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Testimony of Jonathan A. Wolfson before the United States House of Representatives Committee on the Judiciary; Subcommittee on the Administrative State, Regulatory Reform, and Antitrust

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Chairman Massie, Ranking Member Cicilline, and members of the Subcommittee on the Administrative State, Regulatory Reform, and Antitrust, good morning and thank you for having me today. It is an honor to testify before this subcommittee on the important role Congress plays in creating our nation's laws and the need for Congressional oversight when executive branch agencies start to write law rather than simply working to enforce the laws already written.

My name is Jonathan Wolfson and I am the Chief Legal Officer & Policy Director for the Cicero Institute, a nonprofit think tank with a mission of identifying, developing, and advancing entrepreneurial solutions to society's toughest public policy problems. Previously I had the honor of serving as the head of the Office of the Assistant Secretary for Policy at the US Department of Labor (DOL) where I also served as the Regulatory Policy Officer, and Regulatory Reform Officer or chair of DOL's Regulatory Reform Task Force.

Today's hearing centers on ways Congress can bring additional accountability to federal rulemaking, whether by limiting the power of the Executive branch to act when Congress has not authorized the action or requiring legislative approval of regulations. This is an important topic given the growth in the administrative state, the burdens that growth has imposed on businesses and consumers, and the propensity of regulatory actors to test the limits of their authority as evidenced by recent Supreme Court precedents striking down various substantial administrative actions.

I will focus these remarks on four key points. First, the role of the legislature is to create laws and the role of the executive branch is to encourage compliance and enforce those laws, but many regulations look much more like legislation than simply interpretation of a vague clause in a statute. Second, while some claim that Congress ought to delegate complicated questions to agencies with expertise on a topic, experience tells us that agency expertise is often exaggerated and is frequently expertise in regulatory process, not on the complicated tradeoffs between competing priorities. Third, our constitutional republic relies on the legislative branch to balance interests and imposes accountability on legislators who make bad laws. Neither of these checks exist in a system where the agencies writing regulations may finalize regulations completely contrary to the legislators' intentions. Finally, the REINS Act is a valuable step toward restoring Congress' role as the lawmaking body and the agencies' role as the enforcer of the law.

Regulatory reform and good regulatory process matter not only to the regulated entities, but also to the workers who rely on jobs at those workplaces, the consumers who pay for products produced by regulated entities, and the innovators trying to create the next major breakthrough company that must navigate the web of complicated regulations to even have the opportunity to enter the market.

1. Agencies Are Not Supposed to Make New Laws

If your knowledge of separation of powers is based on reading the Constitution or watching Schoolhouse Rock classics like "I'm Just a Bill" and "Three-Ring Government," you could be forgiven for believing that Congress makes laws and the President executes those laws by enforcement and education. As members of this subcommittee know, the present reality is entirely different. Executive branch and independent federal agencies regularly make new laws to fill gaps left by the legislature, intentionally or unintentionally. And at times, regulatory agencies even act to make new laws despite a lack of any Congressional authority.

Every year regulatory agencies fill thousands of pages of the Federal Register, publish hundreds of regulations, and issue tens of thousands of opinions, interpretations, rulings, and other "guidance." And while a regulated party might prefer a world where Congress' laws are the only ones they must follow, they know the power a regulator has to disrupt or even shut down their businesses. And for this reason, generations of lawyers have supported their families by helping businesses to navigate both the federal and state administrative states.

We should admit that some responsibility for this phenomenon certainly falls on legislators who want to take the easy path, pass a bill, put out the press release, and move on without getting into the real hard work of parsing out specifics. It is a lot easier to pass a law to "keep kids safe from car accidents" and leave it to the Department of Transportation to develop detailed rules and guidance that regulate auto and car seat manufacturers than to include detailed requirements for vehicle safety ratings, the appropriate type of harness for infant seats, and the specific crash test a crash dummy in a car seat must be able to survive.

But responsibility also falls on legislative process and political gridlock that makes it very difficult to pass any kind of legislation. Every time a new requirement enters the bill, or every time a specification goes away, some legislators who may have been part of the supporting coalition might be less willing to remain supportive. And when Congress is divided like it is today, these narrow coalitions might be all the more precarious if bills start being weighted down with lots of detailed specifics. Legislators are thus incentivized to be less specific to increase the likelihood that a bill passes.

