Administrative Law & Regulation

REINING in the Agencies: Oversight of Executive Branch Rulemaking in the 21st Century

*By Alec D. Rogers**

Note from the Editor:

This article critiques current procedures for agency rulemaking and proposes an alternative. The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

• Ian Millhiser, *The Little-Noticed Conservative Plan To Permanently Lock Democrats Out Of Policymaking*, Think Progress (Nov. 16, 2015), *available at* http://thinkprogress.org/justice/2015/11/16/3722395/the-little-noticed-conservative-plan-to-permanently-lock-democrats-out-of-policymaking/.

• Press Release, *Science Leaders Decry Congressional Attacks on Science-Based Policy*, Union of Concerned Scientists (May 29, 2015), *available at* http://www.ucsusa.org/news/press_release/Congressional-attacks-on-science-0498#.Vk44Q_mrSM8.

• Elliot Negin, *Industry-Funded Lawmakers Target Public Health and Environmental Protections*, Huffington Post Blog (June 11, 2015), *available at* http://www.huffingtonpost.com/elliott-negin/industry-funded-lawmakers_b_7556454.html.

• Executive Office of the President, Office of Management and Budget, *Statement of Administration Policy: H.R. 367—Regulations From the Executive in Need of Scrutiny Act of 2013* (July 31, 2013), *available at* https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saphr367r_20130731.pdf.

• Clyde Wayne Crews Jr., *The Problem With The White House Threat To Veto The REINS Act*, Forbes (July 28, 2015), *available at* http://www.forbes.com/sites/waynecrews/2015/07/28/the-problem-with-the-white-house-threat-to-veto-the-reins-act/.

I. Introduction

The lack of Congressional oversight of the regulatory process is a problem of long standing. Agency-crafted regulations have increasingly pushed aside congressionally authored statutes in scope and importance, much as statutes once pushed aside the common law.[1] This development is problematic in a country that claims democratic governance, as regulators are unelected and unaccountable to the people except insofar as their representatives are able and willing to exercise effective oversight.[2] In addition to the problem of democratic legitimacy, the separation of regulatory authority from democratic responsibility can lead to bad rulemaking.[3]

As regulations have played an increasingly important role in the lives of Americans, conventions for overseeing them and checking excesses have fallen by the wayside. In 1983, a key device for congressional oversight, the so-called legislative veto, was struck down by the Supreme Court in the landmark separation of powers ruling *INS v. Chadha*.[4] This method whereby delegations by Congress of rulemaking authority to the executive were accompanied by mechanisms allowing for one or both houses of Congress to reverse particular exercises of such authority was held to violate the Constitution's clauses regarding bicameralism and presentment.[5]

The removal of the legislative veto left Congress in a bind. It could stop delegating its significant rulemaking power, thus preserving its authority over the rules that govern the American people. Or it could continue to delegate this authority, thus preserving the federal government's large and growing role in American society, even in matters of increasing complexity. Other less precise devices to control the agencies remained, such as the power of oversight and the power of the purse. And, of course, Congress could always change laws to override bad regulations, or even cut off funding for their enforcement. But they lacked the veto's precision and efficiency.

In recent years, some in Congress have sought new controls over the regulatory process. One fairly common state practice is to empower a joint legislative committee to exercise regulatory oversight and approval authority over regulations. A few state constitutions provide for the committee to exercise a veto over rules.[6] While such a body at the federal level would likely run afoul of *Chadha,* some have proposed arguably constitutional methods by which Congress could exercise similar authority, such as by requiring further legislation to give significant regulations legal effect.[7] In the mid-1990s, several members of Congress proposed legislation along these lines.[8] The underlying concept—that significant regulations could be denied legal effect until Congress enacts legislation explicitly allowing it—has resurfaced in recent years and is currently back on Congress's agenda.

