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"REINS ACT OF 2013": PROMOTING JOBS, GROWTH AND AMERICAN COMPETITIVENESS

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

ON

H.R. 367

MARCH 5, 2013

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Congressional Research Service Report titled *REINS Act: Number and Types of "Major Rules" in Recent Years*, submitted by the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law. This report is available at the Subcommittee and can also be accessed at:

http://www.speaker.gov/sites/speaker.house.gov/files/UploadedFiles/110830__crs__majorrules.pdf

"REINS ACT OF 2013": PROMOTING JOBS, GROWTH AND AMERICAN COMPETITIVENESS

TUESDAY, MARCH 5, 2013

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 11:32 a.m., in room 2237, Rayburn Office Building, the Honorable Spencer Bachus, (Chairman of the Subcommittee) presiding.

Present: Representatives Bachus, Goodlatte, Farenthold, Marino, Collins, Rothfus, Cohen, Johnson, DelBene, Garcia and Jeffries.

Staff present: (Majority) Daniel Flores, Chief Counsel; Ashley Lewis, Clerk; Dave Lazar, Clerk; (Minority) James Park, Minority Counsel; Susan Jensen, Counsel.

Mr. BACHUS. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law hearing will come to order.

Without objection, the Chair is authorized to declare recesses of the Committee at any time.

We welcome all of our witnesses today.

The Chair recognizes himself for the purposes of an opening statement.

Regulations help to implement policies Congress has established by statute. When issued, they should be reasonable, provide clear rules of the road for businesses, and benefit the public more than it hurts them. Today's regulatory system fails the test. The cost it imposes and the uncertainty it creates are choking America's economy and preventing the recovery of American jobs, growth, and global competitiveness.

In its first term, the Administration imposed far more major regulations at a far greater cost than the preceding Administration. Just this December, the Obama administration revealed that it has 2,387 regulatory actions in its current agenda, and the White House admits that at least 128 of these regulations will have an impact on the economy of $100 million or more. According to the American Action Forum, the cost of this current agenda includes $123 billion in planned regulations. These regulations would add another 13 million man-hours in just paperwork alone.

The Small Business Administration has confirmed that small businesses pay a disproportionate share of this regulatory burden.

Indeed, the cost of regulatory compliance has been translated to about $11,000 per worker. Small businesses generate most of the new jobs in our economy; in fact, somewhere between two-thirds and 70 percent normally. However, in the past recession or the recession we are in, small businesses are lagging behind in job creation. In some estimates, they are creating less than half the new jobs, and I believe that that is almost entirely due to regulations, many of those in the financial sector.

Imagine how much better off we would be if we could put that $11,000 back into the businesses to grow and hire workers. Federal Reserve Chairman Ben Bernanke himself expressed concern about the impact and cost of regulations on small businesses during his Humphrey Hawkins testimony last week before the Financial Services Committee. Chairman Bernanke said, quoting now, "We all agree that the burden of regulation falls particularly heavily on small community banks which don't have the resources to manage those regulations very effectively."

It is time for action. Just as it cannot bear the ever-mounting weight of the Federal debt, the economy cannot bear the non-stop increase of high-cost Federal regulation. The REINS Act, passed by the House last year and reintroduced this term by Representative Todd Young of Indiana, provides a critical, simple, and long overdue course correction. It says one thing: when it comes to the most costly new regulations that Federal regulators propose, those regulations will not go into effect unless they can pass an up or down vote by the people's elected representatives.

As an original cosponsor, I believe the REINS Act will help to restore accountability to the Federal regulatory process. It will help ensure that regulations are issued consistent with congressional intent and provide a needed check of the overreach that we have frequently seen from the unelected Federal bureaucracy. It will allow the American people to have a say in approving the most costly decisions that affect their lives and livelihoods.

This reform could not be timelier. American workers and businesses are facing an historic regulatory tsunami from the Administration, not the least of which includes the impact of Dodd-Frank, Obamacare, and the Administration's climate change agenda. In that regard, I would like unanimous consent to introduce Carbon Power Politics from the Wall Street Journal on March 4, 2013.

Mr. COHEN. Despite such an ominous title, I will be part of the unanimous consent.

Mr. BACHUS. Thank you. I can strike the title off. Thank you, Mr. Cohen.

[The information referred to follows:]

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THE WALL STREET JOURNAL.
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REVIEW & OUTLOOK | March 4, 2013, 7:20 p.m. ET

Carbon Power Politics

The next EPA chief and next phase of the Obama green agenda.

President Obama gave his second-term global warming agenda a lot more definition Monday with a new Environmental Protection Agency chief to replace Lisa Jackson. Picking Gina McCarthy, one of her top lieutenants and the architect of some of the agency's most destructive carbon rules, is a sign he intends to make good on his vow of "executive actions" if Congress doesn't pass cap and tax.

Over the last four years running the EPA's air office, Ms. McCarthy has been a notably willful regulator, even for this Administration. Her promotion is another way of saying that Mr. Obama has given up getting Congress to agree to his anticarbon agenda, especially given the number of Senate Democrats from coal or oil states. The real climate fight now is over the shape of forthcoming rules that could be released as early as this summer, and a brutal under-the-table lobbying campaign is now underway.

Related Video

Editorial page editor Paul Gigot on the White House's excuses for not approving the Keystone XL pipeline. Photos: Getty Images

The main target, as usual, is the U.S. power industry, which accounts for 40% of U.S. carbon emissions and about one-third of greenhouse gasses. Last year Ms. Jackson and Ms. McCarthy imposed a moratorium on new coal-fired plants, plus other rules that are forcing utilities to shut down older plants and invest billions of dollars to upgrade everything else. The agency is about to go after the leftovers.

The moratorium is known as "new source performance standards," which the EPA issued because it declared carbon a dangerous pollutant under the clean-air laws of the 1970s. These standards say that all future power plants running on fossil fuels—coal or gas—must not emit more than 1,000 pounds of carbon dioxide per megawatt-hour.

Even the most modern, efficient coal boiler emits 1,800 pounds, while combined cycle natural gas turbines come in barely under that threshold. To adapt what Henry Ford said about the color of the Model T, utilities can build any plant they like as long as it runs on natural gas.

This being Washington, new source standards also apply to old sources. But when the EPA issued the diktat last March, it claimed it lacked sufficient information to impose them on existing power

plants and heavy manufacturers, refineries and the like. Which is to say the information it did have is that costly new rules in the middle of an election campaign were politically verboten. Now that the election is over, the EPA suddenly knows enough to proceed.

Associated Press

Gina McCarthy

The rule for existing sources, now under development, would work like this: Because coal and gas are combined in a single category, the EPA would cap an average rate of, say, 1,400 pounds of CO_2 per megawatt-hour. In this hypothetical, that would allow a utility to run one coal plant and one gas plant—but the average would decline over time. As it fell, the utility would need to switch to more gas and retire coal. The standards for new plants explicitly refer to natural gas as a "system of emission reduction," when in fact it is a system of emission generation.

If the EPA adopts the proposals that such green groups as the Natural Resources Defense Council are lobbying for, utilities that phase out their coal operations early would generate credits they could sell to other operators to keep their coal plants running longer. If that sounds like cap and trade—well, yes, that's the point.

The White House is trying to fracture industry opposition and peel off companies that stand to profit—namely, the ones that have already switched to gas and could sell the credits to other utilities. It is also saying that carbon trading is more "flexible" than unit-by-unit command and control. This is Mr. Obama's version of Jack Benny's old "your money or your life" routine, except without the punch line.

The average rates could also vary from utility to utility or state to state, whatever is more useful for bribes or punishment. These new source performance standards for the existing electric portfolio might also be the only "executive action" that would mollify the environmental lobby if Mr. Obama does eventually approve the Keystone XL pipeline. The greens may not be able to stop the Canadians from extracting oil from the Alberta tar sands, but they would succeed in wiping out American coal-fired power.

Lately Mr. Obama has been going around saying that the problem is that he's a President, not an "emperor" or "dictator," but on carbon regulation this is a distinction without much difference. Ms. McCarthy has been integral in abusing laws that were written decades ago in order to achieve climate goals that Congress has rejected, all with little or no political debate. Someone should ask her about her antidemocratic politics at her confirmation hearings.

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Mr. BACHUS. The Administration has made plain that if it cannot persuade the people's representatives to adopt its legislative agenda, it intends to force that agenda on the people through regulation, and that is actually the subject matter of that article. Unless Congress intervenes and passes the REINS Act and other important regulatory reforms, the increasing tide of major Federal regulations will continue to destroy jobs, harm communities, and weaken opportunities and the ability of American workers to provide for their families.

Enterprising small business owners like our witness from Baltimore last week will continue to face huge fines for failure to sign every copy of a triplicate regulatory form. Communities will continue to worry about their cement plants shutting down, as is the case in my district, just to clear the way for cement imports from dirtier plants in Mexico or China. Community banks will continue to be snuffed out as Dodd-Frank regulations make business possible only for banks that are big and can afford to hire an army of compliance officers.

Our forefathers designed our Federal system of government to include an important system of checks and balances. The REINS Act is commonsense legislation that does that, and I invite all of my colleagues to work together to ensure it becomes law during the Congress and restore the sense of balance established in the Constitution.

[The bill, H.R. 367, follows:]

I

113TH CONGRESS
1ST SESSION

H. R. 367

To amend chapter 8 of title 5, United States Code, to provide that major rules of the executive branch shall have no force or effect unless a joint resolution of approval is enacted into law.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 23, 2013

Mr. YOUNG of Indiana (for himself, Mr. AMODEI, Mr. BACHUS, Mr. BARR, Mr. BISHOP of Utah, Mrs. BLACK, Mrs. BLACKBURN, Mr. BONNER, Mr. BROOKS of Alabama, Mr. BUCSHON, Mr. CAMP, Mr. CASSIDY, Mr. CHABOT, Mr. CHAFFETZ, Mr. COLLINS of Georgia, Mr. CRAMER, Mr. CRAWFORD, Mr. RODNEY DAVIS of Illinois, Mr. DESANTIS, Mr. DESJARLAIS, Mr. DUNCAN of Tennessee, Mr. DUNCAN of South Carolina, Mr. FITZPATRICK, Mr. FORBES, Mr. FORTENBERRY, Mr. GARRETT, Mr. GERLACH, Mr. GIBBS, Mr. GINGREY of Georgia, Mr. GOSAR, Mr. GOWDY, Mr. GRAVES of Missouri, Mr. GRIFFIN of Arkansas, Mr. GUTHRIE, Mr. HANNA, Mr. HARPER, Mrs. HARTZLER, Mr. HOLDING, Mr. HUDSON, Mr. HUELSKAMP, Mr. HUIZENGA of Michigan, Mr. HULTGREN, Ms. JENKINS, Mr. JOHNSON of Ohio, Mr. JONES, Mr. KELLY, Mr. KLINE, Mr. LAMBORN, Mr. LATHAM, Mr. LATTA, Mr. LONG, Mr. LUETKEMEYER, Mrs. LUMMIS, Mr. MASSIE, Mr. MCKINLEY, Mr. MESSER, Mr. MILLER of Florida, Mrs. CAPITO, Mr. MULLIN, Mr. MULVANEY, Mr. NEUGEBAUER, Mrs. NOEM, Mr. NUGENT, Mr. NUNNELEE, Mr. OLSON, Mr. PEARCE, Mr. REED, Mr. RIBBLE, Mr. ROE of Tennessee, Mr. ROGERS of Michigan, Mr. ROKITA, Mr. SCALISE, Mr. SCHOCK, Mr. SENSENBRENNER, Mr. SIMPSON, Mr. SMITH of Texas, Mr. SMITH of Nebraska, Mr. STOCKMAN, Mr. STUTZMAN, Mr. THORNBERRY, Mr. TIBERI, Mr. WALBERG, Mr. WALDEN, Mr. WEBSTER of Florida, Mr. WESTMORELAND, Mr. WILSON of South Carolina, Mr. YODER, Mr. YOHO, Mr. YOUNG of Alaska, Mr. KINZINGER of Illinois, Mr. STIVERS, Mr. TIPTON, Mr. GIBSON, Mr. BOUSTANY, Mr. POE of Texas, Mr. GARDNER, Mr. SCHWEIKERT, Mr. FRANKS of Arizona, Mr. HALL, Mr. RENACCI, Mr. PALAZZO, Mr. ROSKAM, Mr. MARINO, Mr. POSEY, Mrs. ROBY, Mr. FLORES, Mr. BARTON, Mr. CALVERT, Mr. DENHAM, Mr. BARLETTA, Mr. ALEXANDER, Mr. ADERHOLT, Mr. VALADAO, Mr. GOHMERT, Mr. COFFMAN, Mr. UPTON, Mr. SESSIONS, Mrs. WAGNER, Mr. KING of Iowa, Mrs. BROOKS of Indiana, Mr. BENISHEK, and Mr. ROSS) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committees on Rules and the Budget,

for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

---

A BILL

To amend chapter 8 of title 5, United States Code, to provide that major rules of the executive branch shall have no force or effect unless a joint resolution of approval is enacted into law.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Regulations From the Executive in Need of Scrutiny Act of 2013".

SEC. 2. PURPOSE.

The purpose of this Act is to increase accountability for and transparency in the Federal regulatory process. Section 1 of article I of the United States Constitution grants all legislative powers to Congress. Over time, Congress has excessively delegated its constitutional charge while failing to conduct appropriate oversight and retain accountability for the content of the laws it passes. By requiring a vote in Congress, the REINS Act will result in more carefully drafted and detailed legislation, an improved regulatory process, and a legislative branch that

is truly accountable to the American people for the laws imposed upon them.

SEC. 3. CONGRESSIONAL REVIEW OF AGENCY RULEMAKING.

Chapter 8 of title 5, United States Code, is amended to read as follows:

"CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

"Sec.
"801. Congressional review.
"802. Congressional approval procedure for major rules.
"803. Congressional disapproval procedure for nonmajor rules.
"804. Definitions.
"805. Judicial review.
"806. Exemption for monetary policy.
"807. Effective date of certain rules.

"§ 801. Congressional review

"(a)(1)(A) Before a rule may take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

"(i) a copy of the rule;

"(ii) a concise general statement relating to the rule;

"(iii) a classification of the rule as a major or nonmajor rule, including an explanation of the classification specifically addressing each criteria for a major rule contained within sections 804(2)(A), 804(2)(B), and 804(2)(C);

"(iv) a list of any other related regulatory actions intended to implement the same statutory provision or regulatory objective as well as the individual and aggregate economic effects of those actions; and

"(v) the proposed effective date of the rule.

"(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

"(i) a complete copy of the cost-benefit analysis of the rule, if any;

"(ii) the agency's actions pursuant to sections 603, 604, 605, 607, and 609 of this title;

"(iii) the agency's actions pursuant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

"(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

"(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill

1 to amend the provision of law under which the rule is
2 issued.
3 "(2)(A) The Comptroller General shall provide a re-
4 port on each major rule to the committees of jurisdiction
5 by the end of 15 calendar days after the submission or
6 publication date as provided in section 802(b)(2). The re-
7 port of the Comptroller General shall include an assess-
8 ment of the agency's compliance with procedural steps re-
9 quired by paragraph (1)(B).
10 "(B) Federal agencies shall cooperate with the Comp-
11 troller General by providing information relevant to the
12 Comptroller General's report under subparagraph (A).
13 "(3) A major rule relating to a report submitted
14 under paragraph (1) shall take effect upon enactment of
15 a joint resolution of approval described in section 802 or
16 as provided for in the rule following enactment of a joint
17 resolution of approval described in section 802, whichever
18 is later.
19 "(4) A nonmajor rule shall take effect as provided
20 by section 803 after submission to Congress under para-
21 graph (1).
22 "(5) If a joint resolution of approval relating to a
23 major rule is not enacted within the period provided in
24 subsection (b)(2), then a joint resolution of approval relat-
25 ing to the same rule may not be considered under this

1 chapter in the same Congress by either the House of Rep-
2 resentatives or the Senate.
3 "(b)(1) A major rule shall not take effect unless the
4 Congress enacts a joint resolution of approval described
5 under section 802.
6 "(2) If a joint resolution described in subsection (a)
7 is not enacted into law by the end of 70 session days or
8 legislative days, as applicable, beginning on the date on
9 which the report referred to in section 801(a)(1)(A) is re-
10 ceived by Congress (excluding days either House of Con-
11 gress is adjourned for more than 3 days during a session
12 of Congress), then the rule described in that resolution
13 shall be deemed not to be approved and such rule shall
14 not take effect.
15 "(c)(1) Notwithstanding any other provision of this
16 section (except subject to paragraph (3)), a major rule
17 may take effect for one 90-calendar-day period if the
18 President makes a determination under paragraph (2) and
19 submits written notice of such determination to the Con-
20 gress.
21 "(2) Paragraph (1) applies to a determination made
22 by the President by Executive order that the major rule
23 should take effect because such rule is—
24 "(A) necessary because of an imminent threat
25 to health or safety or other emergency;

"(B) necessary for the enforcement of criminal laws;

"(C) necessary for national security; or

"(D) issued pursuant to any statute implementing an international trade agreement.

"(3) An exercise by the President of the authority under this subsection shall have no effect on the procedures under section 802.

"(d)(1) In addition to the opportunity for review otherwise provided under this chapter, in the case of any rule for which a report was submitted in accordance with subsection (a)(1)(A) during the period beginning on the date occurring—

"(A) in the case of the Senate, 60 session days, or

"(B) in the case of the House of Representatives, 60 legislative days,

before the date the Congress is scheduled to adjourn a session of Congress through the date on which the same or succeeding Congress first convenes its next session, sections 802 and 803 shall apply to such rule in the succeeding session of Congress.

"(2)(A) In applying sections 802 and 803 for purposes of such additional review, a rule described under paragraph (1) shall be treated as though—

"(i) such rule were published in the Federal Register on—

"(I) in the case of the Senate, the 15th session day, or

"(II) in the case of the House of Representatives, the 15th legislative day,

after the succeeding session of Congress first convenes; and

"(ii) a report on such rule were submitted to Congress under subsection (a)(1) on such date.

"(B) Nothing in this paragraph shall be construed to affect the requirement under subsection (a)(1) that a report shall be submitted to Congress before a rule can take effect.

"(3) A rule described under paragraph (1) shall take effect as otherwise provided by law (including other subsections of this section).

"§ 802. Congressional approval procedure for major rules

"(a)(1) For purposes of this section, the term 'joint resolution' means only a joint resolution addressing a report classifying a rule as major pursuant to section 801(a)(1)(A)(iii) that—

"(A) bears no preamble;

"(B) bears the following title (with blanks filled as appropriate): 'Approving the rule submitted by _____ relating to _____.';

"(C) includes after its resolving clause only the following (with blanks filled as appropriate): 'That Congress approves the rule submitted by _____ relating to _____.'; and

"(D) is introduced pursuant to paragraph (2).

"(2) After a House of Congress receives a report classifying a rule as major pursuant to section 801(a)(1)(A)(iii), the majority leader of that House (or his or her respective designee) shall introduce (by request, if appropriate) a joint resolution described in paragraph (1)—

"(A) in the case of the House of Representatives, within three legislative days; and

"(B) in the case of the Senate, within three session days.

"(3) A joint resolution described in paragraph (1) shall not be subject to amendment at any stage of proceeding.

"(b) A joint resolution described in subsection (a) shall be referred in each House of Congress to the committees having jurisdiction over the provision of law under which the rule is issued.

"(c) In the Senate, if the committee or committees to which a joint resolution described in subsection (a) has been referred have not reported it at the end of 15 session days after its introduction, such committee or committees shall be automatically discharged from further consideration of the resolution and it shall be placed on the calendar. A vote on final passage of the resolution shall be taken on or before the close of the 15th session day after the resolution is reported by the committee or committees to which it was referred, or after such committee or committees have been discharged from further consideration of the resolution.

"(d)(1) In the Senate, when the committee or committees to which a joint resolution is referred have reported, or when a committee or committees are discharged (under subsection (c)) from further consideration of a joint resolution described in subsection (a), it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) for a motion to proceed to the consideration of the joint resolution, and all points of order against the joint resolution (and against consideration of the joint resolution) are waived. The motion is not subject to amendment, or to a motion to postpone, or to a motion to proceed to the consideration of other business. A motion to reconsider the vote by which

1 the motion is agreed to or disagreed to shall not be in
2 order. If a motion to proceed to the consideration of the
3 joint resolution is agreed to, the joint resolution shall re-
4 main the unfinished business of the Senate until disposed
5 of.

6 "(2) In the Senate, debate on the joint resolution,
7 and on all debatable motions and appeals in connection
8 therewith, shall be limited to not more than 2 hours, which
9 shall be divided equally between those favoring and those
10 opposing the joint resolution. A motion to further limit
11 debate is in order and not debatable. An amendment to,
12 or a motion to postpone, or a motion to proceed to the
13 consideration of other business, or a motion to recommit
14 the joint resolution is not in order.

15 "(3) In the Senate, immediately following the conclu-
16 sion of the debate on a joint resolution described in sub-
17 section (a), and a single quorum call at the conclusion of
18 the debate if requested in accordance with the rules of the
19 Senate, the vote on final passage of the joint resolution
20 shall occur.

21 "(4) Appeals from the decisions of the Chair relating
22 to the application of the rules of the Senate to the proce-
23 dure relating to a joint resolution described in subsection
24 (a) shall be decided without debate.

"(e) In the House of Representatives, if any committee to which a joint resolution described in subsection (a) has been referred has not reported it to the House at the end of 15 legislative days after its introduction, such committee shall be discharged from further consideration of the joint resolution, and it shall be placed on the appropriate calendar. On the second and fourth Thursdays of each month it shall be in order at any time for the Speaker to recognize a Member who favors passage of a joint resolution that has appeared on the calendar for at least 5 legislative days to call up that joint resolution for immediate consideration in the House without intervention of any point of order. When so called up a joint resolution shall be considered as read and shall be debatable for 1 hour equally divided and controlled by the proponent and an opponent, and the previous question shall be considered as ordered to its passage without intervening motion. It shall not be in order to reconsider the vote on passage. If a vote on final passage of the joint resolution has not been taken by the third Thursday on which the Speaker may recognize a Member under this subsection, such vote shall be taken on that day.

"(f)(1) If, before passing a joint resolution described in subsection (a), one House receives from the other a joint resolution having the same text, then—

"(A) the joint resolution of the other House shall not be referred to a committee; and

"(B) the procedure in the receiving House shall be the same as if no joint resolution had been received from the other House until the vote on passage, when the joint resolution received from the other House shall supplant the joint resolution of the receiving House.

"(2) This subsection shall not apply to the House of Representatives if the joint resolution received from the Senate is a revenue measure.

"(g) If either House has not taken a vote on final passage of the joint resolution by the last day of the period described in section 801(b)(2), then such vote shall be taken on that day.

"(h) This section and section 803 are enacted by Congress—

"(1) as an exercise of the rulemaking power of the Senate and House of Representatives, respectively, and as such is deemed to be part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of a joint resolution described in subsection (a) and superseding other rules only where explicitly so; and

"(2) with full recognition of the Constitutional right of either House to change the rules (so far as they relate to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

"§ 803. Congressional disapproval procedure for nonmajor rules

"(a) For purposes of this section, the term 'joint resolution' means only a joint resolution introduced in the period beginning on the date on which the report referred to in section 801(a)(1)(A) is received by Congress and ending 60 days thereafter (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress), the matter after the resolving clause of which is as follows: 'That Congress disapproves the nonmajor rule submitted by the _____ relating to _____, and such rule shall have no force or effect.' (The blank spaces being appropriately filled in).

"(b)(1) A joint resolution described in subsection (a) shall be referred to the committees in each House of Congress with jurisdiction.

"(2) For purposes of this section, the term submission or publication date means the later of the date on which—

"(A) the Congress receives the report submitted under section 801(a)(1); or

"(B) the nonmajor rule is published in the Federal Register, if so published.

"(c) In the Senate, if the committee to which is referred a joint resolution described in subsection (a) has not reported such joint resolution (or an identical joint resolution) at the end of 15 session days after the date of introduction of the joint resolution, such committee may be discharged from further consideration of such joint resolution upon a petition supported in writing by 30 Members of the Senate, and such joint resolution shall be placed on the calendar.

"(d)(1) In the Senate, when the committee to which a joint resolution is referred has reported, or when a committee is discharged (under subsection (c)) from further consideration of a joint resolution described in subsection (a), it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) for a motion to proceed to the consideration of the joint resolution, and all points of order against the joint resolution (and against consideration of the joint resolution) are waived. The motion is not subject to amendment, or to a motion to postpone, or to a motion to proceed to the consideration of other business. A motion to reconsider the

1 vote by which the motion is agreed to or disagreed to shall
2 not be in order. If a motion to proceed to the consideration
3 of the joint resolution is agreed to, the joint resolution
4 shall remain the unfinished business of the Senate until
5 disposed of.

6 "(2) In the Senate, debate on the joint resolution,
7 and on all debatable motions and appeals in connection
8 therewith, shall be limited to not more than 10 hours,
9 which shall be divided equally between those favoring and
10 those opposing the joint resolution. A motion to further
11 limit debate is in order and not debatable. An amendment
12 to, or a motion to postpone, or a motion to proceed to
13 the consideration of other business, or a motion to recom-
14 mit the joint resolution is not in order.

15 "(3) In the Senate, immediately following the conclu-
16 sion of the debate on a joint resolution described in sub-
17 section (a), and a single quorum call at the conclusion of
18 the debate if requested in accordance with the rules of the
19 Senate, the vote on final passage of the joint resolution
20 shall occur.

21 "(4) Appeals from the decisions of the Chair relating
22 to the application of the rules of the Senate to the proce-
23 dure relating to a joint resolution described in subsection
24 (a) shall be decided without debate.

"(e) In the Senate the procedure specified in subsection (c) or (d) shall not apply to the consideration of a joint resolution respecting a nonmajor rule—

"(1) after the expiration of the 60 session days beginning with the applicable submission or publication date, or

"(2) if the report under section 801(a)(1)(A) was submitted during the period referred to in section 801(d)(1), after the expiration of the 60 session days beginning on the 15th session day after the succeeding session of Congress first convenes.

"(f) If, before the passage by one House of a joint resolution of that House described in subsection (a), that House receives from the other House a joint resolution described in subsection (a), then the following procedures shall apply:

"(1) The joint resolution of the other House shall not be referred to a committee.

"(2) With respect to a joint resolution described in subsection (a) of the House receiving the joint resolution—

"(A) the procedure in that House shall be the same as if no joint resolution had been received from the other House; but

"(B) the vote on final passage shall be on the joint resolution of the other House.

"§ 804. Definitions

"For purposes of this chapter—

"(1) The term 'Federal agency' means any agency as that term is defined in section 551(1).

"(2) The term 'major rule' means any rule, including an interim final rule, that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—

"(A) an annual effect on the economy of $100,000,000 or more;

"(B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

"(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.

"(3) The term 'nonmajor rule' means any rule that is not a major rule.

"(4) The term 'rule' has the meaning given such term in section 551, except that such term does not include—

"(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefore, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing;

"(B) any rule relating to agency management or personnel; or

"(C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.

"§ 805. Judicial review

"(a) No determination, finding, action, or omission under this chapter shall be subject to judicial review.

"(b) Notwithstanding subsection (a), a court may determine whether a Federal agency has completed the necessary requirements under this chapter for a rule to take effect.

"(c) The enactment of a joint resolution of approval under section 802 shall not be interpreted to serve as a

1 grant or modification of statutory authority by Congress
2 for the promulgation of a rule, shall not extinguish or af-
3 fect any claim, whether substantive or procedural, against
4 any alleged defect in a rule, and shall not form part of
5 the record before the court in any judicial proceeding con-
6 cerning a rule except for purposes of determining whether
7 or not the rule is in effect.

8 **"§ 806. Exemption for monetary policy**

9 "Nothing in this chapter shall apply to rules that con-
10 cern monetary policy proposed or implemented by the
11 Board of Governors of the Federal Reserve System or the
12 Federal Open Market Committee.

13 **"§ 807. Effective date of certain rules**

14 "Notwithstanding section 801—

15 "(1) any rule that establishes, modifies, opens,
16 closes, or conducts a regulatory program for a com-
17 mercial, recreational, or subsistence activity related
18 to hunting, fishing, or camping; or

19 "(2) any rule other than a major rule which an
20 agency for good cause finds (and incorporates the
21 finding and a brief statement of reasons therefore in
22 the rule issued) that notice and public procedure
23 thereon are impracticable, unnecessary, or contrary
24 to the public interest,

shall take effect at such time as the Federal agency promulgating the rule determines.".

SEC. 4. BUDGETARY EFFECTS OF RULES SUBJECT TO SECTION 802 OF TITLE 5, UNITED STATES CODE.

Section 257(b)(2) of the Balanced Budget and Emergency Deficit Control Act of 1985 is amended by adding at the end the following new subparagraph:

"(E) BUDGETARY EFFECTS OF RULES SUBJECT TO SECTION 802 OF TITLE 5, UNITED STATES CODE.—Any rules subject to the congressional approval procedure set forth in section 802 of chapter 8 of title 5, United States Code, affecting budget authority, outlays, or receipts shall be assumed to be effective unless it is not approved in accordance with such section.".

○

Mr. BACHUS. At this time, I recognize the Ranking Member of the Subcommittee, Mr. Steve Cohen, for his opening argument. The gentleman from Tennessee is recognized.

Mr. COHEN. Thank you, Mr. Chairman. I appreciate the opportunity.

I do, though, have this weird feeling that I am somebody else today. I am Bill Murray, and it is February 2 again and again and again and again. This is the 18th time that this Subcommittee will have had hearings on this type of issue. It is the third time in the last 2 years that this Subcommittee has heard testimony on the REINS Act. It will be the 18th time that we have had hearings on the regulatory system.

