Testimony of Ronald M. Levin
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Before the
U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Hearing on H.R. ____, the "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2014."

February 11, 2014

SUMMARY

At present, agencies conduct retrospective review of existing rules under the influence of a variety of external factors that encourage and guide such review. These mechanisms include legislation, presidential initiatives, congressional oversight, and rulemaking petitions filed by private persons. It is an open question whether a new legislative structure is needed as a supplement to these factors.

Even if so, however, the Retrospective Regulatory Review Commission envisioned by the proposed "SCRUB Act" suffers from serious deficiencies. Its structure would violate the Appointments Clause of the Constitution, because it has been settled law since *Buckley v. Valeo*, 424 U.S. 1 (1976), that persons appointed by legislative leaders cannot exercise significant authority under the laws of the United States.

Even if that deficiency were repaired, the Commission would lack the expertise and political accountability to make such major decisions as the elimination or amendment of agency regulations. Moreover, the provisions defining the Commission's powers would pose major risks of arbitrary decisionmaking. Essentially, the Commission would have authority to order elimination or amendment of *any* agency rule that it considers unnecessarily burdensome, and no external body could provide a check on its decisions. Under some circumstances a *minority* of the Commission could wield the same powers.

The Act would also establish a "cut-go" process: in order to issue a new rule, an agency would be required to offset its costs by rescinding or amending an existing rule as listed in the Commission's report (if any such listed rules remained). This procedure would unduly complicate rulemaking proceedings, and its premise that a quantitative value must be assigned to the costs of *every* new rule is impractical.

Finally, the Act would require that an agency that issues any new rule must accompany it with a plan by which the rule will be reviewed a decade later. This requirement is enormously overbroad. Even if it were limited to major rules only, the preparation of such plans at the rule issuance stage would be premature.

For these reasons, the subcommittee should fundamentally reappraise its plans to revamp the process of retrospective review of agency rules. It should consider awaiting the Administrative Conference's forthcoming detailed study of that topic before taking further action.

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Chairman Bachus, Ranking Member Johnson, and members of the Subcommittee, it is a privilege for me to be able to appear before you today to testify regarding a discussion draft of the proposed "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2014." As some of you may recall, I also testified before the subcommittee on July 12, 2012, on the subject of retrospective review of agency rules.[1] That hearing dealt with the subject on a general level. I appreciate your invitation to return in order to discuss a specific legislative proposal on the same subject.

By way of brief introduction, I am the William R. Orthwein Distinguished Professor of Law at Washington University in St. Louis. I have taught and written about administrative law for more than thirty years. I am the coauthor of a casebook on administrative law and have also written many law review articles in that field. In addition, I am a past Chair and longtime active member of the Section of Administrative Law and Regulatory Practice of the American Bar Association (ABA); and I currently serve as a public member of the Administrative Conference of the United States (ACUS) and chair of its Judicial Review Committee. However, I am testifying today solely in my individual capacity and not on behalf of any organization.

I. Background

As I testified in 2012, I believe a healthy regulatory system must include a capacity to examine existing rules to consider, with the benefit of hindsight, whether they are out of date or are not working as well as originally contemplated. To assess the possible need for legislation in this area, we should begin with an understanding of existing retrospective review ("lookback")

[1] *Clearing the Way for Jobs and Growth: Retrospective Review to Reduce Red Tape and Regulations: Hearing Before the Subcomm. on Courts, Commercial, and Administrative Law of the H. Comm. on the Judiciary*, 112th Cong. (2012) (testimony of Ronald M. Levin) (hereinafter *2012 Retrospective Review Testimony]*, http://judiciary.house.gov/index.cfm/hearings?ID=37A1AEB4-AFA1-6465-6E4E-0529E909296F.

processes and procedures. I discussed the history and structure of programs in this area in my 2012 testimony[2] and will recapitulate that discussion only briefly here.

