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WITH JULIAN GINOS

A RESPONSE TO PROFESSORS ADLER
AND SIEGEL ADDRESSING THE
CONSTITUTIONALITY OF THE REINS
ACT

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Abstract: Professor Sally Katzen responds to Professors Adler and Siegel, both of whom claim that the proposed REINS Act would be upheld as constitutional. Professor Katzen casts doubt on this position by offering a competing interpretation of the Act and of executive power under existing Congressional delegations of regulatory authority. Particularly, the REINS Act impermissibly interferes with the President's duty to "take care that the laws be faithfully executed" by resurrecting a form of the legislative veto rejected by the Supreme Court in *INS v. Chadha*.

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A RESPONSE TO PROFESSORS ADLER AND SIEGEL ADDRESSING THE CONSTITUTIONALITY OF THE REINS ACT

Sally Katzen with Julian Ginos***



The REINS Act¹ (“Regulations From the Executive in Need of Scrutiny”) may seem, to the uninitiated, a typically dry process-oriented piece of congressional legislation. REINS provides that a “major” regulation (that is, an agency-issued rule having an annual effect on the economy of \$100 million, or other specified criteria) cannot take effect unless and until Congress has affirmatively approved it.² Unfortunately, like many another dull procedural hurdle (see, for example, the Senate filibuster), REINS is poised to paralyze crucial parts of the federal government. While the Framers surely never anticipated the filibuster abuse that has become common practice, the drafters and supporters of REINS unabashedly pine for administrative stasis. This piece will respond to two articles that discuss REINS—Professor Jonathan Adler’s *Placing “REINS” on Regulations: Assessing the Proposed REINS Act*³ and Professor Jonathan Siegel’s *The REINS Act and the Struggle to Control Agency Rulemaking*⁴—focusing on their defense of the constitutionality of the proposed Act.

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¹ Regulations From the Executive in Need of Scrutiny Act of 2013, H.R. 367, 113th Cong.; see also H.R. 10, 112th Cong.

² H.R. 367, § 3 (proposing to amend 5 U.S.C. § 801(b)(1) to state that “a major rule shall not take effect unless the Congress enacts a joint resolution of approval . . .”).

³ Jonathan Adler, *Placing “REINS” on Regulations: Assessing the Proposed REINS Act*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 1 (2013).

⁴ Jonathan Siegel, *The REINS Act and the Struggle to Control Agency Rulemaking*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 131 (2013).

Adler and Siegel acknowledge that REINS would have dramatic effects on administrative law and regulatory practice. Adler supports REINS, saying that it promises to “restore legislative control and accountability” for the rapidly expanding administrative state.⁵ Siegel opposes REINS, saying that it is unworkable in practice and would have grave implications for regulation as we know it.⁶ Notwithstanding their profound differences about the wisdom and efficacy of the REINS Act, Adler and Siegel both argue that any constitutional objections to REINS are utterly unfounded,⁷ and they use my 2012 congressional testimony⁸ as a launch pad for discussing the law and lore of separation of powers doctrine. Like Siegel, I believe that REINS is ill-suited to the problem it purports to solve and would inevitably have significant adverse effects on the economy and society at large. But I will leave the debate about the policy implications of REINS to them; enough ink has already been spilled on that subject. Instead, I want to focus on the significant constitutional concerns this proposal raises.

Both Adler and Siegel concede, as they must, that the REINS Act would take us into uncharted territory with respect to separation of powers. There are no Supreme Court cases directly on point, and precious little applicable dictum. While I envy their conviction and emphatic pronouncements that the REINS Act is *clearly* constitutional (with Siegel calling it “perfectly” constitutional),⁹ I am less confident that five justices, let alone nine, would agree.

Over the last several decades, the Supreme Court has paid considerable attention to separation of powers (a principle drawn from, though not explicit in, the Constitution) but has laid down no bright-line rules. The Court has instead careened between two approaches. The first, which academics call “formalism,” countenances no blending of the different branches of government, and is exemplified by cases like *Bowsher v. Synar*¹⁰ and *INS v. Chadha*.¹¹ The second, called “functionalism,” holds that the branches can and indeed must overlap to some degree, and is illustrated in cases like *Morrison v. Olson*¹² and *Whitman v. Amer-*

⁵ Adler, *supra* note 3, at 1.

