Congress on cost-benefit analysis since 2001.[22] These estimates in turn are based on aggregation of the

[**] The World Bank study relied on 35 different sources of global or regional surveys, produced by 33 different organizations. Only 16 of the sources had any measure of regulation at all. Only one specifically mentioned environmental regulations (the World Economic Forum Global Competitiveness Survey). Only 2 of the 35 sources mentioned labor market policy: the African Development Bank (not relevant to the US) and the Institute for Management Development World Competitiveness Yearbook. Neither of these two said which labor market issues they measured, and there was no mention of safety and health by them. *See* Kaufmann et al., *infra* endnote 11, at 29 (Table 1), 39-71 (App. A).

cost-benefit analyses that EPA produced when developing the regulations. Based on this data, Crain and Crain find that the total cost of environmental regulations in 2008 was $281 billion,[23] which is 16 percent of the total regulatory costs according to their estimate of total costs.

To generate cost estimates for its cost-benefit analyses, EPA primarily relies on surveys of representative companies that the regulation will likely affect. Because companies know the purpose of the surveys, they have a strong incentive to overstate costs in order to skew the final cost-benefit analysis toward weaker regulatory standards.[24] Agencies must also fill in any data gaps they encounter by making various assumptions. Due to fear of litigation over the regulation, they tend to adopt conservative assumptions about regulatory costs, such that the cost assessment ends up reflecting the maximum possible cost, rather than the mean.[25]

Industry cost estimates—and therefore the cost estimates that EPA develops-- do not account for technological innovations that reduce the cost of compliance and produce non-regulatory co-benefits, such as increased productivity. When companies are asked to predict which technology they will employ to comply with a particular environmental regulation, they often will point to the most expensive existing "off-the-shelf" technology available. Once the regulation actually goes into effect, however, companies have a strong incentive to invent or purchase less costly technologies to come into regulatory compliance. As a result, compliance costs tend to be less, and often much less, than the predicted costs. Moreover, the technological innovations tend to produce co-benefits unrelated to the regulation—such as increased productivity and efficiency—that the company strives to achieve in any event. Given these co-benefits, only a portion of the innovative technology's costs can fairly be counted as compliance costs.[26]

As the following chart indicates, retrospective studies of regulatory costs find that the initial cost estimates are often too high.

Retrospective Studies of Regulatory Costs

Study	Subject of Cost Estimates	Results
PHB, 1980[27]	Sector level capital expenditures for pollution controls	– EPA overestimated capital costs more than it underestimated them, with forecasts ranging 26 to 126% above reported expenditures
OTA, 1995[28]	Total, annual, or capital expenditures for occupational safety & health regulations	– OSHA overestimated costs for 4 of 5 health regulations, with forecasts ranging from $5.4 million to $722 million above reported expenditures
Goodstein & Hedges, 1997[29]	Various measures of cost for pollution prevention	– Agency and industry overestimated costs for 24 of 24 OSHA & EPA regulations, by at least 30% and generally by more than 100%
Resources for the Future, 1999[30]	Various measures of cost for environmental regulations	– Agency overestimated costs for 12 of 25 rules, and underestimated costs for 2 rules

Finally, unlike the OMB reports, which present regulatory costs as a range, Crain and Crain always adopt the upper end of the range for inclusion in their calculations.[31] The authors justify this move by claiming that agencies allegedly have a strong incentive to underestimate regulatory costs, although they provide no empirical evidence to support this claim. In fact, as just explained, it is likely that regulatory costs are overstated. In any case, the choice by Crain and Crain to always take the higher bound estimate, rather than presenting their results as a range of costs, as OMB does, is a misleading use of the OMB data.

Agencies were not required by Executive Order to provide OMB with estimates of regulatory costs and benefits prior to 1988. For this reason, OMB had to rely on non-government estimates in order to estimate regulatory benefits and costs prior to 2000. For environmental regulations issued before 1988, the 2001 OMB report relied on a 1991 study of regulatory costs undertaken by economists Robert Hahn and John Hird.[32]

Hahn and Hird performed no new calculations of regulatory costs, but instead they generated an estimate by synthesizing a set of earlier studies of regulatory costs conducted by a small circle of conservative economists.[33] These estimates are subject to the same limitations as agency-produced cost analyses, including relying on industry-estimates of compliance costs and failing to account for innovation.[††] An additional problem is that the Hahn and Hird study is nearly 20 years old, and many of the earlier studies and data it relies upon are more than 30 years old. The data and assumptions reflected in the Hahn and Hird study cannot be reasonably extrapolated to modern social and economic reality.[‡‡]

Occupational Safety and Health and Homeland Security Regulation Costs

The Crain and Crain report concludes that the total cost of occupational safety and health and homeland security regulations in 2008 was $75 billion,[34] which is four percent of their total costs. Occupational safety and health regulations accounted for $65 billion of the total.

