Senator Rand Paul
Testimony before the Senate Committee on Homeland Security & Governmental Affairs
Federal Regulation: A Review of Legislative Proposals

June 23, 2011

Good morning. Chairman Lieberman and Ranking Member Collins, I appreciate the opportunity to speak for a few minutes this morning about the issue of federal regulations.

The regulatory burden in this country is immense. One study, commissioned by President Obama's Small Business Administration, recently estimated the annual cost of regulations to be $1.75 trillion, annually.[1] To put that number in context, $1.75 trillion is nearly twice the amount of all individual income taxes collected last year.[2] Businesses with 500 employees or more now pay $7,775 per year to comply with federal regulations.[3] For businesses with fewer than 20 employees, that number jumps to $10,585 per employee.[4] Each household pays, on average, $15,586 to comply with the regulatory burden.[5] It is worth noting that these assessments were done *without* taking into consideration the approximately 370 new regulations that will result from the health care overhaul and Dodd-Frank.[6]

This tangle of regulations has gotten so bad that in a meeting with manufacturing executives, President Obama's Chief of Staff, William Daley, could offer no comforting words except to tell these executives whose businesses have been stymied and stalled that, "sometimes you can't defend the indefensible."[7]

It is clear that regulations in this country have gotten out of hand. I am here today to talk about my proposal to address this issue, the Regulations from the Executive in Need of Scrutiny Act of 2011, or the REINS Act, which has also been introduced in the House by my fellow Kentuckian, Congressman Geoff Davis. The central provision of the REINS Act provides that new, major regulations – those with an economic impact of $100 million or more – cannot take effect unless Congress and the President approve them first.

This morning I'd like to focus on two fundamental aspects of regulatory reform that the REINS Act achieves. The first is to give Congress the ability to review regulations for their adherence to what Congress intended when they first directed the regulation to be created. The second and more important goal that the REINS Act achieves is to return accountability for regulatory decisions to where it belongs – elected lawmakers.

---

[1] Nicole V. Crain & W. Mark Crain, *The Impact of Regulatory Costs on Small Firms,* report prepared for the SBA (Sept. 2010) (available at http://www.sba.gov/advo/research/rs371tot.pdf).
[2] See Council of Economic Advisers, Economic Report of the President tbl. B-81, at 426 (2010); *see also* James L. Gattuso et al., *Red Tape Rising,* Heritage Foundation Backgrounder No. 2482, (Oct. 26, 2010).
[3] *See* Clyde Wayne Crews, *Ten Thousand Commandments: A Snapshot of the Federal Regulatory State*, (2011 edition), at 8.
[4] Id.
[5] *See* Crain and Crain, *supra* note 1.
[6] Estimate provided by the Congressional Research Service.
[7] Peter Wallsten & Jia Lynn Yang, *White House's Daley seeks balance in outreach meeting with manufacturers,* WASH. POST, (June 16 2011).

Over-delegation of authority

The last century has seen an unprecedented amount of authority delegated to agencies by Congress, at the expense of their ability to review how that authority is exercised.

For example, between passage of Dodd-Frank and the Patient Protection and Affordable Care Act, the 111th Congress authorized approximately 370 rulemakings. That is major and controversial legislative action that Congress has delegated to a specified number of agencies, without the requirement to ever review it for accuracy or adherence to Congressional guidelines. While judicial review may ensure that the agencies play by their statutory guidelines, it does not scrutinize policy choices for alignment with contemporary priorities or Congressional intent. This is the role for Congress, but one which Congress lacks the mechanism to fulfill.