Retrospective review has long been prescribed by some legislation, such as the Regulatory Flexibility Act, and by a series of executive orders and other initiatives announced by successive presidential administrations. Beginning in 2011, the Obama administration has made a particularly concerted effort to encourage agencies to engage in retrospective review. In EO 13563,[3] the President called for all executive agencies to submit plans for retrospective review of their "significant" regulations to the Office of Information and Regulatory Affairs (OIRA). A subsequent directive, Executive Order 13579, urged *independent* agencies to comply (voluntarily) with a similar process.[4] Finally, Executive Order 13610 expanded on the prior orders by directing executive agencies to take "further steps . . . consistent with law, agency resources, and regulatory priorities, to promote public participation in retrospective review, to modernize our regulatory system, and to institutionalize regular assessment of significant regulations."[5] The intent of this order is to induce agencies to devote regular attention to retrospective review on a continuing basis.

The administration has claimed considerable success as a result of this initiative.[6] A recent draft article by Professor Cass Sunstein, who was OIRA Administrator during this period, makes this case in some detail.[7]

Although I believe that an agency that administers a program will normally be in the best position to judge whether and how its rules should be modified or rescinded, there is force to the idea that one cannot count on agencies to make optimal choices about lookback on their own initiative. The forces of habit and inertia, not to mention competing priorities, often make it hard for agencies to look beyond their established methods of doing business in the absence of pressure from outside. It is relevant to remember, however, that external pressure does exist. Initiatives from the executive branch, such as the program I just mentioned, are one source of such influence. Congressional oversight can also serve to press an agency to reconsider policies that aren't working.

In addition, a sometimes overlooked, but still important, component of the system of retrospective review is the petition process. Anyone who believes that an agency rule should be changed can file a petition for rulemaking pursuant to § 553(e) of the Administrative Procedure

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[2] *Id.* at 2-3.

[3] 76 Fed. Reg. 3821 (Jan. 18, 2011).

[4] 76 Fed. Reg. 41587 (July 11, 2011).

[5] 77 Fed. Reg. 28,469 (May 10, 2012).

[6] COUNCIL OF ECONOMIC ADVISORS, SMARTER REGULATIONS THROUGH RETROSPECTIVE REVIEW 1 (2012), *available at* http://www.whitehouse.gov/sites/default/files/lookback_report_rev_final.pdf.

[7] Cass R. Sunstein, *The Regulatory Lookback*, forthcoming in B.U. L. REV. (preliminary draft available at http://ssrn.com/abstract=2360277) (draft at 12-16).

Act (APA). If the agency does not accept the suggestion, it must give reasons, and a disappointed petitioner can appeal a denial to the courts. In this fashion, the petition process puts the adversary process of our legal system to work as a force for reexamination of existing rules. Not every petition will be successful, but under some circumstances this means of pressing an agency to consider changes in its rules can be quite effective.

Against this background, we can ask whether these mechanisms, considered as a whole, should be supplemented by further adjustments. In this regard it is important to be aware that the Administrative Conference has recently announced a plan to conduct a study of retrospective review of agency rules and make recommendations.[8] Its goals are to examine agency approaches to retrospective review, identify characteristics of successful reviews, and suggest measures to enhance the process. ACUS intends to complete this project, including issuance of recommendations, by the end of 2014. Much could be said in favor of the subcommittee's awaiting the results of this inquiry before it moves forward with a legislative initiative of its own.[9]

Nevertheless, it is certainly possible that a new structure for retrospective review of rules might be helpful, as a complement to the mechanisms I summarized above. In the remainder of this statement, I will provide a critical evaluation of whether the discussion draft before us today would make such a contribution.

II. Overview of the SCRUB Act

The bill would be known as the "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2014," or SCRUB Act. I will briefly mention the central features here, with further details in the body of my analysis.

Title I of the bill would establish a Retrospective Regulatory Review Commission (RRRC) to propose modification or elimination of existing regulations. The chair would be chosen by the President, and eight members would be chosen by majority and minority leaders of the House and the Senate. The RRRC's mandate would be to identify for elimination or amendment "unnecessarily burdensome" regulations, and the bill contains a non-exclusive list of factors that the Commission could take into account in making this determination. The Commission would formulate a list of rules (or sets of rules) that would be slated for elimination or amendment, either immediately or over time through a "cut-go" process (explained below). The list would be forwarded to Congress, which would have 45 days to consider passing a joint

[8]Request for Proposals: Retrospective Reviews of Agency Rules (Jan. 10, 2014), http://www.acus.gov/rfp/retrospective-review-project-rfp.