Last week I asked that the Subcommittee have limited, substantive, and nuanced discussions about ways that we can help with regulations, and I look forward to working with the Chairman on that. He mentioned small community banks. I am a big fan of small community banks. I bank at a small community bank. I was, I think, the first person in the House and one of the leaders in the House to suggest that FDIC insurance limits should be raised to $250,000 to keep small community banks' depositors from coming and taking the deposits out for fear of the catastrophes that we were experiencing at that time, and that happened.

So I am a big supporter of small community banks, but I am not a big supporter of the REINS Act, which just makes no sense to me. Indeed, the bureaucrats are unelected, but they are knowledgeable, and they have expertise. And to take away from them and to put in the Congress on the second and fourth Thursdays only, if and when we are here, which is becoming less and less frequent, and give us a very limited time to have to approve or have a one-house veto, which is constitutionally suspect, regulations without expertise of the 435 of us, and we would have to approve, and the Senate would have to approve, and the president would have to approve, or there would be no regulation.

That is an impossible task, and it means the end of regulations. And while I understand that bureaucrats are unelected, they do have expertise and knowledge, which we do not have.

So this is a repeat of previous scripts, and I would love to have a hearing just on community banks and what we can do to help them. I have opposed the REINS Act. I will continue to oppose it because it just doesn't make sense, just like the sequestration is pretty much considered dumb by both sides. I think even Speaker Boehner said it is not a good way to do it. This is not a good way to do it. If there are regulations that are a problem, you deal with those regulations, but you don't give the Congress a massive ability to interrupt the regulatory process.

This is mostly aimed at Affordable Care and Dodd-Frank. We had passed a "jobs bill" last time, last Congress, and it will result, if the rules and regulations are done in an appropriate way, in a lot of consumers being bilked of their finances from unscrupulous people trying to finance their companies, and we have a history of trying to look out for consumers, and should, and that is what the SEC has done in the past and what we will continue to do, hopefully, with rules and regulations.

I am not going to go into all the nuts and bolts of what this would require—both houses, the president, joint resolution within 70 days, legislative days. It just makes no sense. I think Speaker Boehner used the word "silly" several times last week. When you go to the dictionary and you look up "silly," it says "see REINS Act." This is silly.

This is also the type of legislation that I believe gives Congress a bad name. It is more political than it is substantive. It is not going to pass the Senate. And yet we could pass something to help community banks if we refined our subject matter, and I would like to see that happen. I hope we can.

In calendar year 2010 alone, there were 94 major rules. This affects major rules, those over $100 million or so. There weren't enough legislative days to consider all of this, and Congress has trouble getting it together. We did approve Neil Armstrong's name on a space center last week, but to think we could go into these regulations and approve all of these with any sense of knowledge and certainty is dubious at best.

So we will continue on with the hearing. It is unnecessary. Congress has many other ways to make the executive contour to what we would hope they would through the budget process, through oversight, and we have control and influence, and that is what we need. There needs to be a check and balance, and there needs to be a manageable system of implementing rules and regulations.

Professor Levin, I am looking forward to his testimony, not that I am not looking forward to Mr. Gattuso's and Professor Claeys', but I know that Professor Levin is going to bring up the possible unconstitutionality of a one-house legislative veto. The Supreme Court held that to be unconstitutional. And Chief Justice Roberts, in discussing a law somewhat similar to this in 1983, said in a memorandum, "Such legislation would hobble agency rulemaking by requiring affirmative congressional assent to all major rules and would seem to impose excessive burdens on the regulatory agencies." Chief Justice Roberts, who upheld the Affordable Care Act, is once again right.

I yield back the balance of my time.

Mr. BACHUS. Thank you, Mr. Cohen.

Mr. COHEN. If I can, Mr. Chairman, introduce Mr. Conyers' statement without the need to cite the outstanding arguments made therein but only introduce it into the record.

Mr. BACHUS. Absolutely.

Mr. COHEN. Thank you, sir.

Mr. BACHUS. The full Committee Ranking Member, Mr. John Conyers' opening statement will be introduced into the record at this time.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, Ranking Member, Committee on the Judiciary, and Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law

H.R. 367, the so-called REINS Act, is a thoroughly problematic bill. This measure is not only unnecessary and unworkable, but it could seriously jeopardize the health and safety of millions of Americans who rely on an effective regulatory system. And, it represents yet another partisan, shortsighted attack against regulations.

To begin with, H.R. 367 creates an unworkable process that will make it nearly impossible for new regulations to be enacted. The measure imposes unrealistic deadlines by which Congress must consider and pass exceedingly complex and technical regulations.

Under H.R. 367, Congress would have only 70 legislative days within which to act after it receives a major rule.

Now, let's put this in some perspective. Over the past few years, the average number of major rules promulgated each year is about 80. In 2010, for instance, 94 major rules were issued.

But keep in mind the following fact: there were *just 116 legislative days in the House* that year.

Worse yet, the bill restricts the days on which these major rules may be considered in the House, which, for 2012, was only **10** eligible days.

Assuming there is just an average number of major rules, Congress would have to consider an average of 8 separate major rules on each of those days.

Under H.R. 367, there is just no feasible way that Congress would have the time to consider all the major rules issued during the year.

And, let's not forget that Congress *already* has the tools to review both major and non-major rules on an individual under the Congressional Review Act of 1996.

Under this Republican-driven initiative, Congress can disapprove a rule, a power that it has exercised previously.

Another concern that I have with the bill is that it would at a minimum significantly delay rulemaking and even worse bring it to a halt.

Major rules are often the product of an intensive, multi-year process, based on extensive input received from the public and affected entities through a notice and comment period.

Agencies often spend many months, if not years, to perfect theses rules based on feedback from these sources and their own expertise.

Under the bill's short-circuited process, however, Congress will not realistically be able to second-guess the merits of these rules.

When in doubt and in response to aggressive lobbying, Congress would likely decide not to approve rules. As a result, the health and safety of Americans would be jeopardized if needed regulations are stalled.

Not surprisingly, more than 70 consumer groups, environmental organizations and labor unions, among other organizations, strenuously opposed a nearly identical version of this measure that was considered in the last Congress.

In support of a veto threat, this is one of the reasons cited in the Statement of Administration Policy issued in the last Congress against the bill's predecessor.

Specifically, the White House expressed concern that bill would "throw all major regulations into a months-long limbo, fostering uncertainty" which interferes with the effectiveness of the federal government's ability to protect "public health, welfare, safety, and our environment."

Finally, H.R. 367 is yet another installment on the Majority's anti-regulatory agenda.

Let's be honest. This bill is clearly intended to take regulatory power *away* from the agencies that have the requisite expertise, and give that power to Congress which is ill-equipped to make highly technical decisions.

Just last week, the Subcommittee, in what was the 17th hearing on this subject matter, heard the well-worn, yet thoroughly false accusation that regulations kill jobs.

As I noted at last week's hearing, if we were really serious about creating jobs, then we should be focusing on those measures that will actually result in creating jobs.

During the last Congress, President Obama, in his address to a joint session of Congress, presented his American Jobs Act, a comprehensive bill that would have:

- cut payroll taxes for qualifying employers,
- fund a work program to provide employment opportunities for low-income youths and adults;
- fund various infrastructure construction projects, including the modernization of public schools; and
- start a program to rehabilitate and refurbish hundreds of thousands of foreclosed homes and businesses.

Unfortunately, Congress chose to ignore this worthy initiative.

As many of you know, I have a measure—H.R. 4277, the "Humphrey-Hawkins 21st Century Full Employment and Training Act"—which aims to provide a job to any American who seeks work.

My bill would create a funding mechanism to pay for job creation and training programs.

These jobs would be located in the public sector, community not-for-profit organizations, and small businesses that provide community benefits.

But, like the President's proposal, my legislation did not receive any consideration during the last Congress.

This is very unfortunate because both of these measures would have, in fact, created jobs and helped our Nation's economic recovery.

The American people deserve better.

Mr. BACHUS. If you want to introduce your full opening statement, I know you didn't take all your time, either.

Mr. COHEN. I took enough time. Thank you.

Mr. BACHUS. All right.

At this time, if there are no further opening statements, without objection, other Members' opening statements will be made a part of the record.

[The prepared statement of Mr. Johnson follows:]

Congressman Henry C. "Hank" Johnson, Jr.

RRCAL Subcommittee Hearing on the REINS Act

STATEMENT

This hearing purports to explore solutions to growing the economy, creating jobs, and increasing America's competitiveness internationally. These are all worthy, laudable goals. But we cannot pretend that this politicized hearing is about economic growth or American prosperity given the Majority's myopic view on regulations.

The Majority pre-supposes that regulations have harmful effects, despite ample evidence from leading bipartisan and non-partisan reports that have found the opposite. The Majority continues to overlook the public benefits associated with regulation. For instance, the 2008 Wall Street collapse stemmed from an avoidable lapse of financial regulation, costing trillions and collapsing the global economy. In many instances, the protections we receive from regulations outweigh the costs.

Having failed to repeal Dodd-Frank, my colleagues on the other side of the aisle are now attempting to gut this bill and others like it to prevent their implementation.

If the Majority was truly concerned with growing the economy, creating jobs, and protecting American competitiveness, we would have come together with a Grand Bargain of spending cuts to address the government's long-term budget deficits and prevented sequestration long ago. Instead, the Republican leadership failure is affecting the livelihood of millions nationwide. Its impact on my home state of Georgia is of grave concern to me.

Instead of assuming regulations are zero-sum, we must strike the proper balance between protecting the safety and health of all Americans and growing the economy and creating jobs. We currently have the power to do this under the Congressional Review Act, which authorizes Congress to disapprove an agency rule to which it objects. Likewise, the President has already issued an Executive Order for considering regulations that seeks to get rid of rules that are slowing economic recovery.

Instead of striking a balance, the REINS Act would amend the Congressional Review Act and require congressional approval of major rules before they even take effect. By flipping this process so that Congress can simply void implementation by not acting on a major rule, the REINS Act falls astray of important balances struck by the Framers in the Constitution. The Constitution provides express procedures on legislation, including the presentment and bicameralism requirements. The Supreme Court has held that these procedures must be strictly observed.

I look forward to hearing from our witnesses today on how we can develop a balanced approach to regulation while upholding the Constitution and preserving the careful balances that the Framers struck. We should not sacrifice so much—public safety, the vision of the Framers, and economic recovery—in the name of obstructing the Obama Administration and preserving corporate profits.

We have a very distinguished panel today, and I will first begin by introducing our witnesses. Each of our witness' written statements will be entered into the record in its entirety. I ask that each witness summarize his or her testimony in 5 or 6 minutes. I am not going to be that stringent with the time, so don't think you have to read fast. Particularly to a Southerner, if you will read a little slower, I can follow it better. To help you stay within or just to know what the time is, we will have lights in front of you.

Now, if I can have the bios of the members? I think we have had twice when we hadn't had those.

Mr. James Gattuso is a research fellow in regulatory policy for the Roe Institute for Economic Policy Studies at the Heritage Foundation. Prior to joining Heritage, he was vice president for policy at the Competitive Enterprise Institute. In that position, he oversaw CEI's policy work and supervised the overall management of the organization. Before joining CEI in 1997, Mr. Gattuso had served since 1993 as vice president for policy development with Citizens for a Sound Economy, where he directed the research activities of that fine organization. From 1990 to 1993, he was deputy chief of the Office of Plans and Policy at the Federal Communications Commission.

We welcome you, Mr. Gattuso.

Professor Eric Claeys is a professor at the George Mason University School of Law. The professor has taught at the University of Chicago School of Law and St. Louis University School of Law. Prior to teaching, Professor Claeys practiced appellate and tort litigation at the law firm of Kirkland and Ellis. Professor Claeys clerked for the Honorable Chief Justice William Rehnquist and the Honorable Melvin Brunetti. Professor Claeys' scholarship focuses on American property in constitutional law, and particularly on the influence of American natural law and natural rights theory on the law. He graduated from Princeton University and received his J.D. from the University of Southern California.

Our third witness is Professor Ronald Levin, who is a legal scholar at the Washington University School of Law in St. Louis, who specializes in administrative law and regulation law issues. He is co-author of a casebook on administrative law and has published numerous articles and book chapters on administrative law topics. Mr. Levin previously served as Washington University Law School's associate dean and is currently a public member of the Administrative Conference of the United States. Prior to joining the faculty at Washington University in 1979, Mr. Levin worked as an associate in the Washington, D.C. office of Sutherland Ashbill and Brennan. He clerked for Judge John C. Godbold of the U.S. Court of Appeals for the Fifth Circuit in Montgomery. He earned his J.D. degree from the University of Chicago and his B.A. magna cum laude from Yale University.

This is an excellent panel that we have assembled. We will now proceed under the 5-minute rule with opening statements.

So, Mr. Gattuso, you are recognized first. Then I am going to go to Professor Claeys, and then Professor Levin.

TESTIMONY OF JAMES L. GATTUSO, SENIOR RESEARCH FELLOW IN REGULATORY POLICY, THOMAS A. ROE INSTITUTE FOR ECONOMIC POLICY STUDIES, THE HERITAGE FOUNDATION

Mr. GATTUSO. Thank you. Mr. Chairman and Ranking Member Cohen, Members of the Subcommittee, thank you for having me here today. Over the past few weeks, all eyes have been focused on Federal spending in efforts to limit an out-of-control budget. Obscure policy terms like "sequestration" have become household words across the country. However, Federal spending is only part of the burden imposed on Americans by the Federal Government. Regulations impose hundreds of billions, or even trillions, of dollars in additional costs. These burdens not only increase consumer prices but keep enterprises from growing and jobs from being created.

During the past 4 years, the regulatory burdens placed on the American people and the economy have grown at a breathtaking rate. During President Obama's first 4 years in office, over 130 major rules increasing regulatory burdens were issued, imposing some $70 billion in new annual costs according to preliminary estimates we have done at the Heritage Foundation, based on agency calculations of their own costs.

I will note that these numbers exclude budgetary transfer costs. It excludes other rules that do not have a regulatory effect. This is a subset of just those rules that constrain private activity. So this is the core amount of regulation.

By comparison, about 50 such rules worth $15 billion in new costs were imposed during George W. Bush's term, and more regulation is on the way. According to the latest Unified Agenda of Federal Regulations, 131 new major regulations are already in the pipeline. That compares to 90 in process when President Obama took office, and only 56 in the spring of 2001.

However, while regulatory growth has accelerated under President Obama, it did not start with his Administration. Each year for the past 30 years, according to the Office of Management and Budget, the burden of regulation imposed on Americans has increased. Not since 1982 have regulatory costs decreased.

Not all regulations are unwarranted. No one is talking about eliminating airline safety rules or allowing contaminated meat to be freely distributed and sold. But there are volumes of rules not so well justified, ranging from the trivial—do we really need to paint an "F" at the front of the locomotive to tell which side is which—to the potentially catastrophic—should the Federal Communications Commission regulate the Internet.

The constant increase in regulatory burdens is taking its toll on the economy at a time when the Nation can ill afford it. Firm action by Congress to rein in this growing red tape is needed. This should include requiring explicit approval of all new major rules by Congress as provided by the REINS Act, ensuring that burdens are not placed on Americans without the approval of their elected representatives.

This would be a significant change in the way rules are issued. The effect, however, is to reinforce, not to upset, the constitutional balance. As a first matter, the change merely restores Congress'

constitutional role of legislating, much of which has been delegated to regulators in the past. As important, the change constrains Congress as much as it empowers it by making legislators more accountable for their actions.

Now, despite claims by opponents and some supporters of REINS, this legislation is not inherently anti-regulatory. Instead, it simply ensures scrutiny by Congress of all proposed rules, all proposed major rules. It would apply just as much to agency decisions that reduce regulatory burdens as it would to those that increase such burdens.

Some critics say that the task of reviewing so many rules would be too burdensome for Congress. But while costly, the number of major regulations issued each year is in the low dozens typically, hardly an unmanageable number. Of these, about half are budgetary in nature, such as those setting Medicare reimbursement rates, and perhaps could be exempted from the REINS Act.

In any case, it hardly makes sense to excuse Congress from the task of reviewing new rules because there are so many being imposed on the private sector. If anything, that would indicate a greater need to monitor the regulatory activity.

Some also argue that the REINS Act would displace regulators' expert judgment with political decision-making. For example, one critic wrote that Congressional action under the REINS Act is "likely to be nakedly political, reflecting the raw political power of public interests," while "agency actions are backed up with reasonable policy determinations."

Outside of political science textbooks, that is not how government works. Regulators have their own interests and agendas, and political considerations, shockingly, do influence the process. Spend an hour in front of almost any agency in Washington and watch the lobbyists flow in and out if you doubt that.

Most regulatory decision-making requires more than scientific expertise. It involves value judgments as to what burdens will be placed on the American people, what those burdens are, what size they are, and for what benefit. Such decisions properly involve Congress.

Now, while the REINS Act would provide an important start toward taming excessive regulations, other steps are needed as well; among these, imposing sunset dates for Federal regulations. The REINS Act is a forward-looking reform, ensuring scrutiny of newly proposed rules. To ensure that the existing rules are justified and effective, they should automatically expire after a period of, say, 10 years if not explicitly reaffirmed by regulators through a notice of comment rulemaking.

Secondly, we need to develop a congressional regulatory analysis capability. In order to exercise its duties under the REINS Act, Congress needs the capability to analyze proposed and existing rules independently, without reliance on the OMB or other regulatory agencies. This can be done through a new congressional Office of Regulatory Analysis, modeled on the Congressional Budget Office, or alternatively through existing congressional institutions such as the CBO or the Government Accountability Office.

Congressional approval of proposed new rules as provided in the REINS Act would be an important step toward holding regulators

in Congress accountable for regulations imposed in the private sector. While it is no panacea for the increasing flood of regulations, it would be a powerful first step toward reform. Thank you.

[The prepared statement of Mr. Gattuso follows:]

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CONGRESSIONAL TESTIMONY

"REINS Act of 2013": Promoting Jobs, Growth, and Competitiveness

Testimony before

The Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Committee on the Judiciary

United States House of Representatives

March 5, 2013

James L. Gattuso
Senior Fellow in Regulatory Policy
The Heritage Foundation

Mr. Chairman, Ranking member Cohen, members of the subcommittee: My name is James Gattuso. I am Senior Research Fellow in Regulatory Policy at The Heritage Foundation. Thank you for inviting me to be here today to discuss H.R. 367, the Regulations from the Executive in Need of Scrutiny, or REINS, Act. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.

Over the past few weeks, all eyes have been focused on federal spending and efforts to limit an out-of-control budget. Obscure policy terms such as "sequestration" have become household words as Congress struggles with the issue. However, federal spending is only one part of the burden imposed on Americans by the federal government. Regulations impose hundreds of billions, or even trillions, of dollars in additional costs. These burdens not only increase the prices for consumers, but keep enterprises from growing and jobs from being created.

During the past four years, the regulatory burdens placed on the American people and economy have grown at a breathtaking rate. During President Obama's first four years in office, over 130 major rules increasing regulatory burdens (roughly defined as those costing $100 million or more each year) were adopted by agencies, imposing some $70 billion in new annual costs according to preliminary calculations based on agency estimates. By comparison, about 50 such rules, with about $15 billion in new annual costs, were imposed during George W. Bush's first term.[1]

[1] Includes "major" rules reported in the Government Accountability Offices' Federal Rule Database, excluding rules with only a budgetary effect or that otherwise do not restrict or impose a mandate on

These new rules have covered a wide range of activity. Financial regulations adopted under the Dodd–Frank law constituted close to a third of the rulemakings. The largest share of estimated costs, however, has come from the Environmental Protection Agency. New energy efficiency mandates on everything from microwave ovens to clothes dryers also upped the total.

And more regulation is on the way. According to the latest Unified Agenda of Federal Regulations, 131 new major regulations are already in the pipeline. That compares to 90 in process when President Obama took office and only 56 in the spring of 2011.[2]

However, while regulatory growth has accelerated under President Obama, it did not start with his administration. Each year for the past 30 years, according to the Office of Management and Budget, the burden of regulation imposed on Americans and the U.S.

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private-sector activity. For a fuller explanation, see James L. Gattuso and Diane Katz, "Red Tape Rising: Obama-Era Regulation at the Three-Year Mark, Heritage Foundation *Backgrounder* No. 2663, March 13, 2012, http://www.heritage.org/research/reports/2012/03/red-tape-rising-obama-era-regulation-at-the-three-year-mark.

[2] Office of Management and Budget, Office of Information and Regulatory Affairs, "Current Regulatory Plan and the Unified Agenda of Regulatory and Deregulatory Actions, http://www.reginfo.gov/public/do/eAgendaMain. Notably, although OMB is required by executive order to release two such "Unified Agendas" each year, no report was released in the spring of 2012, and the fall 2012 agenda was not released until December. See Diane Katz, "Obama's Regulatory Agenda Goes Undercover," Heritage Foundation Foundry blog, August 31, 2012, http://blog.heritage.org/2012/08/31/obamas-regulatory-agenda-goes-undercover/. Similarly, OMB has failed to produce its statutorily required annual report on the costs and benefits of regulation since 2011, releasing only a draft report in early 2012. These failures have impeded the ability of policymakers and the public to evaluate regulatory trends and performance.

economy has grown. Not since 1982 have total regulatory costs declined.[3] Regulatory growth is not a short-term phenomenon confined to an outlier presidency. It is a long-term, persistent trend.

Not all regulations are unwarranted, of course. Many rules are well-justified. No one is talking about eliminating airline safety rules or allowing contaminated meat to be freely sold. But there are volumes of rules not so well justified, ranging from the trivial (do we really need to require railroads to paint an "F" on locomotives to indicate the front?) to the potentially catastrophic (should the Federal Communications Commission regulate the Internet?). And the constant increase in regulatory burdens is taking its toll on the economy at a time when the nation can ill afford it.

Firm action by Congress to rein in this growing red tape is needed. This should include requiring explicit approval of all new major rules by Congress, as provided by the REINS Act, ensuring that burdens are not placed on Americans without the approval of their elected representatives.

Congress, of course, has always had the constitutional authority to control regulatory growth. All of the thousands of rules and regulations adopted each year are based on powers delegated to agencies by Congress itself. These rules can always be revoked or modified by legislation passed by Congress. In addition, recognizing that institutional inertia can make it difficult to move legislation forward, the 1996

[3] Office of Management and Budget, Office of Information and Regulatory Affairs, "2009 Report to Congress on the Benefits and Costs of Federal Regulations a Unfunded Mandates on State, Local, and Tribal Entities," p.32.

Congressional Review Act (CRA) established "fast track" procedures for blocking proposed rules, ensuring an up-or-down vote in the House and the Senate on "resolutions of disapproval."

The CRA, however, has been successfully used only once to stop a rule, and that was over a decade ago, when a Labor Department rule promulgated by the Clinton Administration was rejected shortly after George Bush was inaugurated as President. One problem is that a CRA resolution—like all other legislation—cannot be adopted unless agreed to by the President. But few Presidents are keen on rejecting the work of their own appointees. As a result, the CRA and congressional review of rulemaking have been toothless tigers.

The REINS Act would finally give a real bite to regulatory review by, in effect, reversing the burden of proof. Specifically, promulgation of major rules would be conditioned on approval by Congress. They would not be formally adopted until and unless a "resolution of approval" is adopted by Congress. As with the CRA's "resolution of *dis*approval," this resolution would be subject to fast-track consideration.

This is undeniably a significant change in the way rules are adopted. The effect, however, is to reinforce, not to upset, the constitutional balance of powers. As a first matter, the change merely restores Congress's constitutional role of legislating, much of which has been delegated to regulators. As important, the change constrains Congress as much as it empowers it by making legislators more accountable for their actions.

Under present practice, Congress gets to take credit for enacting popular but vague legislation but then can plausibly deny responsibility for the costly regulations that result. Thus, for example, the FCC is charged with furthering the "public interest," the EPA with regulating "pollutants," and the new Consumer Financial Protection Agency with limiting "abusive" financial practices without a clear indication of what those terms mean. This allows Congress to stand on the sidelines, ready to take credit or to denounce the agencies' actions, rather than take responsibility itself.

The result is power without accountability—a useful formula politically but an abysmal one for policymaking. The REINS Act would end this shell game. Congress would no longer be able to pass vague legislation and disclaim responsibility for agency rulemaking.

Despite the claims by opponents—and some supporters—of REINS, the legislation is not inherently anti-regulatory. Instead, it simply ensures scrutiny by Congress of proposed rules. It would apply just as much to agency decisions that reduce regulatory burdens as it would to those that increase such burdens.

This is not to say that equal numbers of pro-regulatory and deregulatory actions would be subject to scrutiny under the REINS Act. That is not because of any bias in the legislation, but rather is simply because agencies act to increase regulation far more often than they act to reduce it. In Republican as well as Democratic presidencies, decreases in

regulation have been far outnumbered by increases.[4] Under President Obama, they have almost disappeared entirely (at least among major rules). The unavoidable fact is that we are facing a flood of new regulation, not a flood of deregulation. Reviews under the REINS Act would only reflect that fact.

Some critics say that the task of reviewing so many rules would be too burdensome for Congress and would simply "gum up" the regulatory works.[5] But, while costly, the number of major regulations issued each year is in the low dozens—hardly an unmanageable number. Of these, about half are budgetary in nature, such as those setting Medicare reimbursement rates, and perhaps could be exempted from REINS review. In any case, it hardly makes sense to excuse Congress from the task of reviewing new rules because too many are being produced. If anything, that would indicate a greater need to monitor regulatory activity.

Critics also argue that the REINS Act would displace regulators' "expert" judgment with political decision-making. For example, Steven Shapiro of the Center for Progressive Reform writes that Congressional action "is likely to be nakedly political, reflecting the raw political power of special interests," while agency actions "are backed up with reasonable policy determinations."[6]

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[4] See, i.e., James L. Gattuso, "Reining in the Regulators: How Does President Bush Measure Up?" Heritage Foundation Backgrounder No. 1801, September 28, 2004, http://www.heritage.org/research/reports/2004/09/reining-in-the-regulators-how-does-president-bush-measure-up.
[5] Sidney Shapiro, "The REINS Act: The Latest Conservative Effort to Gum Up the Regulatory Works," Center for Progressive Reform blog, January 14, 2011, http://www.cprblog.org/CPRBlog.cfm?idBlog=84F5CF0B-E804-F8D1-7197786456C5DC4F.
[6] Ibid.

But, outside of political science textbooks, that's not how government works. Regulators have their own interested agendas. And political considerations, shockingly, do influence the process. Spend an hour in front of most any agency and watch the lobbyists flow in and out if you doubt that.

Moreover, most regulatory decision-making requires more than scientific expertise. It involves value judgments as to what burdens will be placed on the American people for what benefit. Such decisions properly involve Congress.

Congress and agency "experts" will not always agree. Since Members of Congress must regularly face the voters, they will have a different perspective from appointed regulators. But that's not a bug in the system; it's a feature. Simply put, no rule should be adopted if the American people, as represented by Congress, don't agree it is necessary.[7]

While the REINS Act would provide an important start toward taming excessive regulation, it is no silver bullet. Other reforms that complement the changes made by REINS are also needed. Among them:

[7] Importantly, congressional review under the REINS Act would be in addition to, not instead of, review by the executive branch and by the courts. In fact, the legislation explicitly provides that "[t]he enactment of a resolution of approval does not serve as a grant or modification of statutory authority by Congress for the promulgation of a rule, does not extinguish or affect any claim, whether substantive or procedural, against any alleged defect in a rule, and shall not form part of the record before the court in any judicial proceeding concerning a rule" Sec. 805(c). In other words, approval of a rule by Congress under the REINS Act does not provide a free pass for regulators.

1. Imposing sunset dates for federal regulations. The REINS Act is a forward-looking reform, ensuring scrutiny of newly proposed rules. Action is also needed to address the existing stock of regulations already on the books. To ensure that these existing rules are justified and effective, they should automatically expire after a set period—perhaps 10 years—if not explicitly reaffirmed by regulators through a notice and comment rulemaking. As with any such regulatory decision, this reaffirmation would be subject to congressional review under the REINS Act.

2. Developing a congressional regulatory analysis capability. In order to exercise its duties under the REINS Act responsibly, Congress needs the capability to analyze proposed and existing rules independently without reliance on OMB or the regulatory agencies. This could be done through a new Congressional Office of Regulatory Analysis modeled on the Congressional Budget Office or, alternatively, through existing Congressional institutions such as CBO or the Government Accountability Office. Such a capability would also help Congress better evaluate the regulatory consequences of the legislation it enacts.

Congressional approval of proposed new rules as provided in the proposed REINS Act would be an important step toward holding both regulators and Congress accountable for the regulations imposed on the private sector. While it is no panacea for the increasing flood of new regulations, it would be a powerful first step toward reform.

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Mr. BACHUS. Thank you, Mr. Gattuso.

Professor Claeys?

TESTIMONY OF ERIC R. CLAEYS, PROFESSOR OF LAW, GEORGE MASON UNIVERSITY

Mr. CLAEYS. Chairman Bachus, Ranking Member Cohen, Vice Chairman Farenthold, and Members of the Subcommittee, thank you very much for inviting me to testify. I am honored by the opportunity. With special respect to Ranking Member Cohen, I testified on this issue 2 years ago. So I, too, feel like it is Groundhog Day and sympathize with you.

If I may, I would like to state orally four main points from my written testimony. First, Congress has constitutional authority to enact the REINS Act. Usually, Congress has extremely broad discretion to decide how to structure the executive administration of law. It may, and often does, write primary rules of conduct without the help of agencies and statutes. Congress can strip all executive agencies that currently promulgate rules of their rulemaking powers and convert those agencies into advisory committees for this Senate and this House's authorizing committees.

The power to promulgate legislative rules becomes an executive power if, to the extent that, and under whatever constitutionally proper conditions Congress establishes using the necessary and proper clause. Under that clause, Congress may reasonably find it necessary and proper to recalibrate agency rulemaking powers to make agencies seek pre-approval from Congress for major rules before they take on the force of law.

