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Taming the Fourth Branch of Government

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Key Points

- Operating increasingly as a fourth branch of government, the expanding authority of executive agencies undermines accountable, constitutional government.
- According to the "Unified Agenda of Federal Regulatory Actions," 4,257 new regulations are now in the pipeline. The Code of Federal Regulation occupies 165,000 pages.
- Over the last century, Congress has increasingly relied on broad delegations of regulatory authority to the unelected "experts" at federal agencies.
- Enactment of the REINS Act could restore the Constitution's guarantees of representation and accountability in the making of our laws.

In spite of President Obama's recent championing of regulatory reform, the expansion of the federal regulatory state continues apace. Operating increasingly as a fourth branch of government, the expanding authority of executive agencies undermines accountable, constitutional government. In late August, the President hailed[1] the completion of his agencies' plans to reduce regulatory burdens pursuant to his executive order[2] of last January. The White House claims that the plans will save as much as $10 billion over the next five years. The claimed savings, however, are trivial compared to the costs of even one or two rules in the EPA's ongoing regulatory spree.

The President's request on September 2, 2011, that the EPA indefinitely delay the already long-delayed adoption of a new federal standard for ozone[3] offers little relief from the regulatory shackles choking investment and job creation. And even if EPA finalized the ozone standard today, most of the regulatory costs would not be incurred for three or four years.

The federal regulatory state has been out of control for decades. Executive and independent agencies operate increasingly as a fourth branch of government, beyond the effective control of the President, Congress, and the federal courts. Presidents of both parties have been surprised by the intractability of the federal agencies, composed of a vast army of career civil servants who are practically impossible to fire. The courts are generally hesitant to restrain agency action. Over the last 70 years, Congress has been of two minds—periodically interested in checking selective regulatory excesses but then enacting laws which delegate key policy decisions to the agencies.

The dimensions of the current administrative behemoth and its regulatory progeny elude comprehensive measurement but numbers are indicative. In the 1950s, federal agencies annually filled almost 11,000 pages of the Federal Register. By contrast, the Federal Register for 2010 contained over 80,000 pages. Federal agencies have adopted over 3,500 new regulations each of the last three years. According to the "Unified Agenda of Federal Regulatory Actions," 4,257 new regulations are now in the pipeline.[4] The Code of Federal Regulation occupies 165,000 pages.

A 2009 report from the Small Business Administration concludes that the aggregate cost of "major" federal regulations (i.e., those with costs over $100 million) is over $1.75 trillion per year.[5] That's nearly twice as much as total revenue from individual federal income tax last year.[6] And this multi-trillion-dollar tally derives from the agencies' invariably modest analyses of implementation costs.

Rules proposed or adopted under the Obama administration deter investment and job creation. For example, according to the Federal Energy Regulatory Commission (FERC), four of the new EPA rules could shutter 8 percent of electric generation in the near future. In Texas, just one of those rules, adopted in July, could eliminate 10 percent of existing generation capacity from native Texas lignite coal next year. With the prospect of scarcity pricing* driving electric rates sharply higher, is it likely that investment in energy-intensive manufacturing jobs will expand?

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**Commodities normally trade at an efficient correlation of supply and demand called "commodity pricing". However, when sudden scarcity occurs, a price spike can result out of all proportion to the extent of the scarcity; this is called "scarcity pricing."*

The good news is that this Congress, with growing bipartisan support, is trying to restrain the regulatory leviathan. Many of the new bills aimed at regulatory reform appropriately target EPA's current or proposed rules, which account for $23.2 billion of the $26.5 billion in estimated costs of major federal regulations finalized in 2010, according to the Congressional Budget Office. And note that most of the new EPA rules are discretionary or the result of friendly judicial settlements with environmental groups—unlike the hundreds of new rules mandated by Dodd-Frank and ObamaCare.

A sampling of the reform bills' acronyms-in-search-of-titles catch the mood of this season's regulatory reform.