[9]Professor Coglianese has also suggested that the issuance of evaluation guidelines by OIRA could improve agencies' performance in conducting retrospective review. Cary Coglianese, *Moving Forward with Regulatory Lookback*, 30 YALE J. ON REG. ONLINE 57, 61-62 (2013).

resolution disapproving the list through a fast-track procedure. If the resolution did not pass, the list would be forwarded to the affected agencies for prompt action. If the resolution did pass, the rules on the list would nevertheless become subject to cut-go.

Under Title II, in the cut-go process, an agency would be unable to promulgate any new regulation unless it also offset its cost by eliminating or amending a rule from the Commission's report, until it has taken action on all of those rules. The agency could also make the "cuts" in advance as credits toward future regulations. An agency would be able to bypass the cut-go tradeoff only if this action were affirmatively authorized by enactment of a joint congressional resolution.

In addition, Title III of the bill provides that agencies must, in promulgating any new rule, include a plan for review of this rule within ten years. In the case of a major rule, this decennial review would have to follow the same evaluation criteria as the RRRC would use in its reviews. The Title III obligations would be judicially reviewable under the APA.

III. Constitutionality

A threshold problem is that Title I is plainly unconstitutional, because it vests sweeping authority in individuals appointed by legislative leaders. The Court faced a very similar issue in *Buckley v. Valeo*.[10] As provided in the Federal Election Campaign Act prior to that case, four members of the Federal Election Commission were appointed by the Speaker of the House and the President Pro Tempore of the Senate based on the recommendations of the majority and minority leaders in each chamber. The Court held that this structure violated the Appointments Clause of the Constitution (Article II, § 2, cl. 2). According to that constitutional provision, all "Officers of the United States" must be appointed by the President with senatorial confirmation, except that "inferior officers" may be appointed by the President, the head of a department, or a court of law. The appointments of the four legislatively appointed FEC members were invalid because they fit none of these categories. Generalizing, the *Buckley* opinion stated that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by [the Appointments Clause]."[11] I know of no subsequent Supreme Court case that casts doubt on the Court's continued support for this proposition.[12]

In this regard, the SCRUB Act differs in a critical respect from an otherwise comparable bill now pending in the Senate. Under S. 1390,[13] introduced by Senators King and Blunt, a commission would make *recommendations* to Congress for rescission or modification of existing regulations. To become effective, however, its proposals would have to be affirmatively adopted

[10]424 U.S. 1 (1976).

[11]*Id.* at 126.

[12]*See also FEC v. NRA Political Victory Fund*, 6 F.3d 821, 826 (D.C. Cir. 1993), cert. dismissed, 513 U.S. 88 (1994) (Congress may not appoint the Clerk of the House and Secretary of the Senate to serve on the FEC, even as non-voting members).

[13]Regulatory Improvement Act of 2013, S. 1390, 113th Cong. (2013).

by a joint resolution. The SCRUB Act, in contrast, would empower the Commission to take actions that would have the force of law. It provides that the report of the RRRC would take effect unless it is *disapproved* by a joint resolution. And even if the report were so disapproved, it would remain binding on the agency by virtue of the Act's cut-go process. In substance, this is rulemaking power. In *Buckley*'s words, "[t]hese functions . . . are of kinds usually performed by independent regulatory agencies or by some department in the Executive Branch under the direction of an Act of Congress. . . . These administrative functions may therefore be exercised only by persons who are 'Officers of the United States.'"[14]