⁶ Siegel, *supra* note 4, at 174–80.

⁷ See generally Adler, *supra* note 3, at 24–29 (defending constitutionality of REINS Act); Siegel, *supra* note 4, at 150–71 (same).

⁸ *REINS Act—Promoting Jobs and Expanding Freedom by Reducing Needless Regulations: Hearing on H.R. 10 Before the Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 95–97 (2011) (statement of Sally Katzen); see Adler, *supra* note 3, at 26 & n. 145 (discussing my testimony); Siegel, *supra* note 4, at 153–54 (same).

⁹ Adler, *supra* note 3, at 24; Siegel, *supra* note 4, at 160.

¹⁰ 478 U.S. 714 (1986).

¹¹ 462 U.S. 919 (1983).

¹² 487 U.S. 654 (1988).

ican Trucking Ass'n.¹³ Recall that in *Bowsher* and *Chadha* the Court held that separation of powers principles prohibit Congress from either (a) effectively assigning itself the authority to implement the law,¹⁴ or (b) reserving a one-house veto when delegating to the executive branch the authority to implement the law.¹⁵ In *Morrison* and *Whitman*, however, the Court recognized that those same principles nevertheless allow Congress to restrict the President's ability to fire an independent counsel (whose functions are at the core of executive power),¹⁶ and to delegate broad rulemaking authority to the executive branch so long as there is an "intelligible principle" (another concept not spelled out—or even mentioned—in the Constitution).¹⁷ Given how variably the Court has applied separation of powers principles, I hesitate to assert that the REINS Act is constitutionally unsound, but I also think it too soon to give REINS a clean bill of health.

Let us be clear about what the REINS Act would actually do. By precluding "major" rules from taking effect unless affirmatively approved by both Houses of Congress (and signed by the President), REINS would significantly constrain agency implementation of the law. In practice, agencies would either try to confine their rulemaking activities so as not to trigger REINS or, as Professor Ronald Levin points out in his recent testimony on the subject, attempt to dis-aggregate "major" rules into multiple smaller rules that would elude the statute.¹⁸ Not infrequently, however, such maneuvering will not be sensible or feasible, and the resulting regulation would, under REINS, require congressional authorization before it became effective. In such cases the agency would not be issuing a legally valid regulation, but would instead be producing—often after years of effort involving scientific or technical analyses, stakeholder involvement and input, and multiple legal and economic reviews—a strange creature: something still called a regulation, but without force or effect. This creation would be nothing more than a recommendation for legislation, unless both Houses of Congress approved it and the President signed it, in which case it would revert to being a legally valid regulation, subject to judicial review in the ordinary course. As noted above, the wisdom of this result, though important, is best left for others to de-

¹³ 531 U.S. 457 (2001).

¹⁴ *Bowsher*, 478 U.S. at 732–33 (holding that Congress could not assign functions "plainly entailing execution of the law" to Comptroller General over whom Congress exercised removal authority).

¹⁵ *Chadha*, 462 U.S. at 954–59.

¹⁶ *Morrison*, 487 U.S. at 692 ("Nor do we think that the 'good cause' removal provision at issue here impermissibly burdens the President's power to control or supervise the independent counsel, as an executive official, in the execution of his or her duties . . .").

¹⁷ *Whitman*, 531 U.S. at 474–76.

¹⁸ *Promoting Jobs, Growth, and American Competitiveness: Hearing on H.R. 367, the "REINS Act of 2013" Before the Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Ronald M. Levin, William R. Orthwein Distinguished Professor of Law, Washington University in St. Louis).

bate. However, the means by which REINS achieves this result is constitutionally significant.