Occupational Safety and Health Regulation Costs

To calculate the occupational safety and health regulations, the Crain and Crain report relies on two sources. The first source, a 2005 study by Joseph Johnson, provides the total costs of all occupational safety and health regulations issued before 2001.[35] The second source, the 2009

[††] In addition, many of these earlier studies assume a regulatory baseline of zero for their comparisons of regulatory costs. In other words, these studies assume that in the absence of the regulations under examination, companies would have taken no environmentally protective actions. This assumption has no basis in a reality where other existing regulations (federal, state, and local), fear of tort liability, and simple market forces induce companies to take some minimal level of environmentally protective action all the time. This minimal level of actions represents the proper baseline against which regulatory costs should be measured. To the extent that these earlier studies assume a zero baseline, they grossly overestimate regulatory costs. McGarity & Ruttenberg, *infra* endnote 24, at 2047.

[‡‡] In the intervening years, the U.S. economy and society have drastically changed. For example, scientific knowledge regarding the harmful public health and environmental effects of pollution has greatly improved, the U.S. has shifted from an industrial sector-based economy to a service sector-based one, and even industry has become characterized by more automation and less human labor. *See* Ian D. Wyatt & Daniel E. Hecker, *Occupational Changes During the 20th Century*, MONTHLY LABOR REV., March 2006.

OMB report to Congress, provides the total cost of all occupational safety and health regulation issued since 2001.

The cost estimate from the 2009 OMB report to Congress is based on a simple aggregation of the cost-benefit analyses that OSHA produced when developing these regulations.[36] As discussed above, the cost assessments generated as part of these cost-benefit analyses greatly overstate the costs of regulations, since the agencies that produce them rely on industry for estimates of compliance costs, adopt conservative assumptions to fill in data gaps, and fail to account for innovation.

The Johnson study likewise suffers from several flaws, leading it to overestimate these regulatory costs. The study begins by aggregating the agency-produced cost-benefit analyses for all of OSHA rules issued before 2001.[37] As just noted, these costs estimates are overstated. Nevertheless, the Johnson study then inflates OSHA's cost estimates by multiplying the total of all of the estimates by 5.5. According to Johnson, using the multiplier is necessary to account for the costs of all of OSHA's non-major regulations—since OSHA does not perform cost-benefit analyses for these regulations—and for *fines* levied for violations of any OSHA standards.[38] In other words, the Johnson study assumes that for every dollar industry spends on compliance with OSHA's major rules, it spends $5.50 on compliance with non-major regulations and on fines for violations of existing OSHA standards.

We see no justification for counting the fines that companies pay for violating regulatory standards as regulatory costs. Instead, these are the costs of *choosing* to break the law. That is, the fines would never have occurred if the firms had not chosen to disobey the law. Under this logic, mass lawbreaking raises regulatory costs, enabling regulatory opponents to argue that we need to reduce regulation because of these high regulatory costs.

The Johnson study took the multiplier of 5.5 from a 1996 study by Harvey James.[39] The James study uses an unpublished and otherwise unavailable 1974 estimate prepared by the National Association of Manufacturers (NAM) of the per-firm cost of compliance with OSHA regulations.[40] Because the report is unavailable, it cannot be checked for accuracy. As we related earlier, industry estimates of regulatory costs are suspect because of the political incentive to inflate such costs. Nevertheless, the Crain and Crain report incorporate the Johnson study without any discussion of this significant limitation in the data.

Homeland Security Regulation Costs

To calculate the cost of all homeland security regulations, the Crain and Crain report again relies on the 2009 OMB report to Congress,[41] which is based on the cost-benefit analyses that the Department of Homeland Security produced when developing its regulations.[42] The cost assessments provided in these cost-benefit analyses are overstated for all the reasons stated above: industry-supplied estimates of compliance estimates; conservative assumptions to fill in data gaps; and failure to account for innovation.

Tax Compliance Regulation Costs

To calculate the cost of tax compliance regulations, the Crain and Crain report starts with estimates of the time that businesses, non-profit organizations, and individuals spend each year completing tax-related forms and filings, and multiplies it by an estimate of the hourly cost of filling out the forms. Using this methodology, the Crain and Crain report concludes that the total cost of tax compliance regulations in 2008 was $160 billion,[43] which is about nine percent of their total costs.