In all likelihood, the Commissioners would not even be "inferior officers," but rather so-called "principal officers," who would have to be appointed by the President with confirmation by the Senate. In the recent *Free Enterprise Fund* case, Chief Justice Roberts noted for the Court that "'[w]hether one is an "inferior" officer depends on whether he has a superior,' and that '"inferior officers" are officers whose work is directed and supervised at some level' by other officers appointed by the President with the Senate's consent."[15] I have trouble seeing how the RRRC members could qualify as "inferior" under that test. But the distinction between principal and inferior officers doesn't really matter here, because, just as the Court said in *Buckley* about the FEC commissioners, the RRRC members would at the very least be "inferior officers," because they self-evidently would exercise "significant authority pursuant to the laws of the United States." If a special trial judge on the Tax Court[16] or a judge on the Coast Guard Court of Criminal Appeals[17] falls within that description, I cannot imagine any serious argument that the description would not also apply to the members of the RRRC, which would be empowered (absent supervening action by Congress) to force the repeal of any agency regulation that it considers unnecessarily burdensome.

Although the Appointments Clause problem alone makes clear that the bill should not be enacted in its current form, I believe I can be most helpful to the subcommittee if I assume for the sake of discussion that the bill may be amended to cure that problem, either by following the Senate model or in some other fashion. On that premise I will turn to the policy issues raised by the bill.

IV. The Commission

The establishment of an RRRC would constitute a sharp departure from past practice, which has always assumed that responsibility for retrospective review should rest primarily with the agency itself. Presidential plans to promote retrospective review have always rested this premise, as have the relevant recommendations of the ABA[18] and ACUS.[19] The premise is

[14] 424 U.S. at 140-41.

[15] *Free Enterprise Fund v. PCAOB*, 130 S.Ct. 3138, 3162 (2010) (quoting *Edmond v. United States*, 520 U.S. 651, 662-63 (1997) (Scalia, J.)).

[16] *Freytag v. Comm'r*, 501 U.S. 868, 881-82 (1991); *id.* at 901 (Scalia, J., concurring).

[17] *Edmond*, *supra*, at 666.

[18] *Federal Agency Reviews of Existing Regulations*, 120-2 A.B.A. ANN. REP. 48 (1995).

logical because the agency, by definition, is the entity that Congress has entrusted with the responsibility to implement the overall regulatory program. It is one thing to say, as I did above, that agencies will often need some external pressure to reexamine longstanding policies that may have outlived their usefulness. But this is far from saying, as the bill does, that the agency should be ousted from its role by a commission composed as the RRRC would be.

The bill is plainly intended to follow the independent commission model of the Base Realignment and Closure Act (BRAC), but I think the analogy is not a strong one (aside from the fact that the BRAC system involved *recommendations* to the President, thus avoiding the constitutional problem in the SCRUB Act). The BRAC system was defensible in its own context, because the political system had largely agreed on a goal, namely to reduce the number of military bases. The difficulty was that ordinary decision processes made it difficult to decide *which* bases should be closed, because advocates for particular localities could derail the closure of their particular bases. The decision to entrust the selection of specific bases to a commission whose recommendations could not be amended was an understandable response to a breakdown in the legislative process due to local parochialism. With the RRRC, however, fundamental regulatory policy judgments would have to be made at every turn. Even if one could imagine that the Commission's computation of burdens would involve an objective judgment (a proposition that I would dispute), the question of whether the rules in question are *unnecessarily* burdensome would involve fundamental questions of regulatory policy. Conflicts between business interests and the protection of health, safety, and the environment run deep in our society, and the establishment of an independent commission of private citizens to make final decisions about those conflicts would raise legitimacy questions that go far beyond the BRAC precedent.

More particularly, I question whether the commission would have adequate qualifications to resolve those conflicts. With the exception of the Chair, who would have to be experienced in regulatory affairs (§ 101(a)(3)(A)), the Act states no qualifications whatsoever for the members of the Commission. Any selection by party leaders based on political patronage, or a desire to placate the party base, would do. In this regard the draft differs from S. 1390, which at least would require that all members of the "Regulatory Improvement Commission" be "prominent citizens of the United States with national recognition and a significant depth of experience and responsibilities in matters relating to government service, regulatory policy, economics, Federal agency management, public administration, and law."[20]

But even if a clause articulating credentials of this kind were inserted into the SCRUB Act, it is apparent that the RRRC members would not necessarily have expertise or experience in each of the subject areas affected by the regulations that they would examine. The nine members

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[19]ACUS Recommendation 95-3, *Review of Existing Regulations*, 60 Fed. Reg. 43,109 (Aug. 18, 1995).