This article will discuss the failure of past judicial and congressional doctrines and devices to provide oversight of the executive's rulemaking, the current proposals, and the arguments that have been put forth on both sides. It will close with

** Alec Rogers is the Manager of Government Policy at Xerox Corporation. B.A. James Madison College at Michigan State University, 1990; J.D. University of Michigan, 1993. Full disclosure: I was Legislative Director to Congressman Nick Smith when he introduced H.R. 2990, a forerunner of the REINS Act, drafting the bill and the arguments in favor that appeared in the Harvard Journal on Legislation. Any views expressed are solely my own.*

a modest suggestion for how Congress might move forward in trying to restore meaningful oversight.

II. Judicial Oversight

Although 21st century Americans take executive rulemaking authority for granted, it was not always clear that it was constitutional. The Constitution, on behalf of "We the People," vests "all legislative powers" in Congress.[9] That Congress can delegate its legislative authority to executive departments is not explicit in the Constitution's text, but it has been done since the beginning of the Republic. While the "non-delegation doctrine" places theoretical limits on Congress's ability to devolve its legislative authority to administrative agencies, the evolution of the doctrine indicates that the Supreme Court has largely given up trying to place practical limits on delegation.

In 1825, the Supreme Court was presented with the question of whether state or federal law should govern procedures regarding the writ of executions on judgments emanating from federal courts.[10] Counsel for defendants against whom the writs had been executed had argued that congressionally enacted statutes providing for the federal courts to regulate the issuance of such writs constituted a constitutionally impermissible delegation of legislative power to the courts. Congress, not the federal courts, would need to create these rules. In the absence of its exercise of such authority, there was no federal law on point, and therefore state law should trump federal law.

Chief Justice John Marshall, speaking for a unanimous court, found that Congress "may certainly delegate to others, powers which the legislature may rightfully execute itself," even though it could not delegate "strictly and exclusively legislative powers".[11] Perhaps some powers were not delegable, he reasoned, but merely possessing the constitutional authority to make rules (such as it had done for courts) did not preclude the possibility of delegating rulemaking authority. They needed to draw a line "which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details."[12]

Marshall understood that differentiating between "important subjects" and "general provisions, to fill up the details" could pose a difficult task, and cautioned that the Court would take a limited role in policing Congress's delegation of authority:

> The difference between the departments undoubtedly is that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter into unnecessarily.[13]

Subsequent courts would heed Marshall's advice. In the 1928 case of *J.W. Hampton, Jr. & Co v. U.S.*, the Supreme Court upheld a statute allowing the president to adjust tariff rates within certain bounds as he saw fit to "equalize the... differences in costs of production in the United States and the principal competing country."[14] Chief Justice William Howard Taft's opinion laid down the "intelligible principle" doctrine. So long as there was "an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[15] Taft's formulation is still black letter law.[16]

Seven years later, the Supreme Court struck down two New Deal programs under the "intelligible principle" standard. In *Panama Refining Co. v. Ryan*, the Court struck down a key portion of the National Industrial Recovery Act (NIRA) that permitted the president to establish trade quotas, but did not establish guidance on this grant of authority.[17] In the same term, *A.L.A. Schechter Poultry v. U.S.* invalidated another key provision of the NIRA that provided for the president to adopt privately drafted "codes of conduct" in certain industries and give them the force of law.[18] These were not the decisions of a bitterly divided Court. Only Justice Benjamin Cardozo dissented in *Panama Refining*, but even he viewed the scheme in *Schechter* as "delegation run riot" and joined with his brethren.[19]

The non-delegation doctrine had found a little life, but it would not last. The last time the Supreme Court held a statute unconstitutional on non-delegation grounds was in 1935. Since then, the Court has heard several challenges to statutes on non-delegation grounds, but it has upheld them even with only vague standards guiding the use of power.[20] By 2001, the Court had so retreated from the vigorous application of the non-delegation doctrine that it found the delegation of clean air rules "requisite to protect the public health" with "an adequate margin of safety" had a satisfactorily intelligible principle in *Whitman v. American Trucking*.[21]

As the Supreme Court has reduced the importance of the non-delegation doctrine as a judicial check on executive rulemaking, the Administrative Procedure Act (APA) has arisen in its place, with a focus on due process in administrative rule making. Enacted in 1946, this statutory accord between the executive and legislative branches has changed the role of the courts from determining whether regulations are substantively constitutional to ensuring that their promulgation satisfies procedural requirements. The APA requires, among other things, adequate notice of rulemaking to the public with an opportunity for public comment, publication of the rulemaking record to ensure that comments are considered, and a judicially administrable system to oversee the process. [22] The APA does not limit the promulgation of rules themselves.

