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before the

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of the
House Committee on the Judiciary

on the

Regulations from the Executive in Need of Scrutiny Act (REINS)

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The views expressed in this testimony are those of the author alone and do not necessarily represent those of New York Law School or the American Enterprise Institute.

Chairman Coble, Ranking Member Cohen, Members of the Subcommittee, thank you for inviting me to testify today.

As you know I now am a professor at New York Law School and a visiting scholar at the American Enterprise Institute. Previously, through most of the 1970s, I was one of the principal attorneys at the Natural Resources Defense Council. In that capacity, I headed the campaign of environmental and anti-poverty organizations to protect children from lead in gasoline.

Lead in gasoline: a tragedy illustrating the need for Congress to take responsibility

Congress passed the Clean Air Act in 1970 because the public demanded protection. The pollution that worried voters most came from lead in gasoline. Lead was known to poison children. The bumper stickers read: "GET THE LEAD OUT."

In the 1970 legislation, Congress did take responsibility for a rule that would eventually reduce lead exposure, but the reason was not to protect children. The act authorized the EPA to require that new cars made from 1975 onward use only lead-free gas. The reason was that Congress had decided that auto manufacturers must, from 1975 onwards, include pollution-controlling devices in their cars. The device of choice, the catalytic converter, cut many pollutants, but not lead — in fact, lead would ruin it. For Congress to require motorists to pay for the device and then let it be ruined by leaded gas would look foolish.

Legislators could not tell voters in 1970 that this rule to protect pollution control devices and their own reputations was sufficient to protect children from lead. Children would still be exposed to lead from gasoline for many years after

1970. The rule did not even take effect until the 1975 cars became available. Even then, pre-1975 cars would still use leaded gas and in 1975, there would be roughly 100 million such cars using leaded gas. Many of them would remain on the road emitting lead well into the 1980s.

So Congress in 1970 had to do more to satisfy the demand to protect children from lead. But lawmakers could not simply ban leaded gasoline forthwith; voters also wanted cheap gasoline, and adding lead reduces slightly the cost of refining it. Congress was caught between voters' demand to protect children and voters' desire to keep gas cheap.

When Congress is faced with a controversial choice, it often follows a two-step plan. It (1) announces a lofty goal, but (2) orders an agency to achieve the goal, thus letting the agency take the heat for failing to achieve it or the painful steps necessary to do so. Congress danced this two-step with lead. It (1) announced that a health-based air quality standard for lead must be achieved by May 1976 and (2) ordered EPA to establish the rules to achieve that standard by the deadline.

After passing the statute, diverse members of Congress — Democrats and Republicans, liberals and conservatives — lobbied the EPA, often on the quiet, to do nothing about the leaded gasoline used by the pre-1975 cars. Other members complained about the failure to protect health. As often happens when an agency is caught in such a cross fire, the EPA went into a stall.

In late 1972, my colleagues and I at the Natural Resources Defense Council won a decision against the EPA that prompted it, at last, to issue a rule to reduce the amount of lead in gasoline used in the pre-1975 cars. This victory was followed by many others. Yet, those legal victories did not translate into any

reductions in lead for many years. In fact, the amount of lead used in gasoline increased slightly from 1970 to 1975. Meanwhile, the May 1976 deadline to protect health was approaching.

When Jimmy Carter won the presidential election in 1976, I hoped that his tough campaign talk on the environment would translate into tough action on lead. But, to the contrary, President Carter eventually ordered the EPA to weaken the already weak lead reduction schedule adopted by his Republican predecessors.

Fortunately, lead in gasoline began to decline in the late 1970s, mostly because the pre-1975 cars were being replaced by new cars that could use only unleaded gasoline rather than anything the EPA was doing to protect health. By 1985, so many of the old cars had gone to the junkyard that the large oil companies found it unprofitable to continue distributing leaded gasoline in addition to the unleaded variety. But they did not want to drop leaded gas on their own, for fear of losing market share to small refiners who would still sell it. So Big Oil asked Ronald Reagan's EPA to ban lead additives to gasoline on the grounds that it is dangerous to health, and the agency complied. The EPA finally got tough on lead, but only after powerhouse corporations, protecting their bottom lines, got involved.

If Congress in 1970 had *not* given the EPA the responsibility to make the hard choices on protecting health from lead, Congress would still have had to do something in response to the popular demand to protect the children. Congress would have had to enact a rule cutting lead in gasoline, but that rule would have been a compromise, getting rid of more than half of the lead over the next several years with further reductions to come. After all, in the same statute, Congress had required the powerful auto industry to reduce emissions 90 per cent by 1975.