[20]S. 1390, § 3(b)(3).

might sbe expected to include, at most, one or two specialists in communications, energy, environmental protection, etc. Yet the regulations that govern these areas, and many others, are highly technical. The task of mastering their details could be quite challenging for those who do not know the area well. Furthermore, the rules in many regulatory programs are elaborately interconnected. I doubt that the RRRC members would have the broad perspective needed to make decisions in these areas. True, they would be (and should be) authorized to obtain assistance from the affected agency, GAO, OIRA other officials, and stakeholders.[21] But when various stakeholders press competing plausible positions, would the RRRC members be well qualified to make the judgment calls needed to choose between these positions? Clearly, their qualifications would compare poorly with those of administrative agency heads who interact on a daily basis with career staff who can bring longtime experience and expertise to bear on highly specialized problems. Thus, the SCRUB Act would forego the very advantages that have led Congress to entrust these problems to administrative agencies in the first place.

Furthermore, the bill is antithetical to principles of democratic government, because, unlike the heads of an administrative agency, the commission members would not be politically accountable for their choices. It is not easy to justify entrusting such important value judgments as the rescission of administrative regulations to a group that would have no accountability, whether directly or indirectly, to the electorate or political leadership. The bill does not even provide, as S.1390 does, that the Commission's recommendations would have to be approved by Congress. In my view, the Senate bill's procedures for congressional involvement would not supply enough political accountability, because the legislative judgment would be limited to taking an up-or-down vote on the entire package, with no amendments allowed, after an extremely short period of review. These aspects of the plan for congressional consideration would prevent (indeed, are intended to prevent) the House and Senate from making decisions about the specific details of the package. In my view, this would not allow sufficient political accountability, but at least it is something (in addition to saving that bill from the constitutional flaw that infects the SCRUB Act). But the SCRUB Act would not provide even that fig leaf – the Commission's lack of political accountability for the highly consequential decisions it would be empowered to make would be absolute. Even the enactment of a disapproval resolution would only delay, not prevent, the Commission's decisions from going into effect.

The scope of power that the bill would entrust to the RRRC is breathtaking. The Act would essentially allow the RRRC to force repeal or amendment of *any* rule promulgated by *any* agency if it deems the rule's requirements to be unnecessarily burdensome. Although the Act lists a number of specific ways in which such burdensomeness might be demonstrated,[22] the list is not exhaustive. Even if none of those criteria were met, the RRRC could rely on "[s]uch other criteria as the Commission devises to identify rules and sets of rules that can be repealed or amended to eliminate or reduce unnecessarily burdensome costs to the United States

[21]SCRUB Act §§ 101(f)(3)-(5).
[22]*Id.* § 101(h)(2).

economy."[23] Moreover, although the RRRC is required to develop and post its "methodology,"[24] the bill says nothing about what that methodology must entail. Nor do I see anything in the stated criteria to indicate that the Commission would need to consider whether the agency would still be in compliance with its enabling legislation, or a court decree, if the targeted regulation were eliminated or amended.

Even if significant standards were to be inserted into the bill, the Title I process would put little if any pressure on the Commission to apply them carefully. Although the bill would instruct the Commission to summarize in detail the basis, purpose and substance of a classification,[25] there would presumably be no judicial review to monitor the quality of its reasoning and the factual grounding of its conclusions.[26] Nor would OIRA, or anyone else, play a quality control role in evaluating the Commission's conclusions. The situation would be completely unlike agency rulemaking, in which external reviewers insist that the agency support its decision, whether regulatory or deregulatory, with a comprehensive analysis. Of course, these safeguards have been instituted precisely in order to ensure that an agency's reasons will be factually grounded, rigorously analyzed, and consistent with the legal regime that the agency is required to implement. The loss of these safeguards does not bode well for the reliability of the Commission's recommendations. In my view, checks and balances that can counteract unwise decisionmaking are an essential feature of the administrative law system, and their absence from the RRRC process is disturbing.