There are two different interpretations of how the REINS Act actually works. One school, which focuses on the objective of the Act, analyzes REINS as though it would amend all existing delegations of authority. The other, which looks at how it would play out in practice, sees it as a resurrection of a one-house legislative veto. Siegel is one of those who subscribe to the implied amendment interpretation.¹⁹ He is not bothered by the notion that REINS would amend all extent delegations, because, he argues, what Congress has given, Congress may take away.²⁰ True. But how Congress rescinds its delegations of authority, and the substantive legal changes resulting from that rescission, matters.

Congress can undoubtedly amend the Clean Air Act, the Endangered Species Act, the Affordable Care Act, or Dodd-Frank (to name a few previously enacted laws that are now very controversial) so as to preclude the relevant agencies from implementing those statutes, assuming there were the political will to do so when the issue is starkly presented. It does not necessarily follow, however, that Congress can amend wholesale the substance of an unknown (perhaps unknowable) number of statutes enacted over the course of the last century under the guise of tweaking rulemaking procedures. The Court takes the canon against implied repeal seriously, particularly when the potentially repealing statute has far-reaching effects.²¹ And REINS is nothing if not far-reaching, for both proponents and opponents agree it would fundamentally alter the balance of power between the President and the Congress. Section 2 of the REINS Act, and its legislative history, make abundantly clear that increasing congressional authority vis-à-vis the Executive is the point of the REINS Act.²² Indeed, proponents of REINS, like Adler, rely on this as the principal justification for its enactment.²³

¹⁹ Siegel, *supra* note 4, at 153 (acknowledging that the REINS Act would “effectively amend hundreds, if not thousands, of previously enacted laws”).

²⁰ *See id.* at 153–54 (arguing that there is “no constitutional prohibition against statutes” that remove “underlying regulatory authority”).

²¹ *See Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991) (“Rules of plain statement and strict construction prevail only to the protection of weighty and constant values.”); *accord Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662–63 (2007) (“[R]epeals by implication are not favored’ and will not be presumed unless ‘the intention of the legislature to repeal [is] clear and manifest.’” (quoting *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (second alternation in the original))).

²² *See Regulations from the Executive in Need of Scrutiny Act of 2013*, H.R. 367, 113th Cong. § 2 (stating that REINS Act will increase congressional accountability for regulation).

²³ *See Adler, supra* note 3, at 36 (stating that the REINS Act would “make Congress *more* responsible for federal regulatory activity”) (emphasis added).

When an issue of implied repeal is presented, the Court typically invokes something comparable to the “clear statement rule” requiring that Congress be specific about its intentions.²⁴ But there is nothing in the REINS Act that even approaches a clear statement—not an identification of specific authorizing statutes it intends to amend, not even a bald statement that fairly describes the wide-ranging enormity this act is intended to have. In my testimony I objected to this, calling instead for “truth in legislating,”²⁵ but the problem with REINS runs deeper than that.

Specifically, I argued and continue to believe that by limiting the agencies’ ability to implement their authorizing statutes, the REINS Act would impermissibly interfere with the President’s constitutional duty to “take care that the laws be faithfully executed.”²⁶ Adler dismisses this concern by asserting that such a charge “ignore[s] the distinction between executive and legislative functions”²⁷ and, more specifically, that executive power is the power “to see that legal rules are complied with,” which he claims is distinct from the “quasi-legislative power” to make rules pursuant to a delegation of authority.²⁸ Apparently, Adler believes that REINS would interfere only with the agencies’ “quasi-legislative” power and not with “core” executive power, and that it would therefore satisfy the separation of powers test.

In my view, Adler’s concept of executive power is unduly circumscribed and at odds with virtually all relevant precedent. The Court has been clear that executive power is the power to *implement* (not just enforce) the law.²⁹ In *Bowsher*, for example, the Court noted that the functions assigned to the Comptroller General were executive in nature because “[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law.”³⁰ While there are a few self-executing statutes, Congress typically enacts a law that directs an agency to develop standards or rules that flesh out the

²⁴ See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985) (“[I]t is incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides the guarantees of the Eleventh Amendment. The requirement that Congress unequivocally express this intention in the statutory language ensures such certainty.”); *Nat’l Ass’n of Home Builders*, 551 U.S. at 662–63.