Second, the REINS Act is consistent with the holding of *INS v. Chadha*. Under Chadha, when a congress charges executive agencies to administer acts of Congress, it may not reserve the power to second-guess agencies' administrations of the law using so-called legislative vetoes. In response to such a legislative veto, Chadha holds, "To accomplish what has been attempted by one house of Congress in this case," that means a legislative veto, "requires conformity with the express procedures of the Constitution's prescription for legislative action, passage by a majority of both houses, and presentment to the president," 462 U.S. at 958.

This holding doesn't say the Congress may never inject itself into the executive's administration of the law. Rather, it says if Congress chooses to inject itself into the executive's administration of the law, it may only do so by a legislative process respecting Article 1, Section 7's requirements of bicameralism and presentment. Under the REINS Act, joint resolutions of approval must be passed in both houses. By long-standing practice, it is assumed that such resolutions will be presented to the president. In Chadha's words, that process is "in conformity with the express procedures" of Article 1, Section 7.

I would like to move from my testimony about the constitutional issues to my testimony about the merits. So, third, Congress may reasonably conclude that the REINS Act is a necessary and proper means to protect the rights of U.S. citizens more effectively than current Federal administrative law does. Congress is expected to use its constitutional powers to, in the preamble of the Constitution, secure the blessings of liberty to ourselves and our posterity;

and, in the Declaration of Independence, to secure certain unalienable rights, among which are life, liberty, and the pursuit of happiness.

Like statutes, if well crafted, legislative rules can secure rights—health, safety, the capacity to buy goods and services free from deception or misinformation, and so on. Also like statutes, however, when poorly crafted, legislative rules can threaten rights. More than 20 years ago now, I was honored to work for Congressman Ron Packard, Oceanside, California. Back then, the U.S. Army Corps of Engineers was promulgating wetlands regulations that, in his opinion and mine, unduly threatened property rights. Poorly crafted airport inspection regulations can threaten the privacy of U.S. citizens to be free from unreasonable searches and seizures. Poorly crafted health insurance regulations can coerce American citizens and American businesses to use their own salary or company accounts to cross-subsidize conduct that violates their religious consciences.

At least for rules being scored as major rules, Members of Congress owe it to their constituents to consider carefully whether those rules advance their intended goals, with due respect for those constituents' unalienable rights.

Last, some critics of the REINS Act believe that if the REINS Act is enacted, the REINS Act's joint resolution process will inject politics and special-interest groups into policymaking by apolitical regulatory agencies. With respect, in many cases I believe this view has things backwards. Now more than ever, the president closely supervises agency policymaking and injects a great deal of politics into it.

At least as important, over the last 20 to 40 years legislators and policymakers have learned the theory of capture, and scholars have learned of the theory of public choice, and these capture and public choice theories teach us that special interests quite often exert much more influence in a regime where there is legislation and administration than in a regime where Congress were to do most of the legislating itself.

I cite examples in my testimony involving flame retardant furniture regulation, benzene regulation, and a few others cases. There are many causes and mechanisms for special-interest group influence, and the REINS Act barely scratches the surface. But if you are concerned about special-interest influence, the REINS Act performs a crucial function. The joint resolution process forces public policy and special-interest politics back into the floors of Congress, and Congress must take accountability for the hard tradeoffs between the two.

And since the Chairman gave a little bit of grace, I am just going to use one case example. So there is an ongoing rulemaking right now in the Consumer Product Safety Commission about flame retardant furniture. In this, fire marshals petition for a rule, but the fire marshals were funded by tobacco companies. The furniture companies used health and safety studies to suggest that the chemicals to be used to protect the furniture to make them inflammable might be carcinogenic or threatening to the environment.

I humbly submit that, first, it would be good for Congress to debate and to consider the scientific issues because the science here is so tentative that it becomes inescapably political.

Second, there is a huge moral hazard issue that needs to be considered here, and I don't think the science is capable of considering it. In the backdrop, what drives the fires that are set by furniture when people fall asleep while holding cigarettes, and Members of Congress I think are at least as competent as scientists to decide whether the law would promote irresponsibility by letting people have a couch that protected them from the fact that they fell asleep with a cigarette in their bedroom or on their couch.

Last, if there is special-interest politics, it would be healthy for the political process and the administrative process for debates about whether the safety arguments here are motivated by tobacco companies, and whether the health and environment arguments here are motivated by furniture manufacturers.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Claeys follows:]

Prepared Testimony of

Eric R. Claeys
Professor of Law
George Mason University

Before the
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Committee on the Judiciary
U.S. House of Representatives, 113th Congress

Tuesday, March 5, 2013
Hearing on the
Regulations from the Executive in Need of Scrutiny ("REINS") Act

Chairman Bachus, Ranking Member Cohen, Vice Chairman Farenthold, and members of the Subcommittee, thank you very much for inviting me to testify. I am honored that the members of the House Judiciary Committee on Regulation Reform, Commercial and Antitrust Law have invited me to testify a second time[1] on the Regulations in Need of Scrutiny ("REINS") Act, filed as H.R. 367 in this Congress.

I have been asked to testify on three topics: the REINS Act's constitutionality; how several leading policy arguments interrelate with the constitutional case for the Act; and three common objections to the Act.

I. The Constitutionality of the REINS Act

Under the REINS Act, before any legislative rule takes effect, the executive agency promulgating the rule must submit to both Houses of Congress and the Comptroller General a copy of the rule, a general statement restating the rule, and a classification designating the rule as major or nonmajor. (H.R. 367, sec. 3, proposing new 5 U.S.C. § 801(a)(1)(A).) ("Rules" are defined under the Administrative Procedure Act, 5 U.S.C. § 551(4), and one is deemed "major" if the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget ("OIRA") finds that it is likely to result in $100 million or more annual effect on the U.S. economy, a major increase in costs or prices for various designated groups, or significant adverse effects on competition, employment, investment, productivity, or innovation. See id., proposing new 5 U.S.C. § 804.) Subject to limitations and exceptions enumerated in the Act, a major rule may not take effect unless both Houses of Congress enact and the President signs (or, if after a presidential veto, both Houses enact by two-thirds supramajorities) a joint resolution approving of the rule. (See id., proposing new 5 U.S.C. §§ 801(b)(1), 802.) To minimize the possibility that a joint resolution is never considered, the Act amends both House's internal rules to privilege joint resolutions for expedited consideration and votes. (See id., proposing new 5 U.S.C. § 802(c)-(e).)

The REINS Act is a constitutional exercise of Congress's legislative powers under the Necessary and Proper Clause. (See U.S. Const. art. I, § 18.) The Constitution entrusts all federal legislative powers to Congress. (See U.S. Const. art. I, § 1.) In many different fields of regulation and policymaking, Congress has enacted legislation enabling executive agencies to promulgate rules. Every time that Congress enables an agency to promulgate rules, it makes a judgment that the rulemaking power is a necessary and proper complement to the agency's

responsibility to effectuate policies enacted by Congress in furtherance of Congress's enumerated powers. When an enabling act empowers an agency to make rules, the agency (acting as the President's delegate as specified by Congress) then has executive powers to make rules. Yet (except for extreme situations implicating the President's inherent executive powers) the agency has no power to execute until Congress enacts a law and a legislative policy for it to execute.[2] Ordinarily, then, an agency's executive powers to make rules are entirely contingent on Congress's creating and structuring those powers by prior legislation. Congress may create subject-specific structures for rulemaking (most often, in the statutes enabling rulemaking in agency organic statutes), or general constraints on rulemaking (for example, the Administrative Procedure Act, 5 U.S.C. § 551 et seq., and the Congressional Review Act, 5 U.S.C. § 801 et seq.). These structures and constraints embody Congress's judgments about what processes and procedures are necessary and proper to make rulemaking effective and consistent with other important priorities.

The REINS Act adds another general constraint on the process by which agencies may make rules: Major rules are legislatively deemed not to be necessary and proper supplements to agencies' primary responsibilities to implement Congress's legislative priorities, unless and until Congress enacts a joint resolution of approval for a given major rule. Since the Necessary and Proper Clause gives Congress the power to authorize rulemaking, it also authorizes Congress to impose a new precondition like the REINS Act on major rulemakings.

Last Congress, it was suggested that the REINS Act creates two constitutional problems:[3] The Act may violate the Constitution's bicameralism and presentment provisions as construed in INS v. Chadha (1982),[4] and it may encroach on the President's core executive functions, as delineated in Morrison v. Olson (1988).[5] Neither argument has merit. Chadha declares it unconstitutional for Congress to use so-called "legislative vetos" (resolutions of opposition by a committee of Congress, or by one or both Houses of Congress) to stop executive actions from taking legal effect. Such so-called "legislative vetos" are not constitutionally proper if they alter the rights the parties would have had after executive action. If Congress tries to alter parties' relations, the Court reasoned, its attempt is unconstitutional unless it comes in the form of a "a statute duly enacted pursuant to Art. I, §§ 1, 7."[6] The REINS Act's preapproval process, however, satisfies this test for "duly enacted" congressional legislation. By definition, a "joint" resolution must be passed bicamerally, and by longstanding practice both Houses of Congress

construe "joint resolutions" to require presentment except when the resolution recommends a constitutional amendment.[7]

Morrison suggested that an act of Congress is unconstitutional if it encroaches on the President's core executive powers under U.S. Const. art. II, § 1.[8] An act of Congress is not a proper means for implementing legislative policy if it disrupts the Constitution's assignment of core executive functions to the President. In all foreseeable applications in practice, however, the REINS Act does not create a threat of such encroachment. Neither the President nor executive agencies have inherent powers under the Constitution to promulgate legislative rules over subjects of domestic regulation; they have whatever rulemaking powers they have pursuant to acts of Congress and subject to limitations set by Congress.

To see why, imagine that, in response to demands by shareholders, a company's board of directors validly revises the company's articles of incorporation. Before the revisions, the company's management could purchase assets in its discretion; after the revisions, the management may not purchase assets worth more than $10 million unless it first proposes the purchase to the board of directors and the board approves the proposal. In an extremely abstract sense, the management loses "executive power." Before the revisions, the management had broad discretion to purchase assets; afterward, the management's discretion is limited for purchases over $10 million. Legally, however, the management loses no power it ever really had. The management is a creature of the articles of incorporation, it is obligated to stay within the limits of the articles, and it is obligated to follow directives and policies given it by the board of directors acting on behalf of the shareholders.

When they promulgate legislative rules, executive agencies stand in the same relation to Congress (and voters) as a company's management does to its board of directors (and shareholders). "It is axiomatic that an administrative agency's power to promulgate legislative regulation is limited to the authority delegated by Congress."[9] Rulemakings constitute "executive power" in that agencies promulgate rules to execute their statutory mandates. But agencies have no power to execute until Congress uses its powers to set a policy and authorize means by which that policy may be executed. So neither the President nor executive agencies are deprived of independent powers when Congress revises or imposes new limits on the means by which agencies promulgate rules.[10] Rather, Congress is using its plenary legislative

discretion over rulemaking to specify in what circumstances executive agencies have power to execute.

In short, the REINS Act constitutes a legitimate exercise by Congress of its legislative powers under the Necessary and Proper Clause, and the constitutional objections lodged against the Act last Congress lack merit.

II. Why the REINS Act is Necessary and Proper Today

There are many reasons why Congress may in its discretion decide that it is no longer necessary or proper for major rules to take legal effect without congressional preapproval. I will not recount these reasons exhaustively, primarily because the House Judiciary Committee listed many of them last Congress.[11] To give a sense how the Act's merits relate to its constitutional authority, however, let me recount four representative reasons.

The first reason is economic growth. For the last five years, the annual increase in gross domestic product has been minus 0.3% (for 2008), minus 3.1% (for 2009), 2.4% (for 2010), 1.8% (for 2011), and 2.2% (for 2012).[12] These growth rates are extremely weak; by one report, the growth rates are so tepid that it will take at least 10 years to return to pre-2008 levels of employment.[13] It is possible that the costs of complying with existing regulations are impeding economic growth. By one account, the costs of complying with existing regulations in 2008 were estimated to be $1.75 trillion (on a gross domestic product of $14.3 trillion).[14] Using data available from OIRA, a witness before this subcommittee testified last week that over the last four years the total regulatory cost burden on U.S. economic actors has increased $520 billion.[15] Given the tepid state of the economy, members of this House may reasonably conclude, Congress should stop the federal government from constricting economic activity any further. Members may reasonably conclude that major rules are not necessary unless members of Congress decide for themselves that the benefits claimed for such rules really outweigh their possible tendencies to retard economic growth.

A second reason is that legislative rules can jeopardize individual liberty. Congress is expected to use its constitutional powers to "secure the Blessings of Liberty to ourselves and our Posterity" (see U.S. Const. preamble), and "to secure" "certain unalienable Rights … among [which] are Life, Liberty and the pursuit of Happiness" (U.S. Dec. of Indep., ¶ 2). Like statutes, if well crafted, legislative rules can secure rights—health, safety, the liberty to compete in a lawful trade, the capacity to purchase goods and services free from deception, and so on. Also

like statutory laws, however, when poorly crafted, legislative rules can also threaten rights. Poorly-crafted wetlands regulations can threaten property rights. Poorly-crafted food or drug labeling regulations can threaten free speech. Poorly-crafted commodity targets can undermine farmers' liberties to compete in markets for the crops they produce. Poorly-crafted airport inspection regulations can threaten the privacy of U.S. citizens to be free from unreasonable searches and seizures. Poorly-crafted health-insurance regulations can coerce insured Americans to cross-subsidize conduct contrary to their religious consciences. Poorly-crafted user fees take property, by unnecessarily diminishing the wealth of people who pay the user fees. It would not be unreasonable for members of Congress to insist that, at least for rules scored as being major rules, it would be advisable for members of Congress to consider carefully the rules' intended goals and their likely effects on the rights of regulated parties. The REINS Act embodies a legislative judgment that it is neither necessary nor proper for executive agencies to put major rules in effect without Congress's debating and taking ownership of the determinations those rules make about individual rights and the public welfare.

The third reason relates to the fact that enabling statutes usually remain in effect far longer than the legislative coalitions that first enact them. Many statutes enabling rulemaking were enacted during the New Deal, and many more were enacted during the 1960s and 1970s. The former statutes are now 70 or 80 years old, and the latter are now 40 or 50 years old. When an enabling act gets this old, it becomes possible and even likely that the agency may use rulemaking to implement policies extremely remote from those anticipated by the legislative coalition that originally enacted the enabling act. This possibility is stoking current controversies over efforts by the Environmental Protection Agency ("EPA") to regulate greenhouse gases. The main provisions of the Clean Air Act were enacted in 1970, 1977, and 1990, and the EPA now reads those provisions at least to permit it and perhaps to require it to make rules on greenhouse gases. However, in the course of regulating greenhouse gases, some argue, "the EPA has taken it upon itself to amend the Clean Air Act's numerical emission thresholds that trigger stationary source permitting requirements so as to ensure a 'common sense' approach to emissions control that Congress never conceived, let alone adopted."[16] In other words, it is possible that the EPA is trying to regulate greenhouse gases with a statutory mandate that fits greenhouse gases extremely poorly, because the mandate is outdated and focused on different immediate problems.

The last factor is the increasing polarization of American politics. By many different metrics, American politics are more divisive and polarized than they were when many rulemaking powers were originally granted. At mid-twentieth century, a leading academic political-science committee studying political parties believed there was no significant ideological division between the parties. By contrast, the 111th Congress has been described as the most ideologically polarized in modern history, because the most conservative Democrat in it voted more liberally than the most liberal Republican. In 1984, 41 percent of American voters described themselves as centrists or near-centrists, while only 10 percent described themselves as being extremely liberal or conservative; by 2004, only 28 percent described themselves as being at the center, while 23 percent described themselves as extremely liberal or conservative.[17]

Given these deeper divisions and polarization, rulemaking is likely to be more controversial now than it was mid-twentieth century. During the 110th Congress, a Republican President could use rulemaking powers to set policies contrary to a Democratic Congress elected in opposition to his policies. In the 112th Congress, after a Republican House was elected in opposition to President Obama's agenda, President Obama campaigned saying, "we can't wait for an increasingly dysfunctional Congress to do its job. Where they won't act, I will."[18] For example, the House of Representatives passed a cap-and-trade environmental bill in the 111th Congress, but the debate provoked opposition substantial enough that the Senate Majority Leader dropped the bill and let it die.[19] Politically, it is reasonable to construe that fact and the results of the November 2010 election as a signal that the public is strongly opposed for the time being to further environmental energy restrictions as too expensive and anti-growth. Nevertheless, in December 2010, the EPA initiated rulemaking proceedings for greenhouse gases.[20]

The old-enabling-statute problem and the polarization problem both make rulemaking seem less legitimate than it may have seemed 40 or 50 years ago. American government may fairly be judged by how solidly its institutions "deriv[e] their just powers from the consent of the governed." (U.S. Decl. of Indep., ¶2.) In some circumstances, agencies may and do promulgate rules to complete intentions sought by a legislative majority and expressed in enabling legislation. As the greenhouse-gas example suggests, however, it is possible that agencies may use rulemaking powers to impose new policies onto problems not remotely on the minds of the members of the political coalition that originally conferred rulemaking powers on the agency. In such circumstances, agency rulemaking may cease to relate significantly to the consent of the

electorate. It is also possible for a President and administration of one party to use rulemaking powers in defiance of electoral opposition, even when that opposing party wins a referendum election on an issue under rulemaking. In such a circumstance, administrative rulemaking may be used to defy, circumvent, wait out, or grind down the will of the electorate.

To prevent such mismatches between rulemaking and popular opinion in important policy disputes, members of the House may reasonably conclude that agencies should be denied the power to make enforceable major rules unless and until Congress considers and embraces the policy arguments supporting the proposed rule. The House will act well within its constitutional discretion if, on this basis, it decides that major rules are no longer necessary and proper without prior congressional approval.

III. The Inadequacy of Several Likely Objections to the REINS Act

Opponents of the REINS Act may make three objections against it: Congress lacks the requisite expertise or scientific background to consider the technical issues raised by many rules; Congress is too politicized to consider the merits of these technical issues dispassionately; and the REINS Act would force Congress to spend too much of its legislative calendar considering joint resolutions of approval. None of these arguments have merit.

A. Agencies Sometimes Lack Enough Evidence to Justify Their Pretensions of Expertise

In administrative practice, there are good reasons for suspecting that rules are often proposed with far less science or expertise than REINS Act opponents claim. Consider a benzene rule litigated in the 1970s. Benzene is used in motor fuels, solvents, detergents, and other organic chemicals, and it is also a by-product from refining petroleum. It is lethal when inhaled at extremely high concentrations (20,000 parts per million (ppm)), and it may cause nausea, leukemia, or blood disease at lower concentrations (above 25 ppm) above ordinary background levels (0.5 ppm or lower). The U.S. Occupational Safety and Health Administration ("OSHA") promulgated a legislative rule barring benzene at levels of 1 ppm or higher in the late 1970s. The rule was litigated up to the U.S. Supreme Court, and the opinions written by the various Justices generated important legal precedents about the constitutional non-delegation doctrine and statutory construction of agency enabling statutes.[21] Here, however, I focus not on the legal ramifications of the Supreme Court's decision but on the underlying benzene rule, which illustrates problems common in rulemaking.

When OSHA promulgated the 1 ppm benzene rule, it had available the following statistical evidence: In Turkey, twice as many shoe workers (13/100,000 instead of 6/100,000) contracted leukemia when exposed to benzene vapors between 150 and 650 ppm in badly ventilated conditions. In Italy, workers who made glue or ink contracted leukemia at abnormally high rates when exposed for long periods of time to solvents with benzene in concentrations between 200-500 ppm. Persistent exposures above 25 ppm were correlated with blood deficiencies and a fatal form of anemia. Other carcinogens had triggered leukemia in mice or rats exposed to the compounds at 1 ppm; it was suspected that benzene also triggered leukemia at the same levels, but previous mice and rat tests had neither confirmed nor refuted those suspicions.[22]

These studies provide an extremely thin factual record on which to justify a 1 ppm limitation on benzene in workplaces. Yet these studies constituted the best information available. If these were all the studies available, however, it is not a little pretentious to assert that members of Congress were somehow disqualified from, and only health-and-safety workplace experts were qualified to, make legislative findings about whether benzene needed to be regulated. First, if the available data can identify medical dangers to humans from benzene exposure between 25 and 500 ppm, but not at 1 ppm, how should regulators extrapolate from the data they have to gauge the medical risks of benzene at 1 ppm? Different chemicals pose different risks or benefits to people at different levels, and regulators must make extremely tentative and subjective forecasts to fill in the parts of a risk/exposure curve for which they do not have concrete data. Medical expertise can help make these forecasts, but such forecasts have barely any more epistemological certainty than a legislative judgment. Second, assuming a regulator extrapolates the risk/exposure curve, how feasible is it technologically for the industry to reduce benzene below different exposure levels? And third, assuming regulators can settle these two questions, how should the extrapolated health benefits from reducing benzene be traded off against the economic costs of doing so? The second and third considerations are not scientific; they are transparently political. Yet even the first consideration is political. Scientific method and experience may rule out *some* risk/exposure extrapolations, but they cannot settle on *only one* acceptable curve. If health-and-safety workplace experts have discretion to decide which of several plausible curves best extrapolates the risk of benzene exposure at 1 ppm, they have yet another political choice.

Some major rules may be supported by copious and clear evidence. Given the country's decades of experience with rulemakings, however, members of this Congress may reasonably conclude that the benzene rulemaking is not just an aberrational case but is instead an illustration of common problems. Many contemporary rulemakings raise similar questions—about how to project, from incomplete epidemiological evidence and tests, whether trace doses of substances threaten health, safety, or the environment, and if so, how severely at different levels. Contemporary greenhouse gases regulatory disputes raise difficult questions how to interpret scant empirical information about global warming. Drug labeling disputes raise difficult questions about how closely doctors and patients read warnings and directions on labels. Many rulemakings on economic disputes require regulators to forecast how new technologies may change regulated markets.

Given these and other similar problems, Congress may reasonably conclude that, in at least a significant number of rulemakings, agencies are making judgments with information so scant that the judgments are not really "scientific" or "expert-based" and are instead political. For economically consequential legislative rules, Congress may proceed to conclude that it is no longer necessary and proper that federal agencies make controversial political trade-offs without further review and approval by Congress.

B. Sometimes Agency Rulemakings Are at Least As Politicized As the Legislative Process

It is also far too late in the day for anyone to assert that congressional review of rulemakings will politicize rulemakings that would otherwise be apolitical. Now that the country has had several decades of experience with rulemaking, both policy makers and scholars have become quite familiar with the ways in which special interests can pressure the administrative process as effectively as they pressure the legislative process. The businesses, unions, and individuals regulated by agencies have just as much incentive to pressure or set the agendas of executive agencies as they do for the agenda of Congress. Among policy makers, this possibility is often called "capture." Among scholars of economics and political science, the study of special-interest-group influence has given rise to "public choice theory," or the "theory of economic regulation."[23]

The benzene rulemaking discussed in the last section illustrates this problem as well. Congress did not legislate a specific standard for benzene; instead, it instructed OSHA to set, for all chemicals, workplace-safety standards that would "most adequately assure, to the extent

feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health."[24] OSHA determined that somewhere between 1.1 and 1.4 million workers were exposed to heightened levels of benzene. When litigated, however, OSHA's rule specifically refrained from protecting the workplaces of 795,000 of those workers—gas station attendants.[25] Notwithstanding its claimed expertise, OSHA promulgated a rule that was arbitrary. If the epidemiological evidence suggests that benzene should be controlled in the workplace, it is arbitrary to exclude more than half the affected workers. Somehow, it seems, gas-station owners succeeded in pressuring OSHA to exempt their stations. Congressional preapproval could have prevented such an arbitrary exemption; it would have been difficult for members of Congress to justify the arbitrariness of the gas-station exemption in public debate.

In addition, experience with rulemaking has also taught that administrative processes can suffer from problems more extreme than the corresponding problems of the legislative process. Economist Bruce Yandle describes "a theory of regulation [he] call[s] 'bootleggers and Baptists.'" When Congress tries to insulate an administrative process from ordinary legislative politics, quite often two groups end up exerting undue influence on the process. One group (Baptists) are idealists. They dislike the legislative process precisely because it forces policy makers to sacrifice abstract ideals to the concrete demands of industry groups, labor unions, and other special interests. The other group (the Bootleggers) consist of the biggest and best-connected interests. According to Yandle, Baptists often initiate administrative processes and then lose control to Bootleggers:

> [W]hat do industry and labor want from the regulators? They want protection from competition, from technological change, and from losses that threaten profits and jobs. A carefully constructed regulation can accomplish all kinds of anticompetitive goals of this sort, while giving the citizenry the impression that the only goal is to serve the public interest.[26]

To take one of many examples: It was documented that, between 1994 and 2008, more than 3600 people died, 6500 people were injured, and more than $1.5 billion of property damage was caused by fires involving flammable furniture. Many of these fires were caused when cigarette smokers fell asleep with lighted cigarettes on beds or furniture, or when cigarette smokers carelessly left cigarettes on or close to furniture. This problem is difficult to solve by federal regulation of the makers of cigarettes or furniture, because it is difficult for national law to reach into homes and stop smokers from being careless. Assuming that federal regulatory law

must respond to the problem, however, there are two possible solutions: Compel cigarette companies to make self-extinguishing cigarettes, or compel furniture manufacturers to make non-flammable beds and furniture.

Cigarette companies anticipated the possibility that the Consumer Products Safety Commission (CPSC) might lobby Congress for jurisdiction to require self-extinguishing cigarettes. (By statutory exemption, the CPSC lacked jurisdiction over cigarettes.) Peter Sparber, a vice president of the Tobacco Institute, gave out hundreds of thousands of dollars to local fire departments and courted their support for the National Association of Fire Marshals (NAFM). Later, Sparber left the Tobacco Institute and lobbied in his own name. He "volunteered" as the NAFM's lobbyist while he continued to lobby extensively for the Tobacco Institute. Not coincidentally, the NAFM then petitioned the CPSC to institute legislative rulemaking to require furniture makers to make upholstered furniture flame-retardant enough not to burn if ignited by a smoldering cigarette. Later, the manufacturers of brominated fire retardant chemicals, whose chemicals furniture makers would need if CPSC approved NAFM's petition, lent their support to that petition. (Conveniently, the chemical makers were also represented by Sparber).

Furniture makers responded similarly: They appealed to health and environment concerns to frustrate CPSC's acting on NAFM's petition. Brominated fire retardants have been correlated with thyroid disease, impaired brain development, and impaired reproductive functions in animals. Furniture makers' lobbyists persuaded concerned members of Congress to attach a rider to an appropriations bill blocking further action on the CPSC rulemaking until the National Institute of Health could study the health and environmental effects of fire-retardant chemicals.[27] After these studies were completed, CPSC finally issued the notice of proposed rulemaking in 2008—fourteen years after the NAFM petitioned for a rule. As of the date of this hearing, CPSC still has not yet issued a final rule.[28]

Regardless of what one thinks of the merits of the CPSC's rulemaking, the regulatory process confirms vividly how accurate Yandle's Baptist-bootlegger metaphor is. The tobacco and flame-retardant chemical industries let the NAFM act as the Baptist fronting their bootlegger agendas. The furniture industry used health and environmental advocates as Baptists in the same way. Separately, the politics of the cigarette/furniture dispute illustrate how byzantine contemporary regulatory politics are. At different points, the dispute involved regulatory and

appropriating committees in Congress, the CPSC, the National Institutes of Health, and several other agencies. The agencies gave special interests many more opportunities to pressure the regulatory process than they would have had if they had only needed to deal with committees of Congress. It would not be unreasonable for members of this Congress to decide that this case study is illustrative. If so, members of Congress may reasonably decide that it is no longer necessary or proper to keep rulemaking structured on the pretense that agencies are systematically more insulated from interest-group pressure or capture than Congress is.

C. The REINS Act Will Not Force the House to Vote More Often Than It Should

Finally, the REINS Act will not clog the Congress's legislative agenda. In the last Congress, this House took 1,608 recorded votes.[29] If the last decade's worth of data is representative, if passed the REINS Act will force members of this House to consider between 50 and 100 joint resolutions of approval each year, or 100 to 200 resolutions each Congress.[30] At most, that addition would add three to six percent votes to the House's existing business. But the House can increase the number of days it is in session. The House could pare down the number of votes it takes on other more ceremonial or symbolic issues. And at least some major rules will be uncontroversial enough to pass by voice votes. Once executive agencies appreciate that both Houses will consider major rules more seriously, they should consult both Houses more closely before rules are finalized—to help defuse controversies before they ever get to the floor of either House.

To be sure, the REINS Act may still require both Houses to take more votes than they do now. This possibility, however, deserves two responses. First, since Congress has ultimate responsibility over the nation's federal legislative powers, it is ultimately Congress's job to consider the pros and cons of legislative rules, which are set to take the force of law, and which are likely to have a significant impact on the U.S. economy. Second, citizens deserve a Congress that performs that job. A government is not meaningfully free or republican if it cannot hold its representatives electorally accountable for politically controversial policies. The REINS Act tightens the connection between the federal government's policy making and electoral accountability. Members of this House may reasonably conclude that a few extra votes each Congress are an acceptable price to pay to make the federal government more responsible to the people for the policies it implements by major rules.

ENDNOTES

[1] See Prepared Testimony of Eric R. Claeys, Hearing on the Regulations in Need of Scrutiny ("REINS") Act, March 8, 2011, before the Subcommittee on Courts, Commercial, and Administrative Law, Committee on the Judiciary, U.S. House of Representatives, 112th Congress, available at http://judiciary.house.gov/hearings/hear_03082011.html.

[2] See National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935).

[3] 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, available at http://judiciary.house.gov/hearings/hear_01242011.html.

[4] 462 U.S. 919 (1982).

[5] 487 U.S. 654 (1988).

[6] Chadha, 462 U.S. at 954-55 n.16; see id. at 952-53.

[7] See http://www.house.gov/house/Tying_it_all.shtml; http://www.senate.gov/reference/glossary_term/joint_resolution.htm.

[8] Morrison, 487 U.S. at 688-89.

[9] Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988).

