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U.S. ADMINISTRATIVE LAW eJOURNAL

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Over the past fifty years considerable progress has been made in developing a process whereby the President could review the actions of the regulatory agencies. Recognizing a lack of comparable progress dealing with Congressional oversight of the courts, the Common Law Initiative is a formative step to fill this void. This report is a summary of the multiyear and ongoing program of the Center for Regulatory Effectiveness to implement the Common Law Initiative. Public comments: https://www.thecre.com/forum8/?p=7644

"The Foreign Affairs Function and the APA"

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Federal agency rulemaking is governed by the requirements of the Administrative Procedure Act (APA), which mainly requires public notice-and-comment and a delayed effective date. Sometimes that can be a fast process; other times it can take months or even years. However, a longstanding exception to those APA requirements called the "foreign affairs function allows

qualifying regulations to be immediately issued and effective. But as agencies have increasingly used this exception, its use has been increasingly challenged by litigants. Between these growing disputes, and with little history and context to guide them, courts have been confused as to what qualifies under the exception. And an intra- and inter-circuit split is slowly emerging over the meaning of "foreign affairs." But history and context for this exception does exist. This article uniquely traces its previously unknown origins over a ten-year history to illuminate its source, development, and contemporaneous understandings.

"Regime Change"
Harvard Law Review, Vol. 135, No. 1, p. 1, 2021

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In this Foreword, I take October Term 2020 — a Term of transition — as an occasion to explore both the processes and the promise of what I will call regime change, or the replacement within the executive branch of one set of constitutional, interpretive, philosophical, and policy commitments with another. Given the occasion, I focus on the role of law, legal argument, and the courts in enabling or thwarting regime change and the democratic evolution it represents. Indeed, our current political transition confronts us with a central tension of our legal order, between a judicial and legal culture that valorizes stability and custom using language and concepts that sound in rule of law, and the democratic imperative that our institutions help effectuate rather than impede the political will reflected in election results.

My basic claim will be that we ought not rush to treat disruption and change as shocks or aberrations that must be rigorously explained. Shifts in legal argument should not be met with skepticism, and they often should be credited as legitimate reinterpretations of law that, in turn, will help give rise to a new political regime. More generally, we should regard rapid evolution in legal interpretation and corresponding policy development as things to be valued, enabled, and pursued. Valuing and pursuing these forms of change are justified, ultimately, because they help to sustain a connection between government and democratic politics. This connection should lead us to identify and then think twice about legal doctrines, institutional features, and modes of argument that slow transitions and transformations down, either intentionally or in service of objectives laudable on their face. We should be wary of the turn to legalisms that purport to advance the rule of law but that in fact inhibit the evolution of our political order. Moments of transition, such as the one through which we are living, can help to reveal how the concept of the rule of law forms part of an agonistic struggle perpetuated not just by courts, but also by political actors. The concept provides a ready-made vocabulary, well rooted in our legal culture, that serves important values but that can also be employed to stifle democratic development.

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The Common Law Initiative: Congressional Review of Judge-Made Law - A Progress Report

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Date Written: October 29, 2022

Abstract

Over the past fifty years considerable progress has been made in developing a process whereby the President could review the actions of the regulatory agencies. Recognizing a lack of comparable progress dealing with Congressional oversight of the courts, the Common Law Initiative is a formative step to fill this void. This report is a summary of the multiyear and

ongoing program of the Center for Regulatory Effectiveness to implement the Common Law Initiative. Public comments: https://www.thecre.com/forum8/?p=7644

Keywords: SCOTUS; Judicial Review

The Common Law Initiative: Congressional Review of Judge-Made Law—A Progress Report

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The Common Law Initiative: Congressional Review of Judge-Made Law–A Progress Report

Officials within the Center for Regulatory Effectiveness were instrumental in establishing the Office of Information and Regulatory Affairs in the White House Office of Management and Budget and in doing so focused on the Presidential review of agency regulations; acting in a parallel manner the *Common Law Initiative*, initiated by CRE, focuses on the Congressional review of judge-made Laws. Obviously this is not our first time at the rodeo. The objective of this initiative is to increase the accountability of the courts to the public.

The Center for Regulatory Effectiveness has been a proponent of the *Common Law Initiative* for a number of years. In a nutshell this Initiative provides a blueprint for a manageable review by the Congress of judge-made law, which is not constitutionally based, and its origin and contents are described on this page.

The *Common Law Initiative* is noteworthy because it recognizes upfront the time constraints on Congress by having the Administrative Conference of the US (ACUS) develop recommended procedures for the aforementioned review by the Congress. *The recommended procedures should include the implementation and continuous management of a database maintained by the agencies, and available*

for public input, which will be one input to the administrative record for consideration by the Congress when it addresses the potential shortcomings of a particular judicial opinion. More specifically, pursuant to guidelines issued by ACUS, the aforementioned database would contain a continuous record of the adverse effects of select number judicial opinions. ACUS is ideally suited to fill this important role because it is a federal agency consisting of leading jurists, federal regulatory officials, legal academicians and practitioners all who are appointed by the President and who specialize in the management of the administrative state.