And in some circumstances, the legislative process may take shortcuts when there is an emergency and Congress feels like it must pass something right away so it leaves rulemaking to the agencies for speed and efficiency.[1]

[1] " H.R.6201 - 116th Congress (2019-2020): Families First Coronavirus Response Act." *Congress.gov*, Library of Congress, 18 March 2020, https://www.congress.gov/bill/116th-congress/house-bill/6201/text.

But none of these explanations justify Congress giving away its legislative authority to the executive branch, even if we might be able to explain why it happens all the time today. The Constitutional structure doesn't call for executive branch to write the laws, just enforce them. But we have been drifting from this ideal for years which is why we are here today.

Before we go on, I'd like to provide important caveat: colloquially, "regulation" often means "government restriction." In this sense, a statutory restriction on leaded gasoline is no different from an administrative rule that restricts leaded gasoline. But in this hearing, when we talk about regulation what we mean is "regulation" the way that the Supreme Court in *Chevron*[2] defined it: agency rules that purport to effectuate the laws that Congress passed.

This matters because too often discussions of "deregulation" devolve into a caricature where opponents of regulation are asked whether they care about clean air, safe food, or fair banking practices. The caricature relies on this colloquial phrasing. Nothing in current law or under the REINS Act or other proposals for regulatory reform stops Congress from passing protections of air, food, or financial instruments though statute. Congress could pass a clear law that bans fossil fuels to power electric power plants or lead paint from toys and while those laws would certainly have significant impact in the marketplace, they would not be regulations. In fact, Congress today could codify any section of the CFR it wished and no policy of deregulation or even policies governing regulatory procedure could undo that legislation.

2. Unique Agency Expertise Lies in Regulatory *Process*

Some proponents of the administrative state contend that Congress lacks expertise on the range of issues facing our nation and that agencies are better positioned to have the depth of knowledge and experience necessary for writing the law.[3] They argue that this expertise makes it best for Congress to identify public sentiment on a topic (e.g., let patients know the price of their healthcare before they buy the good/service) and leave the details to the experts at agencies to fill in through binding regulations. Since those regulators will ultimately be in charge of enforcement, it makes sense, they claim, for the agency to use the knowledge it gathers in the field to develop regulations that can be easily applied by the field agents.

These claims lead to additional questions: Should Congress regularly delegate to agencies to finish making the laws within the rough boundaries set by Congress? And if they should, would it make even more sense to have the legislature merely delegate to the executive all complicated legislation in the first place and limit itself to merely the most simple legislation? Or, taking this point to its logical conclusion, given the executive branch's knowledge and experience maybe Congress should have no role in writing laws. These conclusions have two major problems.

First, as already discussed, our constitutional republic does not empower the executive branch to write the law, but rather gives this power to Congress. Second, while regulators bring specialized knowledge and years of experience in government to the table, it is not entirely clear

[2] *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984)
[3] Nicholas Bagley, "Most of Government is Unconstitutional." *Nytimes.com*, 21 June, 2019.

that this experience makes them better at making the rules than members of Congress would be if given the opportunity.

The growth of the administrative state has its basis in the progressive era belief that a government of technocratic, unbiased experts could be the solution to excessive politicization and could make government most effective.[4] But there is only limited evidence that most federal regulators conform to the progressive era ideal of the government expert. And even assuming that the typical federal official writing regulations is indeed a neutral, unbiased subject matter expert who leave his or her own preferences aside, we still must consider whether that expert's expertise is the right kind of expertise. Does that expertise help the agency follow Congress' intentions, weigh competing interests, and ensure that the regulations will be more beneficial than the costs they impose? Or does the expertise simply make it easier for the enforcement arm of the agency to find violations of the law, make it less likely the regulation will be tied up in litigation, or make it more likely that the regulation will be approved by the necessary bureaucrats?