²⁵ *REINS Act—Promoting Jobs and Expanding Freedom by Reducing Needless Regulations: Hearing on H.R. 10 Before the Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 95 (2011) (statement of Sally Katzen)

²⁶ *Id.* at 96.

²⁷ Adler, *supra* note 3, at 26.

²⁸ *Id.*

²⁹ *Buckley v. Valeo*, 424 U.S. 1, 140–41 (1976) (noting that the Federal Election Commission’s rulemaking power, though more legislative than its enforcement power, could nevertheless not be wielded by the Commission because rulemaking and enforcement were equivalent with respect to the separation of powers concern).

³⁰ *Bowsher v. Synar*, 478 U.S. 714, 733 (1986).

statute's general terms. Such a law—be it the National Traffic and Motor Vehicle Safety Act of 1966 or the Food Safety Modernization Act of 2010—has no effect unless and until the implementing regulations are promulgated.³¹ The development of those regulations *is* executing the Act; thus, interference with the promulgation of those regulations impairs the President's ability to faithfully execute the law. This is precisely what the Court condemned in *Bowsher*: Congress may not, "in practical terms, reserve . . . control over the execution of the laws."³² For Congress to do so would "impermissibly interfere with the President's exercise of his constitutionally appointed functions," contravening one of the oft-quoted standards in *Morrison* for evaluating separation of powers challenges.³³

The second interpretation of the REINS Act, favored by Levin (and me), is that REINS is but a wolf in sheep's clothing attempting to resurrect the one-house veto condemned in *Chadha*.³⁴ In the REINS Act, Congress is trying to get a second bite at the legislative apple. Under REINS, it could enact (or retain) legislation and then wait and see how the agencies implement it. If one House were to disagree with the agencies' work product (or be disinclined for any reason to embrace it) the implementing regulations would not take effect. The REINS Act dresses up this power grab in the garb of bicameralism and presentment, but Congress's failure to approve a regulation does not change the underlying law. And under *Chadha*, changing the law is the appropriate recourse for Congress: "Congress must abide by its delegation of authority until that delegation is altered or revoked."³⁵

Simply stated, under the REINS Act, the underlying legislation (which is what authorizes agency regulations in the first instance and which, if truth be told, is what the proponents of REINS actually object to) would remain on the books exactly as it was initially enacted; it would be neither altered nor revoked. Rather, Congress would use its newfound power to set aside the regulations that give meaning to that law, and this would occur by it (or one House) withholding,

³¹ See, e.g., Press Release, Treasury Department, Treasury Department Provides Guidance on Compliance with Section 326 of USA PATRIOT ACT (Oct. 11, 2002) (notifying all financial institutions that they will not have to comply with § 326 until final implementing regulations are issued and become effective), available at <http://www.sec.gov/about/offices/ocie/aml2007/treasury-po-3530.pdf>.

³² *Id.* at 715.

³³ *Morrison v. Olson*, 487 U.S. 654, 657 (1988).

³⁴ *Promoting Jobs, Growth, and American Competitiveness: Hearing on H.R. 367, the "REINS Act of 2013" Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Ronald M. Levin, William R. Orthwein Distinguished Professor of Law, Washington University in St. Louis) (stating that the REINS Act "would reinstate the one-house 'legislative veto' . . . long been thought buried by the Supreme Court decision in *INS v. Chadha* . . .").

³⁵ *INS v. Chadha*, 462 U.S. 919, 955 (1983).

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not exercising, its legislative power (language regarding bicameralism and presentment notwithstanding). This power play between the Congress and the Executive should be seen for what it truly is. As Justice Scalia observed in *Morrison*, often “the potential . . . to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis.”³⁶ With REINS, it is not that hard.

It may be that if the REINS Act becomes law, the Court will uphold it against constitutional attack. Perhaps a majority of this Court shares Adler’s stunted view of executive authority, and perhaps separation of powers can indeed be “gamed” by switching the default rules. But after carefully considering the arguments in Adler’s and Siegel’s articles, I am not convinced that the Court will bless this bid to upset the balance of power between Congress and the Executive.



³⁶ *Morrison*, 487 U.S. at 699.