[10] Assuming that these preconditions satisfy the bicameralism and presentment requirements and do not run afoul of other similar constitutional limitations.

[11] See House Committee on the Judiciary, "Regulations from the Executive in Need of Scrutiny Act of 2011," H.R. Rep. 112-278, Part 1, 112th Cong., 1st Sess., at 7-13.

[12] Data available at U.S. Department of Commerce, Bureau of Economic Analysis, "National Income and Product Account Tables," http://www.bea.gov/iTable/iTable.cfm?ReqID=9&step=1#reqid=9&step=3&isuri=1&910=X&911=0&903=1&904=2008&905=2012&906=A (checked March 1, 2013).

[13] Andre Damon, "Ongoing Slump in America: Tepid US Jobs Report," GlobalResearch, Dec. 8, 2012, available at http://www.globalresearch.ca/ongoing-economic-slump-in-america-tepid-us-jobs-report/5314768.

[14] See Nicole V. Crain & W. Mark Crain, The Impact of Regulatory Costs on Small Firms (SBA Office of Advocacy, Sept. 2010) (regulatory impact); U.S. Department of Commerce, Bureau of

Economic Analysis, "National Income and Product Account Tables," supra (2008 GDP, checked March 1, 2013). But see Lisa Heinzerling & Frank Ackerman, "The $1.75 Trillion Lie," 1 Michigan Journal of Environmental & Administrative Law 127 (2012); "The Impact of Regulatory Costs on Small Firms," available at http://www.sba.gov/advocacy/7540/49291. For a lower estimate of $1.1 trillion, see Clyde Wayne Crews, Ten Thousand Commandments: A Snapshot of the Federal Regulatory State 6 (2010 edition).

[15] See Douglas Holtz-Eakin, "Regulations, Jobs, and America's Global Competitiveness," Testimony before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law, House Committee on the Judiciary, February 28, 2013, available at http://judiciary.house.gov/hearings/113th/hear_02282013.html.

[16] Jonathan H. Adler, "Would the REINS Act Rein in Federal Regulation?" Regulation (Summer 2011), at 22, 25. See Amy Harden, "Clean Air Act: Defend or Dismantle?" NationalJournal EnergyExperts Blog, Sept. 13, 2010, available at http://energy.nationaljournal.com/2010/09/clean-air-act-defend-or-disman.php.

[17] See William A. Galston, "Can a Polarized American Party System Be 'Healthy'?" 34 Issues in Governance Studies 1, 6 (Summer 2010).

[18] Matt Compton, "We Can't Wait: President Obama in Nevada," White House Blog, October 24, 2011, http://www.whitehouse.gov/blog/2011/10/24/we-cant-wait-president-obama-nevada.

[19] Gail Russell Chaddock, "Harry Reid: Senate Will Abandon Cap-and-Trade Energy Reform," Christian Science Monitor, July 22, 2010, http://www.csmonitor.com/USA/Politics/2010/0722/Harry-Reid-Senate-will-abandon-cap-and-trade-energy-reform.

[20] EPA, "EPA to Set Modest Pace for Greenhouse Gas Standards," December 23, 2010, http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/d2f038e9daed78de8525780200568bec!OpenDocument.

[21] Industrial Union, AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 614-16 (1980). The figures used in text are the figures the Supreme Court reported as standard in its opinion.

[22] Id. at 617, 618 n.9, 619 n.12, 657 n.64.

[23] See, e.g., Gary Becker, "A Theory of Competition among Pressure Groups for Political Influence," 98 Quarterly Journal of Economics 371 (1983); George J. Stigler, "The Theory of Economic Regulation," 2 Bell Journal of Economics and Management Science 3 (1971).

[24] 29 U.S.C. § 655(b)(5) (1980), cited in Industrial Union, 448 U.S. at 612.

[25] Industrial Union, AFL-CIO, 448 U.S. at 616 n.6.

[26] Bruce Yandle, "Bootleggers and Baptists: The Education of a Regulatory Economist," *Regulation* (May/June 1983), 12, 13.

[27] Annys Shin, "Fighting for Safety: Your Couch Is Caught in a Flammable Regulatory Battle Between the Chemical and the Furniture Industries," *Washington Post*, January 26, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/01/25/AR2008012503170_pf.html.

[28] 73 Fed. Reg. 11702 (Mar. 4, 2008); http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201010&RIN=3041-AB35.

[29] U.S. House of Representatives Roll Call Votes, available at http://clerk.house.gov/legislative/legvotes.aspx.

[30] Curtis W. Copeland & Maeve P. Carey, "REINS Act: Number and Types of 'Major Rules' in Recent Years" (Congressional Research Service, Feb. 24, 2011), 6 & Table 1.

Mr. BACHUS. Thank you, Professor Claeys.

Professor Levin, you are recognized.

TESTIMONY OF RONALD M. LEVIN, WILLIAM R. ORTHWEIN DISTINGUISHED PROFESSOR OF LAW, WASHINGTON UNIVERSITY SCHOOL OF LAW

Mr. LEVIN. Thank you, Mr. Chairman and Members of the Subcommittee. This hearing is being held in the shadow of the sequester. Indiscriminate budget cuts are going into effect because the two houses of Congress and the president don't agree on what to do about the budget. The sequester is a vivid symbol of much more because these days the House and Senate agree on very little. It is well known that the 112th Congress was the least productive Congress in at least 60 years by a wide margin of about 100 laws, and the 113th has good prospects of being similar.

And yet the bill that is before you today in this hearing would provide that no major rule prepared by an agency could go into effect unless both houses of Congress and the president do agree with it. That suggests to me that if the REINS Act were enacted, major rulemaking on any controversial subject would be virtually impossible.

In view of the extraordinary levels of ideological polarization and lack of compromise that we are seeing today, now is hardly a propitious time to consider a substantial increase in the responsibilities of the legislative branch. The upshot of the REINS Act could be that the dysfunction we now see in the enactment of laws would spread to the implementation of the laws, and I do not think that is an attractive prospect.

If the act were enacted this year, the interference with the rulemaking process would affect a Democratic administration, but in the long run we will have both Democratic and Republican presidents, and this act would pose a major barrier to any president's ability to pursue the policies that he or she was elected to promote. In my view, gridlock in the rulemaking process is a poor idea no matter whether a Democrat or a Republican is in the White House. As Justice Scalia said about the legislative veto right after Ronald Reagan was elected, the legislative veto isn't biased against regulation. It is biased against change. The REINS Act, I think, operates very similarly and would have a similar effect.

Now, it is true that some major rules are much less controversial, and it is not implausible that they could get through Congress in a reasonable period of time. But let's face it, these are matters that Congress delegated in the first place because it did not want to decide them on its own. Many of these matters are dry, technical, and complex, and Congress could very reasonably have thought that they should be left to specialized agencies because resolution of those questions within the legislature is not a wise or efficient use of congressional time.

I see no reason why Congress should now retrospectively overturn all those judgments. It is much too late in the day to turn back the clock and question the legitimacy of delegation itself. We have a functioning system that has been evolving for generations and should not be lightly overthrown. That system allows the busi-

ness of government to go on, but it also includes a good deal of accountability.

Congress can be held accountable for its decision to set up new programs and empower agencies to implement them with rulemaking, and the executive branch is politically accountable for the rules themselves. I don't find anything illegitimate about this system. On the contrary, it is the REINS Act that threatens to overthrow long-established norms and may not even survive constitutional review.

On the surface, the procedures of the act seem to comply with the law-making requirements of Article 1 of the Constitution. But when you look at it closely, you can see that it would enable a single house of Congress to nullify an agency rule without obtaining the concurrence of the other house or the president.

In the legislative veto case in 1983, *INS v. Chadha*, the Supreme Court spent several pages emphasizing that the framers of the Constitution regarded the safeguards of bicameralism and presentment as fundamental precisely because they feared that action by a single chamber could often prove arbitrary.

I think the sponsors of the REINS Act are being too optimistic when they assume that the Court would overlook the fact that the REINS Act would revive those very same dangers that Chadha and subsequent cases have sought to prevent.

In my prepared statement I show that not only the U.S. Supreme Court but also appellate courts in more than a dozen states have strongly and almost unanimously resisted attempts by Congress and other legislatures to expand their control over agency action beyond traditional boundaries. The REINS Act might suffer a similar fate if it were enacted.

In closing, Mr. Chairman, the REINS Act does have a clever name, suggesting reins that guide the horse along the path, but I believe the American people should not be saddled with it.

That concludes my presentation, and I will be happy to respond to your questions.

[The prepared statement of Mr. Levin follows:]

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

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

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

March 5, 2013

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

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

Background

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

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[1] 5 U.S.C. § 801 et seq. (2006).

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

(2) . . . any rule, including an interim final rule, that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in--
(A) an annual effect on the economy of $ 100,000,000 or more;
(B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

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

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

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

Rulemaking Today

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

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

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(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.

[3] 462 U.S. 919 (1983).

changing conditions and emerging problems.[4]

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

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

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

Consequences of the REINS Act

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

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

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

Ordinary rulemaking

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

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

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

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

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

[7]Erica Martinson, *Mitt Romney's EPA would likely look familiar*, POLITICO, May 7, 2012, http://politi.co/IK4c7p.

[8]REINS Act § 802(d)(2), 802(e).

Controversial rulemaking

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

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

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

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

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

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

put in place.

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

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

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

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

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[10] Amanda Terkel, *112th Congress Set To Become Most Unproductive Since 1940s*, HUFFINGTON POST, Dec. 28, 2012, http://nrand.us/151kU. For the official figures, see Office of the Clerk, U.S. House of Reps., Résumé of Congressional Activity, http://library.clerk.house.gov/resume.aspx.

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

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

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

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

Constitutional Concerns

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

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

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

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

> The decision to provide the President with a limited and qualified power to nullify proposed legislation by veto was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed. . . . The President's role in the lawmaking process also reflects the Framers' careful efforts to check whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures. . . .
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> The bicameral requirement of Art. I, §§ 1, 7, was of scarcely less concern to the Framers than was the Presidential veto and indeed the two concepts are interdependent. By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the Framers reemphasized their belief, already remarked upon in connection with the Presentment Clauses, that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials.[15]

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

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

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

[15] *Chadha*, 462 U.S. at 947-49.

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

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

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

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

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

[17]REINS Act § 804(4).

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

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

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

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

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

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

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

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

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

> *[T]he legislative Respondents contend that: "The agency was never authorized to act, only to propose a rule.* The agency has no power to promulgate the rule until such time as the Legislature . . . has authorized the promulgation." Based on this view that the executive branch lacks authority to promulgate regulations, the legislative Respondents deny the existence of a legislative veto arising from the provisions of West Virginia Code § 29A-3-12(b). In other words, until the Legislature approves of proposed regulations, no delegation of executive authority has occurred and therefore, no separation of powers problem comes into existence.
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> *Not only do we find this argument to be spurious, but as Petitioners observe, such a position "is the most extreme assertion of legislative authority."* As we explained in *Barker*,

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

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

[23]462 S.E.2d 586 (W.Va. 1995).

[24]*Id.* at 588-89.

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

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

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

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

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

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[25] *Id.* at 590 (emphasis added).

[26] 122-2 ABA ANN. REP. 465 (Aug. 1997), http://www.americanbar.org/content/dam/aba/directories/policy/1997_am_107a.authcheckdam.pdf

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Mr. BACHUS. Thank you, Professor Levin.

At this time, I will recognize the Chairman of the full Committee, the Judiciary Committee, Mr. Bob Goodlatte from Virginia, for questions.

Mr. GOODLATTE. Thank you, Mr. Chairman. Thank you for holding this important hearing. I want to commend you, and I want to commend Congressman Young of Indiana for his efforts in introducing this legislation here, the second Congress that he has done

so. I think it is an important piece of legislation. And I apologize for not getting here when opening statements were given, so I will submit mine for the record and go right to the questions.

[The prepared statement of Mr. Goodlatte follows:]

Prepared Statement of the Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Committee on the Judiciary

Economic growth is the key to recovery of job creation, the success of Main Street businesses and the hope of America's global competitiveness. With robust economic growth, America can solve a host of the problems that confront us—from high unemployment to fading American competitiveness.

America's current growth rate, however, is anemic. In 2010, real GDP increased only 2.4 percent. In 2011, the rate of growth shrank to 1.8 percent. Although final figures for 2012 are not yet in, growth in the fourth quarter of 2012 was an abysmal 0.1 percent.

Employment figures are no better. In January 2013, real unemployment remained mired at 14.4 percent. Nominal unemployment rose to 7.9 percent. Behind these figures are millions upon millions of struggling American faces, many who have been living without work for many, many months. Economic experts have said that this represents, not just a lingering economic downturn, but a jobs depression.

Other figures paint the picture still bleaker. The number of small businesses being created—the primary source of new jobs—has declined. America's national debt is skyrocketing. Record levels of Americans are on food stamps. The number of Americans on Social Security disability is at record levels, too. Many say this is because millions are turning to disability claims to substitute for unemployment insurance.

Poverty is knocking hard on millions of Americans' doors. National bankruptcy, meanwhile, is knocking hard on America's door.

Everyone knows it has been this way for far too long. But the Obama Administration, instead of fixing the problem, knows only one response—increase taxes, increase spending and increase regulation.

As a result, the Obama Administration has proven one thing better than any other administration in history. America cannot tax, spend and regulate its way to economic recovery, economic growth and durable prosperity for the American people.

The Judiciary Committee has broad jurisdiction over one of the three major strands of this economic knot that the Obama Administration has tied, and America must untie. That strand is the federal regulatory system—a system that every day places more and more obstacles in the path of economic growth. It is my intention as Chairman to do everything that the Judiciary Committee can to achieve real regulatory reform and help provide the growth and recovery America needs.

The REINS Act is one of the simplest, clearest and most powerful measures we can adopt to further that purpose. The level of new major regulation the Obama Administration has issued and plans to issue is without modern precedent. Testimony before the Judiciary Committee this term and during the 112th Congress has plainly shown the connection between skyrocketing levels of regulation and declining levels of jobs and growth.

The REINS Act responds by requiring an up-or-down vote by the people's representatives in Congress before any new major regulation can be imposed on our economy. It does not prohibit new major regulation. It simply establishes the principle, "No major regulation without representation."

By restoring to Members of Congress, who are accountable to the American people, the responsibility for America's costliest regulatory decisions, the REINS Act provides Congress, and ultimately the people, with a desperately needed tool to check the one-way cost ratchet that Washington's regulatory bureaucrats incessantly turn.

During the 112th Congress, the Judiciary Committee originated a number of regulatory reform bills that the House passed on a bipartisan basis. The REINS Act was one of them. I encourage all of the Members of the Committee to assure that the REINS Act is reported out of this Committee once more and is passed on an even greater bipartisan basis in the 113th Congress. The REINS Act is not a partisan issue. It is a paramount institutional and national issue. All Members of Congress should step forward to rein in the federal government's costliest decisions.

Mr. GOODLATTE. Professor Levin, I was interested in what you had to say, your observations about the intrusion of the legislative branch into the authority of the executive branch. Let me just say, and I will get to a specific question in a moment, but I quite frankly think that whether by deliberate act of the Congress writing legislation that is giving tremendous authority to the executive branch or, as many people think, the executive branch overstepping their authority and taking and reinterpreting legislation passed by the Congress and twisting it into new ways to do new things, either way, there has been a dramatic shift in power here in Washington between the legislative branch and the executive branch, and it very much concerns me. So I am all for putting the reins to that with legislation like this.

I hear you say you think this may be unconstitutional. Both Justice Stephen Breyer and Professor Laurence Tribe have written articles opining that congressional pre-approval mechanisms would be consistent with Chadha. Can you summarize why they think pre-approval would be constitutional and explain why you disagree with them?

Mr. LEVIN. Yes, sir. I do know Justice Breyer's article, or Judge Breyer's article, as he was then. I believe he did not endorse the system that he was outlining. He was explaining a method by which you might set up such a system. At that time, I don't think you had the same problem of intense polarization that you have now. Justice Breyer himself got his seat on the Court with strong Republican support because he had worked cooperatively with them. He was a Democrat who had worked on deregulation, and I don't think he would necessarily take the same view today, because Justice Breyer in his scholarship is very interested in things that work out well. He is a pragmatist, and under current circumstances I am not sure he would think it is a good idea.

Mr. GOODLATTE. But he did opine at that time that a pre-approval process would be constitutional.

I want to ask Professor Claeys if he would like to offer his observations on the same question. First of all, do you think a pre-approval process is constitutional, and do you think that Justice Breyer's and Professor Tribe's articles are consistent with your point of view?

Mr. CLAEYS. Yes, Mr. Chairman, I do. I think that then Judge Breyer and Professor Tribe's articles are persuasive on their own, and they are also useful to the Committee. If the Committee is trying to do a litigation assessment, how likely it is that there is going to be a constitutional challenge, I think that then Judge Breyer's and Professor Tribe's articles give you a sense of what the conventional wisdom is about how the Chadha case is interpreted.

So the Chadha case has some loose language, and any good appellate lawyer can cherry-pick out a few pieces of language from one case and another case and another case and string those together to say that these cases all together suggest a certain result. But case reasoning also requires that you take some language from the cases more seriously than others.

In my opening statement I gave you one of what I consider two or three money passages of the Chadha case, and I think those money passages suggest that Congress gets into trouble if Congress

tries to institute some kind of chokepoint using a Committee veto, a one-house veto, or a two-house veto without presenting the two-house veto to the president. Anything beyond that is kind of the looser language of the dicta of the case.

It is telling that Judge Breyer and Professor Tribe said, then, that it would be—Congress could accord it with a respect, the Chadha holding, if it enacted a system that used what Judge Breyer called confirmatory acts.

Mr. GOODLATTE. Thank you very much. My time is running out. I do want to get one more question in to Mr. Gattuso.

In your view, what current regulatory efforts by the Obama administration most highlight the need for reforms like those in the REINS Act, and why, and how do these regulations threaten jobs and growth? With the 30 seconds or so that is left in my time.

Mr. GATTUSO. I think the Obama administration has been moving forward at a rapid clip on a large number of fronts, and I don't think we have seen any Administration move forward on so many at the same time. If I had to name one, I would point to the Dodd-Frank implementation, where there are still hundreds of regulations yet to be made, and we have no idea what they are going to say. The language has been incredibly vague for some aspects, such as the Volcker rule. The agencies themselves don't see any way of implementing it in a way that makes sense. And we have new institutions such as the Consumer Financial Protection Bureau, which is completely insulated from any sort of oversight from other sources.

So I think that is perhaps the single biggest danger out there right now, although there are plenty to choose from.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. BACHUS. Thank you.

At this time I will recognize the Ranking Member of the Subcommittee, Mr. Steve Cohen of Tennessee, for his round of questioning.

Mr. COHEN. Thank you, sir.

Mr. Gattuso, you just said to the Chairman of the full Committee that there were hundreds of regulations that you would be concerned about?

Mr. GATTUSO. What I said was that under the Dodd-Frank law, there are still hundreds of regulations yet to be promulgated.

Mr. COHEN. Right, and in your testimony you said that while costly, the number of major regulations each year is in the low dozens. And yet the data that the Government Accountability Office puts out says there were 237 major rules during President Bush's first term, 268 plus the 11 that happened during the first months of the Obama administration, no more than that.

How do you reconcile those differences in numbers?

Mr. GATTUSO. Well, the hundreds of rules that I cite for Dodd-Frank include all rules. There are over 3,000, typically, in a year.

Mr. COHEN. So how many major rules do you submit are approved each year?

Mr. GATTUSO. It varies, but it is typically in the 60's or 70's. It goes up. Sometimes it can be over 100. Sometimes it will be less.

Mr. COHEN. Yes, that's right. It was 70, 51, 50, 66, 56, 56, 61, 95, 84, and 100. In your testimony it says it is in the low dozens.

Well, I guess low is low compared to 1,000 dozens, but low dozens is generally what you think of as one or two or three, and we are talking about—six may be low dozens, but that is a lot.

Do you keep up with Congress? Are you a C-SPAN guy?

Mr. GATTUSO. I try and watch it when going to sleep, yes.

Mr. COHEN. It is not addictive, so that is good. You realize we are having problems getting things done right now. How many of these rules do you think that the Senate and the House and the president would agree on? In the low dozens, how many of those low dozens do you think would have a chance of getting through?

Mr. GATTUSO. I can't estimate that, but most are not controversial. Also, and I point this out in my testimony, close to half—I don't have the exact number, but a large number of those are budgetary transfer rules, which are really outside the scope of what we are trying to get at with the REINS Act.

Mr. COHEN. So if most of them are not controversial, why should we be burdening ourselves with this?

Mr. GATTUSO. To find out which ones are controversial and which ones are objectionable.

Mr. COHEN. And the Committee has to do this within 15 days of submission. Do you think the Committee, within 15 days of submission—and sometimes we aren't even here for 15 days. But when we are here, we are here for maybe 1 day each of Subcommittee, 1 day a week. How many of these rules can we go through to find out which ones are substantive, and then debate those substantive ones in an intelligent manner?

Mr. GATTUSO. Well, I do know that the Congress spends a lot of time on other issues that are not quite so important. I think there were over 100 post offices that were named by the Congress in the last session.

Mr. COHEN. We quit doing post offices. In fact, we are going to quit the postal authority, probably.

Mr. GATTUSO. I think that it is difficult to go to a small business, for instance, with a straight face and say that we are sorry about these billions of costs that we are imposing on you, but we don't have time to look at them to decide whether they are worthwhile or not.

Mr. COHEN. Let me ask you this question. What is your opinion of Congress' work product? You mentioned that we passed all these post offices and we don't do much, and you watch C-SPAN to go to bed. You don't have a very high opinion of Congress, do you?

Mr. GATTUSO. I do have a high opinion of Congress. I think that Congress has the responsibility to decide what rules should be applied to all Americans and has the moral authority based upon their election by the people to decide that. I think they should be limited, but they also should do their job.

Mr. COHEN. You mentioned lobbyists, and you say that the lobbyists are involved somewhat with the regulatory agencies. Can you imagine the field day lobbyists would have if all they had to do was take one Subcommittee and one portion of the House or one Committee to defeat a rule, that one Committee could defeat a rule? Do you think there would be lobbyists up here trying to influence a Committee to not pass a rule?

Mr. GATTUSO. I think there are lobbyists up here, and there are also lobbyists that have one agency. It certainly is a lot easier to influence one agency at that chokepoint.

Mr. COHEN. Do lobbyists make contributions to the people on the agencies? They don't. And do lobbyists help endorse people that run for the agency? No. But they endorse, and they give contributions, and they could be up here trying to have their influence, and that is where they have their influence. That is where they do that voodoo that they do so well. So it just creates a real problem.

Professor Levin, do you have any comments you would like to make in the last minute here on what has been testified to by the other parties?

Mr. LEVIN. Yes. With respect to the influence of lobbyists, there are political science studies that show that in the legislative veto days, special-interest influences were substantial and had an impact on the way those operated in the states.

Secondly, with regard to the post office bills and the like, first of all, the total product of this last Congress would be even lower if you didn't have the post office bills building up their total. But more fundamentally, I think Congress could make time for major rules or other things if they cut out fundraisers, constituent service, district visits, and ceremonial bills, but I don't think those are the things that would be eliminated, because those are matters that serve the political interests of Members directly.

Mr. COHEN. Mr. Chairman, can I ask for 20 seconds?

Mr. BACHUS. Yes, sure.

Mr. COHEN. I am just curious, and I don't know that a lawyer is supposed to ask a question he knows the answer to, but when the Chairman was asking you about Breyer's and Tribe's opinion, was that on a similar system to where there was a veto by either house, or was it the pre-approval?

Mr. LEVIN. It wasn't anything specific. It was just a thought experiment, I would say, and it wasn't the same as the REINS Act because it would not have provided that, once a matter is approved, it would nevertheless be subject to APA review on all grounds, which this bill contemplates.

Mr. COHEN. All Judge Breyer and Mr. Tribe were saying is that they thought whatever that was, it was constitutional. They did not come to a value judgment, like Justice Roberts did, to say that it was bad policy.

Mr. LEVIN. Justice Breyer, Judge Breyer said he was quite skeptical of its merit. He was putting forth an idea, but he indicated that he would be doubtful about it.

Mr. COHEN. So he concurred with Justice Roberts. Thank you.

Mr. BACHUS. Thank you.

Now I would recognize the gentleman from Pennsylvania, Mr. Tom Marino, for questions.

Mr. MARINO. Thank you, Chairman.

Good afternoon, gentlemen. Thank you for being here. I love constitutional law. I was a prosecutor, but I thoroughly enjoy constitutional law. Maybe perhaps someday, each of us together, one-on-one, can have lunch and I can bore you with my positions, and you can educate me as to what is going on. I think in my second life

I want to study more constitutional law and teach it, if possible. But I respect all of your opinions. You are very bright men.

Professor Levin, am I pronouncing that right? I will start with you for a moment. Why not let the process work? Legislation, and the courts refer to it—Chadha was an opinion handed down by the Burger Court, and I read the case, but it was a cursory reading, again, not the detail that I would read it for in law school. But that was in 1983.

The mood of the people has changed. Big government, invasion by agencies with ridiculous legislation, with administrative laws, for an example, the EPA trying to get control over the waterways by saying a rain puddle, they would have control over that because it is water and it is in a puddle, and they want control over it. Spilled milk on a farm, they wanted control over that as well. I could go on and on.

But Rehnquist and White handed down a rather, I think, excellent dissenting opinion on the one-house legislative veto in violation of the separation of powers, and Rehnquist went into detail on specifically and very narrowly saying it is the intent of Congress. Can you show me where Congress did not have this intent that you are referring to as to why you think it is unconstitutional?

Mr. LEVIN. Well, first, with regard to the antiquity of the Chadha decision, I think the Supreme Court's subsequent decisions have relied on it directly. They have never questioned it. A dozen state supreme courts have reached very similar positions under their respective state constitutions. The case law is overwhelming in suggesting that the bicameralism and presentment restraints should be effective in circumstances like this. I don't think Chadha is out of date at all.

Mr. MARINO. I am not saying Chadha is out of date. I am just saying the mood has changed since that opinion has been handed down. Now, I am not one to determine or to take a guess on where the Supreme Court is going on any decision. But let's get back to the issue of intent.

Mr. LEVIN. I am not sure what you mean by intent, though. Obviously, Congress intends to do things, but it is sometimes not constitutional to do them.

Mr. MARINO. Well, isn't that the way the process works, then? And then the courts, when they are brought in, make that determination? And don't you think that in the Affordable Health Care Act, at least I inferred from Chief Justice Roberts' opinion that, Congress, you legislate, and when it is necessary, then we will come in and make a ruling on that legislation?

Mr. LEVIN. Well, so you could pass the REINS Act and see if it is constitutional or not. But I think you should, in prudence, spend your time on things that have a good chance of surviving review, as opposed to things where the prospects are poor. It is your choice.

Mr. MARINO. I was never one to back down from a fight, whether the prospects are poor or not, or whether the Senate is going to vote on it. You certainly made it clear that Congress hasn't done much, but I think the 40 pieces of legislation on Harry Reid's desk in the Senate that we sent over there that haven't been accounted for says a little bit that the Congress has been trying to work hard on both sides of the aisle here in the House.

Professor Claeys, could you respond to the intent issue concerning Chadha and where we are going with the REINS Act?

Mr. CLAEYS. I will do my best, Congressman. I will make a few points.

First, I think this Congress, forgetting about the assessment of the constitutional merit, should be prudent and ask itself how likely is it that the act is going to be declared unconstitutional or not, just because it is a significant investment of time to enact the law. But I think that the chances that this law would be afoul of Chadha are slim. I am not sure Professor Levin disagrees that much, because he says he is not convinced in his testimony that Chadha will be read narrowly, and he says courts might be disinclined to read REINS as a violation of Chadha.

Second, this Congress, though, is an independent co-equal actor, and it has a responsibility to run down constitutional questions. So, as I said in my written testimony in my opening statement, I think there is no Chadha problem here.

So last, I don't think Chadha has to be overruled. All that needs to happen is for courts to say this law satisfies the expectations that Chadha laid down.

Mr. MARINO. Mr. Gattuso, just briefly. My time, if not out, is running out.

Mr. GATTUSO. On Chadha?

Mr. MARINO. Yes.

Mr. GATTUSO. I think it is an odd argument to say that REINS would be tantamount to a one-house veto. Frankly, that argument proves way too much, in my view. That would seem to cover every legislative action by Congress where if the House or the Senate refused to pass a bill, it is blocked, or the REINS Act itself was passed by the House and not the Senate, was that a one-house veto? I think for that argument to work, there has to be something in the nature of the regulations that are being reviewed that is particular to the executive branch where the Congress does not have the power to revoke that authority.

In every one of the regulations that would be covered by REINS, every one of the 130 regulations that we have identified coming from the Obama administration are legislative. They are not executive. Congress can withdraw them completely. So I see nothing special about them that would make that different than other legislation.

Mr. MARINO. Gentlemen, I leave here today learning something from each of you. I appreciate the discussion, and thank you for being here. I yield back.

Mr. BACHUS. Thank you.

The gentleman from Georgia, Mr. Hank Johnson, is now recognized for his questions.

Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. Gattuso from the Heritage Foundation, do you have any idea how much money the Koch brothers have invested in the Heritage Foundation since its inception?

Mr. GATTUSO. No, I don't. I can tell you that our total corporate donations are in the neighborhood of 5 percent of our income.

Mr. JOHNSON. But that doesn't include the Koch brothers' money, though.

Mr. GATTUSO. That would include the Koch brothers' corporate money. It is not a large part of our basis.

Mr. JOHNSON. Come on. That sounds like horse poop to me.

Mr. GATTUSO. Our donor lists are open. I can get you that information.

Mr. JOHNSON. Mr. Claeys, how much has George Mason University Law School received from the Koch brothers? Do you have any idea?

Mr. CLAEYS. No, Congressman, I don't have any idea.

Mr. JOHNSON. But you do know that it has been—it has taken money from the Koch brothers; correct?

Mr. CLAEYS. I don't know that it has. I would not be surprised if it had.