Indeed, in the case of a "major rule" (typically, a rule that in OIRA's view will impose an annual cost of at least $100 million on the economy), the Act would not even require a majority vote of the Commission. A *minority* of commissioners – four out of nine – could force the repeal of such a rule if the Chair were one of the four.[27] And they could do so even if their reasons were completely specious, because no one would be authorized to keep the repeal from going

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[23] *Id*. § 101(h)(2)(I).

[24] *Id.* at § 101(h)(3).

[25] Id. at § 101(i)(1)(B).

[26] The assumption that judicial review would be unavailable is not entirely certain, because the RRRC would appear to be an "agency" within the meaning of the APA. However, the timetable that the Act sets up, whereby the Commission's report would be placed before Congress for 45 days and then forwarded to the agency for immediate action, seems to imply that the sponsors intend for judicial review to be foreclosed. I would expect a court to follow the reasoning of Justice Souter's concurring opinion in *Dalton v. Specter*, 511 U.S. 462, 479-84 (1994), concluding that judicial review of the BRAC Commission's decisions was precluded. Justice Souter argued that the congressional timetable in that scheme indicated that litigation was not to hold up implementation of the commission's decision following Congress's review. Moreover, he noted that the Act in that case did provide for judicial review of some issues, but not base closure decisions. The SCRUB Act would lend itself to the same negative inference. The subcommittee may wish to clarify its intentions in this regard. However, I reach my interpretation of its probable intentions with ambivalence, because the absence of judicial review would constitute just one more reason to mistrust the reliability of the Commission's work product.

[27] SCRUB Act § 101(h)(4)(B).

into effect. Thus, the principle of majority rule would join all the other customary norms of public law that the Act would cast aside in the interest of promoting deregulation. Overall, the proposed grant of power to the Commission is remarkable, and the potential for arbitrary decisionmaking would be vast.

Many lawyers and judges, including quite a few who consider themselves constitutional conservatives, have advocated a revival of the long-dormant "nondelegation doctrine," which was last used to invalidate a statute for excessive delegation almost eighty years ago in *A.L.A. Schechter Poultry Corp v. United States*.[28] Were that to occur, the SCRUB Act would appear to be a glaring example of a statute that the doctrine would condemn. Indeed, Justice Cardozo's memorable description of the Act involved in *Schechter* as "delegation running riot"[29] seems to be a pretty fair characterization of the draft bill under discussion today.

V. Cut-go Provisions

I now turn to the "cut-go" process spelled out in Title II of the draft bill. It will not surprise you to hear that I reject on principle the idea that an agency's ability to adopt a new rule should in any way depend on its being required to abandon an older one that it may regard as well justified (even though the Commission, in a completely unreliable decision, might have concluded otherwise).[30] At the very least, presumably, the agency would need to conduct notice and comment proceedings on the question of *which* of the rules identified by the Commission should be the next one(s) to be repealed or amended. This issue would complicate the underlying rulemaking proceeding and pose an additional risk of reversal on appeal.

Indeed, one of the most startling aspects of the bill is that the cut-go process would come into play even if Congress has enacted a joint resolution to disapprove the Commission's report. Considering how difficult it is these days for Congress to take *any* action, I am puzzled as to why the bill's proponents would seek to nullify one of those rare events in which the legislative process does result in agreement.

However, even if the Title II process were justified in principle, the unwieldiness of the process would counsel against adopting it. The challenges an agency would face in implementing it would be daunting. The process would require the agency to quantify the costs of every new rule, no matter how trivial the rule might be. This is a substantial departure from current practice. The presidential oversight order, EO 12,866, requires a rigorous assessment of

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[28]295 U.S. 495 (1935).

[29]*Id.* at 553 (Cardozo, J., concurring).