- REINS Act—"Regulations from the Executive in Need of Scrutiny Act" (H.R. 10, S.299)
- TRAIN Act—"Transparency in Regulatory Analysis of Impacts on the Nation Act" (H.R. 2401)
- CURB Act—"Clearing Unnecessary Regulatory Burdens Act" (S.602)
- FREEDOM Act—"Freedom from Restrictive Excessive Executive Demands and Onerous Mandates Act" (S. 1030)
- "Regulatory Responsibility for Our Economy Act" (S. 358)
- "Unfunded Mandates Accountability Act of 2011" (S.1189)
- "Regulatory Flexibility Improvements Act" (H.R. 527)
- "Small Business Regulatory Freedom Act" (S. 474)

Most of the bills aimed at regulation would amend the Administrative Procedures Act to require a more comprehensive analysis of regulatory impacts in the rulemaking process to cover jobs, energy prices, electric reliability, industry sectors, regional economies, consumers, small business and U.S. global competitiveness. Several of the bills require a macroeconomic analysis of impacts of more than a dozen EPA rules coming into effect in the next two to three years, a group commonly known as the "EPA train wreck."

The bills can't emphasize jobs enough. The extent of EPA's oblivion to real world impacts like job loss was brought to light at a hearing of the House Energy and Commerce Committee last April. When Representative Cory Gardner asked EPA Assistant Administrator Mathy Stanislaus how jobs were affected by a rule that carried compliance costs of $43 to $80 billion, he eventually answered to the effect that EPA likes jobs, but jobs are not our job.[7]

Exclusively focused on this "train wreck," the TRAIN Act would establish an interagency Cabinet-level committee, chaired by the Secretary of Commerce, to prepare a "Cumulative Analysis of Regulations that Impact Energy and Manufacturing," with a preliminary report due January 2012. TRAIN wisely tasks the Comptroller General with conducting the analyses instead of EPA. Bureaucracies are masters of subterfuge and creative accounting when measuring the negative impacts and benefits of their regulatory creation. TRAIN's Cabinet-level committee is vaguely reminiscent of the "God Squad" created in 1978, which had the authority to overrule action under the Endangered Species Act (ESA) when a group of Cabinet secretaries concluded that the economic consequences trumped legal protection under the ESA.

The report required by TRAIN would force Congress and the executive branch to confront the economic impacts of EPA's current rules. The TRAIN Act, however, does not provide authority to quash regulations, a limitation likely necessary to build bi-partisan support. The bill passed the U.S. House of Representatives 249-169 on Sept. 23, 2011.

Senator Pat Roberts' "Regulatory Responsibility for Our Economy Act" (S. 358) would codify the multiple directives in the President's Reaganesque executive order to design regulation with the least burdensome requirements necessary to achieve the regulatory objective.

The bills would improve regulatory analysis but gloss a pivotal problem: how to measure the benefits of regulation. For decades, OMB has given EPA a pass on laughably highly-inflated calculations of "monetized" health benefits. EPA may now acknowledge compliance costs in the several billions but finds benefits to public health in the hundreds of billions: speculative figures for which there is no measured evidence. Until Congress drills down on the benefits EPA asserts, regulatory reform will be impossible. Deconstructing how EPA estimates health benefits also will reveal the hollow science EPA now

uses to justify one rule after another with massive compliance costs, in some cases approaching $100 billion.

Alone among the proposed bills, the REINS Act offers a game-changing means of restoring congressional control and accountability within the federal regulatory scheme. The REINS Act simply requires that a major rule of the executive agencies "shall have no force or effect unless a joint resolution [of approval] is enacted into law." As a matter of constitutional principle, agencies, of course, have no power to act as a co-equal, fourth branch of government beyond the control of Congress. As the Supreme Court explained in *Bowen v. Georgetown U.* (1988), "It is axiomatic that an administrative agency's power to promulgate legislative regulation is limited to the authority delegated by Congress."[9]

If an agency can do only "what Congress has said it can do," then Congress should always be able to reclaim or modify the regulatory authority that Congress itself has delegated. The REINS Act is carefully constructed to pass constitutional muster and to avoid the ineffectiveness of previous statutes like the Congressional Review Act. The House Republican leadership included the REINS Act in the GOP's "Pledge to America" and plans to move the bill this fall.

Over the last century, Congress has increasingly relied on broad delegations of regulatory authority to the unelected "experts" at federal agencies. Statutes regularly direct agencies to adopt rules under open-ended policy rubrics such as "in the public interest," "as far as is practicable," and to "protect public health."

Such sweeping grants of lawmaking authority run throughout the major environmental laws and allow EPA to adopt regulation beyond or at odds with the will of Congress. Under statutes 40 years old, EPA keeps finding discretionary latitude to expand regulatory scope and to tighten standards, but on the basis of weaker science and with fewer, if even measurable, benefits.