Unfortunately agencies often have narrow expertise, mainly focused on an expertise in "creating and enforcing regulations" rather than on the important trade-offs that occur in the real world. Regulatory staff at federal departments are excellent at navigating the requirements of the Administrative Procedures Act, the Paperwork Reduction Act, Regulatory Flexibility Act, Congressional Review Act, the required analyses under Executive Order 12866, and the myriad other rules and requirements federal agencies must follow to propose, finalize, and implement a regulation. They also know peers in other federal departments who will be involved in the interagency review process and how to shepherd regulations and other policy decisions through the process. And agency rulemaking staff have inside access to the department's enforcement agencies to know how certain regulations can increase the success of the department's enforcement.

While many agency staff do have expertise in particular fields or industries, that expertise is no greater than the expertise a business in that industry or an academic in that field might possess. However, knowledge and experience in how the government itself works absolutely does set agency staff apart from their peers outside of government. They uniquely understand how scientific, engineering, legal, and financial information can contribute to and be the basis for regulations and enforcement of those regulations. This comparative advantage makes agency staff more likely to revert to regulation when they confront a new challenge, even if regulation is not the best path forward.

Regulators regulate and look for opportunities to regulate all the more. Because regulatory process is their most unique expertise, regulatory agencies often turn to regulation when non-regulatory actions (including legislation) could better meet an objective. And because they have expertise in the regulatory process, regulatory agencies are most adept at labeling a regulatory action as non-regulatory in order to avoid jumping through the hoops full-blown regulation requires.

[4] Postell, J. (2021). "The ambiguity of expertise in the administrative state." *Social Philosophy and Policy, 38*(1), 85-108.

Teams of lawyers pour over the statutes looking for ambiguity or any delegation of authority, not because they want to produce helpful checklists to assist regulated entities staying out of trouble, but because they hope to be able to enact policies via regulation. This is not a "Republican" or "Democrat" phenomenon, but is now expected as executive agencies look to not only apply law, but also to make it too. And when this overreach occurs, the courts are forced to step in and clarify that the agency lacked authority to make laws absent express Congressional authorization or clear issues of interpretation[5,6].

Because regulations have no requisite time limit, regulatory agencies can change regulations months, years, or even decades after Congress passes a bill. This means that an agency could propose a regulation years after Congress passes the law and that the agency need not conform that proposal to Congress' intent and can, in some cases, propose regulations that may appear contrary to the. In fact, when the Secretary changes, or even when the assistant secretary changes, the agency may implement regulations that reverse the department's interpretation from only a few years prior.

To avoid scrutiny, sometimes agencies attempt to call their regulatory actions "guidance." Guidance ought to be compliance assistance – materials designed to help regulated businesses and individuals know what options they might have to comply with the law. But far too often, the agency will make a new rule and rather than subject it to the required process, simply call it "guidance." Guidance need not go through notice and comment under the Administrative Procedures Act, but can still influence how businesses operate in order to remain in compliance.

To remedy this overreach, and to ensure that the public knew what guidance exists, President Trump issued Executive Order 13891,[7] which required all agency guidance to be cataloged and stored on a searchable page on each department's website. It also required agencies to create an internal regulation which we called the "PRO Good Guidance" Regulation at DOL.[8] I had the privilege of overseeing DOL's review of all guidance materials, rescinding thousands of outdated or unhelpful pieces of guidance, and posting all remaining guidance on a searchable portal. I was also honored to sign the Promoting Regulatory Openness through Good Guidance rule in 2020 which clarified that guidance documents could not be independent legal authority, must undergo internal scrutiny, must be clearly marked as guidance, must be included in a searchable database on the Department's website, and, should they impose restrictions or otherwise restrict the economy, be subject to a modified notice and comment process to ensure public input. Unfortunately, the current administration rescinded the PRO Good Guidance rule. More unfortunate still, some agencies, such as the EPA,[9] have removed their guidance search tool so the public must now do a much more complicated search to identify the universe of EPA guidance.