The need for a Congressional review mechanism is obvious. There is plenty of evidence to suggest that agencies frequently overstep their statutory mandates and regulate in a way that is inconsistent with what Congress intended. Even more dangerously, recent initiatives suggest that in the absence of specifically delegated statutory authority, agencies will create out of thin air an entirely new authority for themselves, twisted out of some previously delegated, non-specific mandate for the purposes of doing an end-run around Congress. The following are examples of agency regulations or guidance documents put forward in the last two years that are in direct violation of Congressional intent. In short form, they are:

- *Greenhouse Gas Regulations*; Congressman John Dingell, one of the authors of the Clean Air Act, stated that "the Clean Air Act was not designed to regulate greenhouse gases, as the then-Chairman of the House Energy and Commerce Committee I know what was intended when I wrote the legislation. I have said from the beginning that such regulation will result in a glorious mess and regulation of greenhouse gas emissions should be left to Congress."[8]
- *The Grain Inspection, Packers & Stockyards Administration (GIPSA) Rule*; This rule will fundamentally alter the market rules for the sale of poultry and livestock in this country. Over 120 Members of Congress have signed letters to the Department affirmatively stating that this rule represents a drastic overstep of what Congress directed the agency to develop in the 2008 Farm Bill.[9]
- *EPA Jurisdictional Guidance for the Implementation of the Clean Water Act*; This guidance will expand federal government jurisdiction over water and land that is currently regulated by the states. The text of the guidance is almost exactly the same as the *Clean Water Restoration Act,* which was introduced in the 111th Congress, and which Congress refused to pass. The EPA decided to regulate anyway.[10]

---

[8] Press Release, Rep. John D. Dingell, Dingell on EPA Action Concerning Greenhouse Gases (Dec. 7, 2009) (available at http://dingell.house.gov/news/press-releases/2009/12/091207EPAGreenhouseGases.html).

[9] Letter from American Meat Institute to Rep. Darrell Issa (January 3, 2011) (on file with House Committee on Oversight & Government Reform).

[10] Letter from Sen. John Barrasso et al., to Adm'x. Lisa Jackson, EPA (May 27, 2011) (available at http://barrasso.senate.gov (follow "News Releases" hyperlink under "Newsroom"; then follow "Barrasso, Senators Oppose EPA Takeover of Private Water" hyperlink)).

- *Network Neutrality*; In perhaps the most blatant and dangerous subversion of Congressional intent to date, the FCC has promulgated this regulation despite the fact that Congress has failed to pass this as legislation upon three separate introductions, and one vote in which the concept was rejected in the House by a vote of 269 to 152.[11] Even more appalling is the fact that the FCC promulgated this rule in the face of an appeals court ruling in which the court unanimously and authoritatively stated that the FCC did not have the right to engage in Internet regulation.[12] Despite these stinging rebukes from the courts and Congress, FCC Chairman Julius Genachowski stated he would find a way to regulate anyway.[13]

When agencies will not be constrained by either the legislative or judicial branch, it is clear that their authority has exceeded Constitutional intent and now constitutes a shadowy and unrestrained Fourth Branch of government. However, Congress has limited means to combat agencies like the FCC, who are bent on regulating in the face of all opposition. Rather than wielding the power of one branch of government against regulations that are clearly subversions of original intent, Members of Congress are reduced to writing letters and strongly worded press releases to voice their displeasure with what has become a frequent abuse of authority by unelected agency bureaucrats. This is a dangerous imbalance that the REINS Act will correct.

Restoring accountability

The most important thing that the REINS Act accomplishes is to bring transparency and accountability back into the legislative process. As then-judge Stephen Breyer explained in a 1984 lecture in which he advocated for a REINS-style system, requiring congressional authorization of regulations "imposes on Congress a degree of visible responsibility" for new regulatory initiatives.[14]

Members of Congress are known as lawmakers precisely because it is their job to make the law. And while all statutes are still generated by Congress, the actual substance of the law is now routinely made by regulatory agencies. This has allowed Congress to game the system. On one hand, we can pass a measure like Dodd-Frank and take credit for protecting Americans from the excesses of the financial system, while on the other we can chastise the agencies for writing and implementing the burdensome regulatory directives that we ordered created. The regulatory process has become a handy shield for legislators to pat themselves on the back while pushing off unpopular policy decisions to regulatory agencies. John Quarles, EPA's first general counsel, noted this distinction, remarking that the regulatory system Congress has designed for itself provides "a handy set of mirrors – so useful in Washington – by which a politician can appear to kiss both sides of the apple."[15]