[30]For a critique of analogous proposals, see Sidney A. Shapiro, Richard Murphy, & James Goodwin, *Regulatory 'Pay Go': Rationing the Public Interest*, Ctr. for Progressive Reform Issue Alert #1214 (Oct. 2012), http://progressivereform.org/articles/Regulatory_Pay-Go_1214.pdf.

costs only for "economically significant" rules (roughly the same as "major rules" as defined in § 501(3) of the SCRUB Act).[31] For most rules, although costs are to be considered,[32] the provisions that say so are essentially hortatory. The agency need not even make a written finding regarding them. Moreover, the order is clear in stating that some costs are difficult to quantify.[33] Even with regard to economically significant rules, the order requires quantification of costs only "to the extent feasible."[34] All of these nuances and qualifiers in the executive order are completely brushed aside in the SCRUB Act.

Assigning quantitative values to the numerous consequences of a rule requires a substantial investment of resources, at least if the inquiry is to be conducted rigorously. It also entails highly artificial methods of attaching numbers to intangible cost factors. For the most important rules, this obligation can be justified "to the extent feasible." But the SCRUB Act tacitly assumes that quantification is always feasible – a quite dubious proposition.

The Act also requires OIRA to certify the accuracy of the agency's quantification of costs. This requirement, too, would result is an enormous expansion of OIRA's functions. Under the executive order, OIRA reviews only the relatively small proportion of proposed rules that it deems "significant."[35] This limitation has been regarded as a desirable means of allowing OIRA to concentrate its finite resources on those rules that need attention most. The cut-go process, however, would result in diffusion of those resources. (Notably, OIRA would *not* have authority to evaluate and press for improvement in the *Commission's* cost calculations, no matter how shaky they might be.)

Finally, Title II provides that an agency could proceed with a new rule despite its noncompliance with the cut-go listings if it were to obtain affirmative approval of the rule from Congress.[36] In effect, this requirement would create a miniature REINS Act for rules in this category. As the subcommittee well knows, I testified in opposition to the REINS Act before you last year,[37] so it will be no surprise that I do not find this aspect of the SCRUB Act reassuring. I will not recapitulate my testimony here, except to repeat my observations that the difficulty of obtaining agreement among the House, the Senate, and the President would create a daunting and frequently insuperable obstacle to agency rulemaking and would raise additional constitutional questions of its own. For amplification, I refer you to my previous testimony.

VI. Retrospective Review of New Rules

[31] Exec. Order 12,866, 58 Fed. Reg. 51,735, § 6(a)(3)(C) (1993).

[32] *Id*. §§ 1(a), 1(b)(6).

[33] *Id*. § 1(a).

[34] *Id*. § 6(a)(3)(C)(ii).

[35] *Id*. § 6(b)(1).

[36] SCRUB Act § 203(a)(4).

[37] *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. 65 (2013) (written statement of Ronald M. Levin).

Title III of the SCRUB Act would require an agency to include in the final issuance of any new rule a plan for review of the rule within ten years of its issuance. On this issue I will refer you to the analysis of the ABA Administrative Law Section in its comments on the Regulatory Accountability Act in 2011. I was one of the authors of those comments (although, to repeat, I am not testifying on behalf of the ABA today). The RAA contained a similar requirement, applicable to major rules only. The Section said in part:

> We are [not] convinced . . . that the agency should formulate a plan for reconsideration of a major rule when it promulgates the rule. At that time, the agency will by definition be unaware of future developments that would be relevant to such a plan, such as the manner in which the rule will have worked out in practice, whether it will prove basically successful or unsuccessful, and what other tasks the agency will be responsible for performing when the review occurs (perhaps a decade later). The "plans" for decennial review are likely to be empty boilerplate. . . .
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> Moreover, a flat requirement that an agency must review all major rules at least once every decade will not always be a sound use of the agency's finite resources (not only budgetary, but also time and attention of key personnel). A study by the GAO indicates that, although reviews of existing rules can be useful, mandatory reviews are far more likely to lead to a conclusion that a rule needs no change than are reviews that an agency undertakes voluntarily. Thus, a better system for reexamination of existing rules may be one that requires a serious review commitment but gives agencies more flexibility to determine the frequency with which particular rules will be reviewed. The agencies' plans would, of course, be available for scrutiny and guidance from their respective oversight committees of Congress.[38]