Mr. JOHNSON. Okay. All right.

How about your institution, Professor Levin?

Mr. LEVIN. I have no idea.

Mr. JOHNSON. Okay. All right. Well, I haven't heard any reports about Koch brothers' money into your institution.

Mr. LEVIN. But if they know what I stand for, they would probably not contribute it, at least to me.

Mr. JOHNSON. Well, I would think not, based on what I have heard today. I will say that your analogy or your observation about the gridlock that is the most prominent feature of congressional activity these days, as evidenced by the sequester situation, which I think most folks would say is just this meat ax, meat cleaver approach to cutting the Federal Government, is not wise. I am sure that most would agree. I am sure that Mr. Gattuso and Mr. Claeys would agree with that also.

Oh, you do not? Okay. All right. Mr. Claeys does not agree that the meat ax is not a good way, or the meat ax is preferable to the surgeon's scalpel in terms of cutting the Federal budget.

But I will say your analogy about the gridlock, with that being Exhibit A, is a good reason why, from a practical standpoint, passage of the REINS Act would be a bad idea.

Mr. Gattuso, you would disagree with that?

Mr. GATTUSO. Well, you said this is a meat ax approach. I don't see it that way.

Mr. JOHNSON. No, I am off of that issue. The issue I want you to address is the current gridlock in Congress and whether or not, in light of that gridlock, what would passage of the REINS Act add positively to the ability of Congress to get things done?

Mr. GATTUSO. Well, to start, I don't think that the measure of success for government should be the number of laws that are passed or the number of regulations that are enacted. That is not success. The success should be the value to society, the consideration and deliberation of each rule, of each action that is taken. So the REINS Act would add to that by requiring consideration, more thorough consideration of every action.

Mr. JOHNSON. So your goal is to just cut down on the number of laws and the number of regulations so as to free up the free market system to work its will for the benefit of all.

Let me ask you this, though. Let me ask you this. China, the pollution in Beijing, due largely to unregulated burning of fossil fuels, and the health impact that that has on the blood and on the lungs

of the people in China, and also the people in Japan and across the water, is that a regulatable situation? Is there any economic value in protecting people's health?

Mr. GATTUSO. The last I checked, Congressman, China was still a communist country, and a large portion, the predominant portion of its industry and businesses are still state owned or state controlled. It is not an example of a free market economy.

Mr. JOHNSON. The problem we are talking about is regulations, though.

Mr. GATTUSO. It is not a free market economy.

Mr. JOHNSON. Isn't regulation good when it comes to protecting people's health?

Mr. GATTUSO. I think you can point to China as an example of where the government has taken a firm hand in controlling industry, in directing industry.

Mr. JOHNSON. They don't have any regulations over in China, though.

Mr. GATTUSO. They have government ownership. They have direct government control over these factories and these industries, and it is the government that has been the major polluter, not any independent private sector.

Mr. JOHNSON. Well, you can look at a horse pile of poop on the trail as you ride up on a summer afternoon, and you can smell it, and then you tell yourself that I am not smelling horse poop. You can do that all day, but the bottom line is it is horse poop in the road. You need to step over it and move forward.

I will yield back.

Mr. BACHUS. Thank you, Mr. Johnson.

Mr. Rothfus, the gentleman from Pennsylvania, is recognized for questions.

Mr. ROTHFUS. Thank you, Mr. Chairman.

Thank you, panel, for being here today. I have enjoyed this conversation. Like Congressman Marino, it is like I am back in law school.

I appreciate the comments I have heard about yet another hearing on regulatory issues. I suggest that the reason that we are here again is because the more people learn about how we have empowered unelected elites to micromanage us, the more they want a check on that power. The actions of these elites are resulting in lost coalminer jobs and power plant worker jobs in Western Pennsylvania. The actions of these elites are also threatening the health insurance plans of people in Western Pennsylvania, and therefore their access to healthcare.

Criticism of rule by elites is not of recent vintage. In 1981, President Reagan in his inaugural said that from time to time we have been tempted to believe that society has become too complex to be managed by self-rule, that government by any elite group is superior to government for, by, and of the people. But if no one among us is capable of governing himself, then who among us has the capacity to govern someone else?

I have long had a concern over the abdication by Congress of its constitutional duty to legislate. There is a belief among some that society is just too complex for 535 individuals, 435 here in the House and 100 across the Capitol in the Senate, to come up with

the legislation necessary for a properly functioning society. I reject that premise.

Mr. Gattuso, I would like to just go over some of the recent regulations that we are seeing coming out and just get your opinion. Do you believe that 535 Members of Congress might be able to conclude whether carbon dioxide is an air pollutant under the Clean Air Act?

Mr. GATTUSO. I think that they are capable of making that decision.

Mr. ROTHFUS. Would Congress be able to take hearings on that issue and make a deliberative decision on that?

Mr. GATTUSO. I think you can.

Mr. ROTHFUS. Do you believe that 535 Members of Congress might be able to review the Secretary of Health and Human Service's dicta of what must be in every person's health care plan and make a reasoned judgment on whether that is a good idea or not?

Mr. GATTUSO. Absolutely.

Mr. ROTHFUS. And do you believe that 535 Members of Congress have the capacity to determine what a qualified mortgage should be, whether we should require a 10 percent down payment, a 15 percent down payment, a 20 percent down payment?

Mr. GATTUSO. Not only that, but they are able to decide whether the government can decide that for consumers.

Mr. ROTHFUS. I would like to ask the professors a little bit about the constitutionality issues. Isn't this really yet a further condition precedent to a regulation becoming effective? It is inchoate in the sense that we have requirements that a regulation should go through, and yet we have established one more requirement in the REINS Act where it will not even become effective until it has been approved by Congress. Can you comment on that, professors?

Mr. LEVIN. That is exactly the argument that was made on behalf of the legislative veto in its day, that it was just a device that Congress attached to the Immigration and Nationality Act to be a condition precedent for deportation decisions, and the Supreme Court gave that no weight because it undermined the heart of the bicameralism and presentment requirements. I think the same would be true in this instance.

Mr. ROTHFUS. But when we have legislation that we know is going to be subject to this, can't the Congress be considerate of that? When we delegate to a regulatory agency to come up with a regulation, under REINS we would know that that is going to come back to the Congress for review.

Mr. LEVIN. Well, if I may comment on your previous characterization of this as rule by elites, I think that the process that 535 Members established is actually a pretty sound one. They make some decisions themselves. They leave others to the executive branch through a delegation, and the executive branch's decisions are subject to political accountability because presidents make decisions and they run on their record, and in this instance President Obama ran on his record of regulation. It was squarely an issue in the last campaign. It was hotly debated on all sides. He was reelected, and I think the people spoke, although not everybody seems to have heeded that message.

Mr. ROTHFUS. Professor Claeys?

Mr. CLAEYS. So with respect to Professor Levin, I disagree on several points. First, there is a huge difference between Congress being able to—there is a huge difference between the legislative veto and the REINS Act. In the legislative veto, Congress is saying we want the administrative process always to go forward, and then we want discretion for one house, both houses or a Committee to interject and stop one particular action.

There is a huge difference between that set of affairs and another set of affairs where Congress says even though most of the time rulemaking has advantages, we don't want those advantages to be here because we are so worried about the impact on the economy or the threat to rights. So we want to slow things down, and we want to take ownership of the basic policy choices. I don't think that any judge who is at all practical or is a functionalist, in the way that Professor Levin talks about in his testimony, would ignore that difference.

And—well, I will just stop there.

Mr. ROTHFUS. Thank you.

Thank you, Mr. Chairman. I yield back.

Mr. BACHUS. Thank you.

At this time, I would like to recognize the gentlelady from California—from the state of Washington. I am sorry.

Ms. DELBENE. I am proud to be from the state of Washington.

Mr. BACHUS. Ms. Susan DelBene.

Ms. DELBENE. Thank you, Mr. Chair.

Mr. BACHUS. I want to express my appreciation to you, before your 5 minutes starts, for being a part of the civil rights pilgrimage this weekend to Alabama, where we remembered the 50th-year anniversary of the integration of the University of Alabama, but also some sad events, the bombing of the 16th Street Baptist Church, Martin Luther King's imprisonment in the Birmingham jail. It was a very meaningful weekend for all of us. I know Mr. Cohen has participated in that pilgrimage on many occasions, and I want to express my appreciation to both of you for investing that time. I think you both gained valuable insight.

Ms. DELBENE. Thank you, Mr. Chair. I was born in Alabama, as you know, so it was also incredibly important for me to have the opportunity to participate. So, thank you.

Mr. BACHUS. Thank you.

Ms. DELBENE. And thank you to all of you for being here today and taking your time and speaking with us. I really appreciate it.

Mr. Gattuso, you talk in your testimony about the cost and burden of regulations, and you cite this in your submitted testimony, and we talked about this a bunch today. But if we really look at a cost-benefit analysis, do you ever think that there are benefits to regulations? And is it important that we take that into account?

Mr. GATTUSO. Certainly. There are many benefits, and many regulations are well justified, as I said in my testimony.

I think we have to look at some of the benefit estimates that have been made with maybe a grain of salt. For instance, there are quite a few recent regulations where the benefits that are claimed have little to do with the advertised purpose of the regulation. For instance, if you look at CAFE standards, the gains for the environment and reduced pollution constitute only about one-third of the

total benefits that are claimed for that rule. The other two-thirds of the benefits are so-called private benefits, savings to consumers from using less fuel.

Now, that would be a good thing for consumers if they chose it, but there is no market failure that has been identified and, frankly, consumers should be able to make the trade-off between paying another $1,800 for a car and savings for themselves. So the benefits don't really match the justification for the rule.

Ms. DELBENE. But you think costs are always appropriately calculated and it is only benefits that are not?

Mr. GATTUSO. No, although we do have to recognize that the agencies that do the cost-benefit analyses tend to support the rules that they are proposing. So I think an estimate of cost by an agency is going to be what you might call a statement against interest, but the benefits may be jacked up a little bit. But I think benefits and costs have to be compared, and also costs by themselves is a relevant standard to look at. The cumulative cost of regulations is by itself a factor to consider.

Ms. DELBENE. Professor Claeys, in its most recent report to Congress, the Office of Management and Budget estimates that the total benefits of significant regulations for the past 10 years exceeded the cost by a ratio as high as 16 to 1. So how do you reconcile that with the notion that the regulatory costs are overburdening the economy if we don't also look at the benefits involved?

Mr. CLAEYS. Should this Congress defer to determinations by OMB about what the benefits or the costs are? Why shouldn't this Congress decide for itself what the costs and benefits are? Because this Congress is responsible to the voters and answers to them in elections.

Ms. DELBENE. This is a data point. So if there is data that says that we have benefits, shouldn't that be taken into account?

Mr. CLAEYS. In the House and in the Senate, yes.

Ms. DELBENE. Mr. Levin, or Professor Levin—I'm sorry—what is your view? Mr. Gattuso talked about proposals to impose sunset dates for regulations, and I wanted to hear your feedback on that.

Mr. LEVIN. Yes. I testified to the Subcommittee last year about proposals just to re-examine rules every 10 years, and I testified that that is too inflexible and would take up too much time of the agencies re-examining things, as opposed to getting on with the people's business, which Congress has assigned it.

So I would say, going even further, a sunset provision would be a very bad idea because it takes about 2 years to issue a major rule, and if you have to redo it every 10 years, you are essentially taking enormous amounts of time away from the agency's ability to perform the functions that Congress has told it to do. It would be a very bad idea.

Ms. DELBENE. So what would your proposal be if we look at the challenges that we face in terms of the rulemaking process? Do you have a proposal besides the REINS Act that we might look at to make it a more streamlined process?

Mr. LEVIN. Well, with respect to—I mean, I would abandon this particular line of inquiry and get onto making more effective substantive decisions. But on the specific question of in what ways should Congress oversee agencies, I would encourage you to look at

some ABA recommendations for reform of the Congressional Review Act, which are cited in my prepared statement for today.

Ms. DELBENE. Thank you.

Thank you, Mr. Chair.

Mr. BACHUS. Thank you.

Mr. Gattuso, with respect to the Dodd-Frank financial rules I am familiar with, but even just moving beyond that into just the general condition, many prominent experts have noted that small businesses lack rent-seeking capabilities. They lack regulatory compliance staff to comply, and accordingly are at a competitive disadvantage. They also lack—many, many bigger corporations have lobbying shops that lobby both the agencies and the Congress.

I think, just to give you two examples, in the Durbin Amendment, which applied to debit cards but not credit cards, because the larger banks lobbied and got credit cards exempted, so you have a situation where you have the large banks, the seven large banks, the largest banks have almost all the credit card business, where the community and smaller banks and regional banks have the debit cards, and it is much more important to their business. And yet, they were not successful. So the Durbin Amendment only applies to debit cards.

I think we have many other examples. For instance, the regulators first put caps on the large banks eight or 9 months before they did on the smaller banks. They engineered a bailout of AIG, which turned around, and that money within 24 hours went into some of the largest banks in this country. You didn't see the smaller banks bailed out.

Is there a danger that large corporations can manipulate the process of writing new major regulations to drive their smaller competitors out of business?

Mr. GATTUSO. Not only is there a danger, but it is a reality. It happens all the time. By the way, AIG is not just money going into the banks in our country, but it is going into banks in France and Germany and the rest of the world as well.

But I think that small businesses do bear a heavier burden of regulation because of the reasons that you cite and are not as well represented in the rent-seeking festival in Washington.

But even outside of small businesses, a lot of these regulations are less driven by the public interest, I believe, than driven by conflicts between industries. The Durbin Amendment was a conflict between the financial institutions and big retailers and I think was driven by the representations of each side. You can go down the list. Not every regulation, but a large number of them are just battles between different industry segments rather than something the public interest is behind.

Mr. BACHUS. Thank you.

Professor Claeys, since you last testified before the Committee, the threat that the executive branch will use the regulatory process to legislate unilaterally and thwart the will of Congress has increased. I just introduced an article from the Wall Street Journal that was published yesterday and again today where the EPA is going to take some pretty drastic steps, according to that article.

But how serious a threat is this kind of what I characterized as an end run around Congress to our constitutional system?

Mr. CLAEYS. I am not going to presume to speak for all Americans. For myself, as a citizen and as a scholar, I am very concerned.

Mr. BACHUS. What now?

Mr. CLAEYS. In my own capacity as a citizen and in my own capacity as a scholar, I am concerned. But I don't want to make it sound as if my concern is only about the Obama administration. I think this has been a trend for 30 and 40 years going across both parties and presidents of both parties.

Mr. BACHUS. Oh. And listen, I think that the general public and most Members of Congress would agree with you that this is not something that originated with the Obama administration. I do think that it has accelerated under this Administration. Do you agree?

Mr. CLAEYS. Yes, sir.

Mr. BACHUS. Okay. Does this threat increase the need for the REINS Act as a check on unilateral executive branch lawmaking?

Mr. CLAEYS. Yes, Mr. Chairman.

Mr. BACHUS. Thank you.

Mr. Gattuso, past congresses have delegated to the executive branch authority to legislate regulations that are now estimated to consume 14 percent of the national income. Does that even remotely resemble the framers' constitutional design?

Mr. GATTUSO. The framers established three branches of government. Today we have four, and arguably perhaps the largest one is the regulatory branch, which is not in the Constitution. I am not saying that we don't need some regulations. Certainly, we live in a more complex society than we once did. But the framers established a system of accountability and separation of powers where the Congress is ultimately responsible for setting the rules. I think the REINS Act would reinforce that original conception.

Mr. BACHUS. Do you think that the number and the cost of regulations is inhibiting the creation of jobs, particularly in small businesses?

Mr. GATTUSO. Definitely. We have heard from any number of small businessmen, from entrepreneurs, saying that either they were not able to hire more people or, in effect, hired fewer because of regulation. Only last week, the founder of Subway sandwiches stated that if he had been starting his restaurant chain in the current environment, it would not have succeeded. It would not exist.

Mr. BACHUS. Thank you.

Mr. Claeys, do you believe that the number and extent of regulations, the cost, if it does in fact consume 14 percent of the national income, is that inhibiting jobs, particularly in small businesses?

Mr. CLAEYS. With respect, Mr. Chairman, I am a professor of law and an educated consumer of scholarship about the relationship between administrative agencies and courts and Congress. I don't consider myself an economist. So in my testimony, I cited studies that seem to me reasonable. If they are true, they lay out that predicate. But I do not want to take a hard stand. It is not within my expertise.

Mr. BACHUS. Let me close with Mr. Levin, or Professor Levin. Are you familiar with the financial regulations which require a credit rating or creditworthiness by the three largest credit rating

agencies where the government required a credit rating or a creditworthiness score, say, on securities, on securitizations from just the three largest? Or is that getting out of your field?

Mr. LEVIN. I am not familiar with that specific regulation. No, sir.

Mr. BACHUS. Do you believe Dodd-Frank has disadvantaged community banks and your regional bank?

Mr. LEVIN. I am not sure. If I were talking about Dodd-Frank as a whole, I would say that I am not convinced that it has disadvantaged the country because I think there are strong arguments for doing something to repair the damage that was created without regulation. I can't speak to this community banks area in particular.

Mr. BACHUS. Are you familiar with the length of Dodd-Frank? Have you ever read any of it? Have you read some of the provisions?

Mr. LEVIN. I have read much of it, not all of it.

Mr. BACHUS. Is it somewhat confusing to you?

Mr. LEVIN. In places. Yes, Sir.

Mr. BACHUS. I know the regulators are struggling to try to figure out what Congress intended on the Volcker rule, and really, they are having a tremendous amount of trouble just trying to figure out what Congress intended.

Mr. LEVIN. But I think that is because the area of financial regulation is complex because the phenomenon they are trying to deal with is complex.

Mr. BACHUS. I would agree.

Mr. LEVIN. So it requires specialized work more than Congress itself can manage in order to come to grips with it.

Mr. BACHUS. When it gets to the point where the regulators can't even figure out what Congress intended, I think it is indeed complex.

Mr. Jeffries, the gentleman from Florida, is now recognized for his questions.

Mr. JEFFRIES. Thank you, Mr. Chairman. From Brooklyn, New York. I just want to make sure we correct the record on that. [Laughter.]

I always have to make sure that Brooklyn is in the house.

Mr. BACHUS. Oh, I thought that it was Mr. Garcia. I have confused you, Mr. Jeffries. You are from New York, right?

Mr. JEFFRIES. Thank you, Mr. Chairman.

Mr. BACHUS. Where did Mr. Garcia go?

Mr. COHEN. Back to Miami. [Laughter.]

Mr. JEFFRIES. Seeking warmer weather.

Mr. Gattuso, you testified that in your view, four branches of government have emerged, presumably the fourth branch of government being this amorphous administrative dynamic. Now, let's go through the three branches of government that were created by the founders of this great country. The first branch in Article 1, of course, is this great Congress, given certain enumerated, specific powers.

The second branch created by Article 2 is the executive.

The third branch is the judiciary. Is that correct?

Mr. GATTUSO. Yes.

Mr. JEFFRIES. Now, the premise of the judiciary branch, or at least part of its role, is to rein in unconstitutional overreach by the executive branch created in Article 2. Isn't that right?

Mr. GATTUSO. That is part of it, yes.

Mr. JEFFRIES. So the courts have already been set up in the framework of the Constitution. If there is regulatory overreach, as is claimed by some of those here today, to rein in that administrative overreach if it violates the Constitution. Isn't that the role of the Article 3 judicial system that we have in this country?

Mr. GATTUSO. If it violates the Constitution or a statute. But the courts do not make the substantive judgment about whether the overreach is in itself a good idea, a bad idea, economically sensible are not sensible.

Mr. JEFFRIES. Right. Well, we can agree that if there is administrative overreach that violates the Constitution of the United States, that the framers of this great Republic have already established a mechanism to rein in that overreach, and that is the Article 3 court system, correct?

Mr. GATTUSO. That would be the original purpose.

Mr. JEFFRIES. Okay. Now, we have sort of an argument to be made, then, about the reasonableness of regulations. Some regulations are reasonable. I think you have conceded that, correct?

Mr. GATTUSO. Yes.

Mr. JEFFRIES. And then you have concluded that others are out of control, costly to the economy, correct?

Mr. GATTUSO. Yes.

Mr. JEFFRIES. Now, you have said that there are costs that are billions, if not trillions, of dollars in regulatory overreach. That is in your testimony, correct? Can you cite to me an example of a trillion-dollar regulatory overreach?

Mr. GATTUSO. Well, the trillion would be the cumulative figure. But certainly in the last year, there were two regulations adopted by the Obama administration with costs over $9 billion, the boiler MAC regulation and the CAFE rules.

Mr. JEFFRIES. That is in your estimation, correct?

Mr. GATTUSO. That is the estimate of the agencies enacting the rule, the EPA or the National Highway Traffic Safety Administration. That is not my number, that is their number.

Mr. JEFFRIES. Okay. But there is a cost-benefit analysis that should be put into play. You have acknowledged you have the cumulative effect. Let's put that aside. Then you have individual regulatory actions, each of which presumably has a cost and a benefit. Is that right?

Mr. GATTUSO. That is right.

Mr. JEFFRIES. Now, AIG was cited as an example where their outsized influence impacted perhaps the ability of them to get an accelerated bailout that perhaps other small banks and community institutions, small businesses weren't able to get, at least in a timely fashion. Is that correct?

Mr. GATTUSO. Well, I think that there was a lot going on in 2008 that was more than just standard lobbying. So I won't say the AIG bailout was due just to lobbying by AIG. But I think the point was that—the point I think the Chairman was making was that there

was disparate treatment, disparate effects between the AIGs of the world and the small community banks.

Mr. JEFFRIES. Right. Now, if you invest more regulatory authority in the Congress, which is subject to this lobbying behemoth, doesn't it then give more power to the AIGs of the world, who don't have the same ability to influence the regulators?

Mr. GATTUSO. I think the fact remains that the Congress is the representative of the people, and if the Congress is not the legitimate body to make the decisions, prudential decisions as to how much we want to regulate, who we want to control, who should not be regulated, then there is really nothing the Congress does that can be justified.

Mr. JEFFRIES. Do you recall the size of the AIG bailout?

Mr. GATTUSO. I don't have a number.

Mr. JEFFRIES. One hundred and eighty billion dollars. Why did we have to bail AIG out to the tune of $180 billion? Is it because of the absence of regulation that led to some of the activities such as the issuance of credit default swaps, a totally unregulated vehicle that was out of control, that AIG didn't have the capacity to fund once the market fell out and the bottom dropped out of the economy? Isn't that $180 billion bailout, which is somehow cited as an example of the evils of regulation, in reality a prime example of why, in many instances, particularly in terms of what Dodd-Frank was attempting to accomplish, regulation is necessary?

Mr. GATTUSO. I think the financial crisis of 2008 was the effect of—certainly there was a private role, but a large portion of it was the government policies in terms of interference in the housing market, supporting the bubble in housing, and encouraging the creation of loans that were not appropriate.

Mr. JEFFRIES. Mr. Chairman, I know my time has run out. If I could just allow Mr. Levin to respond?

Mr. LEVIN. I don't agree with that story of why we had a financial crisis, but I think the point I would make is that it does take a while to work through the regulatory response, and the long bill that the Chairman mentioned is long and confusing. That is why you need an extended process by which regulators can sort out some of the details that weren't fully resolved at the beginning. It is an open process, and is participatory, and it is subject to judicial review not just for constitutionality but also for the reasoning of the decision.

So a salient difference between the administrative process and the legislative is that although there is politics at the administrative level, the courts will insist that the matter be rational and defensible. They are a check. You don't have that check on decisions that the legislature makes. So although there is politics on both sides, there is a restraint on the administrative side that doesn't exist on the legislative side.

Mr. JEFFRIES. Thank you, professor.

Mr. BACHUS. Thank you.

Would either of you gentlemen are all three of you gentlemen want to comment further on anything, any questions or any thoughts you have had that you think would be helpful?

Mr. GATTUSO. If I can make just one comment?

Mr. BACHUS. I am going to let Mr. Collins have a round of questions. But be thinking—and this will give you five or 6 minutes to think about maybe if you want to have a 2-minute rebuttal or wrap-up or just some other thoughts.

Mr. Collins is now recognized, the gentleman from Georgia, for 5 minutes.

Mr. COLLINS. Thank you, Mr. Chairman. I appreciate the patience today. It has been sort of a crazy day. I think this is a needed proposal. I think it is something that we can look at.

I do have a couple of questions. Professor Claeys, what are some other ways, in addition to REINS, that we can ensure that the Obama administration weeds through existing regulations and eliminates unnecessary burdens on job creators, something they said they wanted to do but obviously have not?

Mr. CLAEYS. I will give you some thoughts off the top of my head. I am not sure that the question hits at my core scholarly expertise.

Mr. COLLINS. Well, if anybody else wants to jump in after Professor Claeys, go right ahead.

Mr. CLAEYS. I would say the appropriations process and the attempts to link things like the increase of the debt ceiling to negotiate policies that will lead to economic growth and lead to deregulation. Those are a couple of examples.

Mr. COLLINS. Increasing the debt ceiling? Did I hear you correctly?

Mr. CLAEYS. If the debt ceiling is going to be increased, then this Congress can use the leverage it has to do some other——

Mr. COLLINS. You are saying to use the debt ceiling, okay.

Mr. CLAEYS. As leverage for other things that you think will have salutary effects on the economy.

Mr. COLLINS. Okay. Does anybody else have anything that they would like to add to that?

Mr. GATTUSO. I think, and this might sound surprising, but I think the Obama administration's power to control and limit and review regulations should be preserved and expanded, specifically the fact that independent agencies are not reviewed or are not subject to regulatory requirements. So I think extending the Administration's authority over independent agencies actually would be a plus.

Mr. COLLINS. Well, I think extending it or not extending it, they are not doing anything to eliminate, is irrelevant.

Mr. GATTUSO. I am not defending the Obama administration.

Mr. COLLINS. But, I mean, in defending your own answer, we can give them all the power in the world, which we are not, give them all the power in the world, but if they don't do anything, just do their stated claim of unnecessary in relieving these burdens, what is the purpose?

Mr. GATTUSO. It is certainly not the complete answer, but I think putting some limits on independent agencies is appropriate.

Mr. COLLINS. I would not disagree with that. I think maybe we are going about it two different ways.

Mr. Levin.

Mr. LEVIN. As a matter of fact, I was at a hearing of this Subcommittee last year on the subject of retrospective review of rules, and I would refer you to the statement I submitted then which re-

viewed the Obama administration's efforts, which I think have been substantial. But I also commented on ways in which Congress could, if it chose, set up a structure to promote retrospective review of rules on its own. So I would refer you to that.

Mr. COLLINS. Okay. I think one of the issues that is coming up, and I just came from another hearing this morning, and it goes back to sort of your answer to your question a little bit, but there is approximately $67 billion, I think, give or take—and I don't remember the number; I am going back and forth—the IGs have reported to their different departments on savings that could be had, okay? $67 billion has been left on the table and not implemented by the departments. There was much ado and gnashing of teeth, and you would think that truly a lot of things had come to an end this morning because of the sequester that everybody wanted to bring in.

My question sort of tags on here. If we are not implementing—and let's dig a little deeper here. If we are not implementing cost-cutting measures, which have been implemented by the inspector generals in these various agencies, if Congress does not, through the power of the purse, which it is supposed to have, through regular order of appropriations process to control how money is spent, where it goes, and how those operate, isn't it not within the purview of Congress to continue this process given the fact that right now this Administration, and I'm going to say from the perspective the IG presented, previous Administrations as well have chosen to ignore those kind of issues.

What is the difference here in the money issue and the regulatory issues if Congress sort of sits back and lets the Administration do it? Are we not, in essence, giving away our constitutional authority, but also putting a hands-off approach and then complaining about it in the long run?

Mr. GATTUSO. I think that is entirely correct. Congress both has the responsibility and the power to review and scrutinize and ensure that regulations are sensible and justified.

Mr. CLAEYS. I agree with Mr. Gattuso on the regulation. As a scholar, I don't have any opinion on the spending issues. As a taxpayer and a citizen, I support what you say.

Mr. LEVIN. Well, I think the power of oversight is longstanding and traditional, and I think Congress has a legitimate role over time to examine expenditures and decide whether it thinks they are being made wisely. I think it would be well for Congress to pursue these traditional areas of oversight, as opposed to exploring these rather novel alternatives such as the ones that are before us today.

Mr. COLLINS. I take great exception to saying "novel" when you actually look at the constitutional authority of Congress is to watch over and pass the laws and regulations, and it also then, from purse strings to other things, to make sure that the American people and small businesses are protected and taken care of. To say it is a novel approach to simply look at regulations in a way that we can actually rein that in to me is not framing this question very much.

Mr. LEVIN. Excuse me. I was unclear. I met the REINS Act is novel, but regular oversight of rules is not.

Mr. COLLINS. It may be novel in its approach, but at this point, with lack of it going on, I think there is an issue here to where Congress does need to look at this and find the proper way to make sure that we are in an environment in which we are not cutting out our own businesses and others from regulation that are either being done with political agendas or other things.

Mr. Chairman, I see my time is over. I apologize. I yield back.

Mr. BACHUS. I appreciate that, Mr. Collins.

Gentlemen, each of you are recognized for one or 2 minutes, if you wish.

Mr. GATTUSO. Well, I will start. I just want to make two points. Through most of this hearing, there may be an impression left that there is a dichotomy, a choice that needs to be made between relying on experts and Congress taking direct control over regulatory policy. I think that is a false choice. I know nothing about electrical systems, but if I needed an electrician, I can hire one. But if I disagree with what he recommends, I get to have the final say.

So I think Congress can review regulations, but that does not mean that they do it without knowledge, without expert advice and a knowledge of the facts on the ground.

Also, a question was asked about the respect for Congress, and I have been very critical of Congress. I don't agree with everything Congress does. I doubt whether any of you agree with everything Congress does. But it is the only representative national body that we have, and it is imbued by the Constitution with the responsibility to oversee these policy matters, and I think the proper respect for the Constitution and for Congress would demand that that be accommodated.