III. Congressional Oversight

A. The Legislative Veto

Congress has sought to counter the deleterious effects of delegation through a wide variety of means. From the 1930s to the 1980s, it enacted numerous provisions that allowed it to overturn an executive branch action via legislative action without presidential consent. Over 300 statutes provided for some form of these "legislative vetoes."[23]

As noted above, however, the use of legislative vetoes ended after the *Chadha* case in 1983. Examining a legislative veto that allowed one house of Congress to block a decision by the Attorney General not to deport an alien, the Supreme Court held that all legislative vetoes—not just one-house ones—were unconstitutional.[24] Writing for the Court, Chief Justice Warren Burger noted that the Constitution's provisions on bicameral-

ism and presentment[25] required that laws pass both houses of Congress and be signed by the president.[26] Blocking the decision to suspend the deportation of Chadha would have the "purpose and effect of altering the legal rights, duties, and relations of persons," which Congress could not do except through the constitutionally prescribed mechanism of lawmaking.

The disappearance of a binding legislative veto created concerns for a Congress wary of delegating broad authority to the executive branch without some sort of guarantee that its intent would be honored in the execution of that authority. One solution was to draft conference reports accompanying legislation indicating where agencies had agreed to honor committee votes as a matter of accord, even though not legally bound.[27] As constitutional scholar Lou Fisher put it, such arrangements "are not legal in effect. They are, however, in effect legal."[28] So long as comity between the branches held, such an informal substitute could help alleviate concerns.

B. The Congressional Review Act

These "gentleman's agreements" of the post-*Chadha* era, however, have not satisfied partisans of a later era. Thirteen years after *Chadha*, Congress enacted the Congressional Review Act (CRA).[29] The CRA provides a mechanism for Congress to block significant regulations from taking effect in a manner consistent with the presentment clause. To do so, each house must pass a resolution of disapproval and the president must sign it (thereby blocking his or her own administration's regulation) or Congress must override his veto. The onus is on Congress to initiate the process.

Since its 1996 enactment, the CRA has seen little use. It has successfully stopped only one regulation that was promulgated at the end of the Clinton presidency but that, due to the CRA's provisions delaying the effective date of major regulations, would not take effect until the early days of President George W. Bush's presidency. The change in executive allowed the Republican Congress to block the regulation from taking effect, which saved the Bush administration the trouble of repealing it. The single success of the CRA in such an odd factual setting illustrates its limited usefulness in stopping regulations. But Congress should arguably make wider use of the CRA to flag onerous regulations, facilitate debate over them, and rally opposition to them within Congress.[30]

IV. The REINS Act

The most recent attempt by Congress to deal with the growth in administrative government is known as the "Regulations from the Executive in Need of Scrutiny Act" or REINS.[31] Premised on the notion that "[o]ver 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," REINS seeks to restore accountability and transparency by subjecting regulations to a vote of congressional approval before they take effect.[32]

REINS begins by requiring agencies to submit all rules to Congress, along with an analysis and conclusion as to whether and why the rule constitutes a "major rule." Interestingly, a "list of other related regulatory actions intended to implement the same statutory provision or regulatory objective" must be included as well; presumably, this would include any guidance, interpretations, and similar supplements.[33] Non-major rules would take effect upon submission, but major rules would not take effect until a joint resolution of approval was enacted into law. If Congress does not act on a major rule within 70 days, it would be deemed "not approved" and would not take effect. There is an exception where the president makes a determination that failure to enact the rule would imperil health, safety, or national security or would undermine the enforcement of a criminal law or violate a trade treaty (in which case the regulation would take effect for a 90-day non-renewable period).