---

[11] "Advanced Telecommunications and Opportunities Reform Act: Roll Vote No. 239." *Congressional Record* 152:72 (June 8, 2006) p. H3583.
[12] *Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).
[13] Edward Wyatt, *U.S. Court Curbs F.C.C. Authority on Web Traffic,* N.Y. TIMES, Apr. 6, 2010, at A1.
[14] Stephen Breyer, *The Legislative Veto After* Chadha, 72 GEO. L.J. 785, 793-96 (1984).
[15] H.R. Rep. No. 410, pt 2, at 71 (1979) (dissenting view of Rep. Corcoran).

The ability of elected legislators to shift responsibility to agencies may be a win for Congress, but it is a loss for the people who elected them. This open-ended delegation of authority shields elected officials from the weightiest mantle of elected office – the accountability that comes with actually making the law. Americans deserve elected officials with enough courage and conviction to vote for a statute and all of its regulatory directives. President-elect Hoover made the same point when he argued against the Congressional delegation of tariff authority in 1929:

> "Our people have a right to express themselves at the ballot on so vital a question as this. There is only one commission to which delegation of that authority can be made. That is the great commission of their own choosing, the Congress of the United States and the President. This is the only commission which can be held responsible to the electorate."[16]

The REINS Act is not anti-regulatory, it is not about regulation bashing or about haranguing individual agency actions. At its crux, REINS simply represents good government – where elected representatives vote openly and transparently for major regulatory initiatives, and take accountability for decisions impacting our economic future.

As a means of more fully addressing the substance of the REINS Act, and hopefully also to preempt some questions that will follow this testimony, I'd like to use the remainder of my time to respond to some of the frequently cited criticisms of the bill:

The REINS Act and the Constitution

Critics of the REINS Act claim it imposes unconstitutional constraints on executive power, particularly the executive's responsibility to execute and enforce federal laws. This objection is based on confusion about the nature of executive power. To summarize law professor Jonathan Adler's distinction: the power to enforce laws – that is, to see that rules are complied with – is different from the power to make rules using authority delegated from Congress. So, for instance, the EPA's power to impose fines or other sanctions on companies for violating emissions limits is distinct from the agency's ability to set the emission limits themselves. The REINS Act would have an impact on agency action by requiring approval of final rules, but would have no impact on the ability of the President or his agencies to enforce the law once it has been enacted.[17]

It should also be noted that the power to adopt legislative-type rules, as agencies do, is not a core executive function. Rather, Article I, section I of the Constitution vests all legislative power in the Congress, to delegate as necessary, but within limits. As has been stressed by the courts multiple times, an agency

[16] With our Readers, 13 Const. Rev. 100, 100 (1929) (citing Hoover's speech of Oct. 15, 1929).
[17] Jonathan H. Adler, *Reflections on the REINS Act Hearing,* THE VOLOKH CONSPIRACY (Jan. 27, 2011, 11:20 AM), http://volokh.com/2011/01/27/reflections-on-the-reins-act-hearing/.

can do only "what Congress has said it can do."[18] Federal agencies have no inherent authority to promulgate regulations beyond what has been given by Congress. And what Congress has given, it may take back.

