REINS Supreme

Included amongst those both for and against the REINS Act, I'm sure, are some administrative law scholars happy with the chance to reflect on the status of our administrative state.

The acronym for the Regulations from the Executive in Need of Scrutiny Act highlights, as conservative sources celebrate, the bill's intent to rein in federal regulations. In a nutshell, it allows Congress to do through *inaction* what the Congressional Review Act—part of the mid-90s Contract with America—already allows Congress to do with legislative *action*: to disqualify major, new regulations. Under the REINS Act, if an agency proposed a rule that had an estimated economic impact of more than $100 million (this happens about 50-100 times each year), both chambers in Congress would be required to approve of the final rule. If Congress didn't pass a joint resolution within 70 days in the legislative session, the proposed rule would die. The Congressional Review Act already allows Congress to disqualify an agency's rule, but both chambers have to vote affirmatively to do so. Thus, under current law, Congress must pass a joint resolution to *kill* a regulation; under the proposed law, it must pass a joint resolution to *affirm* a regulation.

The politics of the bill are less interesting than the more fundamental concerns with administrative law, so we'll quickly dispel the former. The bill would decrease agencies' ability to create (it would "REIN" in) major federal rules. Some people like that and others don't.

A more sophisticated issue, to segue from politics to administrative theory, is accountability. A blessing and curse of our fleet of civil servants is that they are purportedly experts, insulated from the fickle tides of public opinion; at the same time, is difficult to ascribe accountability to the insulated rulemakers. The conundrum of accountability versus expertise has existed probably as long as representation; but has at least been well pondered since Woodrow Wilson zeroed in on it in 1886.

Supporting insulated expertise, here is Noah Sachs:

> Since the Progressive era, U.S. administrative law has operated from the premise that agency action should be somewhat insulated from political pressure and horse trading. The REINS Act would mark a radical abandonment of that goal, an attempt to correct an oversight problem that doesn't even exist. It would deliver a body blow to the already-sluggish agency rulemaking process by politicizing it and entangling it in the congressional morass. And, over the long term, it would do serious damage to American health and prosperity—stopping agencies from promulgating important rules that, among other things, would help prevent bank failures, ensure the safety of the food we eat, and control toxic pollution in the air we breathe.
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> The results would likely be devastating. In the near term, the REINS Act could be a back-door means of gutting health care reform. The GOP lacked the votes in the Senate to repeal the Patient Protection and Affordable Care Act, but, under the

> REINS Act, it could do serious damage to the statute. The law has more than 40 different provisions that call on the Department of Health and Human Services (HHS) to enact implementing regulations. These forthcoming rules, most of which will be considered "major," will cover issues such as prevention of Medicare fraud and extending dependent coverage to people as old as 26. With the REINS Act in effect, they could be quashed if the House objects to them, or if Republicans simply stall a floor vote on them beyond 70 days.

And supporting accountability, here is Jonathan Adler:

> The primary purpose of the Act is to ensure greater political accountability for major regulatory initiatives. Federal regulatory agencies only have that power delegated them by Congress, but regulatory agencies are not always particularly responsive to Congressional concerns. Nor are members of Congress always willing to take responsibility for how the power they have delegated gets exercised. Requiring a straight up-or-down vote on new major regulations is a way to address both problems and the expedited procedures ensure that traditional legislative logjams and special interest obstruction won't prevent consideration of significant regulatory initiatives. This is why I believe the REINS Act is more about transparency and political accountability than anything else.

Adler's support of the bill, trumpeting transparency and accountability, might sound more coherent if the Congressional Review Act did not already exist. But, it is difficult to see how a bill that allows Congress to quietly overturn proposed rules by *not* voting is more transparent or accountable than existing law that allows Congress to overturn a rule by *voting*. The argument can only be on this question: which scheme promotes greater transparency and accountability--one in which X must reject Y; or one in which X must affirm Y, and is deemed to reject Y if X does not act. I don't think it's impossible to argue that requiring affirmation is as accountability-securing as requiring rejection, but administrative law makes it a stretch. If agencies were actually government bodies with free reign to create rules, willy-nilly, a required Congressional affirmative would make exceeding sense. As it is, though, agencies cannot pass rules that statutes do not authorize. So Congress has already provided an affirmative by passing legislation authorizing rulemakings. A second vote to pass the actual rule resulting from passed legislation seems to me to decrease accountability. A representative might vote yes to the "Everyone Like It in Theory" Act, but vote against (or not vote at all) for the "Actual Details of Putting It into Practice" regulations.

The question that brings us into a truly philosophical examination into our administrative state is: how does the REINS bill strike our notions of the separation of powers? Arguments relying on the separation of powers principle rely on neatly demarcated branches of government, and folks arguing for and against the bill tend to either (1) place agencies in the executive branch or (2) emphasize that they are substantively controlled by legislation; thus, at least rulemaking should be regarded as a legislative branch activity.