Congress would consider resolutions of approval in accordance with "fast track" procedures—including brief time tables and prohibitions on amendment—forcing Congress to take a quick "up or down" vote on approving the regulation. Therefore, consideration of such rules would not be subject to a filibuster or the numerous devices available for delaying consideration, nor could the proposed rules be altered. The committee process would not be skipped entirely, but the roles of committees with appropriate jurisdiction would be significantly curtailed.

In the case of non-major rules, the presumption would be reversed. Congress could use fast track procedures to vote a resolution of disapproval blocking it from taking effect. Failing to do so, however, the non-major rule would take effect within 60 days of its being reported to each house of Congress.

For major and non-major rules alike, the device being used is the joint resolution. Not to be confused with the concurrent resolution, a joint resolution must, like a bill, pass each house of Congress in identical form and be signed by the president to take effect. In short, the president would be part of the process in either case. He or she would, of course, almost assuredly sign joint resolutions approving major rules.

Judicial review has only a limited role under REINS. It would amend 5 U.S.C. § 805 to read: "No determination, funding, action or omission under this chapter shall be subject to judicial review."[34] However, a court would be allowed to determine "whether a federal agency has completed the necessary requirements under this chapter for a rule to take effect."[35] It is not clear whether an agency's failure to properly classify a rule as major, probably the most important failure it could make in this scheme, would fall under this exception.

A. Arguments in Favor of the REINS Act

Supporters of the REINS Act point out the increasing role that regulations play in governing our lives and imposing hidden costs.[36] Even granting that these regulations have benefits as well as costs, and perhaps even more benefits than costs, Congress still needs to ensure that regulations accurately reflect its intent. Courts help ensure that the processes laid out by Congress are followed when regulations are created. Yet "judicial review does not delve into the policy choices agencies make—nor should it. Whether a given agency is following the best course is ultimately a decision for the political branches."[37] Courts will defer to an agency's interpretation of a statute so long as it is reasonable.[38]

Supporters argue that current processes are failing to achieve constitutionally adequate Congressional oversight. While the CRA can highlight regulations run amok, it can

only stop the regulation where there is a two-thirds majority in both houses of Congress. The legislative veto option has been foreclosed by the Supreme Court.

The increasingly broken appropriations process provides another impetus for REINS. Under normal appropriations procedures, Congress enacts twelve bills to fund the activities of U.S. government agencies. These bills sometimes contain provisions barring funding for enforcing regulations Congress believes are unlawful. In recent years, however, the congressional appropriations process has broken down to the point where all of the agencies will often be funded by a single bill. This provides fewer opportunities for amendments, and any controversial amendments that might provoke a veto will shut down the entire U.S. government. It appears unreasonable, then, to attach amendments pertaining to individual regulations.

In sum, given the increasing role of regulations and the weakening of tools for Congress to oversee their promulgation, Congress needs to approve important regulations before they take effect.

B. Arguments Against the REINS Act

Opponents of the REINS Act raise concerns regarding its impact on the administrative state as well as its constitutional viability. They condemn it as poorly tailored to the problems it is attempting to solve and warn that it will not only harm the "economy and society at large" but "fundamentally chang[e] the constitutional structure of our government."[39] In their view, proponents cite an overly broad estimate of the costs of regulations, while failing to account for their benefits.[40] At the same time, critics contend, many regulations are non-controversial despite their status as "major regulations."

Critics further charge that supporters ignore the many checks built into the regulatory process, such as the parameters of the authorizing statute, the Administrative Procedure Act, and other statutes that put in place procedural hurdles for agencies.[41] Finally, Executive Order 12866 imposes internal criteria for regulatory development within the executive branch. At the end of the process stands the judiciary ready to thwart regulations that fail to meet the many pre-existing legal requirements for rule makers. These many safeguards render the REINS Act unnecessary, they say. Meanwhile, many rules that are actually eagerly awaited by program participants or vital to the public's health and safety may be needlessly delayed by a Congress where floor time is a precious commodity and the pace is ponderous.