The reason that Congress did not enact a rule to cut lead in 1970 is that legislators would have been criticized on two fronts: by voters who wanted all the lead out right away and other voters upset by a small rise in gas prices. So, instead of enacting such a law, which would been good for the American people, legislators enacted a statute avoiding responsibility that was perfect for themselves.

The upshot is that lead came out of gasoline much more slowly than if Congress had made the hard choice itself. As a result, massive numbers of children, especially inner-city children, died and or had their IQs reduced below 70. Using EPA data on the health effects of lead in gasoline, I estimate the scale of the disaster in a book published by Yale University Press.[1] *Suffice it to say that the body count from Congress's evading responsibility was on the scale of American casualties in the War in Vietnam.*

The lead in gasoline is far from the only instance to suggest that the people fare better when the elected lawmakers take responsibility. The most striking advances under the Clean Air Act have come when Congress did take responsibility. For example, Congress in 1970 took responsibility for requiring auto manufacturers to cut emissions from new autos by 90 percent. Then, in 1990, Congress took responsibility for requiring power plants to cut sulfur emissions by 50 percent and for phasing out completely stratospheric ozone destroying chemicals. In contrast, where Congress left responsibility for the hard choices to the EPA, as it did with hazardous air pollutants in 1970, the agency was unable to deal with the great bulk of them for 20 years until Congress acted in 1990. Yet,

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[1]DAVID SCHOENBROD, SAVING OUR ENVIRONMENT FROM WASHINGTON: HOW CONGRESS GRABS POWER, SHIRKS RESPONSIBILITY, AND SHORTCHANGES THE PEOPLE (Yale U. Press, 2005) at ch. 4.

Congress often evades responsibility in legislating on the environment. As EPA's first general counsel, John Quarles, put it, the statutes provide "a handy set of mirrors – so useful in Washington – by which a politician can appear to kiss both sides of the apple."[2]

Opponents of REINS claim that the bill is biased against health, safety, and other sorts of regulatory protection. Weirdly, they name the elimination of lead from gasoline as an example of the kind of protection that REINS would block. The environmental experience falsifies such scare tactics. Indeed, as this experience shows, less responsibility for agencies and more responsibility for Congress can well translate into more protection for the beneficiaries of regulation.[3]

Furthermore, because REINS would ensure that the big, hard choices would come back to Congress, REINS gives legislators an incentive to come up with a compromise in the first place rather than instruct an agency to produce the best of everything for everyone.

Liberals showed how Congress can take responsibility

When I left NRDC for academia, this experience with lead prompted me to consider how the people could get the benefit of the elected lawmakers taking

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[2] H.R. REP. NO. 410, pt. 2, at 71 (1979) (dissenting view of Rep. Corcoran).

[3]Christopher Demuth made a related point in testimony before Congress. "Environmental initiatives are often highly popular, and EPA, beset as it always is by interest groups whose métier is exaggeration and alarmism, may find it difficult to see past the lobbying fog: it may underestimate popular support in a way that constituency-minded legislators would not." *Environmental Regulations, the Economy, and Jobs*: *Before the Subcommittee on Environment and the Economy of the House Committee on Energy and Commerce*, 112th Cong. 9 (statement of Christopher DeMuth, D.C. Searle Senior Fellow American Enterprise Institute for Public Policy Research).

responsibility for the laws. What I found was that some leading liberal thinkers had pointed the way.

James Landis, the New Deal's sage of administrative law and later dean of Harvard Law School, urged that agency regulations be presented to Congress for approval. He wrote, "It is an act of political wisdom to put back upon the shoulders of Congress" responsibility for "controversial choices."[4]

Judge (now Justice) Stephen Breyer has explained how congressional vetting of agency regulations could work in practice. As he wrote in a law review article, Congress could enact a statute that, first, bars agency regulations from going into effect unless confirmed through the United States Constitution's Article I legislative process and, second, establishes a fast track process that would require legislators to accept or reject the regulations by a deadline.[5]

The Landis idea becomes REINS

I have been pushing the Landis idea since I was a beginning academic still litigating for the Natural Resources Defense Counsel in the early 1980s.[6] In 1995, I helped turn Judge Breyer's idea into a bill called the Congressional

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[4] JAMES LANDIS, THE ADMINISTRATIVE PROCESS 76 (1938).