The SCRUB Act, however, goes much further by requiring the same procedure for *every* rule, not just every major rule. I have to assume that the subcommittee did not give sufficient thought to this manifestly extravagant requirement. Could the sponsors really mean to require an agency to prepare a plan for decennial review of rules that would have such minor impact that they would even be exempted from notice and comment requirements? Rules that would have no compliance costs at all, because they are instituted to distribute benefits rather than to impose burdens? Rules that are designed to address a short-term situation, so that they will not even exist ten years after they are promulgated? Rules of particular applicability, such as decisions approving corporate reorganizations? Section 301 is stunningly overbroad, but I am not going to recommend that it be trimmed back to encompass major rules, because even with that limitation it should be eliminated from the bill for the reasons stated by the ABA Section.

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[38] ABA Section of Admin. Law & Reg. Practice, *Comments on H.R. 3010, The Regulatory Accountability Act of 2011*, 64 ADMIN. L. REV. 619, 659-60 (2012). The Judiciary Committee has reported out an almost identical bill, H.R. 2122, during the current Congress.

Section 301 goes on to provide that when an agency does conduct its decennial review of a major rule, its review should be "substantially similar" to the RRRC's review of rules under § 101(h) to determine whether they are unnecessarily burdensome. In my previous testimony on retrospective review, I quoted from recommendations of the ABA and ACUS cautioning against the enactment of overly detailed specifications for lookback review. The nine subsections (not counting subparagraphs therein) in § 101(h)(2) would seem to fall within that description, even if they were not all completely onesided (as they are) in their focus on burdens as opposed to benefits. Again, in the interests of brevity I will simply refer you to that testimony for elaboration instead of repeating the same explanation here.[39]

Finally, § 401 of the Act (constituting Title IV) provides that agency compliance with § 301 shall be subject to judicial review under the APA. The best thing that can be said for this provision is that it would probably do no harm, because it is difficult to see how anyone could have standing to sue under it. Standing requires a demonstration that the plaintiff has suffered or will suffer a real and immediate injury. Who could possibly demonstrate with any certainty that he has been injured by an agency's failure to prepare a plan for decennial review or to conduct it according to the Act's specifications? I doubt that anyone could meet that test, because the outcome of such a review would be completely speculative. But even if § 401 did result in some actual judicial review, I would not favor it, because of my disagreements with the obligations that such review would enforce.

VII. Conclusion

Despite my concerns about the specific model in the proposed SCRUB Act, I would not dismiss entirely the potential value of a commission approach in identifying and formulating a plan to deal with problems of obsolescence in a regulatory program. A better model would be one in which a specific area is chosen for examination in advance, and members with expertise and experience in that particular area are selected for service on the commission. Furthermore, the proposals of such a group should serve as *recommendations to the agency* responsible for the regulatory program. The high profile nature of the commission's report would put pressure on the agency to consider it seriously, and other political actors could look to the report and lend support (or voice opposition). If the agency declined to follow some of the commission's advice, it would have to justify that decision on judicial review. The agency would also be politically accountable for that refusal to the oversight committees of Congress and to the public. This approach, therefore, would obtain much of the benefit of an independent appraisal without displacing the agency as the body that is responsible for fulfilling the overall program prescribed by its authorizing legislation.

In light of the multiple difficulties with the current discussion draft, I would urge the subcommittee to approach the subject of retrospective review with greater caution. It would be a good idea to await the conclusions of the forthcoming ACUS study, which may suggest more productive ways in which the practice of retrospective review might be improved. If, however,

[39] *2012 Retrospective Review Testimony, supra* note 1, at 7-8.

the subcommittee desires to move forward with legislation at the present time, it will need to give the present discussion draft a fundamental and thoroughgoing "scrubbing."

This concludes my written statement, and I will be happy to respond to any questions you may have. Thank you again for the invitation to testify.