Critics contend that it is the REINS Act itself that would "constitute a dramatic alteration of our constitutional order."[42] Constitutional concerns include the Constitution's general structure, which assigns the regulatory task to the executive as a means of enforcing congressionally enacted statutes. Where Congress chooses to "prescribe regulatory obligations very specifically," the executive is bound. When it writes more open ended programmatic statutes, it is the job of the executive to fill in the details in a "reasoned fashion."[43] Further, the Supreme Court's ruling in *Chadha* that an executive decision could not be vetoed by an act of one house of Congress poses more constitutional problems for REINS. The REINS Act would, in effect, subject the executive's regulatory function to the same sort of one-house veto. REINS represents old wine is new bottles in this regard, and the same concerns that drove the Court to invalidate the one-house veto in *Chadha* will not be overcome by REINS' "superficially different format."[44]

At the end of the day, the REINS Act could change thousands of long standing regulatory regimes that have been in place for decades, empowering one branch of government over another, an indicia of suspicion noted by Chief Justice Rehnquist in *Morrison v. Olson.*[45] Another criteria identified in *Morrison*, the ability of the executive to exercise his constitutionally appointed function (i.e. taking care that the laws be faithfully executed), would also be undermined by REINS. Congress's ability to approve regulations is therefore suspect just as a law requiring that Congress approve a prosecution would be.

V. Conclusions and a Proposal

The REINS Act has no chance of enactment in the current political environment. Perhaps no president would support legislation that would reduce his or her leverage over the lawmaking process. It is good to see Members of Congress taking seriously the impact that regulations can have both for good and ill and asserting their responsibility to ensure that executive branch rulemaking is consistent with congressional intent.

The constitutional arguments against the REINS Act do not hold up under scrutiny. Critics concede that Congress could legislate to the nth degree of granularity,[46] but they nevertheless maintain that the constitutional order is somehow disturbed if rulemaking power is conditioned upon subsequent congressional action because this puts form over substance in evading *Chadha*. Yet it elevates form over substance to suggest that Congress has plenary authority to legislate, but only if it places the details in the U.S. Code before, rather than after, rulemaking takes place.

Until there is an administration open to the enactment of such a "fast track" regime for approval of regulations, Congress should institute reforms at its own end of Pennsylvania Avenue. This would include drafting more detailed bills that leave less policymaking discretion in the hands of the executive branch. Congress could also place a REINS-like provision in a single bill granting rulemaking authority exercised pursuant to it subject to congressional review. Limited to one law, this would be more difficult to veto, and perhaps less tempting given its narrow scope. It would also allow us to see whether Congress could handle the responsibilities that a REINS regime would entail.

To again quote Lou Fisher: "Congress will remain a power in shared administration… We should not be too surprised or disconcerted if after the Court has closed the door to the legislative veto, we hear a number of windows being raised."[47] REINS constitutes a highly transparent window through which Congress can reengage with the executive to ensure that the laws are faithfully implemented in accord with its intentions. But Congress will need to demonstrate that it has the capacity and good faith as well. Enacting a REINS-like procedure particular to the rulemaking authority in a statute could serve to rebuild trust and confidence in both branches of government in a polarized time.

Endnotes

1 *See generally* Guido Calabresi, A Common Law for the Age of Statutes

(1982). Regulatory activity as measured by the pages in the Federal Register has increased from just under 11,000 pages per year in the 1950s to just over 73,000 pages per year in the first decade of the 21st century. Written testimony of Jonathan H. Adler before the House Subcommittee on Courts, Commercial and Administrative Law, at 2 (January 24, 2011), *available at* http://judiciary.house.gov/_files/hearings/pdf/Adler01242011.pdf.

2 One estimate pegs the compliance costs of regulations at over $1 trillion annually, greater than the amount paid in individual income tax. Adler testimony, *supra* note 1 at 2.

3 For example, Congress would not dream of delegating authority to significantly alter individual tax liability to the Internal Revenue Service, but it often delegates authority over regulatory compliance costs. One possible reason for this is that people are acutely aware of how much they pay in income taxes, while they are largely oblivious to costs imposed by regulation. This points to the need for even greater protection of when it comes to regulatory burdens.

4 462 U.S. 919 (1983).