The report says it derives its estimates of the time it takes to fill out tax forms from the Internal Revenue Service and the Tax Foundation, a conservative-leaning non-profit organization.[44] However, they do not explain which data they use or how those data contribute to their estimate. To the extent that data from the Tax Foundation are used, the report's estimate of the amount time spent on tax compliance should be viewed with caution since the Tax Foundation tends to be "anti-tax" in orientation.

The authors calculate tax compliance costs for businesses separately from individuals and non-profit organizations, using the reasonable assumption that businesses spend more money per hour complying with tax regulations. Crain and Crain assume that all businesses rely on "Human Resources professionals" to prepare their taxes, but they provide no evidence to justify this assumption. They nevertheless multiply estimates of the amount of time it takes to fill out the tax forms by $49.77 per hour ("the hourly compensation rate for Human Resources professionals") on tax compliance.[45] The report then appears to assume that all individuals and non-profit organizations have their taxes prepared by accountants or auditors, and it estimates that these entities spend $31.53 per hour ("the average hourly wage rate for accountant and auditors") on tax compliance.[46] With respect to individuals, this assumption seems particularly unfounded given that millions of American households prepare their own taxes.

Conclusion

The Crain and Crain study is rife with flawed methodologies and questionable data and assumptions. Of even greater importance, each of the problems with the Crain and Crain report's methodologies, data, and assumptions lead to an overstatement of regulatory costs. Because of these problems with the Crain and Crain report's reliability, we believe policymakers should disregard its misleading conclusions as they consider matters of regulatory policy.

Endnotes

[1] NICOLE V. CRAIN & W. MARK CRAIN, THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS (2010) (This report was developed under a contract with the Small Business Administration's Office of Advocacy), *available at* http://www.sba.gov/sites/default/files/rs371tot.pdf.

[2] For the three earlier reports, see W. MARK CRAIN, THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS (2005) (This report was developed under a contract with the Small Business Administration's Office of Advocacy), *available at* http://archive.sba.gov/advo/research/rs264tot.pdf; W. MARK CRAIN & THOMAS D. HOPKINS, THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS (2001), *available at* http://archive.sba.gov/advo/research/rs207tot.pdf; THOMAS D. HOPKINS, PROFILES OF REGULATORY COSTS (1995), *available at* http://archive.sba.gov/advo/research/rs1995hoptot.pdf.

[3] CRAIN & CRAIN, *supra* endnote 1, at 6 (2009 dollars).

[4] OFFICE OF MGMT & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, 2009 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 3 (converted from 2001 to 2009 dollars), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/2009_final_BC_Report_01272010.pdf [hereinafter 2009 OMB Report]. The Regulatory Right-to-Know Act requires OMB to produce a report every year that, among other things, calculates the annual cost of major regulations. Treasury and General Government Appropriations Act of 2001 §624, Pub. L. 106-554, 31 U.S.C. §1105 note.

[5] CRAIN & CRAIN, *supra* endnote 1, at 3-5.

[6] 2009 OMB Report, *supra* endnote 4, at 3 (converted from 2001 to 2009 dollars).

[7] *See, e.g.*, Sidney Shapiro et al., *CPR Comments on Draft 2010 Report to Congress on the Benefits and Costs of Federal Regulations* 16-19 (App. A, Pt. C.) (2010), *available at* http://www.progressivereform.org/articles/2010_CPR_Comments_OMB_Report.pdf; Rena Steinzor et al., *CPR Comments on Draft 2009 Report to Congress on the Benefits and Costs of Federal Regulations* 16-19 (App. A, Pt. C.) (2009), *available at* http://www.progressivereform.org/articles/2009_CPR_Comments_OMB_Report.pdf; Amy Sinden & James Goodwin, *CPR Comments on Draft 2008 Report to Congress on the Benefits and Costs of Federal Regulations* 5-8 (2008), *available at* http://www.progressivereform.org/articles/2008_Comments_OMB_Report.pdf. For all of the comments on OMB's annual reports to Congress on the benefits and cost of federal regulation produced by CPR Member Scholars and staff, see Ctr. for Progressive Reform, *OMB Reports on the Costs and Benefits of Regulation*, http://www.progressivereform.org/OMBCongress.cfm (last visited Feb. 5, 2011).