Sally Katzen argues that the REINS Act would be unconstitutional, relying on an agency-as-executive approach:

> Over twenty years ago, Chief Justice Rehnquist set forth several tests for whether a statute violates the Constitution's separation of powers. One is that a statute is suspect if it "involve[s] an attempt by Congress to increase its own powers at the expense of the executive branch." Much of the discussion surrounding the REINS Act suggests that that may be an apt characterization of the bill's sponsors' intent. Another of Rehnquist's tests is whether an act of Congress "impermissibly interfere[s] with the President's exercise of his constitutionally appointed functions," which clearly includes the obligation to "take care that the laws be faithfully executed." For over a century, the executive branch has taken care to faithfully execute the laws by, among other things, developing and issuing regulations implementing legislation. Justice Scalia, who of all the Justices most aggressively guards the President's authority, has relied in key separation of powers cases such as *Morrison v. Olson* and *Mistretta v. United States* on the fact that the activities at issue in those cases were ones in which the executive had traditionally engaged. That characterization is clearly applicable to agency rulemaking as well.

Jonathan Adler wants to distinguish "execution" from rulemaking:

> Several members of the subcommittee suggested the REINS Act imposed unconstitutional constraints on executive power, particularly the executive's responsibility to faithfully execute and enforce federal laws. Therefore, they suggested, the REINS Act could conflict with Article II, Section 1 of the Constitution. Set aside the curiosity of House Democrats, including Rep. Conyers, defending executive power. This objection is based on a fundamental confusion about the nature of executive power. The power to "enforce" the laws – that is, the power to take action to see that legal rules are complied with – is distinct from the power to make the rules pursuant to a delegation of authority from Congress. So, for instance, the EPA's power to impose fines or other sanctions on companies that violate emission limitations is distinct from the EPA's power to set the emission limits. A requirement that federal regulatory agencies obtain Congressional approval before major rules may take effect requires Congressional assent for the latter, but has not effect on the former.

Sally Katzen raised a more nuanced separation of powers concern, but one that I also find unconvincing, and for largely the same reasons. She noted that under *Morrison v. Olson*, "a statute is suspect if it 'involves an attempt by Congress to increase its own powers at the expense of the executive branch,'" and it is reasonable to see the REINS Act as an effort to constrain the executive. Just look at the bill's full title and findings. The problem with her argument is that it ignores the distinction between executive and legislative functions.

The powers to investigate and prosecute are core executive functions. Any effort by Congress to limit such powers and aggrandize its own is problematic.

The executive power is distinct from the power to adopt legislative-type rules, however. The latter is not a core executive function. Rather it is a quasi-legislative power that must be delegated by Congress. As the Supreme Court has stressed time and again (and as I noted in my testimony), federal agencies have no authority to promulgate regulations beyond that which has been given by Congress. And what Congress has given, it may take back. Restraining the exercise of such authority, whether by adopting rules for the exercise of regulatory authority (as under the Administrative Procedure Act or the Congressional Review Act) or limiting the scope of such authority is perfectly acceptable, so long as other Constitutional requirements (such as bicameralism and presentment) are satisfied. As the REINS Act satisfies such requirements, there is no problem. The REINS Act does not curtail executive power so much as it places limits on the legislative-like power delegated by Congress.

Adler is right to prevent over-simplistically placing agencies into one branch-- whenever people talk about separation of powers, I recommend a seasoning of sufficient salt to add complexity to the dish. I appreciate recent scholarship, such as that from Professor Mashaw, that identifies things we would see as administrative functions before the solidification of an administrative law field. But, it is nonetheless clear that the framers in 1787 did not write up a structure of federal government that foresaw the contemporary administrative state. So, framer-centric arguments about separation of powers elude the post-framing constitutional problems that arose as delegations of quasi-legislative and quasi-judicial powers arose.

Adler, though, seems to think that agencies, at least when making major rules, should be fully and solely creatures of Congress. I'm not sure that is the proper understanding of the nature of agencies' regulatory action. An agency's rule is not a new law; it is the carrying out of a Congressional statute. If a rule goes beyond what an authorizing statute allows, it will be overturned. And so, it is not a stretch to pull rulemaking away from Adler's description of legislative activity and toward his notion of executive enforcement: a rule might be understood as analogous to a police office's enforcement of a criminal ordinance with a policies to identify manifestations of that crime. Likewise, Congress might declare that X is prohibited, and agencies then enforce against X by identifying X in X-1, X-2, and X-3 manifestations. Rules, in other words, are an agency's specified enforcement strategies of a broader Congressional policy.

I'm not interested in placing agencies definitively within wither the executive, legislative, or judicial branch. The point, in fact, is that they do not belong, and should not be conceptualized, as being in either. Sadly for the textualist, there is no appropriate constitutional language that provides direct guidance to the Court on administrative law. That is not to say the language is irrelevant; but it is inadequate.

And speaking of language, it is interpretation that makes all of this most interesting. The argument that agencies execute legislation would make tremendous sense if statutes were never vague. But they are, which undoubtedly emphasizes the latter portion of the hyphenated quasi-legislation.

That is not to say, though, that Congress ought to take control of the rulemaking process when agencies work in the world of *Chevron*. The appropriate response to the mysteries of our administrative state is not to force agencies into an existing branch. The appropriate method for Congress to affect policy is by passing statutes. It would be interesting to read the Court decision in a case deciding whether a latter Congress can prevent a former Congress' legislation from taking effect by preventing associated regulations from becoming final. My hunch is that the practice would fail. Once a bill become law Congress cannot direct the interpretation of that law except by passing a new bill. *Chevron* doesn't require an agency, in the face of vague statutory language, to go get a Congressional interpretation; the Court has created a space for agencies to reasonably interpret statutes, and thus create policy, in a sphere outside that of our generally recognized governmental branches.