[5] Stephen Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785, 793–94 (1984). Breyer was writing in 1984 about how Congress could retrieve the power it lost when the Supreme Court struck down the legislative veto in the I.N.S v. Chadha 462 U.S. 919 (1983). Breyer was showing that Congress could take on the job of voting on regulations rather than arguing that it should do so. Stephen Breyer, *The Legislative Veto After Chadha*, 72 GEO L.J. 785, 796–98 (1984).

[6] *See generally* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY (Yale University Press, 1993).

Responsibility Act.[7] Congress borrowed the name, but did not enact the principle when it passed the Congressional Review Act.[8] It gave the Congress the option of taking responsibility for regulations, while the original bill would have forced Congress to take responsibility. Needless to say, Congress hardly ever opts to take responsibility under the Congressional Review Act.[9]

Now in 2011, this committee is considering REINS, which is modeled on the Congressional *Responsibility* Act.[10] Like the original bill, the new bill would implement Judge Breyer's suggestion, but unlike it would be limited to "major" regulations. These are defined chiefly as regulations that the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget finds have an annual effect on the economy of $100 million or more.[11] In particular, such major regulations[12] would not go into effect until confirmed through the legislative process.[13] The bill imposes deadlines requiring up or down votes in the House and the Senate within thirty legislative days after the bill is introduced.[14]

Although the idea behind the bill can be traced back to a New Deal

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[7]The Congressional Responsibility Act of 1995, H.R. 2727, 104th Cong. (1995).

[8]Congressional Review Act, Pub. L. No. 104-121. Codified as 5 U.S.C. §§ 801 - 808

[9] The Mysteries of the Congressional Review Act, 122 HARV. L. REV. 2162, 2163 (2008 - 2009).

[10] Regulations from the Executive in Need of Scrutiny Act, H.R. 10, 112th Cong. (2011).

[11] H.R. 10 at §804

[12]There are limited exceptions. H.R. 10 at §806.

[13] U.S. CONST. art. II, § 7.

[14] H.R. 10, 112th Cong., § 802(c),(e)(1), S. 299, 112th Cong., § 802(c),(e)(1).

champion of administrative law, some of its sponsors herald it with rhetoric that others hear to be anti-regulation agency-bashing. This raises hackles because it was Congress, often with broad bi-partisan support, that imposed the deadlines and duties on the agencies and authorized the courts to make sure the agencies comply.[15]

Regardless of the battles over rhetoric, the substance of the bill is pro-accountability rather than anti-regulation. That substance was aptly captured in the title of a *Wall Street Journal* editorial – "The Congressional Accountability Act."[16] Thoughtful people will focus on the substance rather than the rhetoric.

REINS will help Congress better serve the people

Consider, again, environmental regulation. Environmental politics are bi-

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[15] In her testimony before the Subcommittee on Courts, Commercial, and Administrative Law, Sally Katzen explained how agencies are "not free agents . . . .they can only issue regulations that implement existing law – that is, laws that are duly enacted (passed by both Houses of Congress and signed by the President)." *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. 4 (2011) (statement of Sally Katzen, Visiting Professor NYU School of Law and Senior Advisor of the Podesta Group).

Professor Katzen rightly notes that there are existing procedural safeguards that help restrain agencies. Statutorily, the Administrative Procedure Act "generally requires that agencies give notice of what they intend to do, along with their supporting data and analysis," and provide people with a meaningful opportunity to comment on the proposed agency action. *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. 4 (2011) (statement of Sally Katzen, Visiting Professor NYU School of Law and Senior Advisor of the Podesta Group). *See also* 5 U.S.C. 551 et seq. Furthermore, the agency that proposes the rule responds to "significant comments and explains whether (and why) they agree or disagree with the comments received." True, there are procedural safeguards in place to restrain agencies. But there are no statutes or safeguards in place that will accomplish what REINS would: force Congress to take responsibility.

[16] January 14, 2011

polar. Industry sometimes vilifies environmental advocates as crazy ideologues and they sometimes vilify industry as greedy ignoramuses.

Such polarized politics affects Congress. Here is how William Ruckelshaus describes the history in 1995 shortly after the Republican victory in the 1994 mid-term elections:

> We recognize, as perhaps the newest members of Congress do not, that the current rhetorical excess is yet another phase in a dismaying pattern. The anti-environmental push of the nineties is prompted by the pro-environmental excess of the late eighties, which was prompted by the anti-environmental excess of the early eighties, which was prompted by the pro-environmental excess of the seventies, which was prompted.... But why go on? The pattern is quite clear. The new Congress may believe that it is the vanguard of a permanent change in attitude toward regulation, but unless the past is no longer prologue, the pendulum will swing back, and we will see a new era of pro-environmental movement in the future.[17]

The pendulum has continued to swing down to the present. Its swings, Ruckelshaus concludes, have had a devastating impact on EPA's ability to act sensibly.