[8] For examples of instances in which anti-regulatory critics have cited the Crain and Crain report and its conclusions, see, e.g., James L. Gattuso, Diane Katz, & Stephen A. Keen, *Red Tape Rising: Obama's Torrent of New Regulation* (Heritage Foundation, Backgrounder No. 2048, 2010) ("According to a report recently released by the Small Business Administration, total regulatory costs amount to about $1.75 trillion annually . . . ."), *available at* http://thf_media.s3.amazonaws.com/2010/pdf/bg2482.pdf; Sen. Mark R. Warner, Op-Ed, *To Revive the Economy, Pull Back the Red Tape*, WASH. POST, Dec. 13, 2010 ("According to the U.S. Small Business Administration, the estimated annual cost of federal regulations in 2008 exceeded $1.75 trillion."), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/12/12/AR2010121202639.html?hpid=opinionsbox1; Press Release, U.S. Chamber of Commerce, U.S. Chamber Calls on Federal and State Lawmakers to Stem the Growing Tide of Excessive Regulation (Oct. 7, 2010) ("Donohue cited statistics from the Small Business Administration's Office of Advocacy estimating the total cost of federal regulations at $1.75 trillion."), http://www.uschamber.com/press/releases/2010/october/us-chamber-calls-federal-and-state-lawmakers-stem-growing-tide-excessive (last visited Feb. 1, 2011).

[9] OFFICE OF ADVOCACY, SMALL BUSINESS ADMINISTRATION, INFORMATION QUALITY PEER REVIEW REPORT FOR THE IMPACT OF FEDERAL REGULATORY COSTS ON SMALL FIRMS 4 (2010) (Bob Litan's peer review), *available at* http://www.sba.gov/sites/default/files/files/TheImpactofFederalRegulatoryCostsonSmallFirmsPRFY2010.pdf.

[10] Telephone Interview with Radwan Saade, Regulatory Analyst, Small Business Administration, Office of Advocacy, Office of Economic Research (Jan. 11, 2011).

[11] CRAIN & CRAIN, *supra* endnote 1, at 18-25. The RQI was developed as part of the World Bank's Worldwide Governance Indicators project, which seeks to establish a variety of indexes for measuring countries' governance and institutional quality. *See* Daniel Kaufmann et al., *Governance Matters VIII: Aggregate and Individual Governance Indicators 1996–2008* at 2 (The World Bank, Development Research Group, Macroeconomics and

Growth Team, Policy Research Working Paper No. 4978, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1424591## (follow "One-Click Download" hyperlink at the top of the page).

[12] Kaufmann et al., *supra* endnote 11, at 6.

[13] *See* CRAIN & CRAIN, *supra* endnote 1, at 21 (explaining that increases in the RQI correspond to "reductions in regulatory burden.").

[14] *See id.*

[15] Kaufmann et al., *supra* endnote 11, at 4.

[16] *Id.* at 5 (describing the RQI as "too blunt a tool to be useful in formulating specific governance reforms in particular country contexts. Such reforms, and evaluation of their progress, need to be informed by much more detailed and country-specific diagnostic data . . . .").

[17] OFFICE OF ADVOCACY, *supra* endnote 9, at 2 (Richard Williams' peer review), *available at* http://www.sba.gov/sites/default/files/files/TheImpactofFederalRegulatoryCostsonSmallFirmsPRFY2010.pdf. Richard Williams is a conservative economist who currently works as the Director of Policy Research at the Mercatus Center, an anti-regulatory think tank. *See* Mercatus Ctr., *Richard Williams Biography*, http://mercatus.org/richard-williams (last visited February 4, 2011).

[18] CRAIN & CRAIN, *supra* endnote 1, at 24 (2009 dollars).

[19] 2009 OMB Report, *supra* endnote 4, at 29.

[20] *See* Kaufmann et al., *supra* endnote 11, at 89-91 (Table C4). The RQI is designed so that possible scores range from -2.5 (*i.e.*, the greatest regulatory burden, however defined) to 2.5 (*i.e.*, the lowest regulatory burden, however defined). In 2008, the RQI score for the United States was 1.579. CRAIN & CRAIN, *supra* endnote 1, at 24.

[21] *See* Kaufmann et al., *supra* endnote 11, at 89-91 (Table C4).

[22] CRAIN & CRAIN, *supra* endnote 1, at 25- 27.

[23] *Id.* at 31 (Table 6) (2009 dollars).

[24] Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation*, 80 TEX. L. REV. 1997, 2011, 2044-45 (2002).