5 Chadha, 419 U.S. at 959.

6 For example, Washington State provides at RCS § 34.05.610 et. seq. for a legislative committee that has the power to recommend that rules not in accord with legislative intent or in compliance with applicable procedures be suspended, but the governor retains ultimate authority. Many states have similar bodies with some degree of power to force reconsideration of rules. In a few states, the committee can even halt them all together. *See* Kenneth D. Dean, *Legislative Veto of Administrative Rules in Missouri: A Constitutional Virus,* 57 Mo. L. Rev. 1157 *et. seq*. (1992).

7 *See, e.g.*, Stephen Breyer, *The Legislative Veto After Chadha*, 72 Geo. L.J. 785 (1984).

8 *See, e.g.*, H.R. 2727, H.R. 2990.

9 U.S. Const. art. 1, § 1.

10 Wayman v. Southard, 23 U.S. 1 (1825).

11 *Id.* at 43.

12 *Id.*

13 *Id.* at 46.

14 J.W. Hampton, Jr. & Co. v. U.S., 276 U.S. 394, 401 (1928).

15 Hampton, 276 U.S. at 409.

16 Douglas Ginsberg, *Legislative Powers: Not Yours to Give Away*, Heritage Foundation Report (Jan. 6, 2011), *available at* http://www.heritage.org/research/reports/2011/01/legislative-powers-not-yours-to-give-away. By that time even such vague phrases such as "in the public interest" or "for the public convenience" had been upheld. Lou Fisher, Constitutional Conflicts Between Congress and the President 91 (1997).

17 Panama Refining v. Ryan, 293 U.S. 388 (1935).

18 Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

19 *Id.* at 553.

20 *See, e.g.*, Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980); Mistretta v. U.S, 448 U.S. 361 (1989).

21 427 U.S. 426 (2001).

22 5 U.S.C. § 551 *et. seq*.

23 Adler testimony, *supra* note 1 at 5.

24 Chadha, 462 U.S. at 974 (White, J., dissenting).

25 U.S. Const. art 1, § 7.

26 Chadha, 468 U.S. at 958.

27 Fisher, *supra* note 16 at 157.

28 *Id.* at 158.

29 5 U.S.C. § 801, *et seq*.

30 Kevin Kosar, *Three Steps in Reasserting Congress in Regulatory Policy*, R Street Policy Study at 6.

31 The REINS Act has been introduced in various iterations in both chambers since 2010. The current version introduced in the House during the 114th Congress by Representative Todd Young (R-Indiana), H.R. 427, will be used for purposes of this article. Previous iterations include H.R. 10 in the 112th Congress, which passed the House but was never considered in the Senate. In the 113th Congress, it was H.R. 367 and also passed in the House. As of publication, H.R. 427 has been reported out of the House Judiciary Committee and awaits consideration in the House. A Senate companion, S. 226, introduced by Senator Rand Paul (R-Kentucky), remains in the Senate Committee on Homeland Security and Governmental Affairs to which it was referred upon introduction.

32 H.R. 427 § 2.

33 H.R. 427 § 3.

34 H.R. 227 § 3.

35 *Id.*

36 Adler testimony, *supra* note 1 at 2-3.

37 *Id.* at 3.

38 Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

39 Written testimony of Sally Katzen before the House Subcommittee on Regulatory Reform, Commercial and Administrative Law (January 24, 2011), *available at* http://judiciary.house.gov/_files/hearings/pdf/Katzen01242011.pdf.

40 *Id.* at 3.

41 For example, see the Congressional Review Act, the Unfunded Mandates Reform Act, the Regulatory Flexibility Act, and the Small Business Regulatory Fairness Act.

42 Written testimony of Ronald Levin before the House Subcommittee on Regulatory Reform, Commercial and Administrative Law, at 2 (March 5, 2013), *available at* http://judiciary.house.gov/_files/hearings/113th/03052013_3/Levin%2003052013.pdf.

43 *Id.*

44 *Id.* at 8.

45 487 U.S. 654 (1988).

46 Levin testimony, *supra* note 42 at 2.

47 Fisher, *supra* note 16 at 159.