Mr. CLAEYS. Mr. Chairman, I have three points. One has to do with this argument about gridlock. I think that the argument for gridlock cuts in the direction opposite to the one it has been suggested to cut throughout this hearing. To me, the analogy that comes to mind is imagine that there is a group of people who are partners, and they have irretrievable or irreconcilable differences. There are circumstances in which it is okay to appoint a receiver, but a receiver is really an option of last resort because if the partners have really deep differences, they won't trust a receiver any more than they will trust each other, because they don't trust each other.

In our polarized climate, the worst thing to do is for people in the minority right now to try to watch the agencies make Democratic policy, and then if the Administrations were to switch, the Democrats watch the Republicans make policy. It is better to have these kinds of deep, visceral disputes in Congress.

My second point is very similar to Mr. Gattuso's. I don't think we have heard enough today about the way in which the REINS Act improves regulatory processes by making the agencies more accountable to Congress, and by making the agencies educate Members of Congress the way the electrical engineer would educate Mr. Gattuso.

On this, I recommend that Members of the Committee consult David Schoenbrod's testimony last Congress on this point. He was a former NRDC lawyer, and he thought that environmental laws

were made best when Congress got actively involved with the EPA regulation.

And last point that Mr. Jeffries made about the courts, this Congress has an independent duty to consult the Constitution, and a lot of the statutes that courts enforce in administrative law are written by Congress. Well, they all are written by Congress, but courts don't look at them very closely. This Congress owes a duty to make sure that it thinks that these statutes are constitutional. There are other situations where courts were not the best arbiters or protectors of individual rights, and the best example I can think of is Dred Scott. It was a Republican Congress and a Republican president that went to the people and said that the court system has messed up our individual rights.

Mr. BACHUS. Thank you.

Professor Levin?

Mr. LEVIN. Yes. I would like to use the example of greenhouse gas regulation, which has been mentioned during this hearing, to try to draw some points together. One, of course, is that the Supreme Court itself told the EPA to get moving in dealing with climate change issues.

But beyond that, the greenhouse gas situation is one in which EPA is now proceeding to come up with regulations to address this matter. The Clean Air Act is probably not the ideal way in which to do it, but the Administration is taking the initiative because Congress has been unable to take any action to further action on climate change. Because of the inaction at that level, the EPA has gone forward on its own.

Now, if you have a system like REINS in which you have not only the ability—Congress is not only gridlocked on its own, but also is able to block the Administration, the upshot is nothing gets done on climate change. The climate is going to just keep getting worse. The climate is not a regulated entity such that if you remove the yoke of burdensome regulations, the climate can breathe free and produce jobs. The climate just keeps getting worse, so something should be done.

If the EPA proceeds with rules, those will be subject to judicial review, and have been to some extent already, and there is some hope of something getting done. But I think the REINS Act would simply generate policy paralysis with no action taken. I think that is not in the interest of the country, and it is an example of the problems that this legislation would bring about.

Mr. BACHUS. I thank all the gentlemen. I think you have all three given thoughtful testimony.

Mr. Cohen, if you have a final word, you are welcome.

Mr. COHEN. I just thank the Chairman for his courtesies in extending time and for his other activities, engaging in the retreat this past weekend in Alabama. His heart is obviously in the right place. Thank you.

Mr. BACHUS. Thank you.

Mr. Cohen and I are in agreement that the gridlock here is—we are making a bunch of cuts in discretionary spending when some of our mandatory spending programs are driving our debt and deficit, and I think we are both disappointed that we have come to what I think we all agree is a dreadful situation.

At this time, our hearing is concluded. Each of the witness' written statements will be entered into the record in its entirety, and I ask that each witness—well, we have already done that.

This concludes the hearing. Thanks to all of our witnesses for attending.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

This hearing is adjourned.

[Whereupon, at 1:17 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Material submitted by the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

December 6, 2011
(House)

STATEMENT OF ADMINISTRATION POLICY

H.R. 10 – Regulations From the Executive in Need of Scrutiny Act of 2011
(Rep. Davis, R-Kentucky, and 204 cosponsors)

The Administration is committed to ensuring that regulations are smart and effective, and tailored to further statutory goals in the most cost-effective and efficient manner. Accordingly, the Administration strongly opposes House passage of H.R. 10, the Regulations From the Executive in Need of Scrutiny Act, which would impose an unprecedented requirement that a joint resolution of approval be enacted by the Congress before any major rule of Executive Branch agencies could have force or effect. This radical departure from the longstanding separation of powers between the Executive and Legislative branches would delay and, in many cases, thwart implementation of statutory mandates and execution of duly enacted laws, increase business uncertainty, undermine much-needed protections of the American public, and create unnecessary confusion.

There is no justification for such an unprecedented requirement. When a Federal agency promulgates a major rule, it must already adhere to the particular requirements of the statute that it is implementing and to the constraints imposed by other Federal statutes and the Constitution. Indeed, in many cases, the Congress has mandated that the agency issue the particular rule. The agency must also comply with the rulemaking requirements of the Administrative Procedure Act (5 U.S.C. 551, et seq.). When it issues a major rule, the agency must perform analyses of benefits and costs that typically are required by one or more statutes (such as the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and the Paperwork Reduction Act) as well as by Executive Order 12866.

In addition, this Administration has already taken numerous steps to reduce regulatory costs and to ensure that all major regulations are designed to maximize net benefits to society. Most recently, Executive Order 13563 requires careful cost-benefit analysis, increased public participation, harmonization of rulemaking across agencies, flexible regulatory approaches, and a regulatory retrospective review. Finally, agency rules are subject to Federal courts.

Moreover, for the past 15 years, the Congress itself has had the opportunity, under the Congressional Review Act of 1996 (CRA), to review on an individual basis the rules – both major and non-major – that Federal agencies have issued.

By replacing this well established framework with a blanket requirement of Congressional approval, H.R. 10 would throw all major regulations into a months-long limbo, fostering uncertainty and impeding business investment that is vital to economic growth. Maintaining an appropriate allocation of responsibility between the two branches is essential to ensuring that the Nation's regulatory system effectively protects public health, welfare, safety, and our

environment, while also promoting economic growth, innovation, competitiveness, and job creation.

If the President were presented with H.R. 10, his senior advisers would recommend that he veto the bill.

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Dissenting Views

INTRODUCTION

H.R. 10, the "Regulations From the Executive in Need of Scrutiny Act of 2011," (REINS Act) is a flawed attempt to make the rulemaking process more subject to Congressional oversight and accountability. In effect, however, the bill will substantially delay and potentially prevent agency rulemaking, at great risk to public health and safety, by requiring that any major new rule be affirmatively approved by Congress and the President. The bill effectuates this process by amending the Congressional Review Act [1] (CRA) to require Congressional approval of major rules (i.e., rules with an annual impact on the economy of at least $100 million) before they may become effective.

This legislation is based on the false premise that regulation is bad for business, only results in costs, and stifles job creation. H.R. 10 is unnecessary because Congress already has sufficient tools to conduct effective oversight, which include narrowing delegations of authority to agencies, controlling agency appropriations, and conducting oversight of agency activity. In addition, H.R. 10 presents serious Constitutional concerns as it may violate inherent separation of powers principles.

By requiring Congressional approval of major rules, H.R. 10 would serve as a procedural "chokehold" in multiple ways on Federal agency rulemaking and undermine the ability of agencies to provide essential protections to Americans. This legislation is a thinly disguised attempt to prevent the implementation of critical laws, such as the Patient Protection and Affordable Care Act [2] and the Dodd-Frank Wall Street Reform and Consumer Protection Act.[3]

The REINS Act is strongly opposed by a broad coalition of 72 environmental, labor, and consumer organizations, including the AFL–CIO, the American Federation of State, County and Municipal Employees, the American Lung Association, Families USA, the National Association of Consumer Advocates, the League of Conservation Voters, and the Union of Concerned Scientists, Science Integrity Division.[4] Additionally, 66 respected academics in the

[1] 5 U.S.C. §§ 801–08 (2011).
[2] Pub. L. No. 111–148, 124 Stat. 119 (2010).
[3] Pub. L. No. 111–203, 124 Stat. 1376 (2010).
[4] The other organizations include: 350.org, AhEeCOSII, Alliance for a Just Society, American Federation of Government Employees, American Rivers, ARISE CHICAGO, Arkansas Interfaith Committee for Worker Justice, Association of Flight Attendants-CWA, BlueGreen Alliance, Breast Cancer Action, California Rural Legal Assistance Foundation, Center for Biological Diversity, Center for Science in the Public Interest, Clean Air Watch, Clean Water Action, Community Organizations in Action, Consumer Federation of America, Consumers Union, Defenders of Wildlife, Demos, Earth Day Network, Earthjustice, Easter Seals, Environment America, Environmental Defense Fund, Equal Justice Center, Friends of the Earth, Gray Panthers, Greenpeace USA, Health Access California, Health Care for America Now, Interfaith Worker Justice, Interfaith Worker Justice Committee of Colorado, International Union, United Automobile, Aerospace, & Agricultural Implement Workers of America (UAW), 3 of 3, National Audu-

Continued

fields of administrative and environmental law also oppose the REINS Act because it is "unnecessary to establish agency accountability and unwise as a matter of public policy because it undercuts the implementation of laws intended to protect people and the environment." [5]

For the foregoing reasons and others discussed more fully below, we must respectfully dissent and urge opposition to H.R. 10.

DESCRIPTION AND BACKGROUND

The REINS Act would dramatically change agency rulemaking by requiring all new major regulations to be affirmatively approved by both Houses of Congress and the President before they can take effect. It should be noted, however, that Congress already has the authority under the CRA to disapprove such rules.[6] Pursuant to the CRA, any agency rule automatically takes effect absent a joint resolution of disapproval enacted by Congress within 60 legislative days from receipt of the rule.[7] H.R. 10 amends the CRA to create a new process for major rules whereby they may only take effect upon Congressional and Presidential approval. By imposing this unrealistic and unworkable requirement, the REINS Act will effectively prevent Federal rulemaking and thereby threaten public health and safety as well as the economic soundness of our Nation.

Section 2 of the REINS Act sets forth the substantive provisions of the legislation. New Section 801(a)(1)(A) requires a Federal agency to submit a report to each House of Congress and to the Comptroller General of the Government Accountability Office (GAO) a report containing: (1) a copy of the rule; (2) a concise general statement relating to the rule; (3) a classification of the rule as a major or non-major rule, including the rule's classification specifically addressing each element of the definition of a "major rule;" (4) a list of any other related regulatory actions intended to implement the same statutory provision or regulatory objective, together with a description of the rule's individual and aggregate effects; and (5) the rule's proposed effective date. With respect to the rule's classification as a major rule, the report must indicate: (1) whether the rule has an annual effect on the economy of $100 million or more; (2) whether the rule imposes a major increase in costs or prices for consumers, individual industries, Federal, state, or local

bon Society, National Consumers League, National Council for Occupational Safety and Health, National Gay and Lesbian Task Force Action Fund, National Women's Health Network, Natural Resources Defense Council, OMB Watch, Our Bodies Ourselves, People for the American Way, Pesticide Action Network North America, Physicians for Social Responsibility, ProgressNow, Public Citizen, Reproductive Health Technologies Project, Republicans for Environmental Protection, RICOSH, Safe Tables Our Priority (S.T.O.P.), Sierra Club, South Florida Interfaith Worker Justice, Southern Environmental Law Center, The National Consumer Voice for Quality Long-Term Care, The TMJ Association, The Wilderness Society, Transport Workers Union of America AFL–CIO, U.S. PIRG, United Steelworkers, United Support & Memorial for Workplace Fatalities, USAction, Voces de la Frontera, Women's Voices for the Earth, Workers Interfaith Network. *See* Letter from 72 organizations to Representative John Conyers, Jr., Ranking Member, Committee on the Judiciary (Feb. 11, 2011) (on file with the United States House of Representatives, Comm. on the Judiciary, Democrats). The American Association for Justice also submitted a letter opposing H.R. 10 to Representative John Conyers, Jr., Ranking Member, Committee on the Judiciary (Feb. 1, 2001) (on file with the United States House of Representatives, Comm. on the Judiciary, Democrats).

[5] *See* Letter from 66 law professors to Members of the United States Senate and United States House of Representatives (Feb. 8, 2011) (on file with the United States House of Representatives, Comm. on the Judiciary, Democrats).

[6] 5 U.S.C. § 801(b) (2011).

[7] *See* 5 U.S.C. § 802 (2011) (outlining congressional disapproval procedure).

government agencies, or geographic regions; or (3) whether the rule imposes significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises.

In addition, new section 801(a)(1)(B) requires an agency to submit to GAO and both Houses of Congress: (1) a cost-benefit analysis of the rule, if any; (2) actions taken pursuant to the Regulatory Flexibility Act;[8] (3) actions taken to comply with the Unfunded Mandates Reform Act of 1995;[9] and (4) any other relevant information or requirement under any other act or executive order.

Under new section 801(a)(1)(C), each House of Congress must provide copies of the report required by 801(a)(1)(A) to the Chair and Ranking Member of each House and Senate standing committee with jurisdiction to report a bill to amend the provision of law under which the rule is issued (hereinafter "Committees of Jurisdiction").

Pursuant to new section 801(a)(2)(A), the GAO must provide a report on each major rule to the Committees of Jurisdiction within 15 calendar days from the date on which an agency submitted the report required by section 801(a)(1)(A). The GAO's report must include an assessment of the agency's compliance with 801(a)(1)(B). New section 801(a)(2)(B) specifies that agencies must cooperate with the GAO in providing information relevant to preparing its report required under 801(a)(2)(A).

New section 801(a)(3) provides that a major rule takes effect upon enactment of a joint resolution of approval or whatever the enactment date is in the rule following enactment of the joint resolution, whichever is later.

New section 801(a)(4) retains current law; i.e., nonmajor rules take effect after 60 days if Congress does not enact a joint resolution of disapproval.

New section 801(a)(5) clarifies that if a joint resolution of approval is not enacted, a joint resolution relating to the same rule cannot be considered in the same Congress by either House.

New section 801(b)(1) prohibits a major rule from taking effect unless Congress enacts a joint resolution of approval pursuant to the Act. In turn, new section 801(b)(2) deems a major rule as not approved and without effect if a joint resolution of approval concerning that rule is not enacted within 70 legislative or session days beginning on the date on which Congress receives the report required by section 801(a)(1)(A), excluding days that either House is adjourned for more than three days during session.

New section 801(c) sets forth certain temporary exceptions to the Congressional approval process for major rules. New section 801(c)(1) provides that a major rule may take effect for one 90-calendar-day period if the President makes a determination under section 801(c)(2). New section 801(c)(2), in turn, authorizes the President to determine by executive order that a major rule should take effect notwithstanding the requirements of this statute if such rule is: (1) necessary because of an imminent threat to health or safety or other emergency; (2) necessary for the enforcement of criminal

[8] 5 U.S.C. §§ 601 *et seq.* (2011).
[9] Pub. L. No. 104–4, 109 Stat. 48 (1995).

laws; (3) necessary for national security; or (4) issued pursuant to a statute implementing an international trade agreement. New section 801(c)(3), however, clarifies that the President's exercise of authority under this subsection does not affect Congressional approval procedures outlined in new section 802.

New section 801(d) addresses instances when major rules are submitted to Congress within 60 legislative or session days prior to the adjournment of a Congressional session through the date Congress first convenes its next session. New section 801(d)(1) states that any rule submitted within such period is subject to the Act's approval and disapproval procedures in the succeeding session. New section 801(d)(2)(A) specifies that, in such a circumstance, the rule must be treated as if it were published in the Federal Register on the 15th session or legislative day after the succeeding session convenes and considers the report on such a rule to have been submitted on such day. New section 801(d)(2)(B) specifies that this subsection should not be construed to affect the requirement that a rule be submitted to Congress before it can take effect. Finally, new section 801(d)(3) provides that a rule in this circumstance takes effect as otherwise provided for by law, including pursuant to the other provisions of the Act.

Although new Section 802 is not within the jurisdiction of our Committee, an explanation of this provision is necessary to place the remainder of the bill in perspective. Subsections (c) and (d) detail the expedited Senate procedures for consideration of joint resolutions of approval. Subsection (c) requires that a Committee of Jurisdiction be automatically discharged from further consideration of a joint resolution if it has not reported the joint resolution within 15 session days after the joint resolution's introduction. The vote on final passage of the joint resolution must take place on or before the 15th session day after the relevant Committees of Jurisdiction report the joint resolution or are discharged from further consideration of such joint resolution.

New section 802(d)(2) limits total Senate debate time on a joint resolution of approval (including all debatable motions and related appeals) to a mere two hours, to be divided evenly between those in support and those in opposition to the joint resolution. A motion to further limit debate is in order, but not debatable. Amendments and motions to postpone, to proceed to consideration of other business, or to recommit the joint resolution are not in order.

New section 802(e) details expedited procedures in the House of Representatives for consideration of joint resolutions of approval. New section 802(e)(1) requires that a Committee of Jurisdiction be automatically discharged from further consideration of a joint resolution if it has not reported the joint resolution by the end of 15 legislative days after the joint resolution's introduction. The vote on final passage of the joint resolution must take place on or before the 15th legislative day after the relevant Committee of Jurisdiction report the joint resolution or are discharged from further consideration of such joint resolution, further limiting the Committee's time for consideration.

New section 802(e)(2)(B) limits total debate time in the House of Representatives on a joint resolution of approval to a mere two hours, divided evenly between those in support and those in opposi-

tion to the joint resolution. A motion to further limit debate is not debatable. Amendments to and motions to recommit the joint resolution as well as motions to reconsider the vote on the joint resolution are not in order.

New section 802(f) concerns the instance when one House of Congress, before it passes a joint resolution of approval, receives a joint resolution of approval from the other chamber. In such an instance, the House that has not yet passed the joint resolution will continue following its procedures as if no joint resolution had been received from the other chamber, but the vote on final passage must be on the other chamber's joint resolution.

New section 803 sets forth an expedited procedure for consideration of non-major rules. Our Committee does not have jurisdiction over this section.

Although new section 805(a) prohibits judicial review of any determination, finding, action, or omission under the Act, subsection (b) clarifies that, notwithstanding subsection (a), a court may review an agency's compliance with the Act's requirements.

New section 807 excepts from the Act's requirements any major or nonmajor rule that establishes, modifies, opens, closes, or conducts a regulatory program for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping. Notably, this exception is not extended to other important matters such as those implicating critical public health and safety issues. With respect to a nonmajor rule, section 807 retains the exception for instances where an agency finds good cause that notice and procedure are impracticable, unnecessary, or contrary to the public interest.

CONCERNS WITH H.R. 10

I. THE REINS ACT IS BASED ON FALSE PREMISES ABOUT REGULATORY COSTS

Proponents of the REINS Act assert that Federal agency regulations impose excessive costs on businesses, stifle job creation, and hobble the Nation's economic growth. The facts are otherwise.

A. The Benefits of Regulations Significantly Outweigh Their Costs

In support of their arguments concerning the costs of regulation, proponents regularly cite [10] a widely debunked study by economists Nicole and Mark Crain, which claims that Federal rulemaking imposes a cumulative burden of $1.75 trillion a year.[11]

Critics of this study note its flawed assumptions and methodologies.[12] For example, the Center for Progressive Reform (CPR) observed that the study does not account for any benefits of regula-

[10] *See, e.g.,* Unofficial Tr. of Markup of H.R. 10, the "Regulations of the Executive in Need of Scrutiny Act of 2011," by the H. Comm. on the Judiciary, 112th Cong., at 16 (Oct. 25, 2011).

[11] Nicole V. Crain & W. Mark Crain, The Impact of Regulatory Costs on Small Firms, Rep. No. SBAHQ–08–M–0466 (Sept. 2010), *available at* http://archive.sba.gov/advo/research/rs371tot.pdf.

[12] *See REINS Act—Promoting Jobs and Expanding Freedom by Reducing Needless Regulations: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary,* 112th Cong. (2011) (statement of Sally Katzen, former OIRA Administrator); *see also* Sidney Shapiro *et al.,* Setting the Record Straight: The Crain and Crain Report on Regulatory Costs (2011), *available at* http://www.progressivereform.org/articles/SBA_Regulatory_Costs_Analysis_1103.pdf.

tion.[13] Additionally, CPR documented that the study did not rely on actual data on costs imposed by Federal regulation in the United States.[14] Indeed, the CPR found that the Crain study's methodology was defective because, in calculating economic costs, it relied on World Bank international public opinion polling on how friendly a particular country was to business interests.

Likewise, the independent, nonpartisan Congressional Research Service (CRS) criticized much of the Crain study's methodology.[15] CRS reported that the authors of the study admitted that it was "not meant to be a decision-making tool for lawmakers or Federal regulatory agencies to use in choosing the 'right' level of regulation. In no place in any of the reports do we imply that our reports should be used for this purpose. (How could we recommend this use when we make no attempt to estimate the benefits?)'"[16] CRS concluded that "a valid, reasoned policy decision can only be made after considering information on both costs and benefits" of regulation.[17]

Further, the Office of Management and Budget (OMB) has annually estimated the costs of regulations, which have been substantially lower estimates than those reported in the Crain study. Significantly, OMB's reports to Congress include data on the benefits of regulations. The latest such report concluded that for fiscal year 2010, Federal regulations cost between $6.5 billion and $12.5 billion and generated between $18.8 billion and $86.1 billion in benefits.[18] According to OMB, the costs of regulations during the ten-year period from FY 1999 through FY 2009 were between $43 billion and $55 billion, while their benefits ranged from $128 billion to $616 billion.[19] 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. Such estimates were consistent across Democratic and Republican administrations.[20] 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.

The benefits of regulation are also apparent when viewed through the lens of prevention. For example, a 2011 Environmental Protection Agency report found that the public health benefits of clean air regulations far outweigh the compliance cost to indus-

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[13] Sidney Shapiro *et al.,* Setting the Record Straight: The Crain and Crain Report on Regulatory Costs (2011), *available at* http://www.progressivereform.org/articles/SBA_Regulatory_Costs_Analysis_1103.pdf.

[14] *Id.*

[15] Congressional Research Service, Analysis of an Estimate of the Total Costs of Federal Regulations, R41763 (2011).

[16] *Id.* at 26 (quoting an e-mail from Nicole and W. Mark Crain to the author of the CRS report).

[17] *Id.* The Economic Policy Institute also issued a critique of the Crain study outlining similar concerns with the study's methodology and data. *See* John Irons & Andrew Green, Flaws Call for Rejecting Crain and Crain Model: Cited $1.75 Trillion Cost of Regulations Is Not Worth Repeating (2011), *available at* http://w3.epi-data.org/temp2011/IssueBrief308.pdf.

[18] Office of Management and Budget, 2011 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities 21, *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf.

[19] *See REINS Act—Promoting Jobs and Expanding Freedom by Reducing Needless Regulations: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary,* 112th Cong. (2011) (statement of Sally Katzen, former OIRA Administrator).

[20] *Id.*

try.[21] The report concluded that restrictions on fine particle and ground-level ozone pollution mandated by the 1990 Clean Air Act amendments would prevent 230,000 deaths and produce benefits of about $2 trillion by 2020.[22]

Alternatively, the costs of not regulating can be significant. *The New York Times* recently published a series of articles highlighting the danger of natural gas extraction practices that led to toxic contamination of the drinking water of potentially millions of people. This contamination was the result of a lack of regulation, often because regulatory authorities were fearful of confronting a lucrative and politically powerful industry.[23]

While a cost-benefit analysis of the current regulatory process clearly establishes the fact that the benefits well exceed the costs, the REINS Act itself will definitely result in more costs than benefits. The real costs of the REINS Act will be the resultant delay, uncertainty, and actual harm to the economy and society from the Congressional approval process dictated by the legislation. Highly beneficial rules will be delayed or even abandoned as a result of the failure of Congressional action. The benefit of imposing yet another significant procedural step before a major rule may become effective is ephemeral, evidenced by the fact that the CRA has only been used once to disapprove a rule in the 15 years it has been in effect.

In an effort to quantify the cumulative benefits of major rules regarding air quality, water quality, and food safety, Representative Mike Quigley (D–IL) offered an amendment to have the independent, nonpartisan GAO conduct a study of this matter. Similarly, Representative Steve Cohen (D–TN) offered an amendment to exempt from H.R. 10's Congressional approval requirement any proposed rule that OMB determines would result in a net benefit to society. Both Members observed that when the benefits of a rule to society outweigh its costs, society has an interest in ensuring that the rule take effect without unnecessary delay.[24] Representative Quigley's amendment failed by a vote of 12 to 21 and Representative Cohen's amendment also failed by a vote of 13 to 22.

B. Regulations Do Not Hinder Job Creation

Proponents of H.R. 10 claim government regulations interfere with job creation because they create uncertainty for businesses, thereby preventing them from investing and hiring.[25]

To the contrary, regulations have no determinable effect on job creation. For instance, a survey from the Bureau of Labor Statistics

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[21] Environmental Protection Agency, Benefits and Costs of the Clean Air Act, Second Prospective Study 1990 to 2020 (2011) *available at* http://www.epa.gov/air/sect812/prospective2.html

[22] *Id.*

[23] *See* Ian Urbina, *Drilling Down: Regulation Lax as Gas Wells' Tainted Water Hits Rivers,* N.Y. Times, Feb. 26, 2011; Ian Urbina, *Drilling Down: Wastewater Recycling No Cure-All in Gas Process,* N.Y. Times, Mar. 1, 2011; Ian Urbina, *Drilling Down: A Tainted Water Well, and Concern There May Be More,* N.Y. Times, Aug. 3, 2011 (investigative series on the dangers associated with the controversial natural gas drilling technique known as fracking).

[24] Unofficial Tr. of Markup of H.R. 10, the "Regulations of the Executive in Need of Scrutiny Act of 2011," by the H. Comm. on the Judiciary, 112th Cong., at 50, 119 (Oct. 25, 2011).

[25] *See, e.g.,* Memorandum from Eric Cantor to House Republicans (Aug. 29, 2011) (on file with the House Majority Leader) *available at* http://majorityleader.gov/blog/2011/08/memo-on-upcoming-jobs-agenda.html. ("By pursuing a steady repeal of job-destroying regulations, we can help lift the cloud of uncertainty hanging over small and large employers alike, empowering them to hire more workers.").

that tracks companies' reasons for large layoffs found that during the first and second quarters of 2011, 144,746 layoffs were attributable to poor "business demand," while only 1,119 were attributable to "government regulations."[26]

Indeed, one of the Majority's own witnesses, during a recent hearing on another anti-regulatory bill, testified that when it comes to linking jobs and regulations, the "focus on jobs . . . can lead to confusion in regulatory debates" and that the employment effects of regulation "are indeterminate."[27] Similarly, the National Federation of Independent Business's latest monthly survey of its members reveals that poor sales, not regulations, are by far the biggest deterrent to hiring.[28] In addition, the *Wall Street Journal*'s July 2011 survey of business economists found that "The main reason U.S. companies are reluctant to step up hiring is scant demand, rather than uncertainty over government policies, according to a majority of economists."[29]

According to Bruce Bartlett, an economist who worked in the Administrations of both Presidents Ronald Reagan and George H.W. Bush, the idea that cutting regulations will lead to significant job growth is "just nonsense. It's just made up."[30] He further opined that "regulatory uncertainty is a canard invented by Republicans that allows them to use current economic problems to pursue an agenda supported by the business community year in and year out. In other words, it is a simple case of political opportunism, not a serious effort to deal with high unemployment."[31]

Rather than hindering growth, regulations actually play a role in promoting job growth. A report by Northeast States for Coordinated Air Use Management (NESCAUM) demonstrates a direct correlation between environmental regulations and job growth in the Northeast. It found that by enacting stricter fuel economy standards and pursuing cleaner forms of energy, more jobs would be created.[32] Specifically, NESCAUM found that stricter fuel economy standards and regulations governing cleaner forms of energy would increase employment from 9,490 to 50,700 jobs; increase gross regional product, a measure of the states' economic output, by $2.1 billion to $4.9 billion; and increase household disposable income increases by $1 billion to $3.3 billion.[33]

According to a recent report from the Natural Resources Defense Council (NRDC), the United Auto Workers (UAW), and the National Wildlife Federation (NWF), vehicle emissions standards and clean vehicle research, development and production are already re-

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[26] Bureau of Labor Statistics, Economic News Release, Extended Mass Layoffs (Quarterly) News Release (Aug. 10, 2011), *available at* http://www.bls.gov/news.release/archives/mslo_08102011.htm.

[27] *The Regulatory Accountability Act of 2011: Hearing on H.R. 3010 Before the H. Comm. on the Judiciary,* 112th Cong. (2011) (statement of Christopher DeMuth, American Enterprise Instutute).

[28] *See* William C. Dunkelberg & Holly Wade, NFIB Small Business Economic Trends (2011) *available at* http://www.nfib.com/Portals/0/PDF/sbet/sbet201109.pdf.

[29] *See* Phil Izzo, *Dearth of Demand Seen Behind Weak Hiring,* Wall St. J., July 18, 2011.

[30] Bruce Bartlett, *Misrepresentations, Regulations and Jobs,* N.Y. Times, Oct. 4, 2011 *available at* http://economix.blogs.nytimes.com/2011/10/04/regulation-and-unemployment.

[31] *Id.*

[32] Northeast States for Coordinated Air Use Management (NESCAUM), Economic Analysis of a Program to Promote Clean Transportation Fuels in the Northeast/Mid-Atlantic Region (2011) (on file with Natural Resources Defense Council) *available at* http://switchboard.nrdc.org/blogs/ngreene/CFS%20Economic%20Analysis%20Report%20INTERNAL.PDF.

[33] *Id.*

sponsible for 155,000 jobs at 504 facilities in 43 states and the District of Columbia.[34] According to the same report, 119,000 jobs have been created in this industry since 2009 alone.[35]

By preventing the promulgation of rules, the REINS Act would seriously stifle economic growth and the creation of new jobs. To highlight this issue, Representative Hank Johnson (D–GA) offered an amendment during the Committee markup of H.R. 10 to exempt from the bill's Congressional approval requirement any proposed rule that OMB determines would result in job growth.[36] Representative Johnson's amendment, however, failed by a vote of 14 to 21.