EPA's Endangerment Finding that carbon dioxide is a pollutant within the legal meaning of the Clean Air Act is a perfect example of an agency acting as a fourth branch of government. After making the policy finding, EPA rewrote the triggers for regulation written in the black letter terms of the law. EPA determined that the "Tailoring Rule," perhaps the most far-reaching regulatory act in the history of the Clean Air Act, was a "deregulatory" action exempt from analysis of economic impacts. Congress considered, but on multiple occasions rejected, regulation of CO_2.

The judicial system, for the most part, has not helped set the constitutional balance aright. According to Justice Antonin Scalia, the Supreme Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." As noted by Jonathan Adler of Case Western Reserve School of Law:

> In principle, the non-delegation doctrine ensures that Congress remains responsible for major policy judgments that drive policy decisions. In practice, however, the doctrine does not impose significant restraints on the delegation of rulemaking power. Under existing precedents, Congress need only provide agencies with an "intelligible principle" to guide regulatory initiatives. It does not take much to satisfy that standard; any broad statement of policy will do.[10]

Critics claim the REINS Act creates an unconstitutional "legislative veto." But in contrast to the legislative veto struck down by the Supreme Court in *INS v. Chadha* (1983),[11] the REINS Act requires passage of the resolution of consent in both houses of Congress with presentment to the President for signature or veto. And the REINS Act does not violate the executive branch authority to execute the law because it only concerns agency rulemaking pursuant to delegations of legislative authority.

The power to execute laws is the power to administer and enforce—an authority distinct from an agency's authority to promulgate and adopt legal rules. REINS does, however, increase the intended constitutional tension between the legislative and executive branches of federal power and just might support greater judicial willingness to restrain agencies acting outside statutory limits.

Construction of the fourth power has been a bipartisan project. For a century, the administrative state has steadily grown while congressional control over regulation has receded. As Steven Hayward notes in *The Age of Reagan: The Fall of the Old Liberal Order: 1964-1980*, the progressive ideologues of

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Woodrow Wilson's era, bent on solving complex problems by specialized expertise, laid the intellectual foundation of the regulatory state.[12] Expansion of the federal apparatus under the New Deal was largely a civil engineering project. LBJ's New Society fueled growth of government as a social engineering project. Under Richard Nixon, to whom the greatest growth of the federal regulatory edifice can be attributed, the administrative state took on economic engineering and continues unabated. Under the Nixon administration, eight independent regulatory agencies and eight new executive branch agencies were created. President Nixon created EPA by Executive Order.[13]

In the last several decades, Congress has done little to keep agencies from operating outside the reach of our tri-partite constitutional system. Given the broad latitude Congress has in delegating legislative powers, it is Congress—not the courts—that has the power to check the regulatory state. These questions are no longer the esoteric interest of constitutional scholars but have been articulated by the grass-roots constitutional movement known as the Tea Party. Procedural reform of the rulemaking process can help. Enactment of the REINS Act and strategic amendment of key statutory delegations of legislative authority could restore the Constitution's guarantees of representation and accountability in the making of our laws. ★

Endnotes

[1] *See* www.whitehouse.gov.
[2] Exec. Order 13563, 76 Fed. Reg. 3,821 (2011).
[3] Deborah Solomon and Tennille Tracy, "Obama Asks EPA to Pull Ozone Rule" *The Wall Street Journal* (3 Sept. 2011).
[4] *See* Office of Information and Regulatory Affairs.
[5] Nicole V. Crain and W. Mark Crain, "The Impact of Regulatory Costs on Small Firms" Small Business Administration Office of Advocacy (Sept. 2010).
[6] Council of Economic Advisers, "Economic Report of the President" (10 Feb. 2010).
[7] *See* YouTube, "EPA Admits Jobs Don't Matter."
[8] Kathleen Hartnett White, "The Ruse of Regulatory Reform" *National Review Online* (16 Feb. 2011).
[9] 488 U.S. 204, 208.
[10] Jonathan Adler, "Would the REINS Act Reign in Federal Regulation?" *Regulation* (Summer 2011).
[11] 482 U.S. 919.
[12] Steven Hayward, *The Age of Reagan: The Fall of the Old Liberal Order: 1964-1980* (2001).
[13] Reorganization Plan No. 3 (9 July 1970).

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