For those who have not been involved in the installation of stringent control systems in massive bureaucracies we would like to emphasize that the presence of ACUS brings a unique dimension to the process. More specifically, the utilization of ACUS allows the initiation of a corrective action to take place immediately as opposed to waiting for the passage of legislation. In addition, in that ACUS is composed of representatives from every major agency in the federal government, the magnitude and depth of the resources that could be devoted to the *Common Law Initiative* could never be matched by the minimal size of Congressional staffs. That said, in that ACUS would be making a recommendation to the Congress, Congressional staff do have the resources to work in a review and decision-making capacity.

Lastly a number of our reviewers have emphasized that until a process is devised to address filibusters in the Senate, the *Common Law Initiative* is not operable. We concur in that observation but it should be noted that an in-depth analytic document produced by ACUS which utilizes information from the aforementioned database which catalogs deficiencies in select judicial rules would constitute a nudge which could restrict the number of filibusters. *Furthermore actions taken by ACUS will serve as a catalyst to enjoin a debate on a particular judicial ruling.*

Professor Vladeck, Professor Heinzerling, Professor Pierce, Professor Yeatman, Professor Walker, Professor Larkin and Senator Whitehouse each acting independently of CRE proposing the *Common Law Initiative*, have set forth their views on the compelling arguments for an intervention by Congress to address judicial overreach. Accordingly CRE concludes:

In order that the Common Law Initiative be implemented it is imperative that affected constituencies be made aware of its contents and its implications. To this

end we are requesting CRE's substantial national and international readership to prepare White Papers on the Common Law Initiative. Upon receipt of the aforementioned White Papers CRE will continue to use them as a catalyst to launch, implement and publicize the Initiative within the Congress, the agencies and the Executive Office of the President.

Some in CRE have worked upwards to sixty years on establishing processes to allow the President to police the activities of the agencies, including the initiation of the benefit-cost analysis of rules, the establishment of centralized regulatory review and OIRA as well as the passage and implementation of the Paperwork Reduction Act and the Information Quality Acts. It was a shocking realization and an equally embarrassing demonstration of CRE's naivete to assume that others had developed comparable efforts to allow the Congress to police the activities of the courts.

Appendix

Implementation

The Congress has been studying the policing of the courts for yeas and just recently has proposed legislation to address this issue. It should be noted however that the initial phase of the *Common Law Initiative* can be implemented immediately. Consequently what is needed for the timely implementation of the *Common Law Initiative* is to employ one or two policy entrepreneurs who are nonpartisans.

The Key to Success: Less Burdensome Implementation Procedures

Although the programmatic impacts of the *Common Law Initiative* could be gigantic, the administrative burden associated with the implementation of its procedural requirements might pale relative to those developed for the implementation of the Information [Data] Quality Act. The decision processes contained in the IQA parallel those inherent in centralized regulatory review and both have withstood the test of time. More specifically, under the auspices of OIRA, and in conjunction with the unmatched participation of the federal agencies, the federal government instituted government-wide procedures to correct inaccurate

information disseminated by federal agencies in record time. We believe comparable results could be achieved regarding the procedures to implement the *Common Law Initiative.* As noted above: (1) manageable procedures are key to Congressional review of judicial rulings and (2) the issuance of government-wide procedural guidance is a mainstay of the charter of the Administrative Conference of the US.

The biggest obstacle to the Congressional policing of the courts is overly complex procedures; efficient procedures are synonymous with timely and informed Congressional action. The aforementioned Administrative Conference of the United States is the ideal institution to develop the first draft of these procedures.

Public Comments

Although the Common Law Initiative has been under development for several years it has not been highlighted until recently. We appreciate the written comments we have received but we do not make them public unless the author so indicates in very explicit terms. To the extent we receive a number of *substantiated* comments that point in the same direction we will post our interpretation of the said comments.

- Financial Sector

The financial sector believes it is far too early in the game to reach any conclusions. The idea of a continuous and forceful mechanism for the Congress to challenge judicial opinions has not been accorded any serious consideration. They recommend that CRE provide: (1) a synopsis of the proposals to date and (2) a comparison of one or more of the aforementioned proposals with the Common Law Initiative.

- Academia

A handful of the legal profession will get involved in the conflict at an altitude of thirty thousand feet but will not become engaged in hand-to hand combat. It appears that the reaction of the legal Academy to the *Common Law Initiative* in general is muted and might be characterized as All Hat, No Cattle.

On the other hand the reaction of the political science community is self serving in that its position can be summarized in the statement “No “Lobbyists” Allowed”.

The primary interest of the economist community is the perfection of benefit-cost analysis, not the interest of the group which politicizes it.

- Public Sector NGO's

Public Sector NGO's appreciate the fact that CRE is moving from developing control systems applicable to the executive branch to developing control systems applicable to the Congress in a natural progression, but they are dubious about CRE's endgame.

- Energy Sector

The energy sector is facing a wide range of existing challenges and is not interested in addressing another challenge.

Work In Progress

Notwithstanding the fact that CRE has worked a number of years on establishing processes for the Presidential policing of administrative agency regulatory programs it is not envisioned that CRE would undertake a similar program to implement the Congressional policing of the judiciary. Nonetheless we have recommended a specific program for others to address the issue which is presented herein, and summarized it in this post and this one, both of which are based on several internationally attended discussion fora.

The bottom line is that we found no group that was willing to make a concentrated and visible effort to have the Congress oversee the actions of the judiciary but we did identify several groups whose writings provide a mechanism for others to act. The program recommended by CRE first consists of a nudge and second, if need be, a coercion. CRE is in the process of developing its next plan of action.