[25] *Id.* at 2046.

[26] *Id.* at 2049-50. Studies of OSHA's vinyl chloride and cotton dust standards concluded that actual compliance costs were much lower than predicted costs in part because of overall productivity gains achieved by regulatees. When company scientists and engineers were forced to concentrate on cost-effective compliance techniques, they also identified ways to improve the overall productivity of an industrial process, or even an entire industry. *See* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, OFFICE OF PROGRAM EVALUATION, REGULATORY REVIEW OF OSHA'S COTTON DUST STANDARD (2000) (identifying extensive technological improvements and increased productivity in the textile industry spurred by OSHA's cotton dust standard); RUTH RUTTENBERG, REGULATION IS THE MOTHER OF INVENTION 42, 44-45 (Working Papers for a New Society, May/June 1981), (identifying six regulation-induced changes in the vinyl chloride industry that resulted in increased productivity).

[27] Winston Harrington, Richard D. Morgenstern, & Peter Nelson, *On the Accuracy of Regulatory Cost Estimates* 6 (Resources for the Future, Discussion Paper 99-18, 1999) (citing PUTNAM, HAYES, & BARTLETT, INC., COMPARISONS OF ESTIMATED AND ACTUAL POLLUTION CONTROL CAPITAL EXPENDITURES FOR SELECTED INDUSTRIES (Report prepared for the Office of Planning & Evaluation, U.S. Envtl. Protection Agency, 1980)), *available at* http://www.rff.org/documents/RFF-DP-99-18.pdf.

[28] OFFICE OF TECHNOLOGY ASSESSMENT, GAUGING CONTROL TECHNOLOGY AND REGULATORY IMPACTS IN OCCUPATIONAL SAFETY AND HEALTH: AN APPRAISAL OF OSHA'S ANALYTICAL APPROACH 58 (1995).

[29] Eban Goodstein & Hart Hodges, *Polluted Data: Overestimating Environmental Costs*, 8 AM. PROSPECT 64 (Nov./Dec. 1997).

[30] Harrington, Morgenstern, & Nelson, *supra* endnote 27. The Resources for the Future study notes that actual compliance costs can also be less than an agency estimates because there can be less regulatory compliance than the agency anticipates. If an agency overestimates the extent of pollution reduction, or some similar benefit, then the regulation may cost less than the agency estimates. In such cases, the original agency estimate might have been accurate, but it turns out to be wrong because the regulatory industry does not obey the regulation to the extent that the agency predicted. *Id.* at 14-15.

[31] CRAIN & CRAIN, *supra* endnote 1, at 27.

[32] *Id.* at 25.

[33] Robert W. Hahn & John A. Hird, *The Costs and Benefits of Regulation: Review and Synthesis*, 8 YALE J. ON REG. 233, 248-54 (1991).

[34] CRAIN & CRAIN, *supra* endnote 1, at 31 (2009 dollars).
[35] *Id.*
[36] 2009 OMB Report, *supra* endnote 4, at 11 (Table 1-2).
[37] Joseph M. Johnson, *A Review and Synthesis of the Cost of Workplace Regulations*, *in* CROSS-BORDER HUMAN RESOURCES, LABOR, AND EMPLOYMENT ISSUES 433, 453-54, 466 (Table 10) (Andrew P. Morriss & Samuel Estreicher eds., 2005).
[38] *Id.* at 455.
[39] HARVEY S. JAMES, JR., ESTIMATING OSHA COMPLIANCE COSTS 10-13 (Ctr. for the Study of Am. Bus., Policy Study No. 135, 1996).
[40] *Id.* James compared the NAM estimate to cost-benefit estimates produced by OSHA. Since the NAM estimate was approximately 5.5 times greater than the aggregate value of OSHA's cost-benefit analyses, he assumes he was justified using a 5.5 multiplier. *Id.* James did not cite an original source for the numbers that he derived from the NAM estimate. He merely cited a book by Robert S. Smith in which the NAM estimate was featured in a table. *Id.* at 4. There is no indication in James' report that he read or made any independent attempt to evaluate the accuracy of the NAM report.
[41] CRAIN & CRAIN, *supra* endnote 1, at 31.
[42] 2009 OMB Report, *supra* endnote 4, at 17-18.
[43] CRAIN & CRAIN, *supra* endnote 1, at 29 (2009 dollars).
[44] *Id.* at 28.
[45] *Id.* at 29.
[46] *Id.* at 29.