II. THE REINS ACT IS UNNECESSARY BECAUSE CONGRESS ALREADY HAS OVERSIGHT AUTHORITY OVER FEDERAL AGENCY RULEMAKING

Congress already has various mechanisms at its disposal to oversee and influence the Federal agency rulemaking process. In its simplest and most straightforward form, Congress can delegate rulemaking authority to agencies with greater specificity or restriction, which would limit an agency's rulemaking authority either from the outset or through later amendment of an agency's organic statute. Indeed, Congress can simply pass legislation to stay the effect of an existing rule, as the House recently voted to do with respect to the Environmental Protection Agency's cement manufacturing standards.[37]

Further, Congress can impose restrictions on agency rulemaking through the appropriations process. These restrictions can take a variety of forms, including restrictions on the finalization of particular proposed rules, restrictions on regulatory activity within certain areas, restrictions on implementation or enforcement of certain rules, and conditional restrictions that prevent a rule from taking effect until an agency takes certain steps.[38] For instance, no fewer than 19 out of the 67 amendments to H.R. 1, the "Full-Year Continuing Appropriations Act, 2011," were aimed at de-funding the promulgation or implementation of existing and proposed regulations.[39]

Congress can also prescribe rulemaking procedures. Prior examples include the Administrative Procedure Act,[40] which was enacted in 1946 to establish baseline procedures for rulemaking. Others include the Unfunded Mandates Reform Act,[41] the Regulatory Flexibility Act,[42] the Paperwork Reduction Act,[43] and the Small Business Regulatory Enforcement Fairness Act,[44] all of which added procedural and analytical requirements to the agency rule-

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[34] Natural Resources Defense Council et al., Supplying Ingenuity: U.S. Suppliers of Clean, Fuel-Efficient Vehicle Technologies (2011), *available at* http://www.nrdc.org/transportation/autosuppliers/files/SupplierMappingReport.pdf.

[35] *Id.*

[36] Unofficial Tr. of Markup of H.R. 10, the "Regulations of the Executive in Need of Scrutiny Act of 2011," by the H. Comm. on the Judiciary, 112th Cong., at 62 (Oct. 25, 2011).

[37] Cement Sector Regulatory Relief Act of 2011, H.R. 2681, 112th Cong. (2011).

[38] *See* Congressional Research Service, Congressional Influence on Rulemaking and Regulation Through Appropriations Restrictions, RL 34354 (2008).

[39] These amendments primarily targeted environmental regulations and regulations implementing health care reform legislation. H.R. 1, 112th Cong. (2011).

[40] 5 U.S.C. §§551–59, 701–06, 1305, 3105, 3344, 5372, 7521 (2011).

[41] 2 U.S.C. §§1501 *et seq.* (2011).

[42] 5 U.S.C. §§601 *et seq.* (2011).

[43] 44 U.S.C. §§3501 *et seq.* (2011).

[44] Pub. L. No. 104–121, §242, 110 Stat. 847, 857 (1996).

making process. In addition, the CRA already allows Congress to disapprove of an agency rule.

Finally, Congress can exert influence over rulemaking through its oversight activities, whether through periodic oversight hearings, GAO reports, or informal contacts with the agencies. Such oversight activity can ensure that agencies are subject to democratic accountability for their actions.

III. THE REINS ACT WILL SEVERELY RESTRICT FEDERAL RULEMAKING, THEREBY UNDERMINING THE ABILITY OF AGENCIES TO PROTECT PUBLIC HEALTH AND SAFETY

The REINS Act will severely restrict agency rulemaking by adding a significant procedural step to the rulemaking process and, through expedited procedures for Congressional consideration of major rules, will afford industry another opportunity to stop major rules from going into effect. In so doing, the REINS Act threatens agencies' ability to protect public health and safety.

A. The Congressional approval requirement adds an unnecessary and dangerous additional step to the rulemaking process for major rules that will further ossify the rulemaking process and create even more opportunities for private special interests to intervene

The REINS Act effectively acts as a chokehold on major Federal agency rulemaking by requiring Congressional assent to major rules before they can take effect. This approval process would be in addition to an already heavily proceduralized rulemaking process that often takes years to conclude. Worse yet, Congressional inertia would effectively constitute a veto of even critically needed rules.[45]

Additionally, the REINS Act would allow well-subsidized business interests to further influence the rulemaking process. As a result of H.R. 10's Congressional approval mechanism, Congress will need to pass judgment on major rules often without the opportunity to make a well-informed decision about their merits. Major rules generally involve highly technical and complex scientific data as well as other types of evidence that require substantive expertise to decipher. Simply put, Congress lacks the time and the resources to provide meaningful review of such rules[46] and it will be susceptible to well-funded lobbying efforts by special interests.

Adding to the concern about Congress's ability to provide meaningful review of major rules is the fact that Congress would have *only 70* legislative days within which to act, and Committees of Jurisdiction would have *only 15* legislative days to consider a proposed rule's merits. Moreover, floor time in each chamber is limited to just *two hours* of debate, evenly divided. As former OIRA Administrator Sally Katzen explained, "Experience during the 111th Con-

[45] *Regulations from the Executive in Need of Scrutiny Act of 2011: Hearing on H.R. 10 Before the Subcomm. on Courts, Commercial and Admin. L. of the H. Comm. on the Judiciary,* 112th Cong. (2011) (statement of David Goldston, Director of Government Affairs, Natural Resources Defense Council) ("Agencies often take several years to formulate a particular safeguard, reviewing hundreds of scientific studies, drawing on their own experts in science and economics, empaneling outside expert advisors, gathering thousands of public comments, and going though many levels of executive branch review").

[46] *Id.*

gress compels the conclusion that there will not be time to consider and approve even the most worthy rules [under the REINS Act]."[47]

This is not the first time that a congressional approval mechanism for agency rulemaking has been considered. In the early 1980's, Congress held a number of hearings on this concept[48] and a bill was introduced that would have required affirmative Congressional assent to all major rules.[49] Wisely, Congress chose not to pursue such a mechanism. Chief Justice John G. Roberts, Jr., when he was an Associate White House Counsel in 1983, criticized this legislation for "hobbling agency rulemaking by requiring affirmative Congressional assent to all major rules."[50] He further noted that such a provision "would seem to impose excessive burdens on the regulatory agencies in a manner that could well impede the achievement of Administration objectives."[51]

B. By restricting rulemaking for major rules, the REINS Act threatens public health and safety

While the REINS Act is clearly unnecessary and unworkable, its most pernicious effect will be putting the health, welfare and safety of Americans at risk. In addition to the monetary benefits of regulations, regulations promote improved air quality, healthier children, reduced discrimination, protection of our public health and safety, protection of human dignity, and other non-quantifiable but fundamental values. The costs of delaying these highly beneficial rules could be substantial.

The meltdown of the nuclear reactors at the Fukushima Daiichi power plant in Japan earlier this year in the aftermath of a devastating earthquake and tsunami illustrate the dangers of ineffective regulation. In response to the disaster, the U.S. Nuclear Regulatory Commission under the Atomic Energy Act[52] promulgated six rules to increase safety of American nuclear reactor facilities. At a minimum, the REINS Act would delay the implementation of these rules. At worst, it could prevent them from ever going into effect.

As Representative Quigley observed at the Committee markup of H.R. 10, stronger, more effective regulations may have prevented various disasters, including the financial fraud committed by

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[47] *REINS Act—Promoting Jobs and Expanding Freedom by Reducing Needless Regulations: Hearing Before the Subcomm. on Courts, Commercial and Admin. L. of the H. Comm. on the Judiciary,* 112th Cong. (2011) (statement of Sally Katzen, former OIRA Administrator).

[48] *See Constitutional Amendment to Restore Legislative Veto: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary,* 98th Cong. (1984); *An Amendment to Sec. 13 of S. 1080, The Regulatory Reform Act, to Provide for Congressional Review of Agency Rules: Hearing Before the Subcomm. on Admin. Practice and Proc. of the S. Comm. on the Judiciary,* 98th Cong. (1984); *On the Impact of the Supreme Court Decision in the Case of Immigration and Naturalization Service v. Chadha Which Found the Legislative Veto Unconstitutional: Hearing Before the H. Comm. on Rules* 98th Cong. (1983); *Legislative Veto and the "Chadha" Decision: Hearing Before the Subcomm. on Admin. Practice and Proc. of the S. Comm. on the Judiciary* 98th Cong. (1983); *The Supreme Court Decision in INS v. Chadha and its Implications for Congressional Oversight and Agency Rulemaking: Hearing Before the Subcomm. on Admin. Law and Govt'l Rels. of the H. Comm. on the Judiciary,* 98th Cong. (1983).

[49] H.R. 3939, 98th Cong. Title II (1983). Then-Rep. Trent Lott (R–MS) was the sponsor of this legislation, which was cosponsored by 79 Members, all but five of them Republicans.

[50] OMB Watch, *Roberts Showed Prudence in Reg Reform Initiative* (2005), *available at* www.ombwatch.org/node/2652; *see also* Alliance for Justice, *Report on the Nomination of John G. Roberts to the United States Supreme Court* 78, *available at* http://www.afj.org/afj_roberts_prehearing_report.pdf ("In general, Judge Roberts disagreed with proposals to require Congress to approve regulations before they took effect. . . .").

[51] OMB Watch, *Roberts Showed Prudence in Reg Reform Initiative* (2005), *available at* www.ombwatch.org/node/2652.

[52] 42 U.S.C. §§ 2011 *et seq.* (2011).

Enron; coal mine fires; the tragic commuter airline crash that occurred in Buffalo, New York; the financial crisis in Wall Street that resulted from deregulation of financial products; and contaminated food items such as cantaloupes, turkey, hamburgers and eggs that have caused numerous deaths. As he explained, regulations play a critical role in ensuring the safety of the bridges we drive across, or the water we drink, or the food we consume.[53]

For example, three years ago, traces of the toxic chemical melamine were found in infant formula that was manufactured by an American company. It is likely that the REINS Act would have substantially delayed any corrective regulation issued in response to this contamination event. In response to this concern, Representative Sheila Jackson Lee (D–TX) offered an amendment at the Committee markup of H.R. 10 to exempt any proposed rule relating to infant formula, as defined by the Federal Food, Drug, and Cosmetic Act.[54] Although Representative Jackson Lee emphasized the need to protect the most vulnerable, namely, infants,[55] her amendment failed by a vote of 13 to 22. Similarly, Ranking Member John Conyers, Jr. (D–MI) offered an amendment to exempt from the bill any rule that protects or saves lives.[56] This amendment also failed on party lines by a vote of 13 to 20.

Finally, the REINS Act, if enacted, would consume vast amounts of limited Congressional time and resources, which would necessarily have to be diverted from other critical legislative, oversight, and constituent responsibilities. In calendar year 2010 alone, Federal agencies issued 94 major new rules that would have been subject to the REINS Act's requirements.[57] Meanwhile, there were only approximately 116 legislative days in the House during that same time period. Under these constraints, there would not have been enough time for Congress to consider and approve even the most worthy rules while also fulfilling its other responsibilities. Even under expedited procedures, Congress would likely be forced to ignore other important duties, doing a further disservice to the American people.

IV. THE REINS ACT OFFENDS SEPARATION OF POWERS PRINCIPLES

The REINS Act presents serious Constitutional concerns by offending separation of powers constraints in two respects: (1) by providing for what may be an unconstitutional one-House legislative veto; and (2) by effectively turning Congress into a "super administrative agency."

Under H.R. 10's Congressional approval mechanism, one House of Congress can effectively veto an agency's rule by simply not acting within the 70-legislative-day time frame provided for in the bill. Such a mechanism would be, in effect, indistinguishable from the one-House legislative veto that the Supreme Court held to be un-

[53] Unofficial Tr. of Markup of H.R. 10, the "Regulations of the Executive in Need of Scrutiny Act of 2011," by the H. Comm. on the Judiciary, 112th Cong., at 74–76 (Oct. 25, 2011).
[54] *Id.* at 104.
[55] *Id.*
[56] *Id.* at 32.
[57] Office of Information and Regulatory Affairs, Office of Management and Budget, *available at* http://www.reginfo.gov/public/do/eoHistReviewSearch;jsessionid=9f8e89cb30d62463a3e4b86440 60b5cee60195668b93.e34ObxiKbN0Sci0Lch8Ma3eKa30Re6fznA5Pp7ftolbGmkTy (last visited November 1, 2011).

constitutional in *INS v. Chadha*.[58] The Court held in that decision that a veto of a Federal agency's legislative act was itself a legislative act that required passage by both Houses of Congress and presentment to the President for his signature.[59] Under H.R. 10, one House could effectively veto agency rules without meeting the Constitutional requirements discussed in *Chadha*.

Another possible separation of powers issue presented by the bill is that by making major rules effective only upon Congressional approval, the REINS Act turns major rules issued by Federal agencies into mere advisory rules. Through the REINS Act, Congress seeks to increase its own power over Executive Branch junctions and, in so doing, usurps a constitutional directive to the Executive Branch to "take care that the laws be faithfully executed."[60]

CONCLUSION

H.R. 10 does nothing to create jobs or improve the economy. Instead, it throws sand in the gears of government by making it nearly impossible to enact important new regulations. By requiring that each House pass and the President sign each new major regulation, this misguided legislation will require Congress to expend time and expertise that it does not have, while increasing the opportunity for private interests to influence the process. This bill is not the solution for the many problems currently facing the American people.

In fact, H.R. 10 is an unworkable solution to an artificial problem. There is no evidence that regulations stifle job creation. What we do know, however, is that regulations play a critical role in protecting the health of all Americans, ensuring the safety of our workers, promoting the integrity of our financial system, and preserving the environment. Delaying or thwarting these critical measures imperils our Nation's well-being. These are tangible benefits of regulations that far outweigh any perceived costs. Indeed, the Administration has expressed nearly identical concerns about similar legislation pending in the Senate. It stated that such legislation would "delay and, in many cases, thwart implementation of statutory mandates and execution of duly enacted laws, increase business uncertainty, undermine much-needed protections of the American public, and create unnecessary confusion. There is no justification for such an unprecedented requirement."[61]

The REINS Act is not necessary because Congress already has myriad tools at its disposal, such as limiting delegations of authority to agencies, controlling agency appropriations, staying the effect of specific rules, and holding oversight hearings. These tools, unlike the REINS Act, do not trample the separation of powers and will not lead to government gridlock.

For all of the foregoing reasons, we strongly oppose H.R. 10 and we urge our colleagues to join us in opposition.

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[58] 462 U.S. 919 (1983) (holding that a one-House legislative veto violated the Constitution's bicameralism and presentment clauses).

[59] *Id.*

[60] *See* Morrison v. Olson, 487 U.S. 654 (1988) (outlining tests for evaluating statutory schemes under separation of powers doctrine).

[61] Executive Office of the President, Statement of Administration Policy on S. 1786, Long-Term Surface Transportation Extension Act of 2011 (Nov. 3, 2011).

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Letter from the Honorable Kevin Cramer, a Representative in Congress from the State of North Dakota

KEVIN CRAMER
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Congress of the United States
House of Representatives
Washington, DC 20515–3400

March 5, 2013

The Honorable Spencer Bachus
Chairman
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

As an original cosponsor to the Regulations From the Executive in Need of Scrutiny Act of 2013 (REINS Act) I would like to thank you for the opportunity to share with your subcommittee my views on this legislation. For far too long the United States Congress has allowed the Executive branch to implement regulations with costs that far outweigh the benefits. Whether our economy is strong and our public debt nonexistent, or whether our economy is weak and public debt enormous, our standard setting economic machine demands more precision from its government.

In March of this year, we expect to see the final rule for a new Tier 3 gasoline regulation published to further reduce sulfur in gasoline. If implemented it's estimated to increase the cost of gasoline anywhere from 9 to 25 cents per gallon. The Boiler MACT rule, the Mercury Air Toxics rule, the Coal Ash RCRA rule, and Greenhouse Gas rule for new and soon to be existing power plants will all make coal-fired plants so expensive that our country will become overly reliant on natural gas to generate our electricity. The Government Accountability Office estimates that Dodd-Frank could cost the government $2.9 billion dollars over five years without taking into account the added compliance costs and lost economic activity due to uncertainty of its implementation.

In my previous position as a Commissioner at the North Dakota Public Service Commission (Commission) I saw firsthand the effects unscrutinized regulation can have. Just last year, the Commission was asked to make an advance determination of prudence finding for a group of electric utility companies to invest in $494 million worth of environmental equipment for a coal-fired power plant immediately across the border in South Dakota. The investment was necessary to comply with the Environmental Protection Agency's promulgation of the Regional Haze rule, and is estimated to increase customer electric rates by 15 percent. Regional Haze has the goal of no man-made visibility impairment in Class I areas (i.e. National Parks and Wilderness Areas) by 2064 with no health component. As a regulator myself, I was at a loss to allow such a drastic cost on families and businesses with no commensurate health benefits.

With the REINS Act in place, regulations like Regional Haze will undergo a more extensive analysis of the costs to consumers, industries, and federal agencies. The effects on competition, employment, investment, productivity, and innovation must be taken into account.

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In a free market economy, we allow consumers and businesses to interact and contract with one another, but in the event major rules and regulations become necessary we should at the very least have the people's legislative body affirm or deny them.

Sincerely,

Kevin Cramer
Member of Congress

Prepared Statement of the Honorable Andy Barr, a Representative in Congress from the State of Kentucky

REINS Act to Help Rein in Federal Regulation

By Rep. Andy Barr

I came to Congress this January to do everything in my power to reduce the costs added by government, encourage investment and create American jobs. The first step in accomplishing this is to work toward a more sensible regulatory code that reduces economic uncertainty and compliance costs.

A more reasonable regulatory policy in which benefits outweigh costs will allow a farmer to spend more time harvesting our nation's food supply and will afford a family physician more time caring for his patients— as both individuals will be spending less time on burdensome and often duplicative compliance paperwork.

With roughly 4,100 new regulations in the pipeline, it comes as no surprise that federal red tape and government regulations consistently rank as the top concerns of small business owners, our nation's job providers. The cost of complying with federal regulations in the United States this year is expected to exceed $1.75 trillion. To make matters worse, compliance costs are 36 percent higher for, and are thus more devastating to, small businesses or firms with fewer than 20 employees when compared with their larger counterparts.

The past four years have also not provided much relief. Businesses across industries, from hospitals to auto manufacturers, have been hit hard with new taxes. Such tax increases coupled with increased federal rulemakings have barred employers from expanding and creating jobs, and the cost of goods and services remains high for everyone. American businesses and consumers simply cannot take this beating any longer.

This is why I am a cosponsor of and support H.R. 367, the Regulations From the Executive in Need of Scrutiny Act (REINS Act) which, among other provisions, requires an up-or-down vote by Congress on all rules with an economic impact of more than $100 million dollars before they can be enforced on the American public. Through providing businesses with more certainty going forward, this one piece of legislation will go a long way in getting our economy back on track. Supporting the REINS Act is supporting improved economic health of American businesses and families alike.

Letter submitted by Kristina Butts, Executive Director, Legislative Affairs, National Cattlemen's Beef Association

March 4, 2013

The Honorable Todd Young
1007 Longworth House Office Building
Washington, DC 20515

Dear Congressman Young,

On behalf of the membership and affiliates of the National Cattlemen's Beef Association (NCBA) and the Public Lands Council (PLC), we would like to thank you for introducing H.R.367, the Regulations from the Executive In Need of Scrutiny Act (REINS). NCBA and PLC strongly support your legislation as it would provide much needed relief to livestock producers from the ever-increasing regulatory overreach of federal agencies. The seemingly constant outflow of burdensome regulations from agencies under the current administration is stifling our economy; business growth; and the entrepreneurial spirit across the nation.

Numerous potential and proposed regulations, primarily from the Environmental Protection Agency (EPA), pose serious financial threats to the livestock industry. The agency's attempt to dramatically expand its regulatory jurisdiction under the Clean Water Act; the continued regulation of coarse particulate matter (dust) at unattainable levels in arid parts of the country; and the regulation of greenhouse gases under the Clean Air Act are all examples of EPA's trend of far-reaching regulations that usurp states' rights and are unfounded by science.

In another example of regulatory overreach, the U.S. Department of Agriculture (USDA) Forest Service has finalized a national planning rule which has the potential to significantly impact livestock producers on federal lands and all activities on National Forests across the country. The rule lies outside the statutory mandates that require the multiple-use management of our National Forests.

In 2010, USDA's Grain Inspection Packers and Stockyards Administration's proposed a livestock and poultry marketing rule that went far beyond the intent of Congress at the expense of producers and, ultimately, consumers. Originally based on key provisions set forth in the 2008 Farm Bill, the proposed rule's vague wording threatened to destroy decades of progress in the beef industry. Broad definitions of "competitive injury" and "likelihood of competitive injury" paved the way for a trial lawyer's bonanza, which if maintained will destroy producer's rights to capture premiums based on the quality of their livestock as well as consumers' rights to a variety of specially branded products they have demanded.

These are just a few examples of the regulatory overreach continually placed on U.S. livestock producers. In order to protect the producers of our nation's food supply from this regulatory attack, NCBA and PLC fully support congressional efforts to bring accountability to the executive branch through a mandatory vote on every new proposed major rule. Therefore, we are fully supportive of the REINS Act and are thankful for your leadership on this important issue.

Sincerely,

Scott George
President
National Cattlemen's Beef Association

Brice Lee
President
Public Lands Council

Response to Questions for the Record from James L. Gattuso, Senior Research Fellow in Regulatory Policy, Thomas A. Roe Institute for Economic Policy Studies, The Heritage Foundation

Questions from Subcommittee Member Hank Johnson for Mr. Gattuso

Mr. Gattuso, your written testimony points to the EPA's major rules on energy efficiency. The Office of Management and Budget has found that the benefits exceed the costs of regulation as much as 16 to 1, while different EPA estimates have found even higher ratios of benefits to costs.

1. **Don't the total benefits of regulations in this area offset their costs?**

The reference in my testimony to efficiency mandates refers to regulations in addition to regulations issued by the EPA. Most energy efficiency standards are promulgated by the Energy Department. The EPA, jointly with the Department of Transportation, does issue Corporate Average Fuel Economy standards for vehicles.

All three agencies conducted regulatory impact analyses of these rules, concluding in each case that the benefits exceeded the expected cost. But in many cases, the bulk of the identified benefits were "private benefits," stemming from changing or limiting the buying habits of consumers for their own good, rather than external benefits to society.

For example, in its analysis of CAFE, the EPA attributes the majority of benefits from the new rules to consumer savings from buying less gasoline, rather than improved air quality or reductions in global warming. EPA claims these private savings outweigh the $1,800 in higher sticker prices consumers will inevitably pay.

But consumers don't seem to agree, as shown by their marketplace decisions. After all, if fuel efficiency was such a good deal for consumers, why are regulations needed to force them to buy more fuel efficient cars, or for manufacturers to produce them?

The Department of Energy's appliance rules similarly rely on private benefits. For instance, in its analysis of last year's clothes washer rules, the lower bound of benefits calculated by DOE was almost entirely due to consumer operating savings.

Quite literally, the regulatory agencies concluded that consumers don't know what's in their self-interest. The consequent rejection of consumers' preferences is counted as a benefit. Absent a market failure, such second-guessing of consumer decision-making should not be used to justify regulation.

2. **Does the cost of compliance with these rules exceed the value to consumers in having appliances that save money on energy costs?**

   [See answer to question #1].

3. **You argue that Congress sits helplessly on the sidelines after passing major legislation. Isn't this an argument in favor of drafting more careful legislation, instead of bypassing the Constitution's procedural requirements like the Presentment Clause through the REINS Act?**

   While Congress should, of course, strive to write more careful legislation, making grants of regulatory authority conditional on approval is a perfectly legitimate method of ensuring its intent is followed. Nothing in the REINS Act violates the Presentment Clause. Like other legislation, a resolution adopted by Congress under REINS would require presidential approval before taking effect.

4. **You also argue in your written testimony that the REINS Act would reinforce the constitutional balance of powers. But you do not, however, address Section I of Article II of the Constitution, which grants the executive power to the President. While the legislative branch exists to make the laws, the executive branch must "take care that the laws be faithfully executed." How do you square the REINS Act with that section of the Constitution?**

   Article II of the Constitution grants executive authority to the president just as Article I grants legislative authority to the Congress. The difference between the two is not always clear, but generally "legislative" action indicates the setting of rules, while "executive" refers to enforcing and implementing them. As Alexander Hamilton wrote in Federalist no. 75: "The essence of legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of society…" The rules covered by the REINS Act fall squarely within Hamilton's definition.

Response to Questions for the Record from Eric R. Claeys, Professor of Law, George Mason University

School of Law
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July 8, 2013

The Hon. Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-6216

re: Questions for the Record relating to the REINS Act of 2013

Dear Chairman Goodlatte,

Thank you again for inviting me to testify on March 5, 2013, in support of H.R. 367, the Regulations from the Executive in Need of Scrutiny ("REINS") Act of 2013. Thank you also for forwarding to me (through the Committee clerk) questions for the record submitted by Congressman Hank Johnson after that March 5 hearing. I will reprint the questions below and do my best to answer them.

Congressman Johnson's questions are as follows:

> Mr. Claeys, you argue in your submitted testimony that major rules can jeopardize individual liberty, citing poorly crafted food and drug labeling regulations as examples of threatening free speech, and poorly crafted airport inspections as threatening privacy. I strongly support Americans' right to speak freely and be free from unlawful searches.
>
> 1. But would passing the REINS Act actually apply to searches at the airport and food or drug labeling?
>
> 2. If Congress would review these regulations before they take effect under the REINS Act, how long should the American people have to wait for Congress to actually agree on the appropriate language for the food and drug label? And what if Congress can't agree?
>
> 3. If Congress doesn't review these regulations before they take effect under the REINS Act, are there any examples of major rules involving free speech and privacy? How long should the American people have to wait for Congress to agree on the appropriate language for these rules, and what if Congress can't agree?

For context, I will reprint here the portions of my submitted testimony (pages 5 to 6) to which Congressman Johnson refers:

> ... [L]egislative rules can jeopardize individual liberty. Congress is expected to use its constitutional powers to "secure the Blessings of Liberty to ourselves and our Posterity" (see U.S. Const. preamble), and "to secure" "certain unalienable Rights ... among [which] are Life, Liberty and the pursuit of Happiness" (U.S. Dec. of Indep., ¶ 2). Like statutes, if well crafted, legislative rules can secure rights—health, safety, the liberty to compete in a lawful trade, the capacity to purchase goods and services free from deception, and so on. Also like statutory laws, however, when poorly crafted, legislative rules can also threaten rights. Poorly-crafted wetlands regulations can threaten property rights. Poorly-crafted food or drug labeling regulations can threaten free speech. Poorly-crafted commodity targets can undermine farmers' liberties to compete in markets for the crops they produce. Poorly-crafted airport inspection regulations can threaten the privacy of U.S. citizens to be free from unreasonable searches and seizures. Poorly-crafted health-insurance regulations can coerce insured Americans to cross-subsidize conduct contrary to their religious consciences. Poorly-crafted user fees take property, by unnecessarily diminishing the wealth of people who pay the user fees. It would not be unreasonable for members of Congress to insist that, at least for rules scored as being major rules, it would be advisable for members of Congress to consider carefully the rules' intended goals and their likely effects on the rights of regulated parties. The REINS Act embodies a legislative judgment that it is neither necessary nor proper for executive agencies to put major rules in effect without Congress's debating and taking ownership of the determinations those rules make about individual rights and the public welfare.

In this testimony, I meant to restate and make relevant to the REINS Act a lesson from The Federalist Papers. Federalist No. 51 argues, "In a free government, the security for civil rights must be the same as for religious rights. It consists in the one case in the multiplicity of interests, and in the other, in the multiplicity of sects." Government can threaten many different individual liberties. In the testimony I just quoted, I cited rights to be free from fraud, property rights, free speech, liberties to compete in business, privacy from government criminal investigation, and freedom of religion and religious conscience. Different citizens and officials may value some of these rights more strongly than others—as Congressman Johnson himself confirms, when he focuses on free speech and freedom from unreasonable criminal investigations to the exclusion of the other examples I listed. As Federalist No. 51 argues, American constitutional government secures all these various rights by requiring: first, that all legislation be passed by two separate Houses of Congress; second, that legislation so passed be signed by the President; and third, that legislation enacted into law be enforced by executive and judicial departments independent of Congress. Whenever any right is threatened, bicameralism, presentment, and separation of powers give rights-holders many opportunities to explain to the broader public why a proposed law threatens their rights.

By the above-quoted testimony, I did not mean to suggest that the REINS Act provides a complete and perfect fix to the problems that occur when federal agencies promulgate substantive rules affecting individual rights. That is why, when I argued that "it would be advisable for members of Congress to consider carefully the rules' intended goals and their likely effects on the rights of regulated parties," I specified, "at least for rules scored as being major rules." The criteria relied on in the REINS Act (and the Congressional Review Act, which the REINS Act is supposed to supersede) classify rules as "major rules" not explicitly with respect to their effects on individual liberties but rather with respect to their economic impacts. (See 5 U.S.C. § 804 (2) (2012); H.R. 367 proposed § 804(2).) An agency could circumvent the REINS Act (or the Congressional Review Act) by promulgating a rights-threatening requirement in a standalone rule, not likely to have $100 million annual effect on the U.S. economy or satisfy any of the other definitions of major rules. For that matter, an agency could also circumvent the rulemaking process entirely, by announcing rights-threatening policies in informal documents that are arguably not yet ripe for judicial review or not covered by the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (For an example of an attempt at such a circumvention that failed, see Washington Legal Foundation v. Friedman, 13 F.Supp.2d 51 (D.D.C. 1998).)