To modulate the bi-polar politics, what has to come, as *New York Times* columnist David Brooks recently put it, "is a sense of humility, that the reason people behave civilly to one another is because, alone, no one has the resources to really conduct an intelligent policy, that you need the conversation, you need the

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[17]*See* Cristine Russell, *Bill Ruckelshaus on EPA: "Battered Agency Syndrom,"* THE ATLANTIC (Dec. 4, 2010), http://www.theatlantic.com/technology/archive/2010/12/bill-ruckelshaus-on-epa-battered-agency-syndrome/67501/.

back-and-forth."[18] Brooks was speaking about the aftermath of the shooting of Congresswoman Gabrielle Giffords, but his statement applies fully to regulation in general and environmental regulation in particular.

The REINS Act would force a conversation between the EPA and centrist legislators, pressuring those on the left and right to join in. Both parties will find that they must adopt a modulated approach to regulation, both on the environment and other fronts, or voters will punish them at the polls. [19] *That is how we should get to sensible outcomes in a democracy, not by elected lawmakers hiding behind unelected agency officials.*

REINS would also improve environmental regulation by giving legislators, at long last, a personal stake in updating obsolete environmental statutes. The basic structure of most key environmental statutes dates back 30 or 40 years. Congress has passed no major environmental statute since 1990 despite decades of experience and the changing nature of the environmental challenge. As a result, the statutes force the EPA to regulate in ways that are often ineffective and

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[18] *Shields and Brooks On Obama's Tucson Speech, Calls for Political Civility*, PBS NEWSHOUR (Jan. 14, 2011) http://www.pbs.org/newshour/bb/politics/jan-june11/shieldsbrooks_01-14.html

[19] As Professor Richard Lazarus explains, voters, "responded with such hostility to [the Republican proposals on the environment in the mid-1990s that their] legislative reform effort was effectively sapped of its political viability."Richard Lazarus, THE MAKING OF ENVIRONMENTAL LAW 131 (2004). "Somewhat ironically the executive branch under Clinton used the same tactics against Congress that Congress had used against the Nixon, Reagan, and Bush administrations during the 1970s and 1980s. Just as Congress had effectively exploited the public's distrust of government to defeat earlier retreats from environmental protection, so did the Clinton administration block Congress in the 1990s. President Clinton, Vice President Al Gore, EPA administrator Carol Browner, and Interior Secretary Bruce Babbitt repeatedly characterized Congress as seeking to undermine public health and environmental quality for the sake of industry profits. The U.S. public responded with such hostility to any proposed change that the legislative reform effort was effectively sapped of its political viability." *Id.*

inefficient. This logjam in updating the environmental statutes gave rise to *Breaking the Logjam*, a New York Law School-New York University School of Law project that has proposed how to update the environmental statutes.[20]

Congress, however, has found it convenient to continue to do nothing. The reason is that the inefficacy and inefficiency caused by the obsolete statutes are problems for the environment and the economy, but not for legislators. After all, legislators can blame the problems on the EPA. But, once responsible for major regulations, as REINS would require, legislators will find that they have a personal stake in finally updating the statutes.

In sum, REINS will condition the power of the EPA, but it improve environmental protection. On the environment and other regulatory fronts, REINS will make Congress more accountable to the people, a better and more responsible public servant, and less apt to cast the blame on agencies.

Some concerns about REINS

REINS would work a major change in how regulation would work so it is

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[20]The co-leaders of the project are Richard B. Stewart (formerly chair of the board of the Environmental Defense Fund and assistant attorney general under George H.W. Bush and now professor at NYU School of Law), Katrina M. Wyman (professor at NYU School of Law), and myself. To help develop proposals to update the environmental statutes, the projects co-leaders brought together fifty diverse environmental law experts to propose and reflect upon ways to modernize a wide spectrum of federal environmental statutes. The undertaking was built upon four principles. The first principle is to adopt market-based tools wherever they can reliably achieve environmental goals. The second is to realign the responsibilities of the federal government and the states so that each level has more effective power over the environmental problems that it is best placed to address. The third is to face trade-offs openly and based on reliable information. The fourth is to use cross-cutting regulatory approaches that address closely related problems together rather than separately. The *Breaking the Logjam* project has issued a report (available at breakingthelogjam.org.) and a book (DAVID SCHOENBROD, RICHARD B. STEWART & KATRINA M. WYMAN, BREAKING THE LOGJAM (Yale University Press, 2010). These publications were completed before REINS came to the attention of the authors.

important to address some concerns that might be voiced by a hypothetical critic.