Finally, a frequently cited argument against REINS is that it constitutes a legislative veto – and by doing so, violates the principles of bicameralism and presentment required by the Constitution. This is incorrect. First, it must be noted that the REINS Act provides for the enactment of a joint resolution in the constitutionally required way: passage by both Houses of Congress and presentment to the President. Furthermore, because major rules could not be finalized after passage of the REINS Act without congressional consent, the REINS Act would not be used to veto or repeal any final executive regulation, or affirmative action. By empowering an agency to implement a rule that would otherwise be unauthorized, the resolution is "essentially legislative in purpose and effect," therefore distinguishing itself from the legislative veto that the Supreme Court found to be unconstitutional in *I.N.S. v. Chadha*,[19] and satisfying the additional requirement laid out in *Bowsher v. Synar* that Congress "pass new legislation" in order to "control the execution" of old legislation.[20]

Indeed, the very concept of the REINS Act was first outlined by then-Judge Stephen Breyer as a constitutional replacement for the legislative veto struck down in *Chadha*. As Breyer explained, the Congress could make new rules ineffective "unless Congress enacts a confirmatory law" within a set time frame.[21] According to Breyer's interpretation, it was completely consistent with the Constitution to hold the legal effect of exercises of delegated authority contingent upon the "subsequent enactment of a confirmatory statute."[22]

Congressional Workload

During the 111th Congress, agencies promulgated 126 final rules, which would have required Congressional action if the REINS Act was in place. During that same period of time, Congress enacted 70 public laws naming post offices, considered 279 bills using the word "congratulates," 74 using the word "commends," and 356 using the word "honoring." The REINS Act would simply require Congress to shift its attention from passing symbolic legislation and to focus on taking responsibility for regulations that bind and protect Americans. Further, as I will explain later, the bill provides for expedited consideration of approval of regulations in the Senate and the House.

---

[18] *CAB v. Delta Air Lines, Inc*., 367 U.S. 316, 322 (1961); *see also La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."); *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1998) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").

[19] *INS v. Chadha*, 462 U.S. 919 (1983).

[20] *Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986).

[21] Breyer, *supra* note 14, at 789.

[22] Id. at 793.

Congressional Expertise

The REINS Act does not materially change the agency's role as the technical expert in the drafting of complex regulations. The agency would still be responsible for creating a record in support of a regulation and for evaluating its impact. Further, once Congress approves the regulation, the agency still takes the lead in implementation of and compliance with the rule. REINS would simply require elected lawmakers to take responsibility for the adoption of these rules which were drafted at the behest of the statute they originally passed.

The REINS Act and Finalizing Regulations

The REINS Act, as law professor David Schoenbrod noted in his recent testimony before the House Judiciary Committee, is "pro-accountability rather than anti-regulation."[23] Indeed, if agencies are discharging their duties in a reasonable manner, then the controls of the REINS Act will have little effect. If the public requests regulations or believes more regulations are necessary, then requiring a resolution of approval will not stand in the way. In fact, the REINS Act would serve to enhance the legitimacy of those regulations by demonstrating that such initiatives have the support of both the legislative and the executive branches.

It should also be noted that the REINS Act contains procedures for expedited consideration in the House and Senate. Particularly in the Senate, no resolution of approval would be subject to holds or filibusters. The bill ensures that each rule would be subject to a straight up or down vote on the floor of each body.

The REINS Act provides a means of curbing excessive or unwarranted regulation, but its ultimate goal is to restore balance to the regulatory process and to return accountability to where it belongs – in Congress. This legislation will hold elected representatives to a higher standard by demanding that we take a stand on major regulatory initiatives, cast our votes in the open, and be held accountable for the decisions that will affect our economic future. Similarly, it will empower us to ensure that agency actions are consistent with Congressional intent and contemporary priorities.

Thank you for the opportunity to discuss the REINS Act this morning.

[23] *The REINS Act – Promoting Jobs and Expanding Freedom By Reducing Needless Regulations: Hearing on H.R. 10 Before the Subcommittee on Courts, Commercial and Administrative Law of the House Committee on the Judiciary,* 112th Cong. 9 (2011) (statement of David Schoenbrod, Trustee Professor, New York Law School and Visiting Scholar, American Enterprise Institute).