Even though agencies could circumvent the REINS Act in these manners, I believe that members of Congress should not make the best the enemy of the good. Members of Congress may and should support the REINS Act in part on the ground that it establishes a new outer-limit protection against threats to individual rights. Even though agencies could circumvent the Act's definition of a "major rule," that definition is more apolitical and easier to administer than most of the likely alternatives. And even though it is hard to predict in advance what rules will threaten what rights, members of Congress may be practically certain that some individual liberty will be at least arguably threatened by any legislative rule that institutes new requirements on individual conduct, to be followed under threat of legal penalty for noncompliance. Members of Congress may have reasons for refraining from second-guessing the effects on individual rights of all legislative rules; they may and should precommit to second-guessing the most far-reaching rules.

I hope that explanation provides context for my more particular answers to Congressman Johnson's questions. In question 1, Congressman Johnson asks whether the REINS Act would apply to airport searches or to food and drug labeling. I assume that the Congressman does not read me to have testified (or to be suggesting himself) that the REINS Act applies to specific airport searches, or to specific enforcement actions by the U.S. Food and Drug Administration enforcing food or drug labels. Such actions would be law-enforcement or administrative actions, not exercises in rulemaking as defined in 5 U.S.C. § 551(4) and proposed sec. 804(4) of the REINS Act.

If I understand Congressman Johnson correctly, then the REINS Act applies to rulemakings by the Food and Drug Administration promulgating new food- or drug-labeling requirements, and rulemakings by the Transportation and Security Administration issuing new airport search procedures. As just explained, these and other agencies can

circumvent rulemakings, and even when they use rulemakings they might be able to structure the rules to avoid having those rules designated as "major rules" subject to the REINS Act's preapproval process. For that and other reasons, I cannot foresee specifically how the REINS Act would apply to labeling rules, search rules, or other similar discrete topics.

That said, I can make a few general points. First, I am aware that prior labeling requirements issued by the FDA have raised First Amendment problems. See Thea Cohen, Note, "The First Amendment and the Regulation of Pharmaceutical Marketing: Challenges to the Constitutionality of the FDA's Interpretation of the Food, Drug, and Cosmetics Act," 49 American Criminal Law Review 1945 (2012). Next, the Office of Management and Budget has scored some FDA labeling rulemakings as major federal rules. See Office of Management and Budget, Draft 2012 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities (2012), Appx. D (citing FDA labeling-related rulemakings with RID nos. 0910-AA19 (p.97), 0910-AB66 (p.99), and 0910-AG41 (p.102)). Last, going forward, it seems to me quite plausible that some FDA labeling rulemakings or TSA airport-security rulemakings could be classified as major rules. Drug labels are meant to prevent deaths and other severe adverse reactions to the wrong drugs. Airport screening rules are meant to prevent catastrophic events like the 9-11 attacks on the World Trade Centers. Such adverse reactions and catastrophes could have economic effects significant enough to trigger "major rule" status under proposed section 804(2).

Question 2 asks how long the American people should need to wait for labeling regulations while Congress agrees on appropriate implementing language to include in the regulations, and what if Congress can't agree. As my citation to and interpretation of Federalist 51 should have made clear, I reject the premise of that question. There are costs for waiting too long to enact rules, and there are costs for enacting them too hastily and thoughtlessly. Like Federalist 51, I believe the latter error costs are more serious than the former.

Let me add a few additional reasons why. The error costs of waiting are most severe if there is no legal rule directly on point to deal with a public health or safety problem. I think this possibility is extremely unlikely. On one hand, REINS Act proposed § 801(c) authorizes the President to make a major rule take effect for 90 days if he determines that the rule is necessary to respond to an imminent threat to health, safety, or another emergency, or a threat to national security. So the American people need not wait for regulation if the rule fits one of these exceptions and President determines the error costs of waiting are too grave. On the other hand, most regulatory problems are already "regulated" by some background laws—state laws, or already-enacted and –administered federal laws. Assume that the FDA initiates a new drug-labeling scheme. Even if that scheme takes years to work out, current labeling regulations will stay in effect until it does. And current labeling regulations protect consumers over and on top of the FDA's new drug

approval process. And consumer health and safety are protected not only by FDA labeling rules and approval processes but also by state laws – for example, tort laws about fraud and products liability.

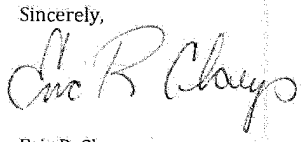
As for question 3. I do not know of any pending rule that I am certain (1) will be promulgated as a final rule, (2) will be classified as a "major rule" when promulgated and (3) will when issued threaten free speech or privacy from criminal searches or seizures. But I am reasonably confident that, if the REINS Act were to be enacted, it wouldn't take long for major rules to force Congress to consider free speech issues.

Here is a recent example confirming my judgment: The Federal Communications Commission has promulgated so-called "open Internet" rules, which seek to regulate whether and how Internet service providers choose among (and set prices for carrying the content of) content providers. See Federal Communications Commission, Preserving the Open Internet, 76 Fed. Reg. 59,192 (Sep. 23, 2011). The FCC order justifies the rulemaking on the ground that Internet advertising sustains $300 billion of American gross domestic product, id. at 59,194 n.5. That order also acknowledges that the rules raise First Amendment free speech and Fifth Amendment takings objections, id. at 59,220-23.

Congressman Johnson's Question 3 has several follow-up questions; my answers to those questions are the same (after adjusting appropriately for differences between food and drug regulation and communications regulation) as my answers above to the Congressman's follow-up questions in Question 2. In my opinion, the country would have been better off if Congress had debated open-Internet policy, its economic implications, and its speech- and property-rights implications than we are with the FCC trying to settle the relevant issues on a delegation from Congress.

I hope these answers respond fully to Congressman Johnson's questions. If I have misunderstood them, please do not hesitate to follow up and clarify, and I will do my best to answer the questions as clarified.

Sincerely,



Eric R. Claeys
Professor of Law

Response to Questions for the Record from Ronald M. Levin, William R. Orthwein Distinguished Professor of Law, Washington University School of Law

Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Hearing on H.R. 367, the "REINS Act of 2013":
Promoting Jobs, Growth and American Competitiveness
March 5, 2013

Questions for the Record

Questions from Subcommittee Ranking Member Steve Cohen for Professor Levin

1. What is your response to your fellow witnesses' assertion that the REINS Act will not impose much in the way of additional legislative burdens on Congress?

As discussed in my written testimony (page 4), I believe the Act would result in a very substantial and unwelcome increase in demands on congressional time, at least if the members take it seriously. Professor Claeys and Mr. Gattuso argue, however, that Congress could make time for the burdens of the REINS Act by meeting on more days and by curtailing ceremonial or symbolic votes. In a sense that may be true, but I don't believe that those choices are the ones that Congress actually would make. Nor do I believe that members would eliminate casework, calling potential donors, or attending fundraising events. The political incentives that lead members of Congress to make all of these choices are too great. Incentives to work on law improvement and oversight are much lower, and that is where I expect the tradeoffs would be made, to the detriment of the overall legislative output.

2. How do you think Congress would assess the benzene rule that Professor Claeys described in his testimony?

The benzene rule had strong support from unions and strong opposition from industry groups. I assume, therefore, that congressional opinion would have been similarly divided. But I would not base any generalizations on the *Benzene* case, because the Supreme Court did, after all, overturn the rule on the merits.[1] Thus, even if the REINS Act had been in effect at that time, the rule presumably would not have gone into effect regardless of whether Congress had voted to approve it or to disapprove it.

3. You emphasized in your statement that the House and Senate have had many disagreements recently. Nevertheless, the two Houses and the President do find areas of agreement at times, and current conditions of polarization are not necessarily permanent. Is there reason to think the REINS Act would regularly lead to stalemate even in less divided times?

Yes, even if we ignore the exceptional polarization of our era, the obstacles to agreement on a major rule would be formidable. Usually, when the two Houses wish to bridge their disagreements, they look for a compromise. For a major rule to survive scrutiny under the REINS Act, however, it would have to survive an up-or-down vote in *each* chamber, with *no amendments allowed*. Professor Claeys suggests that consultations among the agency and the two chambers (and presumably the President) *before* the agency issues its rule could defuse these controversies. However, the logistical challenges of

[1] Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607 (1980).

such a negotiation strategy would be daunting and in many cases insuperable. Moreover, an agency would often be unable in such negotiations to go very far to accommodate political objections without jeopardizing its ability to defend the rule in court as a rational application of the existing statute.

Years ago, addressing the legislative veto, Assistant Attorney General Antonin Scalia discussed some of these challenges in terms that could equally well be applied to the REINS Act:

> ...[I]s it not a common practice for a congressional conference committee to bury a fundamental disagreement between the two houses by simply leaving the point unaddressed in the final bill? What is the agency to do when it must develop regulations pertaining to that particular issue? If it handles the problem one way, the regulations will be vetoed in the House, and if it handles it the other way, they will be vetoed in the Senate. What happens to a piece of legislation which thus cannot be implemented in either direction? What does a court do with a law suit seeking to require an agency to issue regulations mandated by statute? Suppose the agency has tried three times, only to be met with three congressional vetoes? Does the court then mandamus the Congress? . . .
>
> . . . I invite you private attorneys to consider how altered your function will be in the brave new world of congressionally reviewable rulemaking. Currently, having finished your arguments before the agency, you carry them before the courts. In the future there will be an intermediate process of congressional lobbying. It will be not merely an additional step, but a step of an entirely different character, strangely out of tune with the remainder of the process into which it has been inserted. The present system of administrative action followed by judicial review has been accurately described as an essentially unitary process. The agency makes its decision, which must be based upon rational and analytical factors established with greater or lesser specificity (usually lesser) by the Congress, and then the courts review its success in performing that rational and analytic task. Under the new system, the agency will first consider the matter on a rational and analytic basis. The Congress will then decide whether, even though the agency decision may be rationally and analytically correct, it should be abandoned for what may be purely political reasons. But if the agency action survives that test, it will again be reviewed in the courts to see whether it is rationally and analytically correct. ... Such a system, it seems to me, is madness . . . . [2]

4. In your view, does the current rulemaking process already provide sufficient opportunities for transparency and public participation in agency decisionmaking?

Yes. Agencies typically publish the text of every proposed rule, along with the data that supports the proposal and an explanation of the reasoning on which the rule rests. The public is then invited to comment at any length on the proposal, and the agency is required to respond to significant comments. Increasingly, this entire process takes place online, making the public's opportunity to participate in the proceeding especially convenient. Under the Administrative Procedure Act (APA), moreover, these obligations are judicially enforceable, so that agencies have a strong incentive to adhere closely to the legal minima.

Although I would scarcely claim that there is no room for improvements at the margins in the way the APA rulemaking system operates, I consider the system to be basically well designed and effective in enabling the public to be part of the promulgation process. Moreover, nothing in the REINS Act would make the rulemaking process appreciably more transparent or participatory than it now is.

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[2] *1976 Bicentennial Institute -- Oversight and Review of Agency Decisionmaking, Part II*, 28 Admin. L. Rev. 661, 692-93 (1976) (remarks of Assistant Attorney General Scalia).

5. In support of the constitutionality of the REINS Act, could one argue that Congress is simply withdrawing or curtailing its previous delegation of legislative authority to the executive branch agency that promulgated the rule at issue?

No, because this is not an accurate or persuasive account of what the REINS Act does. The Act contains no language that purports to withdraw any jurisdiction from any agencies. Rather, the language as written purports to impose a new condition on agencies' exercise of their *existing* jurisdiction: "A major rule shall not take effect unless the Congress enacts a joint resolution of approval described under section 802."[3] To condition the issuance of rules on compliance with a scheme in which one House of Congress may nullify the rule without bicameralism or presentment is impermissible, as discussed under question 7 below.

The "withdrawal of previous delegation of legislative authority" theory is an artificial reading of the Act that some advocates have devised in order to defend the Act from constitutional attack. They claim that, because an agency would no longer have authority to adopt major rules on its own, the requirement that future major rules could not go into effect without affirmative approval from Congress would not impinge on any existing executive authority. However, aside from the fact that the Act is not written in those terms, this is not a reasonable description of the way the Act would work. An agency's authority would extend to exactly the same subject matter as before. Indeed, the supposed withdrawal of jurisdiction would come into play only if the agency were to draft a rule that OIRA determines will impose $100 million dollars in costs on the economy, cause a major increase in prices, etc. Meanwhile, other rules on the same subject, but with lower price tags, would still fall within the agency's jurisdiction. Nobody who was not trying to make an argumentative point would ever describe such a limitation as withdrawing the underlying delegation, as opposed to placing a condition on the agency's use of its existing jurisdiction.

Furthermore, as my written testimony discusses, the agency would have to comply with all legal requirements for rulemaking (e.g., as prescribed by the APA, Regulatory Flexibility Act, executive oversight orders, etc.), and the rule could still be challenged in court on all familiar APA grounds, even if endorsed through a REINS Act joint resolution. These specifications completely belie the notion that the agency's rule would be a mere proposal that has no legal status unless Congress elects to adopt it. To the contrary, the rule would be an exercise of agency rulemaking authority like any other.

The most one can say for the "withdrawal of jurisdiction" notion is that it is a legal fiction that courts might conceivably entertain in order to find some colorable justification for upholding the Act. As I have discussed, however, the *Chadha* case itself, as well as subsequent decisions including the *D.C. Airports* and *Clinton v. City of New York* (line item veto) cases, indicate that the Court generally has not approved of gimmicks that overcome the basic division of constitutional authority between the branches. I expect that today's Court would be just as skeptical (see question 9 below).

[3] REINS Act (H.R. 367), § 801(b)(1).

6. Professor Claeys states that the REINS Act is a constitutional exercise of Congress's legislative powers under the Necessary and Proper Clause. What is your response?

The Necessary and Proper Clause is not a magic wand with which the legislature may wave away affirmative limitations that the Constitution otherwise imposes. The Court addressed a similar contention in *Buckley v. Valeo*:[4] "Congress could not, merely because it concluded that such a measure was 'necessary and proper' to the discharge of its substantive legislative authority, pass a bill of attainder or ex post facto law contrary to the prohibitions contained in § 9 of Art. I. No more may it vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so."[5] Likewise, Congress may not use the Necessary and Proper Clause to justify the REINS Act, because Article I, Section 7, as interpreted in *Chadha*, presents an affirmative obstacle. See the discussion in question 7 below.[6]

7. What do you think of Professor Claeys's argument that the REINS Act can be justified as an exercise of Congress's power to attach a "new precondition," such as the Act, to its grants of rulemaking power to agencies?

Congress generally has broad power to impose conditions on executive action, but not when those limitations contravene the bicameralism and presentment safeguards that the framers of the Constitution purposely inserted as limitations on legislative action. The "condition" that Professor Claeys would like to see Congress attach to an agency's exercise of rulemaking authority is that "[a] major rule shall not take effect unless the Congress enacts a joint resolution of approval described under section 802."[7] The "condition" that the immigration legislation in *Chadha* imposed, until the Court invalidated it, was that "if … either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the substance of such deportation, the Attorney General shall thereupon deport such alien.…"[8] There is no difference in principle between the two. Since Congress was not permitted to avoid the requirements of Article I, Section 7 by imposing the "condition" of surviving a legislative veto, it also may not avoid them through the "condition" of requiring a joint resolution of approval. Paraphrasing the Court's words: "Disagreement with [a proposed major rule] involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked."[9]

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[4] 424 U.S. 1 (1976).
[5] Id. at 135.
[6] Although the *Chadha* opinion did not address the Necessary and Proper Clause explicitly, the Court could scarcely have overlooked it as a potential justification for the legislative veto. Indeed, the brief of the House of Representatives framed the "question presented" on the merits as follows: "Whether the Congressional review procedures set forth in Section 244(c)(2) of the Immigration and Nationality Act of 1952 constitute 'necessary and proper' means of executing the sovereign legislative power of Congress over the status and deportation of aliens. …"
[7] H.R. 367, § 801(b)(1).
[8] *See* INS v. Chadha, 462 U.S. 919, 925 (1983).
[9] *Id.* at 955.

In discussing the legislative veto, Assistant Attorney General Scalia rejected, as "contrived and hypertechnical," reasoning that would

> make[] the validity or invalidity of the one-house veto or the concurrent resolution depend upon whether the requirement for congressional approval is phrased in the statute as a condition precedent to the regulations' becoming effective or, on the other hand, as a condition subsequent, which strikes down otherwise valid prescriptions. You remember conditions precedent and conditions subsequent from 15th Century property law. [This] theory would make them central to the interpretation of our Constitution. Surely, a decision bearing so closely on the very structure of our government does not depend on such technical refinements. Indeed, as I have noted above, the presidential veto power was set forth in two separate clauses to avoid precisely this sort of quibbling. It is not only when the Congress changes a law ... that the veto power of the President applies, but whenever the Congress takes any action which has operative effect beyond the Hill. Preventing the issuance of a regulation, no less than destroying a regulation already in existence, comes within this description.[10]

8. Professor Claeys contends that the REINS Act does not run afoul of the *INS v. Chadha* decision. What is your response?

Professor Claeys says that the REINS Act's preapproval process complies with the Constitution as interpreted in *Chadha*, because it contemplates that Congress would act through a joint resolution, which implies bicameralism and presentment. This answers the wrong question. It is like saying that Congress could lawfully have used a joint resolution to *uphold* the Attorney General's decision to suspend Mr. Chadha's deportation. Of course it could have. But the significant holding in the case was that a vote to *override* the Attorney General's decision could *not* be validly effected by only one chamber of Congress (with no bicameralism or presentment). Here, similarly, the question is whether a *negative* vote by one chamber, unaccompanied by concurrence from the other chamber and the President, should be allowed to nullify an agency rule. Professor Claeys's account of *Chadha* does not discuss that vital question. My answer to that question, of course, is "no."

9. As Representative Marino noted at the hearing, the *Chadha* case, on which you rely, was decided three decades ago. Is it possible that the modern Court would be more sympathetic toward an effort by the legislative branch to assert greater control over the executive branch through the REINS Act? Does Justice Breyer's analysis in his article suggest that it would?

I showed in my written testimony that, over time, the courts, including the Supreme Court as well as virtually all state supreme courts, have been deeply skeptical of structural measures by which the legislature seeks to enhance its own power at the expense of the executive branch. I would expect the same reaction from today's Supreme Court.

As Representative Marino mentioned, Justice Breyer did deliver a lecture shortly after *Chadha* suggesting that an affirmative-approval statute that resembles the REINS Act in some respects would probably be constitutionally valid.[11] It is important to recognize, however, that then-Judge Breyer refrained from saying that Congress *should* enact such a statute. On the

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[10] *1976 Bicentennial Institute, supra*, 28 Admin. L. Rev. at 690-91.
[11] Stephen Breyer, *The Legislative Veto After* Chadha, 72 Geo. L.J. 785 (1984).

contrary, he expressed "a strong note of skepticism as to the need for the veto in the regulatory area," and he also discerned "powerful if not overwhelming practical considerations" militating against it.[12] Thus, if the REINS Act were adopted today and challenged in the Supreme Court, I see little if any reason to think that he would fight very hard to preserve it. Indeed, a few months after his lecture, at a forum on Chadha, he suggested that he might be having second thoughts about having even raised the possibility of a statutory fix: "I could tell how I worked out a device some time ago which I think would largely replicate the legislative veto. But I feel at this point that discussing it is rather like the people who worked at Los Alamos describing the atom bomb."[13]

Whether Justice Breyer would adhere to his constitutional reasoning from that era, notwithstanding subsequent doctrinal and real-world developments, is uncertain. For the sake of discussion, I will assume that he would. But let's see how much support proponents of the REINS Act could expect to get from other Justices:

• As Representative Cohen pointed out at the subcommittee's recent hearing on this bill, Chief Justice John G. Roberts, Jr., while working as Associate Counsel to President Ronald Reagan, criticized a then-pending regulatory reform bill for "hobbling agency rulemaking by requiring affirmative Congressional assent to all major rules."[14]

• As seen above, Justice Antonin Scalia, while an Assistant Attorney General, was scathingly critical of the legislative veto on both constitutional and policy grounds. Later he became a coauthor of the ABA's amicus brief asking the Supreme Court to invalidate the legislative veto in *Chadha*.

• Before her appointment to the Court, Professor Elena Kagan's major work of scholarship advocated an innovative model of "presidential administration," according to which any regulatory statute should be presumed, in the absence of contrary evidence, to have conferred decisionmaking authority directly on the President.[15] Her article "suggested reasons to welcome some substitution of presidential for congressional influence over administration."[16]

• In 2000, recalling his days working in the Office of Legal Counsel during the Reagan administration, then-Judge Samuel Alito related that OLC lawyers "were strong proponents of the theory of the unitary executive, that all federal executive power is vested by the Constitution in the President. And I thought then, and I still think, that this theory best captures the meaning of the Constitution's text and structure. . . ."[17] He went on to say that the Court has not always enforced executive prerogatives in subsequent

[12] *Id.* at 797-98.
[13] Admin. Conf. of the U.S., *Legislative Veto Of Agency Rules After* INS v. Chadha, Twenty-Seventh Plenary Session Discussion, Dec. 15, 1983, at 38 (remarks of Judge Breyer).
[14] Ctr. for Effective Gov't [formerly OMB Watch], *Roberts Showed Prudence in Reg Reform Initiative*, Sept. 6, 2005, http://www.foreffectivegov.org/node/2652.
[15] Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245 (2001).
[16] *Id.* at 2348.
[17] *Presidential Oversight and the Administrative State* (panel discussion), Engage, Nov. 2001, at 11, 12 (remarks of Judge Alito).

cases, but he added, with approval, that when it "has been confronted with something that seems to fall within a very specific provision of the Constitution, like the Appointments Clause, or the Presentment Clause, it has taken a rather strict approach."[18]

• Finally, Justice Kennedy wrote the Ninth Circuit opinion that the Supreme Court affirmed in *Chadha*, and he relied on much of the same historical language that the Supreme Court later invoked, such as its emphasis on the need for bicameralism:

> From a reading of the Federalist Papers as a whole, the point emerges with singular clarity that bicameralism was deemed to be one of the most fundamental of the checks on governmental power. The critical function of bicameralism as a restraint on power was explained in the Federalist Papers explicitly, early, and at length. It was one of the principal arguments used, particularly by Madison, to convince the people that the federal government would operate responsibly.[19]

Those are five votes that proponents of the REINS Act would find it tough to get. I could posit for the sake of argument that Justice Thomas might support the Act, but if proponents are counting on Justices Ginsburg and Sotomayor to ride to the rescue with additional support, they are indeed optimists.

10. Representative Marino asked for a response to Justice Rehnquist's opinion in *Chadha*, which emphasized the role of congressional intent in cases of this kind. Have you any fuller response?

Justice Rehnquist's dissenting opinion in *Chadha* dealt with issues of severability, not constitutionality. That is, he spoke to the question of whether, if the legislative veto were to be struck down, the rest of the Immigration and Nationality Act would be severable from it, or, instead, should be allowed to remain in effect. Under familiar case law, that issue would, indeed, have turned on congressional intent, i.e., what Congress would want the Court to do under those circumstances. But Justice Rehnquist took no position on the underlying question of whether the legislative veto was constitutional. Nor did he even discuss that issue. Thus, I do not think his opinion sheds any light on the issues raised in the present hearing.

11. Professor Claeys asserts that the REINS Act is a good idea because agencies' enabling statutes remain in effect for far longer than the legislative coalitions that first enacted them, making such statutes out-of-date. What is your response?

I agree that statutes frequently are passed due to a particular constellation of circumstances that may be very temporary. A coalition that manages to enact a program during a given Congress may be gone in future Congresses, or sometimes even later in the same Congress. These truisms do not mean, however, that such statutes are "out-of-date." On the contrary, these statutes are often designed to remain in place for decades, enabling administrative agencies to respond to changing conditions that were not precisely envisioned when the authorizing legislation was enacted. They enable a government to solve numerous challenges

[18] *Id.* at 13.
[19] Chadha v. INS, 634 F.2d 408, 434 (9th Cir. 1980).

that the private sector cannot or will not undertake on its own, and that are too pressing to await the protracted time that would be needed in order to build in order to build a new coalition in Congress. Such statutes are indispensable to stable and effective government.

Programs of this kind could not function if they always had to command majority support from *both* chambers of Congress *and* the White House. Political sentiments in this country fluctuate too rapidly to make that a credible condition. No rational government would invest resources building up a program that was so vulnerable to dismantling with every shift in public opinion, and consequently in legislators' preferences. Thus, the REINS Act would cause great instability and substantially weaken the government's ability to respond to public needs.

Questions from Subcommittee Member Hank Johnson for <u>Professor Levin</u>

Mr. Levin, in your submitted testimony you outline several constitutional concerns with the REINS Act, namely that it represents the same one-house veto that the Supreme Court has already held unconstitutional.

1. **What was the Court's rationale in *Chadha*?**

As I explained in my written testimony, the Court held that the one-House legislative veto was unconstitutional because it did not comply with the bicameralism and presentment requirements of Article I, Section 7. The Court emphasized that the framers of the Constitution considered those requirements to be vital safeguards against improvident legislative actions:

> The decision to provide the President with a limited and qualified power to nullify proposed legislation by veto was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed. . . . The President's role in the lawmaking process also reflects the Framers' careful efforts to check whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures. . . .
>
> The bicameral requirement of Art. I, §§ 1, 7, was of scarcely less concern to the Framers than was the Presidential veto and indeed the two concepts are interdependent. By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the Framers reemphasized their belief, already remarked upon in connection with the Presentment Clauses, that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials.[20]

The Court said that the legislative veto device was subject to these requirements because it "was essentially legislative in purpose and effect." That is, it "had the purpose and effect of altering the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch."[21] More specifically,

[20] INS v. Chadha, 462 U.S. 919, 947-49 (1983).
[21] *Id.* at 954.

it prevented the Attorney General from utilizing the powers that Congress had previously delegated to him:

> . . . Congress made a deliberate choice to delegate to the Executive Branch, and specifically to the Attorney General, the authority to allow deportable aliens to remain in this country in certain specified circumstances. . . . Disagreement with the Attorney General's decision on Chadha's deportation . . . involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.[22]

2. Why would the REINS Act not satisfy the bicameralism and presentment requirements under Article 1, Section 7?

An approval resolution adopted pursuant to the REINS Act would, indeed, satisfy the bicameralism and presentment requirements of Article I, Section 7. But the Act also purports to provide that the *failure* of an approval resolution will prevent an agency's otherwise lawful major rule from taking effect. This is not permitted, because it would mean that a single chamber could nullify a legitimate exercise of executive authority without any need for concurrence from the other chamber or the President.

3. Did the Court express concerns about the ability of Congress to enact oppressive, ill-considered measures?

Yes, the Court developed this theme at length by highlighting the Framers' concerns that Congress, and particularly a *single chamber*, would be tempted to enact such measures. Accordingly, the Court said, they instituted the requirements of bicameralism and presentment as safeguards against these consequences. I will quote only some of the Court's language. As to presentment:

> The President's role in the lawmaking process ... reflects the Framers' careful efforts to check whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures. The President's veto role in the legislative process was described later during public debate on ratification:
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> > "It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body.
> >
> > ". . . The primary inducement to conferring the power in question upon the Executive is, to enable him to defend himself; the secondary one is to increase the

[22] *Id.* at 954-55.

> chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design." The Federalist No. 73, supra, at 458 (A. Hamilton).[23]

And as to bicameralism:

> In the Constitutional Convention debates on the need for a bicameral legislature, James Wilson, later to become a Justice of this Court, commented:
>
> > "Despotism comes on mankind in different shapes. sometimes in an Executive, sometimes in a military, one. Is there danger of a Legislative despotism? Theory & practice both proclaim it. If the Legislative authority be not restrained, there can be neither liberty nor stability; and it can only be restrained by dividing it within itself, into distinct and independent branches. In a single house there is no check, but the inadequate one, of the virtue & good sense of those who compose it." …
>
> These observations are consistent with what many of the Framers expressed, none more cogently than Madison in pointing up the need to divide and disperse power in order to protect liberty:
>
> > "In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit." The Federalist No. 51.[24]

According to the nonpartisan database maintained by the GAO, the number of major rules issued in a single calendar year first exceeded 80 in 2008 under President Bush. Agencies published 84 major rules in the first year of the Obama Administration, but 11 of these were issued during the final days of the Bush Administration. These figures are only slightly up from those in 1998.

1. **Are major rulemakings a uniquely democratic issue, or do they occur evenly across both administrations?**

2. **How have these figures changed over time?**

3. **Has there been a major upswing in major rulemakings under the Obama Administration? If so, is this attributable to a few pieces of landmark legislation like Dodd-Frank?**

As the phrasing of the question suggests, major rulemakings occur in both Republican and Democratic administrations. A report by the Congressional Research Service on this precise topic elaborates:

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[23] *Id.* at 947-48.
[24] *Id.* at 949-50.

> . . . GAO's federal rules database indicates that the number of major final rules has been at or above 50 in every full calendar year since the CRA was enacted in March 1996, and the number of major rules first exceeded 80 during the last calendar year of the George W. Bush Administration, when federal agencies issued 95 major rules. The number of major rules fell somewhat in 2009, the first year of the Obama Administration (to 84), but 11 of those rules appear to have been issued during the final days of the Bush Administration. In 2010, federal agencies published 100 major rules.[25]

Reference to the same database[26] reveals these figures for the years subsequent to the CRS study: for 2011, 80 major rules; for 2012, 67 major rules; and for the first three months of 2013, 19 major rules (which would be 76 major rules on an annualized basis). Thus, the "major upswing" argument finds no support in these data.

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[25] Curtis W. Copeland & Maeve P. Carey, *REINS Act: Number and Types of "Major Rules" in Recent Years*, Cong. Research Serv. R41651 (Feb. 24, 2011), at 25, http://www.speaker.gov/sites/speaker.house.gov/files/UploadedFiles/110830_crs_majorrules.pdf.

[26] GAO, Congressional Review Act Reports, http://www.gao.gov/legal/congressact/fedrule.html.