3. Congress is Accountable, Agencies are Not

[5] *National Federation of Independent Business* v. *OSHA*, 595 U. S. ___ (2022)
[6] *State of New York v. United States Department of Labor, et al.* 20-CV-3020 (JPO)
[7] E.O. 13891 of Oct 9, 2019; 84 FR 55235
[8] 85 FR 53163
[9] 86 FR 26842

Another key reason that agencies ought not legislate is that voters may hold legislators accountable for their actions. If a Senator sponsors a bad bill, voters can vote him or her out in the next election. But if a regulator, even a senior official in a department, writes a bad regulation, there is little opportunity for the public to hold him or her accountable. Even if an agency acts counter to the wishes of the legislature, the agency as well as the individuals working on the regulation face little or no consequences. The unique accountability of elected representatives also makes Congress the preferable lawmaking body.

Accountability is especially important when there are trade-offs between different constituents and competing interests. When, for example, one group argues that minimum wages ought to increase, but another group claims an increase will result in layoffs, the legislature must weigh those claims and consider the practical and political implications of their votes. Buta regulatory agency need only "respond" to the concerns raised during formal notice and comment. If the Secretary supports a particular policy, and the agency staff do as well, that policy will likely prevail. If the policy turns out to harm thousands of workers who wind up laid off, the Secretary will face limited accountability, if any. This is further justification for Congress be the legislative body and not to delegate its responsibility to agencies.

If there were only a handful of regulations and if those regulations had minimal effect on the businesses and others who must comply, this entire conversation might be merely academic. But regulations are burdensome and impose costs on the entire economy. Businesses must spend money to comply; workers must take time to ensure their behavior meets regulatory standards; consumers pay higher prices for the goods and services they buy; and the entire economy is less efficient. The Mercatus Center at George Mason University estimates that federal regulations impose a $2T annual cost on the American economy.[10]

And the number of regulations is rising. According to the Regulatory Studies Center at George Washington University, with only two exceptions, federal agencies finalized at least 150 significant final rules each year since at least 1994.[11] That means for 28 of the last 30 years agencies have proposed, and ultimately finalized, more than 150 regulations that each will have an economic effect over $100 million. And these counts ignore the costs imposed on businesses that conform their behavior when agencies change non-significant regulations, guidance documents, and interpretations, or otherwise make public statements that can imply that businesses need to alter their behavior to be in compliance with the regulations.

Given the substantial burden of regulation, and the inability to hold agencies accountable when that burden or when the harms from a failure to regulate are too high leaves Congress as the body best equipped to write laws. Agencies, on the other hand, should focus on implementation of the laws and ensure that they are capable of faithfully executing their enforcement responsibilities.

4. Congress Can Rein In Regulatory Excess

[10] McLaughlin, et. al. "Regulatory Accumulation and its Costs." *Mercatus Center.* 14 Nov, 2018.
[11] Febrizio, Mark. *Federal Agencies Are Publishing Fewer but Larger Regulations*, Regulatory Studies Center Columbian College of Arts & Sciences, 20 Dec. 2021, https://regulatorystudies.columbian.gwu.edu/federal-agencies-are-publishing-fewer-larger-regulations. Accessed 7 Mar. 2023.

Congress' role is to write the laws and Congress should take this responsibility seriously. Laws that restrict administrative agency legislative activity are one way to restore the proper relationship between the legislative and executive branches. The REINS Act is a good proposal to do just that: it can restore constitutional order and rebalance legislative authority into the legislative branch.

Congress has on multiple occasions restricted the ability of regulatory agencies to create regulations. The Administrative Procedures Act sets forth required processes an executive agency must follow to enact a new regulation. The Congressional Review Act permits Congress to claw back regulations and blocks agencies from regulating in the same way again. The REINS Act is the latest proposal in this line of Congressional action to rebalance legislative and executive authority.

Based on my testimony, it should come as no surprise that I support legislation like the REINS Act[12] to restore Congress to its required and necessary legislative role. It will require agencies to look carefully at statutes, regulate only where Congress clearly delegates authority, and coordinate with Congress on the final regulations since Congress has authority to stop any regulation before it can be enforced.

I am grateful for the opportunity to share my perspective and look forward to your questions.

[12] "Text - H.R.277 - 118th Congress (2023-2024): Regulations from the Executive in Need of Scrutiny Act of 2023." *Congress.gov*, Library of Congress, 11 January 2023, https://www.congress.gov/bill/118th-congress/house-bill/277/text.