Concern: "Legislators are much less knowledgeable than agency experts." But, the agency would, as James Landis put it, continue to be "the technical agent in the initiation of rules of conduct, yet at the same time ... have [the elected lawmakers] share in the responsibility for their adoption."[21]

Concern: "Congress lacks the time to vote on agency regulations."[22] During the 111th Congress, agencies promulgated 126 significant interim final rules and final rules. During the same Congress, Congress enacted 70 public laws naming post offices, federal buildings and other lands.[23] These naming bills take less time than would deciding whether to confirm an agency regulation even though the agency would have already crafted the regulation, developed a record, and evaluated its impacts. The relevance of the naming bills is that they typify numerous ways in which legislators spend a great deal of time taking symbolic stances. Enacting REINS would be a decision by legislators to shift time from taking symbolic stances to taking responsibility for the most important regulations that both bind and protect their constituents. That is what elected lawmakers should do.

Concern: "Regulations will be filibustered." But, REINS limits debate on the confirmatory vote and all related motions to two hours in each house and there

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[21] JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938). E. Donald Elliot makes a related point in calling for Congress to get expert help in crafting statutes."The function of Congress is not to devise solutions to complex technocratic problems, but to provide democratic legitimacy." DAVID SCHOENBROD ET AL., BREAKING THE LOGJAM 122 (2010)

[22] This concern was voiced in http://voices.washingtonpost.com/ezra-klein/2011/02/the_rein_act.html

[23] *Id.*

is no realistic way around this time limit.[24] Quorum calls, roll calls, and other legislative business could well mean that each major regulation could take more than two hours. If the time for considering all the major regulations is too great in Congress's judgment, it should raise the criteria for a major regulation above $100 million rather than abdicate responsibility for the most significant rules altogether.

Concern: "REINS would change the powers of the administration in mid-presidential term." Congress routinely changes the powers of agencies. In any event, President Barack Obama and Democrats in the Senate could exact, as a price for passage, postponing the effective date until the start of the next presidential term. The issue with REINS is whether the elected lawmakers will be accountable to their constituents for the major regulations, not the powers of a particular president.

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[24]H.R. 10, § 802(d)(2), §802(e)(2)(B) However, Professor Sidney Shapiro accuses the drafters of REINS of pulling a fast one. Sidney Shapiro, *The REINS Act: The Conservative Push to Undercut Regulatory Protections for Health, Safety, and the Environment*, CENTER FOR PROGRESSIVE REFORM, www.progressivereform.org/articles/CPR_Reins_Act_Backgrounder.pdf). He argues that the "motion to proceed" to the confirmatory vote would be separately debatable and therefore could be filibustered. Motions to proceed are normally debatable, but not when they are to proceed to a time limited matter. Then they are not debatable. This was the opinion of the Congressional Research Service in evaluating motions to proceed under the Congressional Review Act.

> The Congressional Review Act omits one other provision that appears in many expedited procedures for taking up resolutions of disapproval. The Act does not explicitly make the disapproval resolution privileged. It is established Senate practice that a motion to proceed to consider a matter is debatable (and, therefore, subject to filibuster) unless the matter in question is privileged. Senate precedents, however, indicate that if a statute established a time limit for the consideration of a specified measure, the provision has the effect of rendering the measure privileged, so that a motion to proceed to its consideration is not debatable. Consistent with this principle, the Senate has treated a motion to consider a disapproval resolution under the Congressional Review Act as not debatable, even though the Act does not explicitly bar the debate."

Richard S. Beth, "*Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*," CONGRESSIONAL RESEARCH SERVICE (Oct. 10, 2001) www.crs.gov. REINS is an amendment to the Congressional Review Act and so the the same should hold true.

Concern: "Congress sometimes fails to act responsibly." To the extent this is so, it because Congress found ways to avoid responsibility for the consequences.[25] The solution cannot be for Congress to hand the choices over to even less accountable agencies. With REINS, Congress would reassume responsibility and thereby improve itself.

Conclusion

Agency regulations create rules of private conduct. That is, they make law. The lawmakers that the people elect should strive to be accountable for the laws. Such democratic accountability is the principle for which the Revolutionary War was fought. It is the principle for which revolutions are being waged today around the world. So it is particularly apt for the elected lawmakers in the House of Representatives of the United States Congress to vote to shoulder accountability for the most important laws.

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

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[25] *See generally* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY (1993).